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Brus *versus* Balliol, 1291-1292: the Model for Edward I.'s Tribunal

IT is no small pity that the great lawsuit for the Crown of Scotland still waits a competent and full report of its many aspects not only as a great national episode but also as a brilliant example of exact juridical record, and a leading case in the law of feudal succession. Sir Francis Palgrave edited in 1837, in his *Documents and Records illustrating the history of Scotland*, a great number of till then almost wholly overlooked pleadings and minutes in the elaborate litigation of the would-be kings. For these legal muniments he wrote an important and in many respects fascinating introduction, which brought back for the first time into light and life the varied and often thrilling phases of claims and counterclaims, precedents, answers and arguments, minutes, procurations and notarial notes of the sundry sessions and adjournments of the cause, including the nominations of the Auditors for the various parties and for the postulant Lord Paramount himself in the great debate for a throne.

Much subtle and skilful interpretation was put forward in the introduction, the substance of which has stood little affected by the course of historical or legal criticism during the eighty years which have passed since then. It was a famous and worthy adventure in historical disquisition in which Sir Francis touched with a master-hand many of the constitutional issues at stake. But on one important theme he was silent, and upon that the curiosity of his critics seems to have been no livelier than his own.

The question indeed seems somehow never to have occurred to the Scottish historians or historical critics, ancient or modern. It is the question of a numerical peculiarity about the body of Auditors whom King Edward I. in setting up his tribunal ordered to be 'nominated and elected' to assist him in the judicial task committed to him of determining the right to the realm of Scotland claimed by a dozen aspirants. At a very early stage of the cause, on 3rd June 1291, the great roll of the plea, incorporated in Rymer's *Foedera* (ed. 1816-1869, vol. i. pp. 762-784), that is to say the *Magnus Rotulus Scotiae*,[1] records that King Edward, by unanimous agreement among the various vindicators of their right to the realm, arranged and ordained (p. 766) that for the hearing and discussion of the cause Sir John Balliol and John Comyn for themselves and other petitioners should choose forty fit and faithful men and that Sir Robert Brus for himself and the other petitioners should elect other forty, while the King himself was to nominate four-and-twenty more. The date appointed for these nominations and elections was the third day succeeding, viz. 5th June 1291. That day, at the adjourned sitting of the court, those nominations and elections were duly made, and it is specifically minuted in the great roll (Rymer, i. 766) as well as in the separate notarial protocol of the day (Palgrave, Illustrations, No. ii.) that forty named persons were chosen by Balliol, forty by Brus, and twenty-four by Edward himself. Edward I. therefore in setting up the tribunal that was to determine the great issue of right and succession to the vacant seat of Scottish royalty began by ordering the election of 104 Auditors to be in the closest sense associated with himself in deciding the historic cause. Why this number of the Court?

A return recently for other purposes to this old field of legal interest has made visible the fact that many of the Edwardian annalists and most of the Scots chroniclers were in error not only about the number but also about the precise character of the court. Pierre de Langtoft (*R.S.* ii. 192) does not state the number of the 'tryours' who examined the case. Walter of Hemingburgh persistently styles it an 'arbitration' in which there were 80 arbiters 50 of them Scots and 30 English. Nicholas

[1]This great instrument bears successive dates, beginning with the minute of proceedings at the 'first convention' or opening meeting at Norham on 10th May 1291, and ending with the notarial attestation of Balliol's letter to Edward I. at Newcastle-on-Tyne on 2nd January 1293, some days after Balliol had done homage for the kingdom awarded to him.

Trivet (ed. Hog, p. 324), the anonymous author of the *Lanercost Chronicle* (p. 142) and Sir Thomas Gray in the *Scalacronica* (p. 119) unite in saying that the total number of associates was 40, of whom twenty were chosen from each realm. Fordun (ed. Skene, i. 312, 313) declares that Edward was called in 'not as overlord nor as judge of right, but as a friendly arbiter' (*amicabilis arbiter*), and that he invoked to his assistance eminent persons to the number of 80 according to some, 40 according to others, or according to yet other opinions 24, of whom 12 were English and 12 Scots.

Andrew of Wyntoun, of all the chroniclers by far the most elaborately and argumentatively juridical in his long discussion of this vital episode (ed. Amours, volume v. pp. 165-224), calls the case a 'compromyssion' or 'arbitry' (*ib.* pp. 165, 167 and 175), in which the English King was trusted

> 'as gud nychtbure
> And as freyndful composytoure,' (*ib.* p. 167)

assisted by certain 'wise men' of each realm :

> 'Foure score sum said or fewar
> Bot four and twenty thai said thai ware.' (*ib.* p. 215)

Evidently Wyntoun followed the same authorities as Fordun: in both chronicles it is clear that the conception of the English King's position was that of *amicabilis compositor*. This name, which throughout the middle ages had probably the widest currency as the technical term for an arbiter, nowhere appears in the petitions, pleadings or official protocols of the cause. The competitors themselves ('compromising' themselves it may be truly enough) owned by minuted writing under seal that to Edward I. belonged the jurisdiction *de oir, trier et terminer* the question of right. The entire form of the record in all its scattered parts is foreign to the conception of arbitration. At each stage Edward claims and is recognized to be not arbiter but judge.

Walter Bower, continuator of Fordun's *Scotichronicon*, states at one place (lib. xi. cap. 2) that the auditors were '104 in number, 24 of them English, 80 of them Scots,' but further on (lib. xi. cap. 10) he lapses into mingled error and uncertainty, declaring himself as not knowing whether they were 24 or 40 or 80 (just as Wyntoun had the figures), although mentioning that he had found that the majority of the manuscripts (*plures codices*) favoured the first number. This no doubt explains why the *Liber Pluscardensis* (lib. viii. cap. 2) states that they were 24, of whom 12 were Scots and 12 English. Long afterwards the same

statement was made by Bishop Lesley in his History (ed. 1675, p. 221) where King Edward is styled 'arbiter.'

Clearly there were confusions, and as we have seen, the English chroniclers had their share of them. Henry of Knighton (ed. *R.S.* i. 286) fell into more errors than one when he said that there were 30 Scottish and 30 English 'arbitrators,' that they 'chose' (*elegerunt*) John of Balliol, and that Edward accepted him (*acceptavit eum*). By far the most important record of the trial in the archives of English history, however, with the possible exception of the great roll itself, its component and complementary protocols and some stray pleadings, is an early fourteenth century manuscript, the *Annales Regni Scotiae*, ascribed on apparently quite inadequate grounds to William Rishanger, and therefore edited as part of his diversified important but somewhat scattered historical work in his *Chronica et Annales* (ed. *R.S.* pp. 231-368). There are better reasons [1] perhaps than the editor gave (pp. xxv-xxxi) for believing that this invaluable appendix to the great roll, with its very numerous touches of authentic detail on the course of the trial, came from a first-class contemporary hand, professionally engaged in noting the *res gestae* of the litigation. The acute informant, whoever he was, declares that the 80 of Scotland and the 24 of England were chosen as in the manner of compromission—*quasi per viam compromissi* (p. 238), which was a mode of election familiarly resorted to in contests for ecclesiastical appointments. The analogy is shrewd, especially in so far as a process of election was involved, but the *Annales Regni Scotiae* gives no more countenance than the great roll to the proposition that the law plea for the Crown was an arbitration. Whatever may have been in the mind of the Scots in their approach to the English King it is fair to point out, not merely that no document of process extant bears out the supposed arbitration, but also that Robert de Brus, the apparent original mover of the cause, appealed from the outset to Edward as King and overlord and even addressed him as 'Empereur' (Palgrave, p. 29). That there were nevertheless elective and other elements

[1] The editor, Mr. H. T. Riley, seems to have missed noticing John of Caen's own significant statement (Palgrave, p. 299) to Edward I., dating from about 1306, that he had 'about him' notes and remembrances of the weighty matters touching Scotland—*il eit vers lui notes et remembraunces des chariantes busoignes que touchent Escoce*. These notes, he said, he had not been able to work up in due form because he had been worried and 'rioted' by Archbishop Winchelsea. [*Chariantes* from *charger* (which recurs below) is more readily intelligible in the spelling *charjantes*].

about the cause to which a Lord Paramount's notary was not called upon particularly to attend, and which it was not always convenient to record, need hardly be denied.

It is at least faintly possible that the conflicting misstatements of the number of jurors or assessors in the trial may come in part from contemporary rumours or proposals about the coming trial, *i.e.* that there may have been conflicting methods discussed before the final victorious proposal was actually adopted. A natural precedent might have been the border assizes or commissions of knights. A principle of March law was to have an equal number of representatives of the confronting nationalities, for example, six knights of England and six of Scotland in 1248; twelve knights on either side (together twenty-four) in 1246, 1249, and 1285. In 1245 an enquiry relative to the frontier line was made by 24 knights of Northumberland.[1] There is therefore a little to go upon, admittedly not much, by way of precedent for that number 24 which the chronicler Bower found most prevalent in the manuscripts.

No chronicler, historian, or critic hitherto, however, has offered any hint to account for the actual historical number of 104 auditors, plus the Lord Paramount himself, as certiorated by the great roll, which is not only final regarding the auditors, their number and their character, but is equally definite in registering the fact that the suit was in its authoritative form, as actually conducted, no arbitration dependent for its sanction upon the consent of the litigants, but was projected and carried through by King Edward as a regular legal process of a feudal court, a plenary parliamentary court.

There is, in spite of the many prudential and cautious concurrent acceptances of jurisdiction, no real foundation for reckoning the cause as either in the modern or the contemporary sense an arbitration or 'compromission' of arbitral reference (*compromissum ad arbitrium*),[2] or to style the tribunal, as for instance one distinguished recent historian does, a 'Court of Arbitrators.'[3] The 104

[1] As to these border commissions see Bain's *Calendar*, i. appx. No. 5, i. 1676, 1699; ii. 275; *Acts Parl. Scot.* i. p. 413.

[2] Compare the Scottish proceedings with the *Compromissio ad Arbitrium* made to Edward I. by the Count of Holland and the Duke of Brabant in 1297 (Rymer, 8th Jan., 1297). The complete difference is obvious.

[3] Sir J. H. Ramsay, *The Dawn of the Constitution*, 1216-1307, p. 386. It is an occasion of regret to have to contradict an authority to whom on every count, alike personal and historical, so much deference is due.

were not arbiters, they were auditors; and it was through auditors in the thirteenth and fourteenth century parliaments alike of France, England and Scotland, that the Kings of these countries administered justice in their respective courts of parliament.[1] It was the normal method of parliamentary law; arbitration was a quite different thing. It will be difficult to find in the great roll a single word to countenance the interpretation that Edward I. was only a magnified arbiter, or that the auditors any more than Edward himself were 'amicable compositors' in the technical sense. Certainly they were appointed *ad jus dictorum petentium deffiniendum*, as the *Annales Regni Scotiae* (Rishanger, p. 238) has it, but these annals, equally with the great roll, emphatically state and shew that the function of the auditors was to discuss the case and report to the King who meant, he himself said, *jure proprio* to decide it at law (*definiendum de jure*); to him, he claimed, the decision belonged (*ad quem pertinet negotium diffinire*) and his right to decide was therefore expressly reserved (Rymer, i. 763, 764, 765, and 766; Palgrave, Ill. No. iii.). In fact, if we accept, as most probably we must, the *Annales* as a truthful record on that head, preferable to the great roll itself, the judgment rejecting the claim of Brus was drawn up (*ordinata*) by the King's 'whole council,' along with or inclusive of the 24, after which it was submitted to and approved of by the 80; but it was not the judgment of the 104, it was the King's judgment, and when the time came it was delivered as the King's judgment (*judicium*), not a decree arbitral, by his chief justice, Roger de Brabazon (Rishanger, pp. 261, 262, 358).

If the great roll had risen to the height of its lofty opportunity, each step of pleading and process should, with all attendant circumstance of date and detail, have been notarially recorded, fully, frankly and faithfully. But the notary, although his roll was a notable performance, fell somewhat short of even his own ideal. He confesses one bad oversight, which may well have mortified a medieval formalist: the place where the judgment was pronounced—*le lieu du jugement rendu*—an essential in the right 'rolment of Courts,' had been left out (Palgrave, 298). This was an omission of a most important character, an *article mout durement chariant*, in the chief point of the whole process (*en le plus fort poynt de tot le proces*), which only the hand of the

[1] The great constitutional, legal and historical interest of this for Scotland is dealt with in the introduction to the *Acta Dominorum Concilii*, vol. ii. A.D. 1496-1501; 1917, not yet issued by the Stationery Office.

notary himself John, son of Arthur of Caen (*Johannes filius Erturi de Cadomo, Johan de Caam*) who wrote it, could competently amend (Palgrave, 298, 299). Some Scotsmen may prefer to hold that the flaw in the judgment was far too deep to be cured. Apart from the question of validity, however, the great notarial roll, able and comprehensive document though it was, had graver deficiencies than a failure to register the place of judgment. Important stages of the trial, incidental findings which formed the base of the final decision, diets of the Court, *e.g.* on October 24, 29 and 31, November 3 and 5, 1292, and other matters of pith and moment, whether for fact or form have unfortunately been dropped. It was no doubt a sufficient register of the trial, but vital elements in the process and in the judgment are recorded elsewhere and are wanting from the roll. In fact the roll edited in Rymer is in the main an imperfect incorporation by Master John of Caen of the admirable protocols of Master Andrew of Tange recording from day to day the separate stages of the process. The roll in Rymer is thus not definitive on the entire course of the cause.

But we return from discussion of John of Caen's great roll to raise the enquiry whether it was not by something more than a coincidence that the persons of the court whereof the deliberations and decision it magistrally set down were precisely of the number of the ancient Roman court of the *Centumviri* consisting throughout large part of the republican period of one hundred and five men? It is well known by the evidence of Festus that from at least the middle of the third century before Christ until after Cicero's time the court was representative, each of the 35 Roman tribes having three constituents upon it. Gaius (iv. 16. 31. 95) tells that at its sittings a spear was set up, the historic emblem of quiritarian authority. Its jurisdiction clearly favours the suggestion of its direct adoption as a precedent by Edward I., for the peculiar province of centumviral authority lay in the decision of questions of right of property and specially concerned hereditary succession. The vouchers of the centumviral court and its activities embrace many great names, not only of Roman literature and law, but also of the long line of glossators and commentators who recovered the sense and majesty of Roman jurisprudence. Cicero, Pomponius, Julius Paulus (v. 16), Quintilian, Pliny, Phaedrus, Lucan, Martial, Gellius, Suetonius, Valerius Maximus and Dion Cassius are among the original authorities for the legal function and popular position of the

court. Although its 'ambitious sentences' had to be pruned by Domitian the Emperor, Justinian recognised the amplitude of reputation of the tribunal, and his approbation found emphatic expression in both Digest and Code.[1]

Among the commentators[2] of the civilian renaissance Cujas was followed by Raevardus, Nicolas Boer, Heineccius and Kahl in chapters of exposition of this court which have been classified and expanded by the moderns[3] Mommsen, Sohm, Greenidge, Muirhead and Fowler. Nor may we omit the quaintness of its appearance in the whimsical jurisprudence of Pantagruel (Rabelais, iii. ch. 39). But chiefly it is important to note as the common verdict of legal commentary that this court was noted for the magnitude and authority of its decisions: that one of Justinian's references to it has been styled a eulogium,[4] that in its procedure the old *legio actio sacramento* was long in prevalent use and that its province specially consisted of the vindication (*vindicias dicere*) of rights of property and succession, and indeed that all its actions were *vendicationes*, primarily of quiritarian right. The scope of the court was modified under the emperors, its membership increased to 180, and its method of procedure changed in some respects from the republican conditions under which the 105 centumvirs had sat for over 250 years. Its dignity and importance persisted under imperial auspices.

The correspondence of the conditions as to the number of the court, the high question at issue, and the competitive demands of the petitioners in 1291, points to more than a suggestion of some relationship in constitution between the old Roman tribunal and the *pro re nata* court which was to pronounce the celebrated *dreituriel jugement* of 1292.

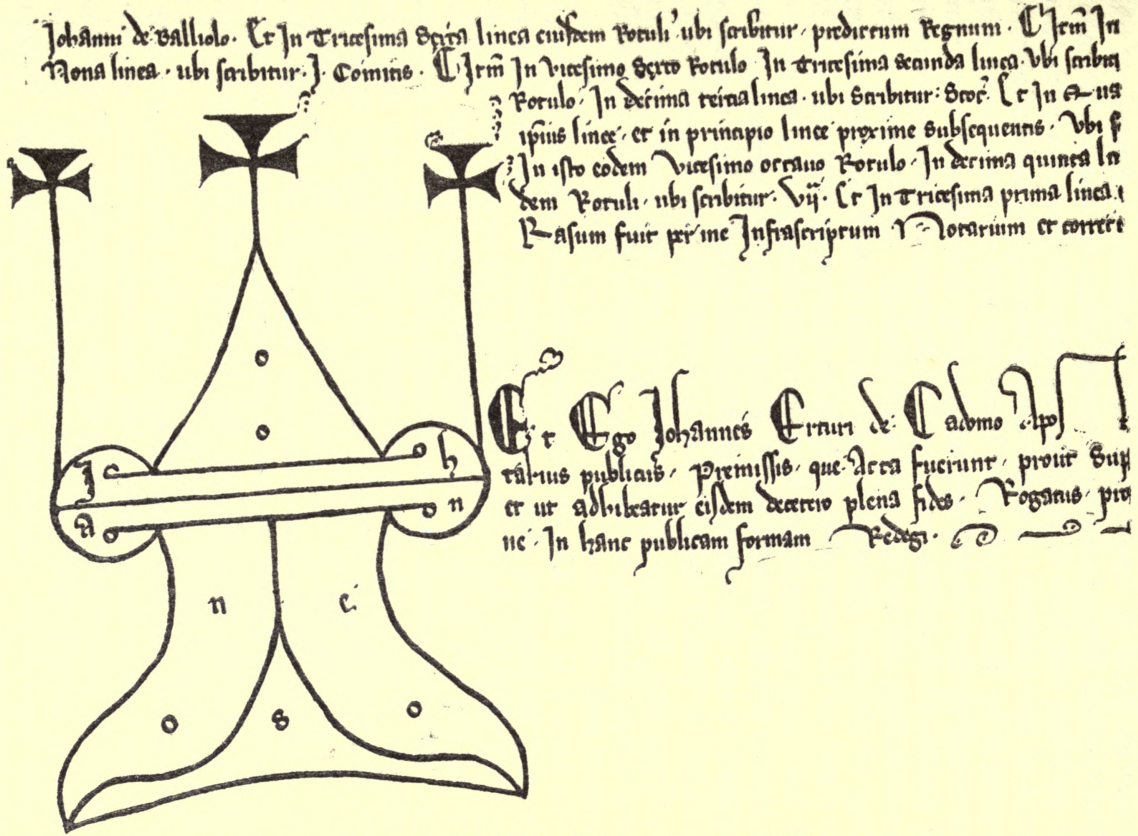
It will be convenient to recall certain stages of the cause; how its origin draws back to an appeal against the Scottish regents

[1] Digest, i. 2. 29: v. 2. 13. 17: xxxiv. 3. 30. Code, iii. 31. 12: vi. 28. 4.

[2] Cujas, *Opera Omnia* (1595), i. 263, iv. 230. Jacobus Raevardus, *Protribunalium Liber*, in Ziletti, *Tractatus Universi Juris* (1584), vol. iii. p. i. fo. 92. Nicolas Boer, in *additio* to Jo. Montaigne, *De Parlamentis*: Ziletti, *Tractatus*, vol. xvi. 273 verso. Heineccius *Antiquitatum Romanarum Syntagma* (ed. 1841), lib. iv. 6. 9. Kahl (Calvinus), *Lexicon Juridicum* (ed. 1684), under *centumviri*, *centumvirale*, *hasta*.

[3] Fresquet, *Droit Romain*, ii. 393-395. Rudolph Sohm, *Institutes of Roman Law*, translated by J. C. Ledlie, ed. 1907. Greenidge, *Legal Procedure in Cicero's time*, 1901. Muirhead, *Law of Rome*, ed. 1899. H. J. Roby, *Roman Private Law*, 1902, ii. 314-315. W. A. Hunter, *History of Roman Law*.

[4] Claudius Cantiuncula, *De Officio Judicis*, ii. cap. i. sec. 15, in Ziletti, *Tractatus*, ii. part i. fol. 78, commenting on the Code, iii. 31. 12.



NOTARIAL SIGN OF JOHN OF CAEN, A.D. 1293.

favouring Balliol, addressed by Brus to the 'King of England and his royal crown' (Palgrave, xiii. xlviii. 17), how at the very outset on June 3, 1291, with the unanimous approval of the claimants the King issued an order of court for the appointment of auditors, and how King Edward assigned June 5th as the day for their nomination. On that date accordingly these auditors are recorded by the notary who kept the roll to have been duly appointed by the 'noble men vindicating their right to the realm of Scotland' (*nobilibus viris jus ad Regnum Scocie sibi competere vendicantibus*) and by King Edward himself. On the part of the King of England there were 24; on the part of Brus and others 40; and on the part of Balliol, John Comyn and others, 40; in all 104 auditors, nominated in presence of distinguished witnesses, including Master John Caen, 'notary public, specially called and required,' while the other notary Master Andrew Tange separately executed a public instrument, attested by his notarial sign, testifying that he also was present, and saw and heard the whole proceedings (Rymer, i. 767-767. Palgrave, Illustrations No. ii. pp. iv to xvi).

On June 6 in the King's chamber in Norham Castle (Rymer, i. 767-768) the litigants, claiming by hereditary succession to vindicate their right to the realm of Scotland (*qui ex successione hereditarie ad Regnum Scocie jus sibi vendicant*), were received by the King, who adjourned the cause until August 2. At Berwick Castle, on Friday, August 3 (Rymer, i. 775), the 24 auditors from England, the 40 Scottish auditors for Brus, and the other 40 Scottish auditors for Balliol, began to receive in the deserted church of the Friars Preachers, near the castle of Berwick, the petitions of the twelve claimants (*vendicantium*) to the realm of Scotland, and on 12th August the hearing was adjourned until 2nd June, 1292 (Rymer, i. 777).

Not one of the petitions (*ib.* 775-777) has the technical term 'vindicate' in its composition, but that rather pedantic word is reiterated in minute after minute of the proceedings. It was not a word in current vocabulary use either in early English or early Scottish legal style. It occurs only in the echoes of Roman law, which at the end of the thirteenth century had begun to make themselves very definitely heard in Great Britain.[1] On

[1] Bracton used the term *rei vindicatio*, although very rarely, and when he did so was usually taking over some passage from Azo or other civilian. Bracton, *De Legibus Angliae*, ff. 9, 103. Maitland's *Bracton and Azo* (Selden Soc.), pp. 105, 106, 116, 121, 176. A considerable search for instances of the use of the term *vindicatio* or

2nd June, 1292, the King and the 104 auditors sat again and ultimately the cause was adjourned until 14th October (*ib.* 777). At the important sitting on that day, according to the great roll, but really perhaps on November 5, the King asked the bishops, prelates, earls, barons, and councillors, as well as the auditors, the vital questions of the cause, and they all 'unanimously in agreement and finally[1] replied' that of two claimants the one remoter in degree lineally descending from the first-born daughter was to be preferred to the one nearer in degree issuing from the second daughter (*ib.* 779). Thereupon the cause was adjourned for judgment (*ad audiendum judicium*) until Thursday, 6th November, at which date the magnates and auditors answered other questions, after which a readjournment was made until Monday, 17th November. On that date (*ib.* 780) in the hall of the castle of Berwick in full parliament (*in pleno parliamento*), present also the 24 English and the 80 Scottish auditors and 'the foresaid petitioners being called

vindicare in the records of actions of right, etc., has yielded no examples. That early examples exist may be probable enough, but it appears certain that normally the term did not pass current in the early law reports, in the sense in which it is employed in the reports of the Scottish Crown case.

[1] This comprehensive proposition is quite correct, but it does not advert to the extremely interesting and important facts set forth in the *Annales Regni Scotiae* (1) that Edward on Monday, 3 November, 1292, put the vital question of the principle of hereditary descent, not to his Auditors as a body, but to his whole Council (*totum Consilium suum*) which comprised 51 persons, the list of whom includes very nearly all of the 24 auditors nominated *pro rege* the year before (Rishanger, 259-260); (2) that they agreed in approving the principle of primogeniture above quoted (*ib.* 260); (3) that on Wednesday, 5 November, 1292, in presence of the King and his whole Council a certain form of judgment (*quaedam forma judicii*) nonsuiting Brus was drawn up (*ordinata*) and accepted by the whole Council (*ib.* 261-262); (4) that next day, Thursday, 6 Nov., 1292, this 'form of judgment' was laid before the 80 auditors of Scotland and the 24 for the King and was answered separately, and with separate approval by all the available members of the 80, virtually by them all (*ibid.* 262-265); (5) that thereupon on same day the King formally gave judgment that Brus 'had not right in his petition to the realm of Scotland according to the form and mode of his petition' as in the question with Balliol; (6) that subsequently after intermediate decision as regards partibility of the realm and other points on which the 80 of Scotland advised (*ibid.* 354), the King on 17th November, 1292, at Berwick gave judgment by Brabazon, auditor as well as chief justice, and awarded the foresaid realm of Scotland to Balliol, as nearest heir of Margaret, Lady of Scotland (*ibid.* 358). It will be observed here that the *Annales* uses the precise words which on 19 November, 1292, were embodied in the precept of sasine, although in the notarial narrative of the great roll (Rymer, i. 780) the terms of the judgment itself are not so set forth (*ibid.*). Whether or not the *Annales* can be interpreted as being or representing the *notes et remembraunces* of John of Caen will depend on the character and degree of such differences and coincidences.

who vindicated right to the aforesaid realm of Scotland,' the judgment was given in accordance with the 'relation' or report of the auditors that the remoter in degree in the first line of descent is to be preferred to the nearer in degree in the second line; and therefore, runs the decision,—'it was considered that the aforesaid John of Balliol should recover and have seisin of the foresaid realm of Scotland, with all its pertinents in said kingdom.'

And so the great cause reached its close in an award of possession of the Kingdom of Scotland to Balliol, to whom a precept, by Edward, with the formula *teste meipso*, was accordingly granted (*ib.* 780) on November 19. The award of possession, that eminently natural consummation, appears to have been the essential point and significance of *vindicatio* in Roman law also. The use of the term both by John of Caen, the notary of the great roll, and prior to him by Andrew of Tange[1] in the protocols, was in terms of Roman law perfectly correct. This, however, would be less remarkable were it not that the term was by Roman law specially apt for cases of centumviral judgment. The preceding considerations might be left to present their own argument, their direct hint of source for the form of the judgment, but there is a final fact which possibly removes the problem from the region of speculation altogether and justifies, if it does not compel, a definite conclusion regarding that source.

In the manifesto by which on 8th February, 1340, Edward III. set forth his claim to the kingdom of France, he found it necessary to denounce David II. of Scotland, and to maintain that the crown of Scotland had been duly and competently awarded to John Balliol as king, and that Robert the Bruce had been a mere tyrant and sacrilegious perjurer. The reference to the award is of a revealing significance. In the manifesto of 8th February, 1340, which is the proclamation *Super titulo ad Regnum Franciae*, Edward III. declares that David II. has no right to the Kingdom of Scotland, which, he says, on the question of succession arising between

[1] Master Andrew, son of William of Tange, a clerk of the diocese of York and apostolic notary, not only appears as attesting along with John of Caen, the chief of the separate protocols in 1291-1298 (Palgrave, Illustrations, pp. vi, xvi, xxvii, 150). After the great suit was decided Master Andrew notarially certified the homage of King John Balliol (Bain's *Calendar*, ii. p. 152). He attested the Ragman Roll in 1296 (Bain's *Calendar*, ii. p. 214). He is also mentioned in 1318 and 1321 as having attested 'the Great Roll of 48 pieces beginning *Quoniam antiquorum* as to the King's right to Scotland' (Bain's *Calendar*, iii. pp. 115, 137). This is the chief Roll of fealties and homages in 1291. *The Ragman Rolls*, Bannatyne Club (1834), pp. 3-56.

John Balliol and Robert Bruys, was disputed at law between them, and was 'by centumviral judgment' adjudged to the said John —*per centum virale judicium judicatum fuit praefato Johanni* (Rymer, ii. 1110).

Surely we have here a plain intimation that some tradition of the English diplomatic service or chancery had preserved the name by which the award of the Scottish crown had in legal circles been characterised. It was a *Centumvirale Judicium*: a term of legal technique of unknown antiquity even in Cicero's time, revived for a unique occasion. The name thus applied in 1340 to the famous trial was no misnomer. It deserves to be noted that John of Caen, the papal notary of the court in 1291-1292, who had been the King's procurator[1] in France in 1278 and at Rome in 1289, was now a master of the English chancery,[2] and that William of Kylkenny, one of the panel of 24 auditors (Rymer, i. 766) nominated by Edward I., was styled in the nomination 'professor of civil law' (*juris civilis professor*). This is by no means a sole proof of contact with Roman law. Francesco Accursi the younger, a famous civilian of Bologna, was for some time in the service of Edward, and has been referred to as his favourite jurist. At any rate, he had from the English King a retaining fee of £40 a year.[3]

The *Magnus Rotulus* itself, let us remember—in whatever light the judgment and its mixed motives may by patriots and counter-patriots be regarded from a political standpoint—is an example of a judicial report and decision so splendid that it has been declared in Pollock and Maitland's *History of English Law* (ed. 1898, i. 197) to be 'the most magnificent of all the records of King Edward's justice.' This superb compliment to the French notary is by at least a full half a misdirection, in that it fails to render the honours due to John of Caen's Yorkshire colleague Andrew of Tange, whose name never appears on the Frenchman's version of the great roll. *Tulit alter honores.*

As for the series of facts and phrases which now go to correlate the shaping of this unique auditorial court and judgment of Edward I. to a remote model of the foremost classical and legal note, is it too much to regard the chain of connexion submitted in this article as irresistible? If the 'centumviral judgment' of

[1] *Roles Gascons*, ed Bémont, Nos. 1158-1160.

[2] Pollock and Maitland, *History of English Law*, 1895, i. 197. Jenks, *Edward Plantagenet, the English Justinian*, 1902, pp. 159, 248, 340.

[3] Rymer, 23 October, 1290.

Edward I. was not in truth a rebirth of Roman parentage why should the chancery of Edward III. have given it the Roman name? To engraft after nearly a millennium the old centumvirs upon the new creation of Anglo-Scottish auditors was a feat of distinction worthy of the cleverest of Renaissance jurists. A fine—even more than an adroit—adaptation of Roman precedent to a high occasion, it reflects by its felicity no small credit upon the unknown civilian—was he himself a notary or a centumvir?—who out of the most dignified memories of Roman law suggested as a precedent for the frame of the tribunal which Edward I. was to erect, a court of such antiquity, standing and appropriateness for the pattern. If by chance the emblematic spear was not set up to denote the ultimate authority of military force behind the tribunal, shall we not say that all men of discernment saw it clearly enough in the air? Thus the term *Centumvirale Judicium* used in the chancery of Edward III., a capitally correct label for the award in *Brus* v. *Balliol*, becomes a footnote of international and legal history imparting fresh point to the epithet which designated Edward I. as 'the English Justinian.'[1]

GEO. NEILSON.

[1] The plate (page 9) is from a photograph by Mr. A. P. Monger, for which I owe my thanks to Mr. H. Rodney of the Public Record Office, London, for facilities and instructions to the photographers. It shews the notarial mark of John of Caen attached to the *Magnus Rotulus Scotiae*, edited in Rymer's *Foedera*. The length of line in the roll made it necessary to cut off most of the notarial docquet which begins *Et Ego Johannes Erturi de Cadomo*. At the top of the plate is seen, correspondingly docked, the end of John of Caen's long and conscientious declaration of erasures, etc., in his extension of his historical instrument.

Two Features of the Orkney Earldom

AS lords not only of that once formidable archipelago, the Orkney Islands, but of the Shetlands, all Caithness and Sutherland, and at one period of a considerable part of Scotland besides, the ancient Orkney Jarls had much more than a local influence. The Orkneys were in fact but one sector in a long chain of kindred communities always in part under these chieftains, and during at least the reign of Earl Thorfinn the Mighty, entirely under their sway. This paper touches on two characteristic features of the Norse Jarls' rule, the constant dividing of their realm into lots or shares, and their 'gœðings' or vassal nobility, through whom they exercised authority. The second feature I have referred to very briefly once before,[1] but the first has not, so far as I know, been dealt with previously.

The Earls' Shares of Orkney.

It may be observed in the first place that the system of sharing their realm did not extend to Caithness (then including Sutherland), which was always in the gift of the Scots King as overlord, and was apparently granted to whichever of the joint earls he preferred. Shetland presumably was divided, but it is only of Orkney that we have any particulars.

We first actually know that the isles were shared on the death of Sigurd the Stout at Clontarf in 1014, though from later analogies it seems probable that they were divided also at an earlier date among the three sons of Torf Einar, since all three appear to have held the title of Jarl contemporaneously; but the Saga touches that period very briefly. On the other hand, it seems certain that they were not shared among the five sons of Earl Thorfinn Skullsplitter, for these are described as succeeding one another in the title. Apart from these two cases, there were no occasions for division before 1014.

[1] Introduction to the *Records of the Earldom of Orkney*.

In that year they were divided into thirds (*triðungar* or trithings), and till 1046 remained so, with the exception of a short period of division into halves between Earl Thorfinn II., the Mighty, and his brother Brusi, and about six years when Thorfinn was sole earl. From 1046 to about 1090 they remained undivided, first during the second period of Thorfinn's sole rulership, and then under the joint rule of his sons, Paul I. and Erlend II. Dissensions between these sons led to their division for the second time into halves, and from about 1090 down to the death of Rognvald II., the Saint, in 1159, they were sometimes undivided, but for the greater part of the time shared in halves. After that they passed under the sole rule of Earl Harald Maddadson, and we have no record of further divisions.

Thus for thirty-two years they were almost continuously split into trithings, and for about seventy years remained in halves most of the time, and the first question is—How complete was the division and how independent were the divided lots?

Though the references in the *Orkneyinga Saga* are few and brief, they fortunately answer this question very clearly. At the beginning of the trithing period the three earls were Brusi, Einar II., and Thorfinn II.; Einar's third becoming, after his death, a disputed heritage. In Chapter 22 we learn that 'Brusi had the northermost lot of the isles and was then there,' *i.e.*, when Thorfinn was defending the rest of the isles against the King of the Scots. Again, Chapter 14 tells us that 'a great dearth arose in his (Einar's) realm from the toil and outgoings which the bonder had; but in that lot of the land that Brusi had was great peace and plenty, and the bonder had an easy life.' So we know that Brusi's third was a geographically distinct realm in the North Isles, and was ruled by him after his own fashion quite independently of his brothers.

Two more brief passages complete the picture. In Chapter 26, when Rognvald I. claimed King Olaf's third (Einar's old trithing, escheated for his misdeeds) in addition to his father, Brusi's, third, Thorfinn consents and gives him the disputed trithing with the words, 'His help is more worth to me than the scats which I get from it.' And finally, in Chapter 30, when Thorfinn and Rognvald had fallen out, Rognvald's friends 'said too, it was bad counsel that Rognvald should lay himself out to fight against Thorfinn with that force he could get from two lots in the isles, when Thorfinn had a trithing and Caithness

and a great share of Scotland and all the Southern Isles.' Hence it is quite plain that each trithing (and the same would obviously apply to the halves) was for practical purposes a self-contained small earldom in itself, and in the case both of trithings and halves one would like to know what they were and how they were bounded.

It is only with regard to Brusi's third that we have a definite statement as to its position, but scattered through the *Saga* it is possible to find a number of clues to the other trithings and to the halves; as for instance in references to the earls' seats, their private estates, or places where they obviously had special influence or exercised jurisdiction.

Taking the trithings first, we have Brusi definitely established in the North Isles. Then in Chapter 33 we find Thorfinn living in Hrossey (now the Mainland), and his subsequent connection with Birsay is well known. He lived there 'almost always,' and founded there the first bishop's see; so that evidently the West Mainland was in his lot. And of Einar's third we have two indications. We know that Thorkel Amundason of Sandwick in Deerness was evidently a chieftain in his share of the isles, and we also find him descending on the Norwegian noble Eyvind Urarhorn while he lay sheltering in Osmundwall in Walls, and making short work of him (hence the subsequent forfeiture of his trithing).

It will be noted that all these indications are consistent with one another, placing the three lots in different corners, as it were, of Orkney, and they serve to give us a good rough idea of the lie of the land and its general division into North Isles, West Mainland, and East Mainland with the South Isles.

But it is possible to define these trithings exactly, and the principle to be applied is one that may help to elucidate other questions concerning all parts of the Norse dominions in Scotland where the land measures of the 'urisland,' or ounceland, and the pennyland were in use. The urisland of eighteen pennylands was the earliest land unit for the collection of the scats or taxes,[1] and hence if we know that two districts paid the same scats, we know that they must have contained the same number of urislands. But we have already seen that 'the scats which I get from it' represented the value of a trithing to Earl Thorfinn, so that a

[1] This is the true original urisland, and must be distinguished from the parish districts styled 'urslands' (though these last were originally based on the true urislands).

general equality of urislands must be assumed in the case of these trithings. Also it is clear that natural boundaries must have been respected, since each trithing or half was a self-contained realm, and apt to be on delicate terms with its neighbours.

Without going into the details of the process of enumerating the urislands, it may be said briefly that the basis was the three rentals of 1492, 1502-03, and 1595, plus additional information from various other sources, and that no 'quoylands' were included, since these neither paid scat, nor, like the earl's 'bordlands,' rent to him instead. In some parishes the evidence is conflicting, but the margin of error is never more than a single urisland, and very seldom that. In the case of Eday and one or two of the minor islands I can find no evidence at all, but the number of urislands thus omitted is quite certainly extremely small, and the total works out at a few more than 188; 192 being probably about the precise number.[1] The figures placed in each parish and island of the annexed map, or beside the names, may safely be taken as extremely close to the mark.

Starting now with Earl Brusi's 'northernmost lot,' we find that the group divided from the rest of Orkney by the Westray and Stronsay Firths, and always styled the 'North Isles,' contains at least 66 and very probably 68 urislands. This is a trifle over a third of 192, and may safely be taken as Brusi's trithing.

Crossing the Westray Firth, if we begin with Rowsay and sweep through the West Mainland, the first natural boundary we come to is the belt of moorland hills forming the southern margin of the basin of the Harray and Stenness lochs. This includes the islands of Rowsay, Egilsay, and Wyre, and almost all the West Mainland, and contains 64 urislands as nearly as may be, exactly a third of 192 (one urisland in Stromness is included and one in Stenness cut off by the natural boundary, but presumably the marches of the parishes would be followed). And here we evidently have Earl Thorfinn's lot.

[1] Captain Thomas, in his paper on 'What is a Pennyland' (*Proc. Soc. Antiq. Scot.*, vol. xviii.) made the suggestion that the fine of 60 merks of gold paid by Earl Einar on behalf of the Orkney border represented approximately the value of their lands, since in return they pledged their lands to him. Since then a note in the *Old Lore* series enlarged on this supposition and calculated the number of ouncelands (64 ounces = 1 gold merk) as 170 at 22½ years' purchase. The principle seems sound, but 170 is too few, and 22½ years seems a curious number to select. But 20 years' purchase gives 192 urislands, already known to be practically the number, and therefore probably the exact number.

In the third trithing, Earl Einar's, we are left with all the parishes and islands round Scapa Flow, plus Shapansey, and this contains just under 60 urislands.

These are the dimensions and boundaries of the three trithings as defined on the urisland principle, and as some confirmation of its accuracy as a guide, a very significant coincidence is to be noted. In another place I drew attention to the four different compartments, as it were, into which Orkney was divided for the purposes of the 1502-03 rental (and presumably for many a long lost rental before then).[1] The four actually are: 1. Thorfinn's trithing; (2) Brusi's trithing; (3 and 4) Einar's trithing. To follow up the apparent connection suggested by this between the trithings and the political divisions for the Lawthing would be outside the scope of this paper. But some connection seems highly probable.

Passing now from the trithings to the halves, we know that this form of division was first made for a short time between Earls Thorfinn and Brusi about the year 1021, and it may safely be taken that each would retain his own lot, and that Einar's would be cut in two. Then about 1090, when Paul I. and Erlend II. were joint earls, we find the long period of division into two lots beginning with the statement that 'the isles were shared into halves as they had been between Thorfinn and Brusi.' This seems to imply that the boundaries were the same, and all the facts bear it out.

The division thus made between Paul and Erlend can be traced long after their time. Paul's half was inherited by his son Hakon, then by Paul II., Hakon's son, and finally by Harald Maddadson, Paul's nephew; while Erlend's half went first to his son Magnus and then to Rognvald II., the Saint.[2] It is thus possible to get data over a long period to identify certain places in these halves.

Taking first the Paul I.-Hakon-Paul II.-Harald, half (which we may term here Half A), we find Paul II. living at Birsay and Orphir, and after a truce had been arranged with Rognvald and the isles were divided into lots, he went to stay in Rowsay. Then in the three-cornered contest between Rognvald II., Erlend III., and Harald, we have Harald lying

[1] Introduction, *Rec. of Earldom of Orkney*.

[2] See chaps. 47 and 64, *Ork. Saga*, where the inheritance of a particular half is very explicit.

with his force off Cairston in Stromness[1] when he was surprised by Erlend and Sweyn Asleifson. Driven from the islands, he went to Caithness, and returning secretly a little later, he lay for two nights under Graemsay and then landed at Hamnavoe in Stromness. So that we have Birsay, Orphir, Rowsay, Graemsay, and Stromness apparently in this half.

Coming to the Erlend-Magnus-Rognvald half (Half B), we know that Erlend's legitimate daughter inherited an estate in Paplay, in Holm, and that his natural daughter lived at Knarstane in St. Ola. Then in chapter 72 we find Kol urging his son Rognvald to make his famous vow in the following very suggestive terms:—'My wish is that thou vowest to him (St. Magnus) if he will grant thee the inheritance of thy kindred and make thee his heir, that thou wilt let a stone minster be built in the Orkneys at Kirkwall . . . so that thither may come his halidome together with the bishop's seat.' As Rognvald was only claiming St. Magnus's half of Orkney, it is obvious from this that Kirkwall lay in that half, and Birsay—the seat of the bishops hitherto—in the other.

When Rognvald at last descended upon Orkney, it was in the North Isles that he landed, and the men of Westray were the first to swear allegiance to him. Then when the truce was arranged, he took up his abode in Hrossey, and thereafter is found holding *things* with the Orkneymen in Kirkwall. And finally we know that he had a private estate of his own at Knarstane in St. Ola.

Thus we have the East Mainland, St. Ola, and the North Isles identified with Half B, and corroboration of Birsay being in Half A; so that simply on the data given by the *Saga*, Orkney falls into the two halves indicated in the map. And this is exactly the division which would naturally be made between Thorfinn and Brusi when they fell heirs to Einar's trithing, and

[1] Munch suggested that this place (Kjarrekstaðer in the *Saga*) is a mistake for Knarrarstaðer (Knarstane in St. Ola), as an explanation of the tale of Arni's flight from this battle to the church at Kirkwall (*Ork. Saga*, chap. 100). But references to Knarstane are frequent, and this place name is quite different; and what is more, it is repeated in the next chapter. Also, there was a castle at Kjarrekstaðer, which would certainly have been mentioned again in connection with Knarstane had the places been the same. Two years later Sweyn and Erlend surprised Earls Harald and Rognvald off Knarstane, and another fight took place under almost identical circumstances and with the same result. I think there can be no doubt that the tradition of Arni's flight has simply been attached by the *Saga* writer to the wrong battle.

moreover the two halves each contain, as nearly as one can calculate, 96 urislands, on the basis of the total being 192. In any case there is almost, if not quite, an exact equality.

And not only does the impossibility of materially rearranging the boundaries in the face of all these data confirm this division, but there is one curious and interesting little bit of evidence in still further corroboration. When Earls Hakon and Magnus met to decide their differences, Egilsay was the appointed rendezvous. Why? There would be obvious objections to holding such a meeting (with but a small following on either side) in any of the large islands belonging to either of the rivals. A small island, whose position made it a half-way house, would clearly be the ideal spot, and given the line of partition we have discovered, a glance at the map will show why Egilsay was selected, and how it confirms this boundary.

It is difficult to think that these complete divisions of the isles persisted so long without leaving some traces in their wake. A trace we have indeed noticed already in the early rental, and it seems more than likely that there are others only waiting to be discovered.

The Earls' Gœðings.

'Among the Norsemen in Orkney and Shetland, *gœðing* was used synonymously with lendir menn in Norway,' says Vigfusson in the *Oxford Dictionary*, and he adds that the word meant 'properly a man of property,' evidently deriving it from *gœði* (emoluments or profits). Subsequently he seems to have changed his mind and considered it equivalent rather to 'good men' in the Greek sense of *αριστοι*.[1] The reputation of Vigfusson is so high and so well deserved that his mere opinion must always carry weight, but in this case he quotes no evidence and it seems difficult to avoid the apparently obvious connection between the *gœði* (easements or emoluments of office) specifically stated to have been enjoyed by Sweyn Asleifson,[2] and the peculiarly Orkney title of gœðing.

Certainly, however, it was a word associated chiefly with Orkney. One or two references are given in the Dictionary to other sagas, and several to the Bible, the meaning always being 'nobles' or 'lords,' but its peculiar connection with Orkney is shown not only in the repeated mention of the gœðings in the *Orkneyinga*

[1] *Corpus Poeticum Boreale*, vol. ii. p. 594.

[2] *Orkneyinga Saga*, chap. 100.

Saga, but in the allusion to the *gæðinga-skip* (a ship conveying Orkney nobles) in the Icelandic Annals, and in that refrain running through the Orkney Bishop Bjarni's *Jomsvikinga-Drapa*, reminiscent (one trusts) of his pre-episcopal youth, 'The noble's (*gæðings*) daughter, she alone kills all my joy; the scion of a great house is she that works me sore distress!'

As to the term being used synonymously with lendirmen in Norway, a general similarity is apparent from various passages in the *Saga*. Like the lendirmen, the gœðings were vassals. 'Gœðings of Earl Paul,' 'all the Earl's gœðings,' 'many of his (the earl's) gœðings':—these and many other passages prove a semi-feudal relationship to the Orkney jarls. Again, like the lendirmen, they held fiefs of land of the earl (not heritably, but presumably for life or long periods). Kugi held the earl's bordland of Rapness in Westray; Thorkel Flett was given the lands in Stronsay escheated from Sweyn Asleifson; and Olaf Hrolfson 'had great honours given him by Earl Paul.' They were under oaths to rule the land; they were summoned to the earl's feasts and councils; they were responsible for the defence of the country in time of war; and in all these particulars they resembled the lendirmen.

The lendirmen were the barons of medieval Norway (indeed, the title was finally changed to baron), an aristocracy half feudal and half traditional or tribal. They were in fact the *hersar* or ancient hereditary district chieftains under a new name and placed in a new vassal relation to the sovereign. This change was instituted by King Harald Fairhair towards the end of the ninth century and thenceforth they derived their authority nominally from the King as overlord, but actually, as appears from various passages in the *Heimskringla*, to a large extent from the traditional respect in which they were held by the bonder as being their immemorial leaders and representatives.[1] Theoretically they were not strictly hereditary, the title and emoluments being re-created at every generation, but practically they were so strict a hereditary caste that Professor Taranger tells us:

[1] See for instance chap. xliv., *Saga of St. Olaf*. 'These lendirmen were of great help to the kings or earls who ruled the land; for it was as if the lendirman had the bonder of each district in his power. Earl Sweyn being a good friend of the lendirmen, it was easy for him to collect people.' Earl Sweyn was at that time ruler of Norway, and it is to be observed that it was he who derived his influence with the bonder through the lendirmen, and not the lendirmen who derived theirs through him.

'The King could create a bonde lendirman, as Sigurd Jorsalafarer did with Ottar Birting. But practically this happened extremely seldom in the early middle ages; because by tradition and custom a man should be lendirman-born to become a lendirman, and jarl-born to become a jarl. Prejudice against a breach of birth or family *ret* (right or privilege) was so strong that an upstart always played the part of parvenu in the eyes of his equals by birth. And this was a thing no honest man took pleasure in.'[1]

It was in fact that ideal state of society in which every man is a high Tory, and this passage makes an interesting comment on those curious theories once in vogue (even held by so eminent a writer as Samuel Laing) that our viking ancestors were a democratic people. And an equally instructive comment is to be seen in the case of republican Iceland, where the *goðar* or district chieftains formed a close and absolutely hereditary oligarchy, very much on the lines of the lendirmen.

With such ideas permeating the Norse people, and knowing such facts as we do know about the Orkney gœðings, it is manifest that they must have been an aristocracy with the same essential feature of traditional hereditary position in addition to the authority and emoluments given them as vassals by the earl. At the same time Orkney was a self-governing and practically independent colony, and we can no more assume that the structure of her society and her constitution were absolutely identical with those of the mother country than we can assume the same thing of the British or Spanish colonies. It is necessary therefore to examine such evidence as exists and see how far we can define these Orkney gœðings.

One difference between them and the lendirmen appears pretty clearly from several references, and seems to be emphasised by certain negative evidence. In more than one passage in the *Orkneyinga Saga* a gœðing is termed a 'bonde.' Sigurd of Westness, Thorkel Flett, and Kugi of Rapness are instances where both terms are specifically applied to the same man; though on the other hand we do find in one place a distinction drawn between the 'riksmen' or nobles and the bonder or rank and file of the landowners. But in Norway this distinction was always made, the lendirmen having become a class apart by the eleventh and twelfth centuries.

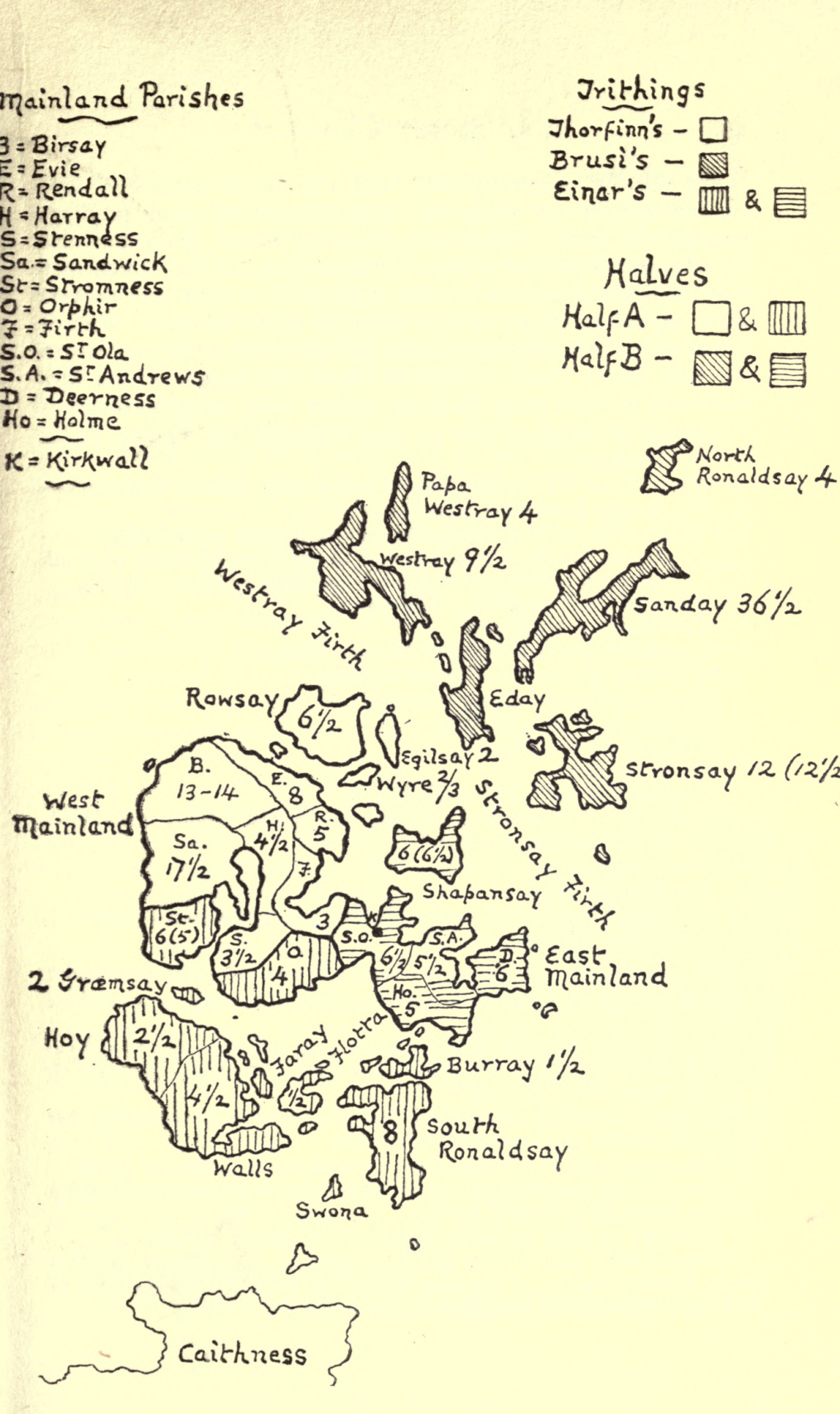
Again, there is no mention anywhere of a man being created gœðing, or of any gœðing's privileges, and this negative

[1] *Udsigt over Den Norske Rets Historie.* Part ii. p. 137.

evidence, added to the bonder references, points decidedly to the gœðings being, so to speak, like the lendirmen, only less so. Looking to the great difference in size between Norway and Orkney, and the one or two references to 'many' gœðings, most of them must have been chieftains on a smaller scale than the lendirmen, and one would judge them to have remained, like the Icelandic goðar, still of the bonder, even though sometimes alluded to in contra-distinction to the rest of that class. They may, in fact, be styled a kind of semi-baronage, though certain powerful individuals, like Sweyn Asleifson, with his eighty retainers, had no reason to envy any baron who ever defied his liege lord.

The best light thrown on the gœðings as a whole is to be found in Chapter 59 of the *Orkneyinga Saga*, where a list of magnates is given, beginning with the explanation, 'There were then in the Orkneys many *göfgra manna* (noble or worshipful men), who were come from the stock of the Earls.' In this list is included every man who is either specifically termed a gœðing in the course of the *Saga*, or who at that time clearly must have been, with the exceptions (*a*) of one or two of the men named in Chapter 39 as being 'all earl's kin and gœðings in the Orkneys' (the others being included in Chapter 59); and (*b*) of Eyvind Melbrideson, one of the chieftains who came with his war ship to Earl Paul at Westness, when he hurriedly summoned his gœðings.

This inclusion of every recorded chieftain of the time, with the one exception of Eyvind, within the circle of families 'come of the stock of the Earls' is most suggestive, and seems clearly to imply that the great majority of the gœðings belonged to such families. As the learned Torfæus long ago observed in commenting on this list, the precise steps of the descent of these families from the stock of the earls is not given, but there can be no doubt that they must have been sprung, like the chieftains Einar oily-tongue and Einar hardchaft, at an earlier day, and one or two known cases in this list, from daughters of the earls who in the course of more than two centuries had married Orkney magnates, since male cadets would have had a claim on the earldom. And naturally the men who married into the ruling family would be the traditional chiefs of the bonder. We may therefore safely take it that the earls pursued the obvious policy of creating this vassal nobility chiefly out of the great odallers attached to them by ties of kindred.


Mainland Parishes
B = Birsay
E = Evie
R = Rendall
H = Harray
S = Stenness
Sa. = Sandwick
St = Stromness
O = Orphir
F = Firth
S.O. = St Ola
S.A. = St Andrews
D = Deerness
Ho = Holme
K = Kirkwall
Thirdings
Thorfinn's –
Brusi's –
Einar's – &
Halves
Half A – &
Half B – &
North Ronaldsay 4
Papa Westray 4
Westray 9½
Westray Firth
Sanday 36½
Rousay 6½
Eday
Egilsay 2
Wyre ⅔
Stronsay 12 (12½)
West Mainland
B. 13-14
E. 8
R. 5
H. 4½
Sa. 17½
F.
6 (6½)
Shapansay
Stronsay Firth
St. 6(5)
S. 3½
3
4
S.O.
S.A. 6½ 5½
D. 6
East Mainland
Ho. 5
2 Græmsay
Hoy 2½
4½
Walls
Flotta
Burray 1½
South Ronaldsay 8
Swona
Caithness

But this list, when analysed, seems to throw some light also on the system on which the earls distributed their gœðings through the isles. Below are given the names in it, and also the islands and parishes where they either lived or with which they were connected; and an asterisk is attached to such men as were either styled gœðings, or can safely be taken as such. One or two of the others are probabilities, but the evidence is insufficient, and only in the cases of Grim of Swona and Borgar do the *Saga* references to them seem distinctly against their being gœðings.

*Sigurd of Westness and his sons *Brynjulf and *Hakon Pik.—Rowsay.[1]

*Magnus and *Thorstein, sons of the gœðing Havard Gunnason.—Sanday (containing 3 parishes).

*Hakon Klo and *Dufnjal, also sons of Havard.—No locality mentioned, but the family belonged to the West Mainland or South Isles (see below), and Stenness is indicated by other evidence.

Erling of Tankerness.—St. Andrews.

*Olaf Hrolfson[2].—Rendall.

*Sigurd of Paplay and his son *Hakon.—Holm.

*Thorstein Ragnason.—North Ronaldsay.

*Kugi of Rapness.—Cross, Westray.

*Helgi.—St. Mary's, Westray.

*Thorkell Flett.—Westray.

Grim.—Swona.

Dagfinn Hlodver's son.[3]—Fair Isle.

Thorstein of Flydruness.—Hrossey (no precise locality mentioned, but Firth is suggested).[4]

Borgar Jaddvorson.—St. Ola.

John Wing.—Hoy.

Richard of Brek (John's brother).[5]—Stronsay (containing 3 parishes).

Grimkell of Glaitness.—St. Ola.

The feature of this list to be noted is the fact that practically every family is in a separate parish. And knowing how ancient

[1] An early list of the parish kirks in Orkney states that there were '3 kirkis of old' in Rowsay, implying three parishes in the island at one time. (*History of the Church in Orkney*, vol. ii. p. 232.)

[2] Olaf was father of the famous Sweyn Asleifson (Asleif being his mother), but Sweyn only came to the front after Olaf's death.

[3] From chap. 74 it would appear that Hlodver was a kinsman of Sigurd of Westness, and very probably they represented branches of the same family with a common descent from the earls' house.

[4] Thorstein's son Blian was keeper of the castle on Damsay in Firth.

[5] These brothers were kinsmen of Sweyn Asleifson, and again we may have simply different branches of the same family. In fact this is likely enough to have been the case with a number of the men in this list.

these parishes were (in the form of districts created for some purpose), it looks very much as though the jarls placed their vassals through the isles on the general principle of a vassal in each district. This is of course an inherently probable system, and certain passages in the *Saga* seem not only to provide some evidence in confirmation, but also to indicate that gœðings were sometimes placed on the earl's bordlands (away from their own odal estates) for purposes of administration in peace time or defence in war.

For example we have the bonde or odaller Kugi living on the bordland of Rapness in Westray, with no odal lands at all in that part of the island. He, Helgi, and Thorkell Flett are the three Westray chieftains in the list, and when Thorkel got a gift of a forfeited estate in Stronsay and removed himself thither, the two left, Kugi and Helgi, are specifically named as the two men under whose leadership the Westray men immediately placed themselves when Rognvald invaded the island; so that these were manifestly the only three gœðings in Westray. Two ancient parishes are known, Cross and St. Mary's, and Kugi certainly lived in one and Helgi in the other. But from the quite disproportionately large size of St. Mary's and from analogy with Sanday and Stronsay, it seems likely there were once three parishes; and in any case Papa Westray formed a separate parish. Thus the single instance of Westray, when the facts are put into some relation with one another, affords considerable support to both the suggestions made above.

Again, turning to Sanday, when the islands were in a state of war, and invasion was imminent from the north-east, we find Magnus Havardson placed in charge of the beacon there, and his brother Thorstein in the same island shortly afterwards. But their father, Havard Gunnason, was a chieftain of Earl Hakon's (since he was one of his party that sailed to meet St. Magnus), and the family were therefore certainly not North Islemen. And the point of this is seen when one remembers that Sanday, and also Westray and Stronsay, formed part of Rognvald's heritage, that half of the islands which he was seeking to invade and conquer. Indeed, it seems not improbable, from some of the circumstances we have noticed, that others of Earl Paul's gœðings, such as Kugi and Thorkell, may also have been trusted chieftains from his own proper half of the islands, placed where they would act most effectively in his interest.

It is plain that the evidence is insufficient to justify dogmatic

conclusions or give a detailed picture of the Orkney Earls' gœðings and their office, yet it all seems to point one way, and the general outline that emerges is entirely consistent with what one would reasonably expect from the analogy of the Norwegian King's lendirmen. And it is not only in the Orkneys that we should naturally look for such vassal chieftains, with much the same origin, functions, and relation to their liege-lord, but round the northern and western rim of Scotland too ; so that a somewhat wider application may perhaps be found for what can be learned from those isles.

J. Storer Clouston.

The Revolution Government in the Highlands

AN unfortunate prominence has been given to the massacre of Glencoe, which, however discreditable to its authors, was an isolated event, and cannot be regarded as a real indication of a settled policy. The interest taken in it has only tended to distract attention from the more important question of the way in which the problem of Highland government was regarded by the Revolution statesmen, and of how they attempted to deal with it. The preliminary negotiations with the chiefs for a settlement, and the correspondence connected with them, furnish evidence on this point, and while it exonerates all but a few individuals from responsibility for the massacre, it gives grounds for a far more fundamental condemnation of the whole system and character of the government as applied to the Highlands. The affair of Glencoe itself has been compared to some of the repressive measures taken by James VI. against the Macgregors and others, but even this period affords no parallel to the infirmity of purpose and lack of scruple which were shown towards the Highlanders under the authority of William III. When the general character of the government is in question, it is impossible to assign personal blame, but it is hard to exonerate the Master of Stair for his failure to pursue the policy which gave promise of a permanent settlement by his half-heartedness in dealing with Argyll, for using so untrustworthy an agent as Breadalbane to negotiate with the chiefs, and for giving him the excuse and opportunity for using public resources to execute private revenge.

The worst acts of the Revolution government in the Highlands were not the result of any deliberate intention; it made the fatal mistake of not pursuing any definite policy and drifting into inconsistencies which made it impossible for the Highlanders to rely upon it either for good or evil. The trouble was inherent in the political circumstances of the time, and for that very reason served to emphasize the Highlanders' innate distrust of

a change in the hereditary succession to the throne, and their hostility to a foreign usurper.

The administration of James VII. in the Highlands was unusually intelligent and sympathetic, and it is, therefore, not surprising if their experiences of the change confirmed the clans in a loyalty which successive disappointments and failures could not shake. The Revolution statesmen were chiefly occupied with more important concerns—the European war against France, the settlement of the Church, and many constitutional and financial questions which were a constant menace to the stability of the state. The King himself was never in the country, and had to consider first the political affairs of England.

The Revolution had strengthened the influence of the aristocracy in Scotland, always dangerously strong, by removing the restraint of an autocratic monarchy, and Jacobite intrigues and propaganda created a condition of uncertainty which was ruinous to political morals already at a low ebb by a long tradition of unrest. The government was divided, and its policy consequently erratic. The Scottish Privy Council was always liable to be overruled by the intervention of the King, who left it to carry out orders it might not approve, and to aid negotiations of the exact nature of which it was ignorant. To add to the confusion the exercise of the royal authority itself was divided between the King in Flanders and the Queen in London, and however united the two sovereigns were in intention the difficulties of communication led to the appearance of difference in their policy. The Council was thoroughly confused and annoyed at the interference with its own decisions, and disliked Stair's influence with the King; 'the different orders from the King and Queen looked very odd to us at distance, and I wish the Queen be not impossed upon, which your Lo., being on the place, may more easily discover, and put her Majestie on her gard.'[1] This was from Hamilton to Melville in London. Livingstone, the commander-in-chief, was even more perturbed. 'I am at present so circumstanced that I know not what way to turne myself. . . . I am now again commanded to encamp. . . . If I encamp, I cannot make the horse subsist but by eating of the people's cornes. If I do this, to well affected ther is a clamour; if to disaffected ther is a breach of that they call cessation of armes, of which the Councill will not take notice; and after all, my hands is ty'd up

[1] *Papers illustrative of the Political Condition of Highlands of Scotland*, 1689-96, p. 27, Maitland Club, 1845.

in committing no acts of hostility; all this, together with other difficultys, putts me under hard circumstances.'[1] The effect of all this upon the clans can be imagined. They had very accurate and speedy information both of the intentions and resources of the government, and Colonel Hill found that they were sometimes better informed than himself. For his own part he sums up the situation in the complaint, 'I love not soe many masters.'[2]

This characteristic of the government, so different from that which Hill had known under Monck, rendered it peculiarly unfitted to deal successfully with the clans. The military and financial resources of the country were so limited that even when a decision was taken it could not always be carried out, and it was impossible that an authority so divided should develop or follow a consistent policy on a matter about which there was little accurate or disinterested knowledge and no general agreement.

From the very first there were two conflicting policies before the Council for the conquest or the settlement of the Highlands. First, there was a military policy of a more or less drastic type. Opinion came to be generally united upon the essential importance of garrisons in maintaining order in the hills, but this was only a beginning. Even after the defeat of the Highlanders at Cromdale, in May 1690, Buchan remained in command, and it was feared that the disorganised forces might gather again, especially on any rumour of invasion. Various strong houses rendered the clans more or less secure in their own districts. Troops were urgently needed in Flanders, and the Scottish forces were ill supplied with ammunition, provisions and other necessaries. There was constant fear of the arrival of a force from France as long as the Highland Jacobites were prepared to afford it a welcome. A vigorous campaign would have been the best solution in the opinion of such men as Sir Thomas Livingstone. The government should make the necessary effort to find money and supplies, and allow the soldiers to complete the conquest of the Highlands by seizing and occupying Invergarry, Duart and other strong houses, and thereby forcing the chiefs to submit to whatever conditions the government saw fit to impose upon them for the permanent settlement of the country. There was no question here of massacre, but of straightforward military measures of whatever severity was needed to ensure a complete pacification.

[1] *Ibid.* 28-9. [2] *Ibid.* p. 11.

There were two serious obstacles to this policy; first, that of expense—the provision of men, money, and materials, which were either unobtainable or badly needed elsewhere; second, considerable opposition, from the military party, from interested or Jacobite intriguers, and from the advocates of the alternative scheme of conciliation. Colonel Hill, the old Cromwellian commander, was heartily in favour of the continued military occupation, to the success of which he personally had so much contributed, but he was of opinion that a regular campaign was unnecessary, and that it would prove a far more costly and difficult undertaking than the Council thought. He was confident that the people could be induced to submit in time by a sufficient show of force if they were given the opportunity. He was constantly able to report signs of willingness to do so. Lochiel let him understand that he was determined not to desert his associates by being the first to submit, but that he would not prevent his people doing so, and had no intention of rising in arms.[1] He had similar hopes of Maclean and others, but these were constantly dashed by some circumstance connected with the war in Europe or rumours that the Duke of Berwick with a French force was expected to take command of the Jacobite forces.[2] The Council wanted to set some period to this sort of diplomacy, and gave Hill orders to take action in the hills, but at the last moment the expedition was countermanded, greatly to his relief. The order had been known to the Highlanders, he wrote, 'worde by worde, long before it came to my hands.'[3] The country was peaceful, except for 'broken men and thievis.'[4] His own plan was 'the taking off the Chiefs, by some such munificence off the Kings, as might be no longer continued than they prove honest; but money was not proper; ffor iff a fforce come, itt will but make them to joyne them the better; iff none come, they must submitt of course.'[5] It was a policy such as that of which he had proved the value under Monck, but it demanded firmness and patience, and the government displayed neither. Hill complained that he was expected to settle the matter out of hand, 'which if I could doe there would be as little need for them as they say there is for this garrison.'[6] The question of the garrisons was fundamental. They were absolutely necessary for the settlement of the country, or for its conquest,

[1] *Highland Papers*, p. 15. [2] *Ibid.* 9, 10, 16, 17. [3] *Ibid.* p. 11.
[4] *Ibid.* p. 16. [5] *Ibid.* p. 20. [6] *Ibid.* p. 10.

and were open to attack from two sides. The party which advocated a more active military policy complained that they were doing nothing, and there were constant Jacobite intrigues aimed at getting rid of them altogether. There was a danger that concessions of any kind might be exploited as a means of attaining their withdrawal or of obtaining control over them,[1] a danger which had not been present under Monck's command.

The natural suspicion that the policy of conciliation was simply a cloak for Jacobite intrigue made it impossible that it should be considered entirely on its merits, and even rendered those who were anxious to adopt it less whole-hearted in carrying it through than was necessary for its success.

It was pointed out by Lord Tarbat that the chief of all causes of disturbance in the Highlands was the existence of feudal superiorities and other similar claims by certain nobles and chiefs over the property or people of other clans, which gave rise to innumerable feuds, ambitions, and rivalries, and kept the whole country in a state of unrest. Under Cromwell the superiorities and heritable jurisdictions were abolished, but revived at the Restoration. James's personal influence in Scotland, both as Duke of York and King, tended to the settlement of various old disputes by getting rid of feudal rights which were inconsistent with the independent position of different clans. His methods were questionable, and as Argyll was the chief superior affected, James's Highland policy did not commend itself to the Whigs. Tarbat saw no reason why it should not be carried out in a more thorough and impartial manner. He recommended that the King should free the Highlanders from their worst financial or legal embarrassments by buying up the claims of Argyll and others, and so bringing them into direct relations with the Crown.

He claimed various advantages for his scheme. First it met the practical obstacle to the carrying out of the military policy to which he was opposed—it would be much cheaper. He estimated that the last Highland campaign had cost £150,000, that the conquest of the Highlands would take two or three years and involve a greater loss in men and money than the ruin of the clans was worth, and that £5000 or thereabouts would be sufficient to settle the claims of Argyll.[2] The reform

[1] *Ibid.* 20-1, 47.

[2] Sir J. Dalrymple, *Memoirs of Great Britain and Ireland*, Edinburgh, 1771, ii. 209; *Leven and Melville Papers*, Edinburgh, 1843, Bannatyne Club, pp. 584, 588.

effected in the feudal status of the chiefs was likely to attach them definitely to the new government, as the partial attempts of James in the same direction had already bound them to him. Foreign opinion would be favourably impressed by the willing submission of the clansmen to a government which claimed to rule by consent of the governed. The settlement should be safeguarded by the permanent establishment of the garrison at Fort William, which was to be made a burgh, with some 'neutrall man to all adjacent interests' as Governor.[1]

The essence of the plan was that the money should go, not to the Jacobite chiefs, but as compensation to Argyll for the changes which were to bring the chiefs under the direct feudal authority of the King. This step would not only have relieved them from many galling inconveniences, but would have been an important reform in the constitutional position of the monarchy, and one which has been recognised in numerous other cases as essential to progress. The power of a factious aristocracy had been the curse of Scotland, and the Revolution, according to the Master of Stair, had increased their power as against the Crown.[2] The improvement in the position of the chiefs proposed by Tarbat remedied their just grievances, but was not of a kind to render them more independent of the government. On the contrary it gave to the Crown a more direct power of control over them, as well as rendering it more independent of the great noble houses. The maintenance of garrisons to carry on the duty of policing the country, which Colonel Hill so judiciously discharged, was recognised as essential to the success of the whole scheme of conciliation. The distribution of money to the chiefs was quite subsidiary, and was moreover so usual an expedient as to be regarded on both sides rather as a commonplace. Pensions were a recognised method of government, and the contention of the chiefs, that without money compensation for their losses in the war their clansmen could not exist without preying upon their neighbours, had much truth in it.

Any arrangement of this kind was harmless, as long as it remained entirely subordinate to the main plan; it became dangerous only when the government was tempted to follow the way of least resistance, and substitute a money distribution among the chiefs for the purchase from Argyll of rights which stood in the way of a genuine settlement of the Highlands.

[1] *Leven and Melville Papers*, p. 565.

[2] Burton, *History of Scotland*, 1689-1748, i. 59, London, 1853.

The case of Lochiel, who was generally regarded as the leader of the Stuart cause among the Highlanders, gives the best illustration of the troubles involved by the dual ownership of land characteristic of feudalism in practice if not in theory, and of the clashing between the feudal authority of the landlord and the customary patriarchal authority of a chief over his clan. During the Civil Wars Lochiel's Tutors, he being then a minor, had lent money to his superior, the Marquis of Argyll, on the security of lands belonging to the Huntly estates given to Argyll on the Marquis of Huntly's forfeiture. For better security the Camerons also secured a warranty over lands in Ardnamurchan which were actually Argyll's property. Their foresight was justified when Huntly's estates were given back at the Restoration,[1] and the justice of Lochiel's claim was so far recognised that Parliament recommended his case to the Commission appointed to deal with the settlement of Argyll's estate after his forfeiture, and the satisfaction of his creditors.[2] When the Argyll estates in their turn were restored to the Earl of Argyll by Lauderdale, Lochiel's chances either of repayment or compensation from the warranty lands vanished—the last was a serious loss, for since the inhabitants of Ardnamurchan were Camerons, Lochiel, if he could have purchased the lands in question, would have done away with the clashing of authorities by the union of the patriarchal and feudal powers in his own hands.[3] This was more important to him and his clansmen than the mere loss of the money lent to Argyll, but the injustice of this loss became the more marked when Lochiel was obliged to borrow in his turn from the Earl of Argyll in order to buy off ancient claims of superiority over other portions of his lands which had caused centuries of warfare between the Camerons and Mackintoshes. This loan was made nominally free from interest, but Lochiel was obliged to accept Argyll's superiority over the lands in question and pay a small feu duty.[4]

This arrangement in turn led to new complications; on the Earl of Argyll's forfeiture these rights were transferred to the Duke of Gordon, who at once took measures to evict Lochiel from the lands and to obtain repayment of the money he had

[1] *Memoirs of Sir Ewen Cameron of Lochiel*, 167, 168, Edinburgh, 1842, Abbotsford Club.

[2] *Acts Parlt. Sc.*, 5th Sept. 1662.

[3] *Memoirs of Lochiel*, p. 170.

[4] *Ibid.* p. 193.

borrowed from Argyll,[1] which was practically speaking the price of the superiority and not a loan. Repayment of the money would not relieve Lochiel of the superiority of Gordon, who had lent him nothing. In short, in order to buy from Mackintosh the legal ownership of the lands which he had occupied from time immemorial, the Cameron chief was obliged to sell a legal right to Argyll, which when transferred to Gordon enabled him to take the lands and demand the restoration of the price at the same time. Throughout the reigns of Charles II. and James VII. Sir Ewen Cameron, notwithstanding his undoubted loyalty, was involved in a succession of lawsuits of a most complicated kind with all their accompaniments of intrigue, outlawry, and private warfare, involving visits to Edinburgh and London and endless worry and expense. From the point of view of equity, if not of strict law, Lochiel's claims were very strong, and a settlement was most desirable in the interests of the country.

In this connection two things are particularly noticeable: first, that a similar state of affairs had been impossible under the government of Monck, owing to the abolition of the Superiorities and feudal jurisdictions, and to the military force which rendered the government effective; secondly, that King James had taken a real personal interest in the matter, and had gone far to remedy Lochiel's grievances even at the risk of offending the Duke of Gordon, at the time when he was most anxious to secure his political support.[2] Moreover James had certainly intended to do more, and other clans had found him equally ready to interest himself to procure a judicious compromise in similar affairs. Therefore if James had remained upon the throne there was reasonable expectation that the Camerons would attain to a position as favourable as that which they had occupied under Monck, and it is natural to suppose that if the Revolution government had carried out a policy which Monck had adopted and James entered upon, and which William and Stair recognised as sound, the chiefs' ambitions for themselves and their people would have centred less exclusively upon the forlorn hope of a Stuart restoration, which actually remained the only outlet for Highland patriotism. All accounts agree in attributing to Lochiel the main influence in holding the Highland combination together. He was both from principle and interest a life-long royalist, but however idealistic his sentiment for the ancient monarchy, he was

[1] *Memoirs of Lochiel*, pp. 221-2. *Acts Parl. Sc.*, 15th June 1686.

[2] *Memoirs of Lochiel*, pp. 210, 222, 231.

a practical man and not a visionary. Hill informed Forbes of Culloden in November 1690 that Lochiel, alone of the Highland chiefs, did not believe the prevalent rumours of assistance from France,[1] and he had even expressed the opinion that unless England appeared ready to reverse the decision of 1688 it was useless to attempt anything in the north. Nevertheless he was convinced, and persuaded others, that they could best fulfil their duty to their master and serve their own interests by continuing to hold out as long as possible,[2] and the treatment of Seaforth, who submitted, was not calculated, according to Tarbat, to encourage the others to follow his example.[3]

Throughout 1690 and 1691 the progress of events not only influenced the attitude of the chiefs with regard to resistance or submission, but caused equal vacillation on the part of the government as to the nature of the terms they were willing to give. When their affairs prospered the government became more strict in their demands, when things went ill they became correspondingly generous, and this was the real reason of Lochiel's determination. French aid was not practically to be relied upon, but the fear or expectation of French aid was of very real value in obtaining concessions from the government and encouraging the chiefs to stand together. Lochiel knew as well as Stair that they would be at the mercy of the government if their combination was broken, and besides their own advantage, while they held together they were always ready for the King's service if his hopes and promises turned out after all to have been well founded. The government made half-hearted efforts at a settlement through Tarbat, Hill and others which came to nothing. Sir Thomas Livingstone's success at Cromdale and the dying down of fears of a French invasion caused the conciliation scheme to be dropped for a time, and there were further signs of Highland willingness to make terms.[4] Sir Donald Macdonald, who had not signed a bond drawn up by some of the others that they would not submit without the consent of King James's general and a majority of themselves,[5] tried to negotiate for an indemnity, a pardon, the restitution of his son's forfeiture and a pension, 'because his estate is sore broken, that he may have what to live on in peace.' He was informed that

[1] *Culloden Papers*, 1625-1748, p. 13, London, 1815.

[2] *Memoirs of Lochiel*, pp. 292-3.

[3] *Leven and Melville Papers*, 552, 585.

[4] *Dalrymple Memoirs*, i. 187, ii. 209.

[5] *Acts Parlt. Sc.*, ix. app. p. 60.

he might perhaps get concessions if he first surrendered unconditionally.[1] This the chiefs were naturally determined not to do if they could help it, and Tarbat urged that they should be given something annually during their fidelity, and goes on to say that if this concession is refused the clans will break out plundering, and make more profit out of it than any losses the garrisons could inflict.[2] This can only refer to some money payment, an unsatisfactory expedient from every point of view except that of an immediate and temporary peace.

In the early months of 1691 the situation grew worse. Colonel Hill had been seriously ill, and was short of officers; the troops were mutinous for lack of pay, some French ships actually arrived in Skye, and on the continent Mons was surrendered to the French. Rumours of invasion took more definite shape, Hill was disappointed of various expected submissions, and Glengarry began to strengthen his fortifications. It was calculated that cannon must be brought up to reduce him.[3] The Government felt the necessity of strong measures, while their ability to carry them out effectively was doubtful, and a reverse would have been most dangerous. The Council ordered an expedition, the Queen countermanded it. The Council challenged her authority, and were referred to William in Flanders, only to find that he had authorised a truce with the clans, and had commissioned the Earl of Breadalbane to negotiate.[4] Stair defended the policy which he had inspired in a letter to the Duke of Hamilton, in which he reviewed the situation: 'I have sent your grace a copy of the concessions to the Highlanders; the application of the money is by buying in from my Lord Argyll and from Mackintosh those lands and superiorities which have been the occasion of trouble in the Highlands these many years. When your grace does consider that the expense comes not from us, that the apprehensions of danger were great when it was begun, and that the King could not refile, with the care we may have of two or three regiments which we cannot pay, and that the French may be the more earnest to get a footing in Britain, that they are likely to lose Ireland, I hope your grace will find the settlement not so ill, nor so ill-turned, as to be either dishonourable to the king, or useless to the country at this juncture.'[5]

[1] *Leven and Melville Papers*, 551-2.
[2] *Ibid.* p. 584.
[3] *Highland Papers*, pp. 5, 9, 11, 16, 29.
[4] *Highland Papers*, 24-5, 30.
[5] *Dalrymple Memoirs*, vol. ii. pt. ii. p. 209.

It is not clear how Breadalbane came to be chosen as negotiator; Hill attributed it to the influence of Stair and Mackay,[1] and Breadalbane was known to have considerable influence, both at Court and in the Highlands. His intimate knowledge of the latter was his most obvious qualification, and it is possible that his most obvious disqualification also served to commend him to Stair. He was known to be thoroughly untrustworthy in the sense that he was frankly guided by his personal interests. The events of 1715 seem to show that he was a Jacobite at heart, but in 1691 he was certainly convinced that Jacobitism did not pay, and probably he wished to make his own position sure by rendering an important service to government. Mackay described him as 'one of the cunningest temporisers in Britain,' and accused him of having fomented trouble, not from love of King James, but in order to render himself necessary.[2] The chiefs seem to have been willing to negotiate with him in the belief that he was secretly favourable to themselves and their cause, although Glengarry was bitterly opposed to treating with him, and also Macdonald of Glencoe, to whom Breadalbane was a personal enemy. None of them really trusted him, according to Hill, particularly Lochiel, his cousin, who knew him well, and for whom personally Breadalbane seems to have done his best. They doubted if he really had the money he promised to give, and suspected that he would retain a good deal of it.[3] On the second point they were wrong, for Dalrymple was careful not to give him the opportunity, and although the money was available somewhere, it is very uncertain if the government really intended to part with it. Hill perhaps makes the most of the chiefs' suspicions, for his own diplomacy was at once rendered nugatory by the very fact of Breadalbane's negotiations; he had also good reason for regarding the Earl as an enemy of the garrisons;[4] he certainly had a scheme for creating a Highland militia and giving Cameron of Lochiel, whose Jacobitism Fort William was specially intended to check, an important share in their command.[5] 'I should have had much more off the people under oath,' Hill wrote, 'hade not this provisione ship, and my Lord Breadalbin's designe hindred, which I wish may doe good, but suspect more hurt than good from it; ffor my parte, heirafter, iff I live to have geese, I'll sett the ffox to keep them.'[6] Tarbat, whose pet scheme was thus

[1] *Highland Papers*, p. 20.
[2] Mackay's *Memoirs*, 306, 72.
[3] *Highland Papers*, p. 20.
[4] *Highland Papers*, p. 47.
[5] *Dalrymple Memoirs*, vol. ii. pt. ii. 218.
[6] *Highland Papers*, p. 19.

filched from him by one whose motives were so gravely suspect, expressed his annoyance to Melville: 'if B. gett 10,000 lb. sterling, as they say, for what, if you had pleased, I had easily done, he is a wiser man nor I am, and of that there is little doubt.'[1] It was generally assumed that Breadalbane would cheat someone, but even his contemporaries, though they were aware of his double dealing, were quite unable to decide which party he really intended to betray.

Stair promised Breadalbane a sum of £12,000 with which to adjust the rival claims and ambitions of the clans, and left him a fairly free hand as to the details, on the general understanding that it was desirable to buy out Argyll's and Mackintosh's claims over lands inhabited by other clans. Breadalbane had taken a leading part in Charles II.'s reign in settling the famous feud between the Camerons and Mackintosh on these lines.[2] His intimate acquaintance with the various rights and ambitions of the different parties and their capacity for enforcing their wishes was a very great asset, even though it was not combined with impartiality. The first step was to arrange a cessation of arms; this was done behind the backs of the Council, which was then ordered to do all in its power to assist the negotiation. The object was set out in a letter from William, in which it is noticeable that there is not a word about money being distributed to the chiefs, but stress is laid on the question of the superiorities.

'We being satisfied that nothing can conduce more to the peace of the Highlands, and reduce them, than the taking away the occasion of these differences and feuds which obleidge them to neglect the opportunities to improve and cultivate their countrie, and accustome themselves to depredationes and idleness. Therefore, we are graciouslie pleased, not only to pardon, indemnifie and restore all that have been in armes, who shall take the oath of alleadgance before the first day of Januarie next. But lykewayes, We are resolved to be at some charge to purchass the lands and superiorities, which are the subject of these debates and animosities, att the full and just availl, wherby the Highlanders may have their imediat and entire dependance on the croune. And since we are resolved to bestow the expense, and that no bodie is to sustain any reall prejudice, we must consider it as ill service done to Us and the Countrey, if any concerned shall, through obstinacy or frouardness, obstruct a settlement so advantagious to our service and the publict peace. And we doe

[1] *Leven and Melville Papers*, 644. [2] *Memoirs of Lochiel*, 191.

expect from yow the utmost applicatione of our authority to render this designe effectuall.'[1]

The Council issued the necessary proclamations, but there is little evidence of hearty co-operation on their part to make the scheme a success, and it was hardly to be expected. Breadalbane was known to be attempting to undermine the effectiveness of the garrisons, and was suspected of using his position in the Jacobite interest. Hill judged the preliminary conditions assented to by Breadalbane 'too dishonourable to the King my master, and too advantageous to those gentlemen off the Highlands, and their cause; and it hath often mett me, that it was our cessation proposed to and pressed upon them, and that they did nothing but what was honourable in accepting such offers of advantage to themselffes and King James his affairs, which some of them have said to myselffe before many witnesses.'[2] The Council knew what the proposed scheme was in a general way, and showed no enthusiasm for it; of the details they were kept entirely ignorant, and when they became aware of them, found them to be of a highly suspicious nature.

In addition to the public truce, Breadalbane had entered into private articles with the chiefs. The condition on which they absolutely insisted from the first, that James's consent should be obtained, was more or less public property, but Breadalbane also agreed that the cessation of arms should be null and void in case of an invasion or organised rising, and undertook himself to join them with a thousand men if William and Mary refused any or all of the articles, one of which was 'That if their forces goe abroad, then wee will rise.'[3] Presumably the chiefs believed, like many others, that he was secretly working in the interests of King James,[4] but Glengarry, who was opposed both to him and to the treaty, sought to ruin both by giving information to Colonel Hill.[5] The Council were naturally startled, and Breadalbane's enemies gladly seized the opportunity to expose his treachery to the King. The Duke of Hamilton wrote to Melville 'That Breadalbane will deny these articles sent by Collonell Hill, I put no doubt of, as I little doubt the truth of them wold be found, if put to exact tryall; but if he had leave to allow the Highlanders to send to France, I shall thinke no thing strange of all the rest,

[1] *Highland Papers*, 33-4.
[2] *Ibid.* 47.
[3] *Highland Papers*, 22.
[4] *Memoirs of Lochiel*, p. 307.
[5] *Acts Parlt. Sc.*, 10th June, 1695.

and does admire the politicke.'[1] William himself was not disturbed by the revelations which Hamilton regarded as so scandalous. His attitude is probably correctly represented by the *Dalrymple Memoirs*, which attribute to him the remark that 'Men who manage treaties must give fair words.'[2] Breadalbane wrote to defend himself from the charge of treachery, and was assured by Stair, 'Nobody believes your Lordship capable of doing either a thing so base, or that you could believe there could be any secrets in your treaties when there were so many ill eyes upon your proceedings; but the truth will always hold fast. The King is not so soon shaken; and this attempt against you is so plain that it will recommend and fasten you more in his favour, when the issue clears the sincerity on your part. And I hope it's not in anybody's power to deprive you of the success to conclude that affair in the terms the King hath approven.'[3] It is unfortunately impossible to regard this as a protestation of Stair's belief in the straightforwardness of Breadalbane's diplomacy. Another letter attributed to Stair warns Breadalbane, 'I need not tell you here your enemies insult on the apprehensions that the Hylanders will say the sham articles were true.'[4] William thwarted the Council's attempt to bring Breadalbane to trial for high treason, and there can be no reasonable doubt that Stair and perhaps William were accessories to Breadalbane's double dealing and were satisfied that he did not intend to betray them. What then was the nature of the terms the King had approven? Breadalbane continued to carry on his negotiations, though the exposure of his methods must have told heavily against the chances of his arranging a really permanent settlement on sound lines.

From this point of view the negotiation was certainly a failure, and a part of the fruits of the failure was the massacre of Glencoe. The massacre belonged neither to the policy of conciliation nor of conquest, and it marked the inability of the Revolution Government to find any solution of the Highland problem. It is not so easy to determine to what the failure was primarily due or who was responsible for it. There are some causes which lie upon the surface, such as the activities of Jacobite intriguers who were determined to frustrate any settlement by exploiting the rivalries of the different clans. There were enemies of Breadalbane who were eager to 'stop the work for the despite against

[1] *Highland Papers*, 44.
[2] *Dalrymple Memoirs*, i. 189.
[3] *Highland Papers*, 45.
[4] Burton, *History*, 1689-1748, i. app. p. 528.

the instrument.'[1] Stair blamed the shiftiness of the chiefs, but this is little more than an expression of his own impatience at their refusal to conclude an immediate bargain. He constantly protested that they were wrong in thinking that by waiting they would get better terms.[2] The fundamental difference between them and the government was that their idea of submission to William did not preclude the possibility of the restoration of James; they refused to regard the oath to a King *de facto* but not *de jure*, taken with James's permission, as abrogating James's own original claim on their loyalty. The Revolution government did nothing to deserve their loyalty for itself by a real attempt to redress genuine grievances and promote the welfare of those who had unwillingly become its subjects. As a matter of fact the chiefs never had a really firm offer from the government of the terms which had been proposed as likely to lead to a real settlement. The necessary condition of success was that Argyll should surrender a power and position which his ancestors had long and painfully built up. The government never succeeded in securing this condition, and the whole scheme degenerated into one for a distribution of money to enable the chiefs to adjust their own grievances as best they could—a very different proposal both from their point of view and that of the State. Eventually the modified scheme went the way of its predecessor, the superiorities were not bought, the money was not distributed. Stair was perfectly aware from the beginning that Argyll was unlikely to consent without pressure, but beyond the general direction to the Council in the King's letter there is no evidence of any real attempt to secure his adhesion to the scheme. Apparently Stair left to the Council, of which Argyll was an influential member, the whole responsibility for arranging this delicate matter, in the interests of a policy which he had undertaken without their knowledge, and to which many of them were strongly opposed. All he did himself was to give Breadalbane a hint that he might with advantage add this to his other diplomatic activities. 'If you can see and fix Argyll, it would magnify you, though that cannot be required at your hands. I am sure you are able to make him sensible, considering what the King knows, that his part of the terms are very kind and advantagious; and it must make clear to the world his engagements elsewhere, if he does obstruct his own conveniency, and the King's Service in this settlement.'[3] But it

[1] *Highland Papers*, 52. [2] *Ibid.* 57.

[3] *Dalrymple Memoirs*, vol. ii. pt. ii. p. 211.

seems unlikely that the difficulty made much difference in Breadalbane's offers to the clans. In December Stair wrote that none of the chiefs could get the money they had been led to expect, if Argyll did not consent to the scheme, 'for that destroys all that is good in the settlement, which is to take away grounds of hereditary feuds.'[1]

It was late in the day to leave so important a point unsettled if there were any sincerity in the government policy. As regards the government as a whole there certainly was not; the executive authorities in Scotland were frankly hostile to it. William personally could not be expected to give the question much attention, and Stair was busy with far more important concerns. Nevertheless he found time to deal in some detail with the question, and it is impossible to believe that he cared very greatly for the best aspects of the scheme. It is possible that the whole affair was simply a blind, calculated to divide the Highlanders, so that those who refused terms having been the more easily destroyed, those who accepted need not be given what they had bargained for. 'The King,' says a letter attributed to Stair, 'by the offer of his mercy, hath sufficiently shown his good intentions; and by their ruin he will rid himself of a suspicious crew.'[2] This coincides with the Jacobite estimate of the *Lochiel Memoirs*, that 'King William meant no more in yielding to the conditions of that treaty but to amuze them, and to catch them in the snare which he (with so much art and policy) contrived to ruine them.'[3] If this was a deliberate plan Breadalbane may have allowed himself to be made a more or less unconscious instrument. Possibly he thought he could outwit Stair so far as to obtain real advantages for himself and his friends, help to ruin his own enemies among the Macdonalds, and be able to claim that he had rendered valuable service to either James or William as events demanded.

It seems more likely that Stair's policy was shaped by events, than that he devised and carried through so doubtful a scheme consistently. Tarbat's original plan of conciliation was perfectly genuine, and Stair undoubtedly recognised its good points, but he had no such sincere desire for the improvement of the Highlands as to make him take it up with real interest. Without real interest it was impossible that it should be carried through in the face of interested obstruction and Jacobite intrigue. He betrays his attitude of mind in writing to Breadalbane: 'what account

[1] *Highland Papers*, 51. [2] Burton, *History*, 1689-1748, i. 525.
[3] *Memoirs of Lochiel*, 306-7.

can be given why Argyle should be forced to part with Ardnamurchan, to which Lochiel hath no more pretence than I? You cannot believe with what indifferency the King heard this matter.'[1] Lochiel's claim had actually a strong foundation from the legal, moral and utilitarian point of view, but Stair regarded Ardnamurchan merely as a concession proposed to bribe Lochiel without any force of justice or reason behind it. For various reasons Stair was ready to try the policy of conciliation; if Breadalbane could carry it through, and quickly, so much the better, but this he scarcely expected, and he could console himself for failure by making the most of the resulting situation. There was an alternative to fall back upon, and for some reasons Stair preferred the alternative. He had formed the opinion that Breadalbane's attractive offers would induce some of the chiefs to come in at once, and perhaps combine with the government against those who held out. He had made up his mind that Glengarry would hold out, and that his neighbours could be induced to save the government trouble and expense by helping to take the strong house of Invergarry, which would make a convenient additional garrison between Fort William and Inverness. 'I wrote to you formerly that if the rest were willing to concur, as the crowes do, to pull down Glengarry's nest this winter, . . . garrisoning his house . . . will be full as acceptable as if he had come in.'[2] 'I doubt not Glengarry's house will be a better mid-garrison betwixt Inverness and Inverlochy, than ever he will be a good subject to this government.'[3] He had no doubt that at least the Protestant chiefs could be induced to accept offers which certainly appeared extraordinarily favourable. 'I am satisfied these people are equally and unthinking, who do not accept what's never again in their offer. And since the government cannot oblige them, it's obliged to receive some of them to weaken and frighten the rest. The M'Donalds will fall in this net. That's the only popish clan in the kingdom, and it will be popular to take severe course with them.'[4]

By degrees Stair found out his mistake. The loyalty which induced the clans to insist on King James's permission was a first and serious obstacle to his policy. It prevented the early submission which was expected to release troops for Flanders and relieve the Scottish Treasury of expense, and it obviously rendered the oath of allegiance nugatory, since by implication it

[1] *Highland Papers*, 51. [2] Burton, *History of Scotland*, 1689-1748, i. 527-8.
[3] *Dalrymple Memoirs*, vol. ii. pt. ii. 213. [4] *Highland Papers*, 52-3.

made effective Breadalbane's sham concession that the clans were free to resume hostilities in case of an invasion or organised rising, the only occasions on which they were really dangerous. The way in which the chiefs continued to stand by each other was equally disconcerting. Even in December the Protestant clans had not deserted the Macdonalds, and Stair expressed his annoyance to Breadalbane. 'I should be glad to find, before you get any positive order, that your business is done, for shortly we will conclude a resolution for the winter campaign. I do not fail to take notice of the frankness of your offer to assist. I think the Clan Donnell must be rooted out, and Lochiel. Leave the M'Leans to Argyll. But before this, Leven and Argyll's regiment with two more would have gone to Flanders. Now all stops, and no more money from England to entertain them. God knows whether the 12,000 l. sterling had been better employed to settle the Highlands or to ravage them; ... their doing after they get K.J. allowance is worse than their obstinacy, for those who lay down their arms at his command will take them up at his warrant.'[1] This must have been obvious from the first, yet Stair had consented to the condition at the beginning, and the necessary messengers had received passports from the government. He wanted to go back on his bargain when it proved likely to become a reality. It is to be noticed, too, that the £12,000 of which he speaks was not used for settlement any more than for destruction, for it remained in the hands of the government. The *Lochiel Memoirs* state that the chiefs' delay in taking the oath, although they had been given until January 1 to do so, was made the excuse for the non-payment of the money,[2] and this is borne out by Breadalbane, who says they refused to take it in November, and therefore lost the chance of it through their own folly and fault.[3] He is discreetly silent as to the superiorities. In December Stair wrote that the consent of Argyll to the scheme was necessary before the chiefs could get the money they expected, which is surely conclusive evidence that the excuse about their delay in coming to terms was trumped up for the occasion.

If the clans were unwilling to trust to Stair and Breadalbane, and were therefore the more difficult to bring to terms, they can hardly be blamed. Even Breadalbane was doubtful as to the fact of the £12,000 being really available, and had to be assured of it

[1] *Highland Papers*, 49. [2] *Lochiel Memoirs*, 312.
[3] *Highland Papers*, 54.

by Stair,[1] who also protests once or twice that those who submit will not be attacked afterwards. When expressing his satisfaction at hearing that Glencoe was late, he added, 'It's necessary that it be well understood that those who have submitted and taken the oaths are safe, least wee fright them altogether again.'[2] Glencoe was one of those who had submitted and taken the oaths, only he had gone first to Colonel Hill instead of the Sheriff, and was therefore a few days late. In view of complaints of the betrayal of information to the Highlanders, there is little doubt they were aware of William's cryptic command that the troops should 'show noe more zeall against the Highlanders after their submissione, then they have ever done formerly, when these were in open rebellione.'[3] The Council itself felt it necessary to ask for an explanation of a phrase 'which being somewhat unclear, may perhapps be understood otherwayes by these officers then your Matie intends it.'[4] A proclamation directed against the Macgregors was an indication of policy which was not reassuring. It is scarcely surprising if the clans remained deaf to promises from this quarter while the superiorities remained unpurchased and the £12,000 was held back. Absolutely no proof of good faith came from the government, while Stair continued to put forward new demands for the surrender of houses and the giving of hostages by the chiefs. In all the circumstances the reason he gives for this last condition is decidedly unfair, 'for there no regarding men's words, whom their interest cannot oblige.'[5]

For obvious reasons it suited Stair to attribute the failure of the negotiation which he had authorised against the wishes of the Council to the foolish and wilful perversity of the clans, although he on his part had made no real effort to overcome the foreseen difficulty of Argyll's obstruction, which was the real rock on which the conciliation policy was wrecked. As the fear of France abated, Stair saw less reason for troubling about a settlement, and repented of the concessions he had made. He had many enemies who were ready to make the most of every miscalculation, and several had hopes of profiting by the expected Highland forfeitures.[6] The military were heartily tired of the taunt that the garrisons were doing nothing, and were glad of a fair occasion to show that they served for some use.[7] Breadalbane was angry

[1] *Dalrymple Memoirs*, vol. ii. pt. ii. p. 212.
[2] *Highland Papers*, 62.
[3] *Highland Papers*, 34.
[4] *Highland Papers*, 39.
[5] *Highland Papers*, 51.
[6] *Dalrymple Memoirs*, i. p. 189.
[7] *Highland Papers*, 69.

at being given away by Glengarry, and Stair must have been extremely embarrassed by the consequent accusations of treachery made against his agent, even though William knew the truth. He wrote to Breadalbane, 'I am not changed as to the expediency of doing things by the easiest means, and at leisure, but the madness of these people, and their ungratefulness to you, makes me plainly see there is no reckoning on them ; but *Delenda est Carthago.* Menzies, Glengarry, and all of them, have written letters, and take pains to make it believed that all you did was for the interest of King James. Therefore look on, and you shall be satisfied of your revenge.'[1] Stair himself was resentful at the non-success of his diplomacy. His calculations were upset by the fact that the genuine loyalty of the Highlanders to King James, who had never treated their vital interests with indifferency, outweighed their old tendency to private feuds, and enabled the leadership of Sir Ewen Cameron of Lochiel to secure an unprecedented unity of action. When the chiefs unanimously held out to the longest possible moment, and when their eventual submission was so general that the government was left with no solid excuse for military action, it dawned upon Stair that he had been outwitted. He tried to make up for it by an exemplary vengeance upon Glencoe.

The government had been half-hearted in its policy of conciliation, and at last fell back upon a policy of very partial severity. Breadalbane had early informed Glencoe that he should obtain no good from the settlement, a direct inducement to the Macdonald chieftain to put off his submission to the last moment in the hopes that Glengarry's efforts or some lucky chance might render Breadalbane's negotiation abortive. The Glencoe Macdonalds were not a powerful sept compared to some others, but they had continually raided the Campbells, and the situation of their valley made the enterprise against them easy. 'I would be as tender of blood or severities as any man,' wrote Stair, 'if I did not see the reputation of the Government in question upon slighted mercy, and the security of the nation in danger by those who have been obstinate to that degree, that if wee believe them rationall, wee must think they depend upon such assurances of help, that wee can never oblige them even to their own advantages from this Government, and therefore it must make sure of them.'[2] No doubt Stair thought an example necessary on public grounds, but the particular victim was selected for other

[1] *Highland Papers*, 51. [2] *Ibid.* 59.

reasons, not merely due to the accident by which Glencoe offered his submission to Hill at Fort William and not to Campbell of Ardkinlass at Inveraray. When he realised his danger, his anxiety to take the oath was extreme, and the circumstances can hardly have been unknown to Stair, although some obscure intrigue in Edinburgh prevented the facts from being brought officially to the notice of the Privy Council.[1]

There was no slighting of mercy here, compared with others who were spared, presumably because they were better able to protect themselves. Menzies, a supporter of the government, procured an extension of time for his people, on the ground that he could still persuade them to submit.[2] The obstinate Glengarry was allowed to surrender his stronghold and receive terms.[3] Clanranald, another papist, but a minor, took refuge in France, yet his estates were not forfeited nor his clansmen attacked.[4] Maclean, who, like Clanranald, had influential friends, surrendered Duart; of his clan Stair speaks most highly as a law-abiding people who had rendered distinguished service to Charles II. during the Civil Wars, a singular contrast to his former suggestion that they should be left to Argyll.[5] In the end he fell back upon the thieving habits of Glencoe for his justification; it was a poor one, for cattle-lifting was, after all, not so abnormal as to call for punitive measures of so exceptional a kind.

Even had the massacre of Glencoe stood alone it could hardly have failed to re-animate the hostility of the clans towards the Revolution; it did not stand alone, for the whole preceding negotiations and their outcome were calculated to inspire mistrust. Stair also distrusted the clans; 'the reputation through the world of their submissiones is of more importance than anything can be promised from their honesties';[6] possibly he thought this absolved him on his part from any obligation of honour towards them. As a matter of fact they seem to have been far the more reliable of the two parties to the negotiation, but this virtue told in favour of King James rather than of King William, and Stair accordingly did not appreciate its merits. On the one essential point of the consent of King James they were perfectly definite from the beginning, and stuck to their point and to their own confederation to the end; in spite of the

[1] *Ibid.* 114. [2] *Highland Papers*, p. 56. [3] *Ibid.* 65, 69.
[4] A. Mackenzie, *History of the Macdonalds*, p. 421.
[5] *Highland Papers*, 76. [6] *Ibid.* 49.

numbers and the rivalries of the chiefs, it is comparatively easy to determine their intentions and policy throughout. With regard to the government it is impossible. The question whether they ever really intended to part with the £12,000 is one instance; Stair's attitude as to King James's consent to the treaty is another. Having agreed to this at the beginning, his complaint in December that it rendered the whole bargain valueless, indicates that he had regarded it simply as a decoy, and when his concessions failed to entrap the chiefs, he saw no use in maintaining them merely for the sake of 'the reputation of the government.'

The clans fulfilled the conditions, and the government did not, and Stair had no right to complain of slighted mercy. The chiefs had every ground for the belief that the mercy they slighted was far from genuine; it sprang from the embarrassments of the government and the poverty of its military resources. The chiefs had been given until January 1 to submit, and as they were honourably waiting for the return of their messenger to France, their delay to submit sooner was not a fair reason for altering the terms agreed upon. Undoubtedly the game of bluff was played on both sides, but the erratic policy of the government was far more responsible for the chiefs' conviction that it was worth holding out for concessions than any real dependence upon France. Stair himself, as was natural, was ready to offer more or less according to circumstances; even after the truce had expired, he instructed the military not to risk a disaster to the King's troops by adhering too rigidly to his instructions only to accept unconditional surrenders.[1] The government as a whole was divided, opportunist and irresponsible; to have attempted to call it to account was to undermine the Revolution. Its principal supporters were interested parties. It was from its very nature incapable of united or straightforward action, and it dealt with the Highlanders as beyond the pale.

In every respect the government of William in the Highlands compared ill with those which had preceded it. The comparison with that of Monck is fallacious, except in the one matter of the establishment of garrisons. Superiorities and heritable jurisdictions were then swept away, the clan organisation remained and the chiefs took no oath and surrendered no arms, but undertook to live peaceably. Monck's rule was consistent, effective and popular, neither he nor his subordinates had private ends to serve. Colonel Hill continued worthily to represent the English

[1] *Highland Papers*, 66-7.

tradition, and his personal influence was the one redeeming feature of Revolution government. Neither William nor the Council effectively directed or controlled its policy. This was under the influence of innumerable private interests and intrigues only comparable to those of the Restoration period in lowland Scotland, and was vacillating and untrustworthy. Finally vengeance fell upon a chieftain who had shown a real intention of complying with the government demands, because he was weak and unprotected. The manner of it was unprecedented, and called forth from the Earl of Carmarthen the remonstrance that no act of James had been so arbitrary, and that it was to deny to one section of the people the status of subjects.[1] The Highlanders knew that the government which had been forced upon them claimed to rest its power on the subjects' consent, whereas there was nothing in its dealings with them to attract a free people or to compel respect for its authority. It displaced a king whose administration, except only when perverted by religious zeal, was able and conscientious, and in the Highlands had been unusually sympathetic and just. Under his personal influence the authority of the Crown had done much for them in the vital matter of feudal claims, even when he ran the risk of losing powerful support.

The Revolution increased the too great power of the Scots nobility, and the alien Prince proved no such guardian of Highland national liberties as the King who claimed an ancient hereditary right, and acknowledged a corresponding responsibility to God for his subjects' welfare. Early experience formed the conviction which Hanoverian rule did nothing to dispel, that no good could come to the country from a government based upon usurpation and bolstered up by the interests of an aristocratic party. Religion, tradition and experience combined to fortify a political creed which such a man as Dr. Archibald Cameron continued to hold even after 1745, and expressed when he gave his life for the cause of his native Prince; 'I pray God to hasten the restoration of the Royal Family, without which these miserably divided nations can never enjoy peace and happiness.'[2]

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[1] *Memoirs of Lochiel*, 317.

[2] Mackenzie, *History of the Camerons*, 276.

On the Church Lands at the Reformation

THE feuing of the Church Lands is a matter to which adequate attention has not been directed by historians of the Reformation. It is one of the important economic factors in the period. There can be no doubt that organised research by a number of workers would throw a much-needed light upon things which are still somewhat dark and neglected. In the meantime it may be useful to state some facts, and to indicate some lines of inquiry.

No account of the Reformation can be intelligible unless it goes back to the time of James I. and the end of the great schism. From that period it is easy to detect a growing assertion of the power of the Crown, and an increasing sense of nationality in opposition to the claims of the Papacy. A desire to prevent the flow of money to Rome, to control the appointments and important benefices and attach the prelates to the Crown, to recover some of the wealth alienated by the ancient piety of David I.—these are some of the familiar features of the development. At the present it is with the impulse to regain some of the resources made over to the Church that we are especially concerned.

In the fifteenth century the Crown right to the temporality and to advowson, *sede vacante*, was satisfactorily established. James III. was able to agree with Innocent VIII. for an interval of eight months after vacancy, during which royal nominations would be awaited, a favour with obvious financial consequences. The conduct of James IV., notably the promotion of his brother and then of his natural son to the primatial see, and the exploitation of ecclesiastical patronage by the Regent Albany were a prelude to the action of James V., who frankly bargained for what he could extract from the fears of the churchmen and the diplomatic difficulties of the Papacy.

Along with the mere necessities of royal finance, aggravated by the growing expense of artillery, which had to be provided out of the funds at the disposal of the Treasurer, there was genuine interest in the general development of the country.

James IV., 'for policie of his realme,' obtained permission from Parliament to feu his proper lands. It was thought that security of tenure would promote wealth, and that military strength would be greatly increased. The Parliament of 1503-4, which authorised James to proceed, also encouraged the churchmen to follow suit; but they were in a somewhat difficult position owing to the restraints of Canon Law, which regarded perpetual *emphyteusis* as alienation.

It cannot be doubted, however, that the action of the Crown and the recommendation by Parliament tended, along with the natural inclination of ecclesiastics who were becoming more and more secularised, to produce a development along the lines of what was considered a national policy. In 1556 it was officially stated that alienation of kirklands began to be a serious abuse in the period immediately after Flodden.[1] The confirmatory evidence is necessarily scattered and defective; but there is no reason to reject the assertion. In a period of faction and confusion, with a Governor intent upon the profits of his office, relations with Rome by no means settled, and the Reformation movement already on foot upon the Continent, the churchmen were likely to follow a course which offered immediate personal or political advantages. The Roman authorities could not fail to see that any considerable change from tenure by renewable lease to heritable possession at a fixed duty would free the tenant from ecclesiastical control. Yet it was difficult to meet the danger without affronting national policy and feeling; and illegalities were an important source of papal revenue.

The first marked development of feu-farm in connection with kirklands came about in a curious way. During the minority of James V. and the regency of Albany the royal finances fell into a hopeless state. Money must be found at once; and, as a profitable marriage could not be arranged, James and his intimate advisers, notably Erskine of Haltoun, the secretary, applied to Clement VII. for assistance. The Pope, whose position was very difficult owing to the power of Charles V. and the danger which threatened from the conduct of Henry VIII., was persuaded or forced to impose a heavy tax upon the Scottish prelates for the benefit of the Crown. The endowment of the College of Justice was the specious motive put forward, with some vague references to the administration of the realm. Privately, the Emperor and Clement were led to

[1] *Papal Negotiations* (Sc. Hist. Soc.), 529.

understand that this 'great tax' would have military consequences useful to their policy and disagreeable to Henry VIII. James himself was chiefly bent upon clearing up his financial affairs and supplementing his deficient resources.[1]

The prelates were very angry—with the Pope as well as with the King. They succeeded in preventing the tax of £10,000 from becoming a perpetual annuity, as it was planned to be; but even for a few years the payment of 3s. 3d. on the pound of Bagimond's assessment proved an unwelcome burden upon their incomes. It occurred or was suggested to them that the tax might be defrayed by feuing kirklands for a consideration. This was an expedient which exactly suited the royal views. Over and above the advantage to the realm, James would get his money out of those who were ready to pay handsomely for heritable possession; and he would get it without irritating the clergy or laying a direct tax upon the laity. The Crown would derive its profit and the national economy be fostered in a perfectly natural way. As for the Pope, he had put himself in an impossible position. Having offended the sentiment of autonomy in the Scottish Church and used the prelates as his diplomatic tools, he could hardly refuse to approve the methods by which they proposed to recoup themselves. When Henry VIII. was the head of a National Church it would not be wise to exasperate the Scottish ecclesiastics. There can be little doubt that they were now freed from former scruples and restraints; and it is easy to detect in the narratives of their feu-charters a desire to exonerate themselves and lay the responsibility upon the Pope and the King.

The grantees were quite aware that they had to do with two competing powers, the Crown and the Papacy. The most complete security was, of course, to be obtained by resort to both authorities for confirmation. This is illustrated in an interesting series of documents described by Dr. Neilson.[2] The feuing of Drygrange was not carried out owing to the 'great tax,' and was in no danger from any charge of dilapidation; but the steps taken deserve to be noted. The feu-charter and infeftment were followed by a confirmation under the great seal. The grantee then forwarded a petition to Rome, and a commission of inquiry was appointed, which sat in St. Giles and issued sentence of confirmation. The whole performance covered a space of two years.

[1] For the story, see *Sc. Hist. Rev.* xv. 30. [2] *Sc. Hist. Rev.* vii. 355.

This was not a case where scrutiny could be unwelcome. The feus which were granted, however, in order to raise money for the taxation were in a somewhat different position. It is certain that very many feuars never faced the expense of a resort to Rome, and did not apply to the Crown. As regards Rome, it is probable that the churchmen did not go out of their way to advertise the papal claim, because that might interfere with their own profit. Sometimes they stated in their charters that they expected confirmation to be obtained by the grantee from the Roman Court, expressing it as a pious opinion rather than as a condition of validity.[1] The Crown, on the other hand, directly interested in the success of the feuing process, was not unwilling to foster the belief that the royal approval would serve in practice: it was never its policy to divert Scottish money into the Roman exchequer. Hence, while there was a widespread neglect of the Roman authority and no insistent application to the Crown—for the Crown was clearly understood to approve—there was at the same time a tendency on the part of prudent people to make their position secure at home, and to take out writs of confirmation.

There was, in fact, a very considerable variety of practice, from complete neglect—probably the more common—to abundant precaution. In 1593 an Act of Parliament, dealing especially with one manner of confirmation adopted before the Reformation, described the position.[2] Prelates had 'of auld' granted infeftments of feu-farm; and in certain cases, particularly in the reign of James V., the grantees had contented themselves with a writ under the privy seal and the royal subscription, 'quhilkis according to the estait of tyme wer lauchfull securities to the ressaveris thairof, and neidit na particular confirmation to be interponit thairto, aither be auctoritie of the pape or of our soverane lordis predecessouris, thair being na law, statute, nor constitutioun ressavit obleissing the subjectis thairto; and incace ony confirmatioun haid bene requisit, the samyn culd import no forder in effect or substance than the consent of the prince under his seill and subscriptioun.'[3]

[1] Cf. *R.M.S.* iii. 2741 (2): in 2636 the granters consent to confirmation *ubi facilius haberi posset.*

[2] *A.P.* iv. 20.

[3] Specimens of these privy seal writs occur occasionally in the Register down to 1557. The feu-charter, entered at length, is granted by royal *license* and is fortified by (1) the chapter seal, (2) the privy seal, and (3) the royal subscription. Sometimes there is great seal confirmation (*R.S.S.* xii. 73; *R.M.S.* iii. 2298).

In the time of James V. the royal attention was fixed upon the national economy and upon extracting sums from the churchmen by way of contribution. It was natural, therefore, to encourage a process which would facilitate payments. The authority of the Pope was not openly contested: it was being quietly undermined. Of this the Roman Court was not unaware; but the King had contrived a subtle policy and knew how to make capital out of the situation. Paul III. was repeatedly asked to grant Cardinal Betoun the powers of legate *a latere*, and complied only when the death of James and the general position of affairs made it absolutely inevitable. It is easy to see that the Pope's reluctance must have been due in great measure to the fact that the Cardinal, chief minister of the Crown, would be competent as legate *a latere* to institute commissions of inquiry for those who desired confirmation of their infeftments in kirklands.[1]

The ecclesiastics, led by Betoun, committed themselves and James to war with England. The death of the King in 1542 modified their position but did not relieve them of financial burdens. They had now to grant subsidies directly for the conduct of the struggle with Henry VIII. and the maintenance of their church. The policy of feuing kirklands was an obvious expedient to procure money and win support. In the case of St. Andrews archbishopric, for instance, the process had been carried so far that in 1545 Cardinal Betoun ordered the compilation of a new rental book.[2]

James V. cultivated the commons; and it was far from his intention to oust small tenants in favour of capitalists. It is reported, indeed, that he actually threatened to make the clergy feu their lands without augmentation.[3] Yet circumstances rendered the development prejudicial to the smaller men. This had already become apparent when Lyndsay wrote the *Satire of the Three Estates*. We hear of 'gentill men' who take the steadings of the humbler sort in feu:

> 'Thus man thay pay greit ferme, or lay thair steid,
> And sum ar plainlie harlit out be the heid
> And ar distroyit, without God on thame rew.'[4]

Again the spirituality is advised to set their temporal lands in feu:

> 'To men that labours with thair hands,
> But nocht to ane gearking gentill man,
> That nether will he werk nor can:'[5]

[1] *Rentale S. And.* (Sc. Hist. Soc.), xxvi. [2] *Ibid.* xxviii.
[3] Robertson, *Statuta*, i. 137 n. 2. [4] Laing's ed. 2575. [5] *Ibid.* 2685 ff.

and we can detect some apprehension that a development which was originally expected to be of military advantage, owing to the increased wealth which would arise from heritable right, was actually tending in an opposite direction. The English war pressed very hardly upon Scotland. The prelates became less considerate in raising funds; and those who could offer large and ready money for feufarm were apt to be preferred. It was also beginning to dawn upon the Crown that methods which had proved attractive to James V. were not by any means designed for the enrichment of his successors.

When Mary of Guise assumed the regency in 1554 she was compelled, like her husband in 1531, to appeal to the financial resources of the churchmen. Clement VII. had granted the 'great tax' to James V. in connection with the endowment of the College of Justice: Paul III., satisfied that James was really committed to war with Henry VIII., imposed another subsidy, which was inoperative owing to the King's death;[1] and now Mary of Guise sought to repair the losses suffered under the Hamilton administration by an application to Rome. Paul IV. seems to have granted a taxation beginning in November, 1556, and ultimately extended for a second year.[2] The representations made to the Pope by the Cardinal Protector of Scotland dwelt upon the wealth of the churchmen; but it was pointed out how 'for about forty years' prelates had been alienating, usually to the more powerful nobles, and had in fact practised dilapidation to the detriment not only of the Church but also of the Crown. The Pope was asked to revoke alienations carried out without regard to the forms of Canon Law; and he was to insist upon the necessity of the royal license.[3]

On the eve of the Reformation the tendency to dilapidation was naturally accelerated. Apprehensions for the future, present needs, and the loosening of the papal authority induced many prelates to consult their own interests and those of their relatives. The churchmen themselves were forced to legislate upon one aspect of the matter. In the last General Council, 1558-9, a statute was passed to forbid the setting of lands over the heads of kindly tenants, a practice which led to the impoverishment of the lieges and the lowering of military efficiency.[4] This

[1] *Letters and Papers* (Hen. VIII.), xviii. 319; *Scot. Hist. Rev.*, xi. 1 ff.

[2] *Papal Negotiations* (Sc. Hist. Soc.), 3.

[3] *Ibid.* 529.

[4] *Statutes of the Scottish Church* (Sc. Hist. Soc.), 179.

enactment may have been prompted by Mary of Guise, who exercised a considerable influence on the proceedings of the Council; but it could not fail to be accepted as prudent.

It is clear from the representations made to Paul IV. on Mary's behalf in 1556 that direct interference by the civil authority was becoming inevitable: the Pope, as has been said, was to recognise and support the licensing power of the Crown. It was significant that a petition for a papal imposition like that granted to James V. in 1531 should now contain a request for action against improper alienation. The 'great tax' upon the prelates by Clement VII. had produced disastrous results. The spiritual estate from time to time voted subsidies, and was in these cases responsible for its own conduct; but the device of alienating in feufarm for money down and an augmentation which was almost nominal, adopted specially to meet the exigencies of the 'great tax,' proved too tempting for greedy and careless churchmen. Thus Paul IV. is frankly informed by the Cardinal Protector of Scotland that the clergy are wealthy and must be compelled to contribute to the royal exchequer; but the contribution ought to be out of their ample incomes. They are well able to subscribe to the needs of the Crown and to spend upon the fabrics of their churches without resorting to dilapidation. It looks as if the statute of Provincial Council anent kindly tenants of kirklands was directly connected with the taxation which the Pope had recently imposed; and it should not be forgotten that March 6, 1558-9, when the Council was in session, was the date from which Crown supervision of the feuing process and protection of the kindly tenants were afterwards supposed officially to begin.[1]

Unfortunate gaps in the Register of the Privy Council prevent us from following events very closely; yet the recorded measures will now be fairly intelligible, and may be set down in chronological order:

(1) General proclamation in June, 1561, forbidding churchmen to feu their lands.[2]

(2) Act of Council in September, referring to the prejudice suffered by the Queen and the poor tenants, and the export of money by grantees applying to Rome for confirmation: no papal

[1] This was the date recognised by the Act of Oblivion as the beginning of the troubles.

[2] *Treasurer's Accounts*, xi. 55 ff.

confirmation was to be sought for any feu of kirklands since March 6, 1558-9.[1]

(3) Act of Council in December against removals from kirklands set in feu. A respite till Whitsunday, 1563, granted to tenants, pending legislation in Parliament.[2]

(4) Act of Council in February, 1562-3, explaining that Parliament has not been held, and extending the respite till Whitsunday of 1564.[3]

(5) Act of Parliament in June, 1563, in response to 'grevous complaintis,' continuing the respite to Whitsunday of 1566: royal license is required in order to enforce removal of tenants, and also for any feu to be granted during the next three years.[4]

An interesting case arising out of this Act of 1563 came before the Privy Council. It illustrates the necessity for Crown intervention and, incidentally, the immediate profits which might be realised by the churchmen.

John Achesoun, burgess of Edinburgh, held certain lands in Perthshire, one-third of the Crown, two-thirds from the monastery of Scone. Of the kirkland he had an assedation covering his own life, that of his wife, and the life of an heir. He fell at Pinkie; and his widow continued to occupy the land. She and her son, aware of the legislation for the protection of kindly tenants, applied to the commendator, Patrick Hepburn, Bishop of Moray, for a feu, 'and offerit him in compositioun xxx merkis for ilk merk of maill, howbeit the extremitie of the law gevis bot xx merkis for ilk merk land in heretage, without payment of feu maill out of the samyn.' Hepburn chose, however, to feu the land to a natural son. The Privy Council ordered the Commissioners on the confirmation of feus—who, as we shall see, had been appointed—not to compound for a signature until the circumstances were fully considered before the lords.[5]

Another inducement to interference by the Crown was found in 'eirnest sute' by the Queen's subjects. They desired confirmation of feus set by the prelates since March, 1558-9, 'in tyme of troubill contrare the tenour of hir graces letters of inhibitioun,' and also of feus given prior to that date.[6] The Queen is now 'avisit' and intends to grant confirmations,

[1] *Register of the Privy Council*, i. 162; *T.A.* xi. 71 ff.
[2] *R.P.C.* i. 192.
[3] *Ibid.* 234.
[4] *A.P.* ii. 540.
[5] *R.P.C.* i. 465-6.
[6] The day is hereafter March *8*, not 6 as in previous enactments.

'willing that the samin be sure to sic as sall obtene thame.' The Act of Parliament (Dec. 15, 1564) goes on somewhat timidly to declare that the confirmations now to be granted by the Crown shall be as good as those proceeding from Rome, and provides that infeftments since March, 1558-9, require ratification in order to be effectual.[1]

The hesitating and somewhat diffident tone of this Act is remarkable. It was not in fact clear at the time how events were likely to turn; but there was one circumstance which must have weighed heavily—the condition of the Treasury. Under the Hamilton administration there was a deficit of £31,000. Mary of Guise, as we have seen, obtained an ecclesiastical tax from the Pope,[2] and in 1558 her treasurer actually showed a small balance on the right side; but Richardson, who followed, could not make ends meet. His deficit in 1559 was £7100: by 1569 it was £60,500. It was necessary for the Crown, therefore, to make the very most of its casualties.

In the Treasurer's account which begins at January 16, 1564-5, we have the first charge of compositions for signatures of kirklands. About three months after the Act of 1564 proclamation was issued that unconfirmed infeftments since March 8, 1558-9, should be submitted to the commissioners sitting in the Treasurer's chamber during April, May, and June.[3]

It was a function of the Privy Council, if necessary, to advise upon the passing of signatures. When the finances of James V. had reached a desperate condition, a special committee of 'compositors' was appointed to deal with a dangerous abuse, the gift of casualties by corruption or favour to the detriment of the Treasury. The Act of 1564 opened up new ground and required a special body of commissioners,[4] as each individual case would have to be examined on its merits.

We may assume that the Crown authorities approached the matter with the intention of exacting all the profit they could obtain. The condition of the Treasury demanded it: subsequent legislation proves it; and the Earl of Montrose, speaking in 1579, represented confirmation as a *privilege* granted by Parliament to Mary and James VI.[5]

[1] *A.P.* ii. 545. [2] *Papal Negotiation*, 3: cf. *T.A.* x. 444. [3] *Ibid.* xi. 353 ff.

[4] See *R.P.C.* i. 466: cf. *A.P.* iii. 97 (Act of 1578): 'the compositioun of the infeftmentis of few ferme of kirk landis sall pas be the commissionaris appointed tharto, as the consuetude hes bene befoir.'

[5] *A.P.* iii. 165.

An inspection of confirmations granted in 1565, with the compositions paid, shows that the work of the commissioners must have been intricate. There were clearly several points to be considered. What was the date of infeftment? What was the character of the bargain? How much might the grantee be able or be prepared to pay? What of kindly tenants? And so on. The compositions bear no obvious or constant proportion to the duties. The first confirmation recorded was that of a feu by Robert, Commendator of Holyrood, to his half-brother Laurence Bruce.[1] The composition was *fifteen* times the duty. Again, the Prioress of North Berwick feued to a kinsman twenty-six acres of arable land at a duty of £3, for which the grantee now gave a composition of 100 merks—exactly the same sum as was taken in the case of another parcel of Priory lands, where the duty was almost £50.[2]

It is not necessary to accumulate details. Upon comparing the duty with the composition in upwards of thirty cases it appeared that the latter was scarcely ever an exact multiple of the former. The approximate multiples varied, apart from the instances quoted, from ten to about one-and-a-half. In a single case—an infeftment of 1555—the composition was a little over one-half and the duty was high, well above £100.[3]

The Treasurer charged himself with £9104 from these compositions between January, 1564-5, and June, 1566. He started that account with a deficit of £32,696 and ended it with a deficit of £42,937. By 1569 the debt exceeded £60,000. The confirmation of feu-charters of kirklands did not make ends meet, but it prevented matters from being much worse than they were.

Though a respite had been granted in favour of kindly tenants till Whitsunday of 1566, it does not seem to have been effective. In December, 1567, a few months after Mary's abdication, the Lords of the Articles were informed of the damage that was being suffered. 'The commonis quhilkis ar the gretest part of the people ar and wilbe altogidder maid unhable to serve in the kingis weris.' It was suggested, therefore, that a statute should be framed to protect the poorer sort for a definite number of years till the proper policy could be determined.[4] Nothing further appears to have been done. The clamant poverty of the Crown and the disinclination of the landlords must have been

[1] *R.M.S.* iv. 1593; *T.A.* xi. 304.
[2] *R.M.S.* iv. 1598, 1604; *T.A.* xi. 305-6.
[3] *R.M.S.* iv. 1605; *T.A.* xi. 306.
[4] *A.P.* iii. 45.

important factors in the situation. As regards the Crown, we are told in 1574-5 'how unabill it is upoun the present rentis thairof to sustene evin now the estait of our soverane lord and public chargeis of the realme, meikle les to beir out his majesteis estait and expensis at his mair mature and perfyte aige.[1] The accounts of Ruthven, as Treasurer, amply support this statement. In 1583 his total deficit amounted to £67,000.

In 1578 an Act was passed which requires some explanation: it has been frequently and seriously misunderstood. It will be remembered that the Act of 1564 did not compel confirmation. There were many applications to the commissioners, but even in 1584 there was a large number of feus prior to March, 1558-9, which had never come in.[2] This Act of 1578 was partly designed to stimulate application by providing that in cases where there were double infeftments priority of confirmation should determine validity.

The preamble explains how double confirmation came to be given. Feuing of kirklands, as we have seen, had been in active process for many years. It was not surprising, accordingly, that the compositors were from time to time between 1564 and 1578 confronted with the problem of double infeftments. They naturally applied for advice to the Privy Council, who laid it down that 'our soverane lord and his hienes compositouris aucht not to deny his confirmatioun upoun the ressonabill expensis of the pairtie sutand upoun thair awin perrall.' This view, which seems to have been repeatedly expressed, does not appear to be recorded in the Register of Council. The omission will not surprise anyone who has perused the minutes of proceedings during the century from 1478, when the record begins. Administrative ordinances of the kind are disappointingly few; and it may be assumed that much of the advice given to officials was never formally entered.

These 'sundry ordinances' were made between 1567 and 1578—or between 1564 and 1578, if the reference to the King may be held to include Queen Mary. The topic is clearly feu-farm of kirklands: there is express mention of the compositors; and it was in pursuance of the Act of 1564 that special commissioners were appointed to consider confirmation and compound. The preamble adds that the practice of giving double confirmations had extended to the alienations of lands held immediately of the Crown. It does not say whether this was a contemporary development, due to the principle laid down by the Privy Council anent

[1] *A.P.* iii. 89. [2] *Ibid.* 351.

the confirmation of feus of kirklands. The wording—'confirmatiounis ar grantit'—naturally suggests that the matter is recent.

The result of this practice was discontent and expensive litigation. It was therefore enacted that priority of confirmation, both in the case of kirklands and of lands held of the King, should determine the title. Thus holders of infeftments of kirklands who had been diligent to compound were rewarded; and a stimulus in the interest of the Treasury was provided for the future.

The Act went on to forbid double confirmations, and hence to modify the 'sundry ordinances' of the Privy Council; but it safeguarded the Crown by providing that if they *did* pass—presumably *per incuriam*—the competitive title should be decided on the principle of priority already laid down. In fact, it was now the law that the King and his compositors ought to deny double confirmation; but that, if a second confirmation happened to be granted, it was still at the risk of the applicant.

Sir George Mackenzie draws the inference from this Act 'that the Lords of Exchequer ought not to refuse to grant confirmations.'[1] Erskine, referring to the superior's right of refusal, says that the Crown 'by several acts of Privy Council, mentioned in 1578, *c.* 66,' gave up this right for the public utility.[2] Stair makes the remarkable statement that 'it is declared by several ordinances of the Privy Council that the King or his commissioners ought not to deny his confirmation upon the reasonable expences of the party; which ordinances are repeated in an act of Parliament; and tho' the design thereof gave not occasion to ratify the same, yet they are contained in the narrative, as motives of that statute; and therefore are not derogate from but rather approved.'[3] It may be as well to point out that the historical evidence does not support the views of these distinguished lawyers. Stair's view, especially, the historian will find the utmost difficulty in accepting: he does not seem to have grasped the circumstances and significance of the Act.

The Act of 1578 anent double infeftments and confirmations (*A.P.* iii. 103) narrates that 'it is fundin be sindrie ordinances of the previe counsall that our soverane lord and his hienes compositouris aucht not to deny his confirmatioun upoun the ressonabill expenssis of the pairtie sutand upoun thair awin perrall.' The reference to 'compositors' (1) places the 'ordinances' between 1564 and 1578 and (2) confines them to feus of kirklands. The 'commissioners' or 'lords compositors' (*T.A.* xi. 353 ff., 524) were

[1] *Observations.* [2] *Institutes*, ii. 7, 6. [3] *Institutions*, ii. 3, 43.

specially appointed under the Act of 1564 (cf. *A.P.* iii. 97, 112). They are to be distinguished, of course, from the 'compositors' who assisted the Treasurer at the Justice Ayres (*T.A. passim*). It is true that 'compositors' appear in 1526 (*A.P.* ii. 304), when James V. was in financial trouble; but these were specially appointed to prevent the sale of casualties below market value and to act as a check upon the young King (*A.D.C.* Ap. 19, Aug. 2, 1528; March 13, 1528-9). The matter is made clear by the Act of 1578 anent the Privy Council (*A.P.* iii. 96). Certain signatures are to be considered in Council: other 'common' signatures, including confirmations where there is no change in the tenor, may be dealt with by the Treasurer and his clerk, 'as has been usit befoir': compositions for infeftments in kirklands 'sall pas be the commissionaris appointit tharto, as the consuetude hes bene befoir.'

Failure to observe these facts has led Stair and Erskine into error. Stair's interpretation is not happy. He leaves out 'sutand upoun thair awin perrall'—an essential part of the dictum. He also states that the ordinances were not 'derogate from but rather approved,' which seems to indicate that he had not read the Act carefully, for 'derogate' was just what it *did* do. Erskine's mistake is mainly historical. The Privy Council were not thinking of 'public utility': they were thinking of the Treasury, and of feus of kirklands. They could not mean that the Crown ought to give confirmation wherever the party was willing to pay the reasonable expenses. The Act of 1564 assumed a discretionary power to refuse; and necessarily so, for the Crown had inhibited feus without licence, and the kindly tenants had to be considered. The right of refusal was the trump card which the Crown held in its hand. Both Stair and Erskine may have been misled by the arbitrary and unauthorised punctuation introduced by editors like Skene and Glendook.

The Act of 1564 admitted no right on the part of the applicant: it stated that confirmations would 'be sure to sik as sall obtene thame.' This was the correct and indeed inevitable attitude, owing to the complaints from kindly tenants, and the knowledge that dilapidation had been practised. Our records do not indicate what applications, if any, were refused. The needs of the Treasury and recurring complaints from old possessors suggest that the Crown acted mainly upon financial grounds and was apt to ignore the claims of these smaller men. It is remarkable that in one or two recorded instances of obstructed confirmation the complaint of the applicant is not that a right has been denied, but that a handsome offer has been refused. The Crown had undertaken to confirm, at its own discretion; but the circumstances of the time did not permit of drastic action. The Treasury needed the compositions and had to adopt an attitude of invitation: the grantees were naturally disinclined to disburse money, particularly where there was no apparent danger to their infeftments; and doubtless there

were those who preferred to run a certain amount of risk, rather than pay the large compositions in which the nature of their bargains would involve them.

What actually happened, therefore, when the Commissioners on feus of kirklands began to sit in 1564-5 seems to be clear. Certain cases of double infeftment occurred: the Privy Council was consulted, and replied that these should be passed on composition: it was, in fact, the business of the compositors to get in money, and the risk lay with the parties. The Act of 1578 was designed to meet the very natural complaints of those who went into the law courts and found that they had paid compositions for nothing, and at the same time to provide an incentive to grantees hitherto neglectful.

This, however, was not all. In the Parliament of 1585 it was represented that John Hamilton, the last Roman archbishop of St. Andrews, granted the lands of Cragfudy and Middlefudy in Fife to Grissell Sempill in liferent and to John Hamilton, their son, heritably. Infeftment was on July 10, 1567, just after Mary's surrender at Carberry and a fortnight before her abdication. The Hamiltons, as is well known, took the Queen's part and suffered the consequences. The archbishop's son alleged in 1585 that he 'maid instant sute be his freindis, offering greit sowmes of mony at sindry and divers tymes to our said soverane lordis thesaurar to haif the confirmatioun thairof exsped.' Archbishop Hamilton was executed in 1571; but Grissel Sempill does not seem to have been disturbed,[1] and survived until 1575. In 1576 Patrick Adamson became archbishop. He seized the opportunity to grant a feu to his own son: contrived to obstruct John Hamilton's confirmation, for which the signature was now actually granted; obtained his own confirmation; and finally procured the Act of 1578 to clinch the matter.

John Hamilton, in seeking redress, resorted to the patronage and influence of his cousin Lord Hamilton, now restored to Scotland, who told the story in the Parliament of 1585.[2] The facts were accepted by the house as 'notorlie knawin,' and by special dispensation John Hamilton was allowed to 'purches confirmatioun' and that 'upoun his expensis as accordis.' He was required to pay £200 in composition.[3] The demands of the Treasury were as urgent as ever. In 1582 the revenue from

[1] *R.P.C.* ii. 100. [2] *A.P.* iii. 415.

[3] Register of Signatures, ix. 109; which mentions Cragfudy alone. The duty (Middlefudy included) was about £200 (*R.M.S.* iv. 2703-6, 2725).

casualties had been particularly unsatisfactory, and attention was drawn to the increase in the King's debt.[1]

Hamilton of Drumry's case was much more complicated than the narrative in Parliament would lead us to suppose. It illustrates so many of the points under discussion that the story, pieced together with difficulty and uncertainty from the extant records of the Session, deserves special treatment.

On June 14, 1566, Grissel Sempill, Lady Stanehouse, and John Hamilton, her son by the Archbishop of St. Andrews, obtained a tack for nineteen years of Cragfudy and Middlefudy.[2] On July 10 of the following summer a feu-charter was granted, with the liferent to Grissel Sempill.[3] This disposition created difficulties with the kindly tenants, some of whom were there in Cardinal Betoun's time. In 1577, when Patrick Adamson had become Archbishop and Lady Stanehouse was dead, the new prelate granted a charter of Middlefudy to his brother-in-law, James Arthur, and charters of Cragfudy, in four equal portions, to kindly tenants of whom three belonged to influential families in Fife. These charters were confirmed by the Crown without delay:[4] whereas Hamilton's charter had never received confirmation.

Thus there were five feuars holding of the Archbishop; but it is important to notice that there were other kindly tenants, who seem to have remained in possession of their land, paying rent to the feuars. It is sometimes assumed that *nativi tenentes* were necessarily quite humble folk. As a matter of fact, in this period, the expression applies without distinction to those who had been in occupation for a period of years and who held by more or less formal agreements. When we read of complaints from 'kindly tenants' regarding their hardships where kirklands were feued over their heads, it must be remembered that some of the voices are those of substantial men, even neighbouring lairds, and not merely the cry of the poor threatened with removal. The present case illustrates what might happen when a prelate alien to the locality attempted to establish his kin in a place where they were comparative strangers. It was true that the richer occupiers tended to absorb the land and were ultimately those who could afford to purchase feus, when feus were in the market; but the humbler sort, who remained as their subtenants, naturally allied themselves with the local feuars, and distrusted the alien.

Litigation over Archbishop Adamson's charters began in the St. Andrews courts. On January 30, 1577-8, the Lords of Council and Session advocated two actions by Adamson requiring John Hamilton of Drumry to exhibit his infeftments.[5] Unfortunately he could not comply, as doubtless

[1] *R.P.C.* iii. 478-9. Craig (*Jus Feudale*, i. 15, 29) says that the Act of 1584 anent confirmation (v. *infra*) was notoriously *augendi aerarii causa*.

[2] *Acts and Decreets*, lxxi. 357.

[3] *A.P.* iii. 415; *A. and D.* civ. 81, gives *June* 10.

[4] *R.M.S.* ix. 2703-6, 2725.

[5] *A. and D.* lxxi. 191.

the Archbishop had reason to suspect. It was explained that his writs had been deposited with his father in Dumbarton Castle, and after the fall of that fortress had come into the hands of Cunningham of Drumquhassill, who became keeper of the place. It would be necessary to have evidence from Hamiltons and others now exiled in Flanders, and from Hew Johnston, the late Archbishop's chamber servant, who had found his way into Sweden. Commission to take depositions was procured for Captain Hary Balfour, 'crowner to the Scottis cumpany' in Flanders, and for the ordinary judge in Stockholm.[1]

Meanwhile Drumry was engaged in trying to enforce his tack, which would not expire till Whitsunday of 1586. Adamson boldly asserted that this document was 'fals and fenzeit,' and demanded production, hoping probably that it also was missing. He was disappointed. There was some talk of an obligation by Grissel Sempill, undertaking not to molest the kindly tenants; but the aged Mr. John Winram, whose position as sub-prior of St. Andrews would involve him in the business, seems to have discredited the story; and the lords upheld the tack, though they required caution for the repayment of rent should it be proved invalid.[2]

According to the sequence of events represented in the Parliament of 1585, James Arthur relinquished Middlefudy in favour of his nephew James Adamson, with liferent for his sister Elizabeth Arthur, the Archbishop's lady. As Drumry's infeftment had not been found, and had not been confirmed by the Crown, the Act of 1578 anent double infeftments and confirmations was peculiarly opportune to secure the interests of Archbishop Adamson's grantees. Even if the evidents turned up, Drumry could be no more than tacksman till 1586.

By a decreet, unfortunately lost, the lords reduced Hamilton's infeftment; and he was compelled to make terms with the Archbishop. For a sum of 5000 merks Drumry ratified the decreet so far as concerned Middlefudy and renounced his tack thereof, leaving Elizabeth Arthur and her son in possession. In return Adamson promised to make no further attempt to invalidate the tack in relation to Cragfudy. The missing charter and sasine were ruled out by the Act of 1578; and it was understood that Drumry would pursue his search, and hand them over, if discovered, that they might be cancelled.[3]

While Hamilton was still hotly engaged with the occupiers of Cragfudy, who, though apparently deserted by the Archbishop, fought a series of delaying actions with great pertinacity and skill, the missing documents were traced. The circumstances are not explained; but, when Lord Hamilton returned to Scotland in 1585, Drumry was able to air his grievances in Parliament, and obtain a special Act authorising the confirmation of his infeftment, which was now to be valid as against Adamson's. The signature (Jan. 6, 1585-6), as registered, mentions Cragfudy only: it is exceedingly difficult to suppose that the royal charter did not include Middlefudy as well.

[1] *A. and D.* lxxii. 40.

[2] *Ibid.* lxxi. 279, 357, 414; lxxvi. 74.

[3] *Ibid.* lxxix. 365.

The tables were turned, and a portentous vista of litigation now opened. Drumry's infeftment was to prevail over those granted by Adamson : yet there was the agreement of 1580 ratifying the reduction in respect of Middlefudy. Even these hardy men quailed before the prospect, and submitted to arbitration, with Betoun of Balfour as oversman. It was decided that the Archbishop should cause Drumry to be infeft in Middlefudy, and should hand over the titles granted to James Arthur, Elizabeth Arthur, and young James Adamson : that Hamilton should pay over £6500 to be invested in land or annual rent : that James Adamson should be infeft therein, and should then infeft Drumry in warrandice of Middlefudy. Hamilton was not to sue the Adamsons for warrandice of Cragfudy, though his right to take action against a succeeding archbishop was reserved. This decreet the Archbishop very shortly declined to fulfil ; and it was registered in the Books of Council and Session.[1]

A mysterious fact is that when his infeftment received royal confirmation Drumry does not seem to have been in actual possession of his charter. How the confirmation was obtained, in view of this, there is not a word to explain. In April, 1586, he sued Cunningham of Drumquhassill and Hamilton of Rouchbank for delivery. The charter turned out to be with Rouchbank, who stated that he received it from the late John Cunningham 'about the tyme that the last erlis of Ergile and Atholl assembled thameselffis in the castell of Striveling aganis umquhile James erle of Mortoun, than regent,' *i.e.* in 1578-9. It had passed into Cunningham's hands when Lord Fleming, in 1571, lost Dumbarton Castle.[2] There is no evidence to show what part Rouchbank was playing in this curious affair ; but it should be noted that he was one of the two arbiters named by Drumry in February, when he and Adamson submitted their quarrel.

We are not told why the Archbishop declined to fulfil the decreet arbitral. He may have hoped that his feuars of Cragfudy, who had been for years in vigorous controversy with Drumry, might after all succeed. These men clung tenaciously to their assertion that Grissel Sempill had executed an undertaking not to disturb the kindly tenants. They represented that both the tack and the heritable feu were forged at her instance by the late Mr. Robert Winram and Alexander Forrester, Archbishop Hamilton's secretary, who kept the round seal. Knowing that there would be public controversy, Winram and Forrester, it was said, sought to secure themselves by obtaining Grissel Sempill's obligation not to use the infeftment as an authentic evident.

This was a highly coloured tale. Mr. John Winram, who seems to have denied the story in 1579, was dead and could not contradict it. Yet in spite of the inherent improbabilities of forgery, there seems to have been an obligation. When the tenants now demanded production of the bond, Drumry made no attempt to deny its existence: in fact he alleged that it was in the hands of Archbishop Adamson.[3] Possession of it was perhaps what regulated the tactics of the prelate after the decreet arbitral.

Drumry, with infinite labour, had lately succeeded in entering upon possession of the Cragfudy lands. Now the dispossessed were working

[1] *Deeds*, xxiv. 231. [2] *A. and D.* civ. 81. [3] *Ibid.* cv. 40.

vigorously to get him out; and in the autumn of 1586 his goods were arrested.[1]

To settle the question of Grissel Sempill's obligation it was necessary to call the Archbishop, among other witnesses. He paid no attention to the summons.[2] In addition he was put to the horn for refusing to fulfil the decreet arbitral,[3] and was inhibited from dilapidating or putting away the lands of Middlefudy.[4] In 1587 we find him taking action to quash the decreet, still withholding Middlefudy, and put to the horn, with his brother-in-law, his wife, and his son.[5] It seems that the controversy came up in the Parliament of this year, in which the kirklands were annexed to the Crown, and that Drumry's claim to this part of the lands was ratified. Yet the Archbishop succeeded in obtaining suspension. The interminable litigation, however, had become more than could be tolerated. The Lords of Session had the case before them, in one form or another, on some fifty occasions; and even the protagonists were becoming weary. They submitted themselves to arbitration before judges who were all Senators of the College of Justice, with the Chancellor as oversman. Drumry was to pay 5000 merks, to be invested for the benefit of Elizabeth Arthur and her son, and was to hold Middlefudy directly of the Crown, according to the annexation. For an additional 6500 merks he could take over the land free of any tacks set by the Adamsons and set it to whom he pleased.[6]

Cragfudy, however, he had to relinquish. In the autumn of 1588 we find Adamson's feuars in possession.[7] Whether this was due to Grissel Sempill's obligation we are not informed.

Another interesting case shows the common attitude towards composition and confirmation. In 1581 Dunbar of Cumnok produced an infeftment in certain fishings feued from Pluscardin about twenty-two years earlier. He paid 1000 merks for confirmation; but for some reason, apparently at the instance of a competitor, the keepers of the seals had been ordered to stay expedition. Dunbar's view was that confirmation 'aucht not to be denyit unto him mair nor to ony utheris fewarris of kirklands, especiallie sen he hes already payit sa great a compositioun thairfore.'[8]

As regards the lot of the kindly tenants, we hear their voices in petition to the Parliament of 1578. Bishop Graham, provided to Dunblane by the influence of Montrose, proceeded to feu the temporal lands to the Earl on a comprehensive scale. The

[1] *Fife Hornings*, Oct. 24.
[2] *A. and D.* cv. 292, 347.
[3] *R.P.C.* iv. 125.
[4] *Fife Hornings*, Dec. 23.
[5] *A. and D.* cxii. 152; *Fife Hornings*, Aug. 15.
[6] *Deeds*, xxxi. 89; *R.M.S.* v. 1642.
[7] Auditors of Exchequer, 1584-98, 167.
[8] *R.P.C.* iii. 391.

holders represented that removal would be their inevitable fate. A thousand of the King's 'commonis and pure people' would be ruined, and his Majesty's service would suffer 'quhen as sa grite rowmes, quhairupoun sa mony ar sustenit, salbe reducit in the handis of ane particular man.' This was proposed in spite of the fact that the petitioners were 'content abone thair power to do everie ane for thair awin rowmes.' Parliament ordained 'the lordis commissionaris deput for the confirmatioun of fewes' to consider the case, and before passing Montrose's confirmation to see that 'the saidis kyndlie tenentis be satisfeit for thair kyndnes.'[1]

In January following, 1578-9, the Earl found caution before the compositors; but he objected to the conditions imposed upon him, and raised the matter again in the Parliament of 1579, especially as he had not been called in 1578. One paragraph of his remonstrance is very instructive. 'The said act is gevin in manifest hurt and prejudice of our soverane lord and aganis the privilegis grantit to him and his hienes predicessouris of befoir in parliament anent the confirmatioun of all fewis of kirklandis, quhilk was frielie grantit to his hienes and his majesties dearest mothir bering regiment for the tyme, without ony sic provisioun or prescrivit conditioun as is contenit in the said act gevin aganis him, and swa stopping his hienes to have sic commoditie as the said erle wald be glaidlie contentit to gif.' Montrose added that he was being treated exceptionally, 'aganis all ordour usit in sic caisis and forme of all confirmationis of few landis usit to be grantit be our soverane lord, the like quhairof was nevir usit aganis ony nobilman within this realme quha had gottin few of kirklandis.'[2]

Up to this time the Crown had not succeeded in bringing all infeftments of kirklands before the compositors, so as to obtain the profits of confirmation and conserve the interests of kindly tenants. On March 24, 1583-4, the matter came up again before the Privy Council. The Acts of 1564 and 1578, it was said, had been neglected by very many, and the result was 'greit misordour and hurt.' Sometimes composition was made; but the signature was left lying on the Treasurer's hands without any attempt to expede the writs: in numerous cases there was no application at all for confirmation. The situation was naively revealed in the hope that people would 'acknauledge thair awin weill and dewitie as becummis thame heirin.'[3]

[1] *A.P.* iii. 111-2. [2] *Ibid.* 165. [3] *R.P.C.* iii. 643.

In August of 1584 Parliament passed an Act which indicated that the Crown authorities were now convinced that general exhortation would not serve. All unconfirmed feus of kirklands, including a large number prior to March 1558-9, were to be submitted by September 1585, that was within about a year. Failure to apply—this was the new sanction—would be a sufficient ground of reduction at the instance of the Advocate, and the lands would fall to the King's disposition.[1]

There was a special clause in this Act in favour of 'auld possessouris,' stating that they might have their confirmations within a year at a fixed charge, four times the mail or money rent, and twice the ferme or victual rent. If they procrastinated the charge would be eight mails and three fermes respectively. It is not in the least clear what this means and how it was intended to apply. The preamble refers to 'lang takkis' as well as feus, both requiring royal confirmation. Speculation is useless in the absence of precise indications. What is important is the fact that legislative consideration was now given to the kindly tenants so as to make it possible for them to secure their position.

This Act, which could not be carried out to the letter owing to pestilence, was prorogate in 1585; and December 10, 1586, was fixed as the last day upon which holders of feus might obtain confirmation.[2] On July 29, 1587, immediately after James VI. was of age, came the Act annexing the temporalities of benefices to the Crown, whereby the King had 'recours to his awin patrimonie disponit of befoir (the caus of the dispositioun now ceissing) as ane help maist honourable in respect of him selff and leist grevous to his people and subjectis.'[3] The full significance of the annexation this is hardly the place to discuss. One point, however, directly bearing on the financial aspect of the matter, should not be allowed to escape notice in view of the development which has been traced. Secretary Maitland, according to the writer in the *Historie of King James the Sext*, affirmed 'that it war necessar that the temporal lands of prelaceis sould be annexed to the Croun to enriche the same, which was then at small rent. And he consideritt weill that offers wald be maid be every possessor, wha wald bestow layrge money to obtene the gift thareof to him self heretablie, and that the King was frank in granting lands as he mycht be persuaded, being facile of his nature; and thareby he thoght to make gayne of a part of the offerris to be maid, as it fell owt indeid.' It would have

[1] *A.P.* iii. 351. [2] *Ibid.* 380. [3] *Ibid.* 431.

been a great benefit, he adds, to James and his successors if the temporalities had been appropriated, or if the sums offered had been invested so as to yield annual revenue. He blames Maitland for 'a new uncumlie custume that never Prince did afore, nor ever was counsallit or permittit to do for whatsoever caus: to sell, annalie, engage the rents of his Croun for a pecuniall sowme.'[1]

R. K. Hannay.

[1] *Historie of King James the Sext* (Bann. Club), 231, where the subject is treated at some length.