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EXPECTATIONS OF THE LAW IN 12TH AND
13TH CENTURY SCOTLAND

by

HECTOR L. MACQUEEN (Edinburgh)*

In 1993 I published a book that attempted to portray the development in medieval Scotland of a law common to the whole kingdom, based upon the growth and regularisation of royal justice from the twelfth century on¹. Because it was evident that much in that development had been influenced by what was happening in contemporary England, I naturally drew heavily upon interpretations of what underlay English developments, in particular upon the debate sparked by the work of S.F.C. Milsom. But I think that I can fairly claim that through my book there runs what is at least a sub-theme, namely, that the role of the Church was also, in various ways, an important element in the rise of the medieval Scottish common law, and it is this sub-theme which I wish to highlight and elaborate in this paper. My argument is that the Church was a crucial formant of ‘expectations of the law’, not only because through its own canon law and ecclesiastical jurisdiction it was a provider of law, but also because it was a spiritual and moral critic of, and threat to, secular law and jurisdiction which could not be ignored. Kings who claimed to reign by the grace of God had to take account of what the Church said and did about law and legal matters, and the process of action and reaction which this engendered can clearly be seen as an important factor in legal change in twelfth and thirteenth-century Scotland.

These centuries were, of course, a crucially formative period in the development of law in western Europe generally². The earlier century – characterised

* Professor of Private Law, University of Edinburgh. This paper was previously presented at a conference *Expectations of the Law in the Middle Ages* held at the University of Exeter in March 2000, and at the Fifteenth British Legal History Conference held at the University of Wales, Aberystwyth in July 2001. It is an abbreviated version of a longer paper to be published in a collection of essays on the reign of Alexander II king of Scots 1214–1249, edited by R.D. Oram and to be produced by Tuckwell Press, East Linton, UK. I am grateful to all those who have commented upon the paper in one or other of its versions at one or another occasion, in particular to my Edinburgh colleagues, Professor John Cairns and Mr David Sellar, but am alone responsible for what follows.

1. H.L. MacQueen, *Common Law and Feudal Society in Medieval Scotland*, Edinburgh 1993.

2. See for general surveys e.g. F. Wieacker, trans. T. Weir, *A History of Private Law in Europe*, Oxford 1995, chs 2–4; O.F. Robinson, T.D. Fergus and W.M. Gordon, *Introduction to European Legal History*, 2nd edn., London 1994, chs 2–4; R.C. van Caenegem, *An Historical Introduction to Private Law*, Cambridge 1992, ch 3; M. Bellomo, trans. L.G. Cochrane, *The Common Legal Past of Europe 1100–1800*, Washington DC 1995, chs 3–7; S. Reynolds, *Kingdoms and Communities in Western Europe 900–1300*, 2nd edn., Oxford 1997, chs 1 and 2; R.W. Southern, *Scholastic Humanism and the Unification of Europe*, I: *Foundations*, Oxford 1995, chs 7–9.

by one historian of law as a period of ‘extremely rapid, intense, and creative crisis’³ – saw the recovery of the Digest of Justinian and the renewal of its study and use in teaching, first at the *studium generale* of Bologna in northern Italy, and subsequently elsewhere, at universities in the rest of Italy, southern France, Paris and Oxford. The work of the school known as the Glossators was to culminate in the thirteenth century with the *Summa Codicis* of Azo (d. 1230) and the *Magna Glossa* of Accursius (d. 1263), ‘a huge compilation of glosses or apparatus of glosses to the whole *Corpus Juris Civilis*’⁴. Alongside the redevelopment of Roman or civil law marched the law of the Church, the canon law. Around 1140 the hitherto scattered canons of the Church began to be brought together by Gratian in what became the unofficial compilation entitled *Concordia discordantium canonum* but better known as the *Decretum*⁵. This provided the platform for a major expansion of the canon law and the juristic claims of the Church. In 1234 Pope Gregory IX promulgated an official restatement of the canon law compiled by Raymond de Peñafort (d. 1240), and this came to be known as the *Liber Extra*. The scholarly techniques which had been applied to the texts of Roman law were equally brought to bear upon the *Corpus Juris Canonici*, which also became part of the legal curriculum in the universities. In the bull *Super speculam* of 1219 Pope Honorius III abolished the teaching of the secular civil law at Paris, confining legal study there to the canon law. While this was to create a division between canon and civil law of some significance for the future development of legal studies, it nevertheless remained true that ‘*legista sine canonibus parum valet, canonista sine legibus nihil*’ (a legist [i.e. civil lawyer] without the canons is worth very little, a canonist without the civil laws nothing)⁶. The point was underlined when in 1235 Pope Gregory IX authorised the teaching of civil law at Orleans to supplement that of canon law at Paris.

The rules of the canon law were developed and applied throughout Europe by a vast machinery of courts and bureaucrats, the authority of which flowed ultimately from the Pope in Rome. This authority was manifested at the local level not only by specially authorised papal representatives but also by structures established under the bishops of the dioceses into which the lands within the sway of the Church were divided. Further, from such local decision-making machinery appeal structures led all the way to Rome itself. Canon law laid claim, not just to the internal arrangements and governance of the Church, but also to a range of matters affecting the spiritual well-being of its flock. Through its

3. Bellomo, *Common Legal Past* (*supra*, n. 2), p. 33.

4. Robinson et al., *European Legal History* (*supra*, n. 2), p. 50. See further P. Stein, *Roman Law in European History*, Cambridge 1999.

5. What we do not know about Gratian is well discussed in J.T. Noonan, *Gratian slept here: the changing identity of the father of the systematic study of canon law*, *Traditio*, 35 (1979), p. 145–72. See further Southern, *Scholastic Humanism* (*supra*, n. 2), p. 283–310. A. Winroth, *The Making of Gratian’s Decretum*, Cambridge 2000, argues persuasively that there were two recensions of the *Decretum*, written between 1139 and 1158, the first probably by Gratian, the second (the text we know now) possibly not.

6. The maxim was derived from *Decretum Gratiani*, D. 10 c. 7. See further F. Merzbacher, *Die Parömie ‘legista sine canonibus parum valet, canonista sine legibus nihil’*, *Studia Gratiana*, 13 (1967), p. 273–82. For the citation of classical canon law materials see J.A. Brundage, *Medieval Canon Law*, London 1995, appendix 1.

courts the Church provided the means by which its jurisdictional claims could be made good. While the precise impact of this upon medieval society varied from place to place, there can be no doubt that the law of the Church did indeed form a universal element drawing together the legal culture of contemporary Europe⁷.

These developments had impact in Scotland and upon the Scottish Church as elsewhere in Europe⁸. Diocesan and parochial structures were firmly established in the course of the twelfth century⁹. A further important development in the last quarter of the century was the establishment of the independence of the *ecclesia Scoticana* (Whithorn or Galloway always excepted) from the sway of York or Canterbury. A series of Papal bulls, culminating probably around 1192 in *Cum universi*¹⁰, declared that not only was Scotland a special daughter of the Papacy, but also that disputes about the possessions of the Scottish church should be determined within the kingdom by Scots or papal appointees, unless an appeal had been made to the papal courts in Rome¹¹.

There is evidence that pre-Gratian canon law materials were known in Scotland¹², and there cannot be much doubt that the *Decretum* was also in circulation there. Before the end of the twelfth century there were diocesan functionaries in Aberdeen, Glasgow and St Andrews known as ‘officials’, whose task was to administer the canon law in consistory courts held under episcopal authority¹³. Indeed, almost all the officials of whom we have knowledge before 1214 were university men, most probably in decreets¹⁴. Papal judges-delegate had

7. See generally Brundage, *Medieval Canon Law* (*supra*, n. 6), *passim*; R.H. Helmholz, *The Spirit of the Classical Canon Law*, Athens Ga. 1996; H.J. Berman, *Law and Revolution: the Formation of the Western Legal Tradition*, Harvard 1983.

8. See generally G. Donaldson, *Scottish Church History*, Edinburgh 1985, p. 40–5; S.D. Ollivant, *The Court of the Official in Pre-Reformation Scotland*, [Stair Society, 34], Edinburgh 1982, especially at p. 22–7; P.C. Ferguson, *Medieval Papal Representatives in Scotland 1125–1286*, [Stair Society, 45], Edinburgh 1998.

9. Donaldson, *Scottish Church History* (*supra*, n. 8), p. 11–24; I.B. Cowan, *The Parishes of Medieval Scotland*, Edinburgh 1967.

10. See most recently A.D.M. Barrell, *The background to Cum universi: Scoto-papal relations, 1159–1192*, Innes Review, 46 (1995).

11. For comment, see H.L. MacQueen, *Regiam Majestatem, Scots law and national identity*, Scottish Historical Review, 74 (1995), p. 9.

12. See A.C. Lawrie (ed.), *Early Scottish Charters prior to A.D. 1153*, Glasgow 1905, no. 263 (a grant of the old priory of Loch Leven by Bishop Robert of St Andrews to the priory of St Andrews 1152/1153 ‘et cum his libris, id est ... exceptiones ecclesiasticarum regularum’); D. Baird Smith, *Canon law*, in H. McKechnie (ed.), *The Sources and Literature of Scots Law*, [Stair Society, 1], Edinburgh 1936, at p. 187 observes that this book ‘may have been the *Decretum* or *Panormia* of Saint Ivo of Chartres’. For Ivo, see Southern, *Scholastic Humanism* (*supra*, n. 2), p. 252–62.

13. D.E.R. Watt, *Fasti Ecclesiae Scoticanae Medii Aevi*, St Andrews 1969, p. 23, 187, 323.

14. For Matthew and Walter, officials of Aberdeen, see Watt, *Fasti* (*supra*, n. 13), p. 23, and Watt, *A Biographical Dictionary of Scottish Graduates to A.D. 1410*, Oxford 1977, p. 1, 563; for William, official of Brechin, see Watt, *Fasti*, p. 56, and Watt, *Dictionary*, p. 582; for Matthew, official of Dunkeld (possibly the same man as Matthew, official of Aberdeen, above), see Watt, *Fasti*, p. 124, and Watt, *Dictionary*, p. 1, 489; for John de Huntingdon, official of Glasgow, see Watt, *Fasti*, p. 187, and Watt, *Dictionary*, p. 273 (but note that John’s predecessor, Richard de Hassendean, does not appear in the latter work; and for Ranulf de Wat and Laurence de Thornton, officials of St Andrews, see Watt, *Fasti*, p. 323, and Watt, *Dictionary*, p. 531, 576–7.

also begun to become familiar figures by 1200, and their use in Scotland was to become commonplace from the pontificate of Innocent III (1198–1216)¹⁵. All this meant that men with knowledge and experience of the learned laws were at work as judges, pleaders and ecclesiastical administrators in Scotland by this time: an outstanding example is William Malveisin, described by a contemporary as *utriusque juris peritus*, that is, learned in both the canon and the civil laws, bishop first of Glasgow in 1199 and then of St Andrews from 1202 until his death in 1238¹⁶. Malveisin's career in Scotland was to last some fifty years, with much of that time spent in the service, first of King William the Lion (1165–1214), and then, as we shall see further below, of King Alexander II (1214–1249). He is also on record as a judge-delegate on at least three occasions¹⁷. Another clerk learned in the laws whose career was to straddle the two reigns was Master Peter of Paxton (d. c. 1230), who served in the household of King William's brother, Earl David of Huntingdon, from the 1180s, and who on 12 November 1219 pledged his copies of the *Digestum Novum*, *Codex*, *Infortiatum* and *Institutes* – that is, most of the core texts of Roman law – to the abbot and convent of Holyrood in security of a loan¹⁸. But Master Peter's career was spent more in England than in Scotland, his Paxton being in the earldom of Huntingdon rather than the estate of the same in Berwickshire.

The Church could also bring effective pressure to bear on the secular law and customs. The important concept of 'default of justice', which underpinned at least some royal interventions in other courts, had roots in pre-Gratian canon law¹⁹. There are also signs that the Church encouraged the king to set his sights against at least some aspects of both the vengeance and the compensation aspects of society's honour code, as involving either an inevitable spiral of violence or the condonation of mortal sin. Thus in 1197 the magnates and prelates swore to assist King William to take *vindicta* of (i.e. punish) wrongdoers, and not themselves to take *pecunia* from them so that justice was not done²⁰. Another institution for the preservation of peace in which king and Church seem to have joined forces was ecclesiastical sanctuary, within which one accused of

15. Ferguson, *Medieval Papal Representatives* (*supra*, n. 8), p. 120–2.

16. For his career, which was to extend into the reign of Alexander II until his death in 1238, see Watt, *Dictionary* (*supra*, n. 14), p. 374–9. See also D.D.R. Owen, *William the Lion: Kingship and Culture 1143–1214*, East Linton 1997, in which it is suggested that Malveisin was the Guillaume le Clerc who composed the *Roman de Fergus*. W.W. Scott suggests that he may have been the author of Scottish annals based on the *Melrose Chronicle*: D.E.R. Watt *et al.* (edd.), *The Scotichronicon of Walter Bower*, 9 vols., Edinburgh 1987–96, 9, p. 251–9. See also A.A.M. Duncan, *Roger of Howden and Scotland, 1187–1201*, in B.E. Crawford (ed.), *Church, Chronicle and Learning in medieval and early Renaissance Scotland*, Edinburgh 1999, p. 145–51.

17. Ferguson, *Medieval Papal Representatives* (*supra*, n. 8), p. 128.

18. C.W. Foster and K. Major (edd.), *Registrum Antiquissimum of the Cathedral Church of Lincoln*, [Lincoln Record Society, 12 vols.], Lincoln 1931–73, 3, no. 821, facsimile also on facing page; K.J. Stringer, *Earl David of Huntingdon*, Edinburgh 1985, p. 152.

19. Helmholz, *Classical Canon Law* (*supra*, n. 7), p. 119–20, 132–4.

20. T. Thomson and C. Innes (edd.), *Acts of the Parliaments of Scotland 1124–1707*, 12 vols., Edinburgh 1814–75, [henceforth *APS*], p. 377, c. 20. This assize appears to be modelled upon the *edictum regium* of Hubert Walter in England in 1195, as to which see J. Hudson, *The Formation of the English Common Law*, London and New York 1996, p. 138; G.W.S. Barrow, *The Kingdom of the Scots*, London 1973, p. 111; A.A.M. Duncan, *Scotland: The Making of the Kingdom*, Edinburgh 1975, p. 201–3.

wrongdoing could take at least temporary shelter from his victim and their kin. Twelfth-century royal grants show that in at least some of these – for example, the Stow of Wedale, Tynninghame and perhaps Innerleithen and Torphichen – the peace of the Church was given additional support and a wider territorial scope by that of the king, and it seems clear that this was intended to prevent feuds from escalating in further violence and bloodshed²¹.

Influence could also be exercised through the activity of ecclesiastics in government: William Malveisin was the king's chancellor as well as bishop of Glasgow from 1199 to 1202, for example. Equally it might come directly from the Papacy itself. As early as 1110/1113 Pope Paschal II was writing to Turgot the bishop of St Andrews urging him to ensure that the laity in Scotland conformed to the canonical norms of marriage²². In 1200 Pope Innocent III instructed King William about the right of sanctuary afforded to those who, having committed offences, fled to churches 'that, through reverence for the sacred place, they may escape the penalty they have incurred'²³. Drawing on 'the prescriptions of the sacred canons and the teaching of the civil laws', Innocent laid down a series of propositions distinguishing between the position of free men and serfs, and concluded:

Do you therefore, very dear son, see to it that when in the kingdom any such case occurs you proceed according to the distinction hereinbefore drawn, that the honour and immunity of churches may be preserved intact and the occasion of evil speaking be taken away from men of a perverse disposition.

Around the same time John de Belmcis, the former archbishop of Lyons, wrote to Malveisin as bishop of Glasgow to condemn the involvement of the clergy in judicial duels or ordeals²⁴. It thus seems clear that the Church sought to exercise as much of a voice in the development of secular law and custom as it had in relation to its own.

One of the issues which provoked Papal letters to the king of Scots was competition between ecclesiastical and secular jurisdiction. Early in the thirteenth century Pope Innocent III sternly rebuked King William for allowing to be decided in the king's court a case about the right of patronage in the church of Leuchars, disputed by St Andrews cathedral priory and Saer de Quinci, lord of Leuchars²⁵. But papal disapproval does not seem to have prevented the successful assertion of secular jurisdiction in the case any more than it did shortly

21. See H.L. MacQueen, *Girth: the law of sanctuary in Scotland*, in J.W. Cairns and O.F. Robinson (edd.), *Critical Studies in Ancient Law, Comparative Law and Legal History: Essays in honour of Alan Watson*, Oxford 2001, p. 333–52.

22. R. Somerville (ed.), *Scotia Pontifica: Papal Letters to Scotland before the Pontificate of Innocent III*, Oxford 1982, no. 2. See further Duncan, *Scotland* (*supra*, n. 20), p. 130; W.D.H. Sellar, *Marriage, divorce and concubinage in Gaelic Scotland*, Transactions of the Gaelic Society of Inverness, 51 (1980), p. 474–5.

23. D. Patrick (ed.), *Statutes of the Scottish Church 1225–1559*, Edinburgh 1907, p. 205, from the *Decretals*, book 3 title 49 c. 6.

24. *Ibid.*, p. 292. See further Duncan, *Roger of Howden* (*supra*, n. 16), p. 146–8.

25. T.M. Cooper, *Select Scottish Cases of the Thirteenth Century*, Edinburgh 1944, p. 7–8; Barrow, *Kingdom* (*supra*, n. 20), p. 90; Ferguson, *Medieval Papal Representatives* (*supra*, n. 8), p. 181.

afterwards in the celebrated litigation between Melrose abbey and the earl of Dunbar over the lands of Sorrowlessfield near Earlston. Here the earl persistently refused to answer before judges-delegate the monks' complaint of his violent occupation of the lands, pleading that as the case concerned a lay tenement it ought to be heard before a secular court. The case was finally settled in King William's full court at Selkirk²⁶. In both disputes the ecclesiastical argument was that when cases concerned land granted in alms, both the custom of the realm and the custom of the Scottish church gave jurisdiction to the Church courts; but the evidence of these two cases is that this claim could easily be countered with one that the lands were lay and that there was no standard procedure available comparable to the English assize *Utrum* of 1164, under which it could be determined whether land was a lay fee or held in alms²⁷.

In the reign of King William's son, Alexander II, continuing developments in the world of secular law and custom went alongside the continued growth of ecclesiastical jurisdiction. Officials can be found in virtually every Scottish diocese in the period, and on the whole they continued to be university men, presumably having studied decreets²⁸. There was also a considerable growth in the use of papal judges-delegate. Nearly half of the 158 cases identified by Dr Paul Ferguson as having taken place before judges-delegate between 1165 and 1286 occurred in the reign of Alexander II²⁹. Many if not all of these judges-delegate must have been, like the ones who decided the great dispute over the lands of Monachkenneran in 1233, 'wise men learned in both the canon and the civil laws'³⁰. A striking example may be Master Laurence of Thornton, 'the single most frequent judge-delegate of the period [1209–1238/1240]', and also official of St Andrews diocese between 1203 and 1224 as well as a close associate of Bishop Malveisin³¹.

The increasing role of judges-delegate during Alexander II's reign must have been apparent to contemporaries. This may be evident in the increasing number of clashes between the ecclesiastical and secular jurisdictions, especially where a dispute over land broke out between a layman and the Church in some shape

26. Cooper, *Cases* (*supra*, n. 25), p. 9–11. See further on this case MacQueen, *Common Law* (*supra*, n. 1), p. 108, and Ferguson, *Medieval Papal Representatives* (*supra*, n. 8), p. 138–40.

27. On the assize *Utrum*, see Hudson, *English Common Law* (*supra*, n. 20), p. 129.

28. For Richard and 'W.', officials of Aberdeen, see Watt, *Fasti* (*supra*, n. 13), p. 23, and Watt, *Dictionary* (*supra*, n. 14), p. 468–9 and 561–2; for Daniel and Maurice, officials of Argyll, Watt, *Fasti*, p. 38; for Henry de Norham, official of Brechin, Watt, *Fasti*, p. 56, and Watt, *Dictionary*, p. 430; for Durand and Geoffrey, officials of Galloway, Watt, *Fasti*, p. 140; for Richard de Ancrum, official of Glasgow, Watt, *Fasti*, p. 187; for "M." and "J.", officials of the Isles, Watt, *Fasti*, p. 212; for William Agnus, official of Moray, Watt, *Fasti*, p. 244, and Watt, *Dictionary*, p. 3; for Walter de Mortimer and Andrew de Aberdeen, officials of St Andrews, Watt, *Fasti*, p. 323, and Watt, *Dictionary*, p. 1, 419–20; and for Alexander de St Martin, official of Lothian, Watt, *Fasti*, p. 327, and Watt, *Dictionary*, p. 478. It is worthy of mention that the officials of Argyll, Galloway and the Isles are not known to have been university men.

29. See Ferguson, *Medieval Papal Representatives* (*supra*, n. 8), Appendix I.

30. C. Innes (ed.), *Registrum Monasterii de Passelet*, [Maitland Club, 17], Glasgow 1832, p. 169.

31. Ferguson, *Medieval Papal Representatives* (*supra*, n. 8), p. 129; Watt, *Fasti* (*supra*, n. 13), p. 323; idem, *Dictionary* (*supra*, n. 14), p. 531.

or form. Like his father before him, King Alexander received papal letters reproaching him for allowing suits about land held in free alms to come before secular tribunals³². An apparent innovation of his administration was a form of royal prohibition by which litigation in an ecclesiastical forum could be halted by the claim that the matter was secular. An early example is the case between Robert Hood and the bishop of Moray over the lands of Llanbryde in 1225, which began before judges-delegate but was prohibited by the king, 'asserting that the aforesaid manor was his barony and that therefore it should take place in the royal and not an ecclesiastical court'³³. The royal letters or brieves which were used for this purpose probably took more or less the form found in the later 'registers' of brieves, under which the Church court was prohibited from proceeding in cases of lay tenements³⁴. Their effectiveness is suggested by the precaution which churchmen seem to have started to take, by obtaining from their opponents in litigation a renunciation of the king's letters of prohibition³⁵.

But the picture of conflict between church and state should not be over-dramatised. As Dr Ferguson has pointed out, churchmen were frequently able to make claims to land against laymen successfully before judges-delegate, while laymen often made claims against the Church in the same forum³⁶. Dr Ferguson concludes with appropriate caution³⁷:

The picture which seems to emerge here is one of occasional instances in which powerful laymen were able to defeat or delay their ecclesiastical opponents and to force them into the secular forum. Secular jurisdiction was also invoked when the subject of the suit was of particular interest to the Crown ... Where lesser men were defenders, and where such interests were not involved, the jurisdiction of papal judges-delegate seems seldom to have been challenged by secular jurisdiction. As Duncan notes, however, a firm conclusion on this issue will require a comprehensive study not only of the cases before judges-delegate but also of the many compositions which may have resulted from litigation in the secular forum.

The jurisdiction of the canon law in the affairs of the laity seems to have won acceptance in questions of status, marriage and legitimacy³⁸. At the very end of King Alexander's reign and at the beginning of that of his successor, Alwin of Callendar and John of Kinross, both laymen, were litigating before papal judges-delegate over John's claim that Alwin was illegitimate and therefore not en-

32. W. Smythe (ed.), *Liber Ecclesie de Scon*, [Bannatyne Club, 78], Edinburgh 1843, no. 120. See also C. Innes (ed.), *Registrum Episcopatus Glasguensis*, [Bannatyne Club, 75; Maitland Club, 63], Edinburgh and Glasgow 1843, vol. I, nos. 158, 161; Ferguson, *Medieval Papal Representatives* (*supra*, n. 8), p. 187.

33. C. Innes (ed.), *Registrum Episcopatus Moraviensis*, [Bannatyne Club, 58], Edinburgh 1837, appendix, p. 459, no. 6.

34. Lord Cooper, *The Register of Brieves*, [Stair Society, 10], Edinburgh 1946, p. 46, no. 64; p. 55, nos. 23-7; A.A.M. Duncan, *Formulary E: Scottish Letters and Brieves 1286-1424*, University of Glasgow, Scottish History Department Occasional Paper 1976, nos. 4-7.

35. MacQueen, *Common Law* (*supra*, n. 1), p. 110.

36. See Ferguson, *Medieval Papal Representatives* (*supra*, n. 8), p. 140-1, 181-2, 187-9.

37. *Ibid.*, p. 189.

38. *Ibid.*, p. 157-9.

titled to inherit certain lands which would otherwise fall to John³⁹. The case nicely illustrates the interaction between the ecclesiastical and the secular in matters of law and litigation. Since the lands in question were unquestionably a lay tenement, a judgement in John's favour on the legitimacy point would not have concluded the process of recovering the lands. He would have had to go off to the secular courts for that purpose. But at the same time the substance of the canonical rules on marriage and legitimacy was crucial to the secular rules on inheritance of land, since one dubbed illegitimate by the canon law would be excluded from any claim to inherit.

Major developments occurred in the general canon law itself during the reign of Alexander II. Apart from the promulgation of the *Liber Extra* in 1234, already mentioned, in November 1215 there took place in Rome under Pope Innocent III the Fourth Lateran Council, which ushered in a large number of major reforms, including, most significantly for our purposes, a prohibition upon clerical participation in the ordeal⁴⁰. Although the Council was attended by three Scottish bishops, including William Malveisin, and by Henry abbot of Kelso⁴¹, there were problems in administering its reforms in Scotland through the lack of a metropolitan archbishop. This led to the establishment by Pope Honorius III of the Provincial Council of the Scottish Church in 1225⁴². This became, not only the deliberative body of the Scottish Church, but also both a legislative and a judicial body. Donald Watt observes in his account of the Provincial Council⁴³:

Provincial councils everywhere after the Fourth Lateran Council were charged with reform of 'mores', meaning presumably prevailing customs of all kinds. In Scotland, as elsewhere, a consequence was that the decades after 1215 saw local church leaders compiling collections of statutes for approval at both diocesan and provincial levels. ... [T]he bulk of the Scottish provincial statutes is concerned with defining matters of local custom, rather than with emphasising the universal law of the Church. ... Whatever a pope like Innocent III might think, the *Corpus* [*Juris Canonici*] was no monolithic code of law ready to be enforced everywhere throughout the Church: it was a quarry from which church lawyers were constantly excavating rules which they claimed to be the law of the Church, but which were interpreted in widely divergent ways by different schools of lawyers.

The Provincial Council was not the only body to issue legislation between 1214 and 1249. Perhaps the single most significant piece of legal material surviving from the reign of Alexander II is his statutes, which undoubtedly em-

39. Cooper, *Cases* (*supra*, n. 25), p. 61–5; Ferguson, *Medieval Papal Representatives* (*supra*, n. 8), p. 158–9.

40. For a translation of the decrees of the Council, see H. Rothwell (ed.), *English Historical Documents*, III: 1189–1327, London 1975, p. 643–76. The abolition of clerical participation in the ordeal is c. 18 (*ibid.*, p. 654). On the Council see J. Sayers, *Innocent III: Leader of Europe 1198–1216*, London and New York 1994, p. 95–101, 114–15.

41. A.O. Anderson, *Early Sources of Scottish History 500–1286*, Edinburgh 1922; reprinted Stanford 1990, II, p. 405.

42. *Statutes of the Scottish Church* (*supra*, n. 23), p. 1.

43. D.E.R. Watt, *The Provincial Council of the Scottish Church 1215–1472*, in A. Grant and K.J. Stringer (edd.), *Medieval Scotland: Crown, Lordship and Community*, Edinburgh 1993, p. 147, 151.

body and reflect extremely important steps in the creation of the Scottish common law. They appear in particular to give a new prominence to the jury as an instrument of justice in both civil and criminal matters, to reduce dependence on the duel and the ordeal, and, finally, to be the occasion of the introduction of the pleadable *briefe* of *dissasine* or *novel dissasine*, modelled on the crucially important English common law writ of *novel disseisin*.

The deployment of the jury, and the downplaying of the duel and the ordeal, in these statutes has taken on significance mainly as the Scottish response to the abolition of clerical participation in the ordeal by the Church at the Fourth Lateran Council in 1215. Robert Bartlett has shown how this withdrawal of ecclesiastical support undermined the credibility of the ordeal as the judgement of God, and therefore presented a major crisis for the secular systems of justice throughout Europe⁴⁴. It seems clear that the need for alternative systems of proof which was universally felt in the difficult cases in which the ordeal had previously been available must also have been applicable in Scotland. Ian Willock has rightly cautioned against seeing the statute of 1230 as representing the definitive abolition of the ordeal in Scotland and its replacement with the jury (here described as a *visnet*) as a mode of proof, since in terms it is confined to cases of theft and robbery⁴⁵. Similarly, the statute which requires the use of a local group of persons (i.e. a jury) to consider the complaints of those 'who ought not to fight' must be seen as a specific solution in a particular context – the loss and recovery of moveable property – rather than an attempt to abolish the duel in all cases⁴⁶. But nonetheless the statute does reflect the influence brought to bear on the secular law by ecclesiastical pressure, personified at Stirling by Bishop Malveisin in particular. He had attended the Lateran Council and had already been a no doubt willing recipient and disseminator of correspondence from other ecclesiastics railing against the judicial duel⁴⁷. It was probably Malveisin again who, having remained in Rome after the Lateran Council⁴⁸, had procured from Pope Innocent III in 1216 a bull specifically condemning the 'baneful custom' in Scotland by which the clergy could be compelled to undergo judicial duels⁴⁹. Prominent amongst the persons who under the 1230 statute were not to fight duels were men of religion, clerks and prebendaries⁵⁰; and this probably had some effect, to judge from two *briefes* of protection issued by the king in 1232, taking the monks of Melrose and Balmerino respectively under royal protection and instructing all his sheriffs to treat the causes of the monks as though they were the king's own, including finding a champion (*pugnatores*) for them if need be⁵¹.

44. See R. Bartlett, *Trial by Fire and Water: the medieval judicial ordeal*, Oxford 1986.

45. *APS*, I, p. 400, c. 6; I.D. Willock, *The Origins and Development of the Jury in Scotland*, [Stair Society, 23], Edinburgh 1966, p. 23–8.

46. *APS*, I, p. 399, c. 5.

47. See above, p. 283.

48. See Anderson, *Early Sources* (*supra*, n. 41), II, p. 405, 431.

49. *Statutes of the Scottish Church* (*supra*, n. 23), p. 293.

50. *APS*, I, p. 399, c. 5.

51. C. Innes (ed.), *Liber Sancte Marie de Melros*, [Bannatyne Club, 56], Edinburgh 1837, no. 175; *Eighth Miscellany of the Scottish History Society*, [Scottish History Society, 3rd series, 43], Edinburgh 1951, p. 8–9.

Further legislation in 1245⁵² provided that the justiciar of Lothian should hold an inquest to identify wrongdoers within his jurisdiction since Christmas 1243. Those identified were to be arrested and brought before the justiciar and a faithful *visnet*, which would determine whether they were guilty of ‘*murthra*’ (probably meaning secret killing, unseen by witnesses), robbery or similar felonies pertaining to the king’s crown. If so, all their goods would be forfeit to the king. But conviction of such lesser crimes as theft or homicide (i.e. killing other than *murthra*⁵³) would lead to forfeiture to their lord. The procedure of indictment by inquest and trial before the justiciar was to continue in future, but all those convicted of theft or homicide would be handed over to their lords to have justice carried out without any redemption save by the grace of the king.

As Geoffrey Barrow has observed, the procedure introduced in 1245 is highly reminiscent of the jury of presentment introduced in England by the Assize of Clarendon in 1166⁵⁴. But the influence of canonical criminal procedure must also be taken into account. From early in the thirteenth century, and in particular after the Lateran Council in 1215, the Church was developing the accusatory process of the inquisition, ‘so-called’, writes James Brundage⁵⁵,

because it was conceived of as an investigatory process initiated by public authorities, such as judges, who operated through inquiry (*per inquisitionem*) into wrongdoing that was a matter of common knowledge or grave suspicion (*notorium, manifesta* and *fama* were the terms generally used to describe such affairs).

The process was concerned with the ‘occult crimes’, such as heresy, which did not lend themselves to ready or decisive proof; and it is striking that the inquest established by the Scottish statute of 1245 was to concern itself with secret killings and robberies, violent crimes to which the only witness apart from the perpetrators might well be the victim. A combination with direct English influence seems quite probable, however, since in a final provision of the 1245 statute, any knight indicted by the inquest was to have a *visnet* of other knights or freeholders of heritage. This principle of ‘trial by peers’, found in Magna Carta (cc 21, 39, 59), was to be repeated in the last known legislation of the reign, at Stirling in May 1248⁵⁶.

What were the factors which led the 1230 gathering at Stirling to take the step of introducing an action for dissasine? The statute’s reference to dissasine by the complainer’s ‘lord or any other person’ suggests the possible relevance of a debate amongst English legal historians as to the origins of novel disseisin. Was the assize originally simply a means of regulating the lord’s power to dis-

52. *APS*, I, p. 403–4, c. 14.

53. The statute is an interesting indication that the distinctions of homicide which would later crystallise as killing by forethought felony or upon a sudden were already present in the criminal law. See further W.D.H. Sellar, *Forethocht felony, malice aforethought and the classification of homicide*, in W.M. Gordon and T.D. Fergus (edd.), *Legal History in the Making*, London and Ronceverte 1991, p. 43–59.

54. Barrow, *Kingdom* (*supra*, n. 20), p. 112.

55. *Medieval Canon Law* (*supra*, n. 6), p. 94–5.

56. *APS*, I, p. 404, c. 15. See further J.C. Holt, *Magna Carta*, 2nd edn, Cambridge 1992. For possible influence from the learned laws see R.H. Helmholz, *Magna Carta and the ius commune*, *University of Chicago Law Review*, 66 (1999), especially at p. 326–9.

cipline tenants who failed to perform the services owed for their land by ejecting them from their tenement? This would explain, amongst other things, the requirement that the disseisin be 'unjust and without a judgment'; a just judgment of the lord's court was necessary before a tenant could be expelled from his holding⁵⁷.

But while this view has offered a powerful insight into a world in which disseisin could happen otherwise than through casual, almost anarchic violence, and links in an important way with the principle that the king would remedy defects of justice in the courts of others, it has not gained acceptance as the sole explanation for the development of the action. In support of this conclusion, it may be noted, the Scottish statute does not see lords as the only dissaisors against whom redress might be sought. Another potential source of disseisin which emerges from the English evidence was the Church, enforcing its rights to land, not as a feudal lord, but under the canon law rules which required bishops to recover land unjustly alienated by their predecessors. Could novel disseisin have been the means by which laymen who had acquired land from the Church were enabled to resist the processes of the canon law⁵⁸? Did the problem extend further, as our earlier discussion of the clashes between ecclesiastical and secular jurisdiction in cases about land may suggest, to the expulsion of laymen from their holdings following litigation before judges-delegate?

I have suggested in my book that a dispute which was ongoing around 1230 before Walter Olifard as justiciar of Lothian may have been a specific trigger for legislative action in Scotland⁵⁹. The case was between Patrick, son of the earl of Dunbar, and the priory of Coldingham. Patrick was said to be unjustly occupying the priory's lands of Swinewood in Berwickshire. The whole matter was eventually settled in Walter's justiciary court at Roxburgh in 1231, when Patrick renounced his claim and acknowledged the *plenum ius* of the priory to the lands. Was this settlement obtained because the priory now had to hand a royal remedy by which its claim could be made good? It may be significant that Thomas Melsanby, prior of Coldingham, was another who was present at Stirling in October 1230 to assent to the passage of the statute on dissasine. But if there was a connection between this case and the statute, then it is worth noting that there does not appear to have been any tenorial relationship between Patrick and the priory, and that in this case it was the ecclesiastical organisation which successfully resisted the claims of the layman, even in the secular court.

In sum, therefore, while during the reign of Alexander II royal justice clearly built on foundations already laid in the course of the twelfth century, it also became more articulate and systematic, and began to assert much more strongly not just ultimate, but also exclusive jurisdiction within the realm in relation to secular land. The claims of the ecclesiastical courts were resisted and circum-

57. The argument begins with S.F.C. Milsom, *The Legal Framework of English Feudalism*, Cambridge 1975, p. 1–35; see now Hudson, *English Common Law* (*supra*, n. 20), p. 193–8.

58. M. Cheney, *The litigation between John Marshal and Archbishop Thomas Becket in 1164: a pointer in the origins of novel disseisin?* in J.A. Guy and H.G. Beale (edd.), *Law and Social Change in British History*, London 1984, p. 9–26.

59. J. Raine, *The History and Antiquities of North Durham*, London 1852, appendix, no. 126; MacQueen, *Common Law* (*supra*, n. 1), p. 142–3.

scribed. A key instrument in this process was the royal *briefe*, by the increasingly standardised forms of which the claims of royal justice were made apparent in both secular and ecclesiastical fora.

But it would be wrong to see the legal developments of this period purely as a reaction to the presence of competition from the Church. In particular, the Church can be seen to have provided an impetus for change quite apart from the breadth of its jurisdictional claims. As the guardian of the spiritual and moral health of Christendom, it brought a wholly different kind of pressure to bear upon secular law and custom, a pressure which seems to have borne fruit in Scotland. The most obvious example discussed or mentioned in this paper is the success of the ecclesiastical attack upon the *judicium Dei*, and the deployment in its place of the inquest or jury. But many other instances can be given. The fundamental concept of default of justice as a means of expanding royal jurisdiction was transplanted from the canon law. Criminal law, and in particular the gradations of homicide, seems to be informed by the moral perceptions of the Church, as does the desire, already evident in the twelfth century, to repress the settlement of feud by private settlement rather than by just punishment. The canon law of marriage, legitimacy and status not only challenged the lax customs of the laity but came to lie at the heart of the secular rules about the inheritance of land. We may also suspect that it was the Church which was the most important influence in establishing the right of women to inherit despite much contrary social practice. In this way the development of Scots law was exposed to the influence of wider patterns of development in Europe. At the same time it drew inspiration from the rising common law of England, while retaining much from a past that stretched back beyond the twelfth century. In 1254, five years after the death of King Alexander, Pope Innocent IV issued the bull *Dolentes*, identifying Scotland as a land where the affairs of the laity were governed by lay customs and those of the church by the canons of the holy fathers⁶⁰. Understandably the Pope did not dwell on the interplay just observed between the lay customs and the canon law, but it was already, and would continue to be, a vital ingredient in the emergence of a distinctive common law of Scotland.

60. The text of the bull is to be found in H.R. Luard (ed.), *Matthaei Parisiensis Chronica Majora*, London 1872–83, vol. VI, p. 295.