Alice Taylor, THE SHAPE OF THE STATE IN MEDIEVAL SCOTLAND, 1124-1290

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It should straightaway be said that this book is the most significant contribution in half a century to a general understanding of the development of government in twelfth- and thirteenth-century Scotland. No-one with a serious interest in any aspect of the subject will be able to neglect it. A very important part of it is concerned with the law of the period in its substance as well as its judicial institutions and court procedures. This review will focus most on that aspect of the book. A much fuller (and very helpful) discussion can be found in Dr Andrew Simpson's review article published in (2016) 4(2) *Comparative Legal History* 215-232. But even he has largely to leave on one side Dr Taylor's impressive chapters on accounting and revenues (6) and on the existence or otherwise of a bureaucracy within royal government (7).

My focus will be Chapters 3 to 5. It is however necessary to start by summarising Dr Taylor's method and her general conclusions. Her approach to the scattered and relatively scanty sources that survive from her chosen period is, as rigorously as possible, not to read earlier evidence in the light of later or comparative material. Rather she seeks to understand it first in its own terms and not to go beyond what that shows for the source's own point in time without good reason to do so being first established. By this means she pursues a much sharper chronology for the (long generally accepted) intensification of Scottish royal government in the twelfth and thirteenth centuries. This then becomes the platform for her more general analysis. The argument is that the twelfth century saw a gradual territorialisation of power in the kingdom of the Scots, with jurisdiction in particular ceasing to be based primarily on kinship relations and instead being defined by links to defined units of land. Her overall thesis is that in government royal authority worked in a symbiotic relationship with aristocratic power: "While the king's governmental structure was based on aristocrats and their landed power, aristocratic landed and jurisdictional power was based on royal authority" (p 455). In the period under review, there was "a dynamic relationship" (p 455), in which royal and aristocratic power developed and changed together. It is thus contended that twelfth- and thirteenth-century Scottish government was throughout quite distinct from its English counterpart, and that developments in Scotland are not to be seen as a process of "Anglicisation" or imitations of what was happening south of the border. More generally still, the concept of the medieval "state" needs to be re-thought, not as the growth of public power (represented by the king and his officials) at the expense of private aristocratic power, but as embracing both. "In Scotland, aristocratic power was not separate from the state" (p 454).

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Chapter 3 (entitled "Written Law and the Maintenance of Order, 1124-1230") builds on Dr Taylor's previously published and very impressive recovery work on written laws attributable to David I (reigned 1124-1153), William I (1165-1214) and Alexander II (1215-1249). The chapter offers much penetrating new insight on criminal law processes, the justice of the feud, and compensation systems for

wrongs. Dr Taylor also sees a critical change in written law during this period: from the declarations of what she calls "legal specialists" (the *iudices* in the Latin sources of the period, probably *brithemain* in Gaelic, perhaps best rendered as "lawmen" in modern English), to the legislative prescriptions of kings acting with the advice of the great men of their kingdom. And where the texts of the lawmen did not concern themselves with how the law might be enforced, royal legislation looked much more towards frameworks for enforcement: to courts, officials, and punishments. This enforcement was, crucially, as much through aristocratic lordship as through the king's officials.

All this leads Dr Taylor to criticise Alan Harding's argument (published in 1966) that grants of the king's peace and protection were the most important elements in legal development in twelfth-century Scotland. "For Harding, because the king's peace was inherent in *every* charter and brieve the king issued, it acted *de facto* as the conceptual underpinning of society and thus vastly increased the king's presence in the maintenance of law and order" (p 166). Whether or not this was what Harding was saying, however, the fact remains that the king could and did assert his authority to protect grantees against injury of all kinds (including deprivation of their property), poinding, non-payment of debts, and obstruction to their recovery of absconding serfs. Even if (as I would agree) persons other than the king could make such grants of peace and protection, he was the only one who could do it for the whole of the kingdom. There are vital links (as, building on Harding's work, I have argued elsewhere) between this kingly authority and the subsequent development of the law in relation to landholding and security of possession, debt enforcement and the remedying of wrongs.

In chapter 4 ("The Institutions of Royal Government, c.1170-1290"), Dr Taylor establishes persuasive cases (1) for seeing as a long drawn-out process occurring across the twelfth century the rise of sheriffs as judicial officers with jurisdiction over territorial units usually called *ballia* (rather than sheriffdoms), with in particular the country north of Forth to Inverness becoming subject to it only in the 1180s or later; (2) that the king's justices of that period did not operate on the regional basis of "Lothian" (or Scotland south of Forth) and "Scotia" (Scotland north of Forth), which emerged only the reign of Alexander II; (3) that only by then did these officers become known normally as justiciars; and (4) that the justice-ayres, in which each justiciar went on circuit through the sheriffdoms of his region, holding court and dispensing criminal and civil justice in each one, were probably instituted in the same period. But (5) the ayres were held intermittently rather than twice a year, as suggested by a late and unreliable source from the end of the thirteenth century. Dr Taylor also conducts a particularly valuable analysis of the sheriffs' supervisory function over the jurisdictions, not only of secular but also of ecclesiastical lords, whose jurisdiction over those living within their lands or who held land of them (tenure) was increasingly defined by royal grants made by way of written charters.

Much of this as it relates to the justiciars is a significant revision of the conclusions drawn by the late Geoffrey Barrow in a seminal article which began life as a Stair Society Lecture and was first published as an article in the *Juridical Review* in 1971. But Barrow did notice "a more formal stage of development" in the recorded activities

of the mid-thirteenth century justiciary. Might this, along with the re-arrangements for which Dr Taylor argues, be attributable to the lengthy and overlapping justiciarships of William Comyn earl of Buchan (1205-1232, Scotia) and Walter Olifard II (1215-1242, Lothian), and also to the office of the justice clerk, which escapes Dr Taylor's otherwise eagle eye but which Barrow showed as in existence from no later than the 1230s, with a particular association with Olifard?

The subject of Dr Taylor's fifth chapter is "The Development of a Common Law, 1230-90". This extends to just over 80 closely argued pages. So far as our sources go, the phrase "common law" is first applied in the Scottish context in the 1260s. The chapter's starting point is however revision of some of the provisions in the legislation of Alexander II, based on further manuscript work from which Dr Taylor identifies two variant manuscript traditions. Of greatest interest to me, thanks to my own previous work on the subject, is the 1230 act introducing the royal brieve of novel dissasine. Dr Taylor highlights the lesser technicality of the language in one of her manuscript traditions, in particular the absence of any reference to the complainer being dissaised "of any tenement in which he was previously vested and saised". But other key elements remain clear in both traditions: the complaint to the king or justiciar that the complainer's lord or another person had dissaised him unlawfully and without a judgment; an order by brieve that a "recognition" by the men of the locality take place to determine the facts; and, if the complaint is then upheld, the complainer being resaised and the defender subject to the king's mercy for £10. But if the complaint is not upheld, then the complainer is in the king's mercy, again seemingly for £10.

Just how significant the absence of the words highlighted by Dr Taylor may be is perhaps not very clear. It was surely absolutely implicit in the language of dissasine that a person dissaised had previously had sasine of the land – that is, was infeft therein by a superior lord. And sasine seems to mean land (although in the second manuscript tradition, sasine of and dissasine from chattels seems to be envisaged; Dr Taylor passes no comment here, but perhaps it is a slight garbling of the point that the dissaised person recovered with the land the chattels that were on it). Possibly all this simply shows that the first tradition is nearer than the second to the text of the enactment of 1230.

More important is a point that I had previously overlooked in my own work on the subject, and which was first made in print by Professor David Carpenter. The value of the £10 fine imposed on an unsuccessful complainer was on a scale amounting to half of a typical knight's income; on the face of it, as Carpenter says, "a major deterrent to bringing a common law action". There is a big contrast with the English novel disseisin, where the equivalent fine was very small, and the remedy was therefore readily available and widely used across almost all sectors of free society. Carpenter and, following him, Dr Taylor are accordingly highly doubtful as to whether the Scottish remedy was deployed by persons other than those of the highest social status in the thirteenth century. In this regard, at least, the "common law" was perhaps not so very common.

Some response to these doubts is possible, however. It is perfectly conceivable that the legislators of 1230 did not want to introduce a remedy that would be used other than in pretty clear cases where a person lately in sasine no longer had it while someone else did, despite the absence of any lawful judgment to that effect. The dissaisee had to move quickly to bring his complaint to court. The remedy was for "novel", i.e. recent, dissasine. As is clear in all the act's traditions, the typical dissaisor would be the complainer's superior lord, who had the jurisdiction to dissaise especially as a disciplinary response to a tenant's failure to perform the services for which land was held. But the lord was meant to do such dissaising lawfully, by means of a judgment of his or another's court that the tenant was indeed in default. As much as anything else, then, the act of 1230 may have been an instruction to lords to dissaise their tenants only by due and open process.

Of course, lords were not the only potential dissaisors, as again the act itself says in all its variant texts, albeit without more specification of who these other dissaisors might be. In some cases, perhaps, they were the lord's officers and supporters; perhaps even his court, if it acted unlawfully in some way in passing its judgment. It may also be that the Church could be a dissaisor in its pursuit of lands that others thought should be in secular possession. But I have argued elsewhere that ecclesiastical bodies were actually another intended beneficiary of the 1230 act, gaining royal protection from the depredations of their powerful secular neighbours. Such wealthy institutions may have been less daunted by the £10 fine than knightly or lesser dissaisees. Further, the fine was a matter of the king's mercy; so was it always exacted in full, especially from complainers who were in other respects the special objects of the king's protection (the poor, widows, and orphans, not to mention the Church)? And, finally, as our one other explicit piece of evidence for novel dissasine in the thirteenth century shows, at least one complainer was so undeterred by the fine that he took the risk more than once, albeit that he then lost literally everything. This may, of course, have been an instance of the "litigation mania" wholly un-accepting of the cold reality of lack of prospects of ultimate success, so very familiar to those operating in modern courts. Whatever, we cannot conclude from the evidence of the fine alone, and against a background of a general lack of any evidence at all, that in the thirteenth century (or later) the brieve of novel dissasine was used only by persons of status more or less equivalent to that of their dissaisors, and that otherwise the act of 1230 was effectively a dead letter.

Dr Taylor next provides an elaborate argument to the effect that, like the brieve of novel dissasine in fact, two other of the brieves that brought disputes into royal courts (right and recognition) were in their own terms limited to those who held their land of the king, and that only the brieves of perambulation and mortancestry were generally available without any punitive fines attached to their unsuccessful deployment. Space prevents full summary or detailed comment, but if the thirteenth-century brieve of recognition was, as its later medieval form suggests, a process by which a tenant-in-chief could have determined by a recognition before a justiciar the boundaries between his estate and that of all his neighbours, it is difficult to see this in what we know of the facts and circumstances of the pre-1250 cases discussed by Dr Taylor (pp 311-312).

The chapter next turns to consider retourable brieves of inquest, highlighting in particular an example of 1271 the result of which, it is argued, was to bring back before the court of the earl of Lennox in 1273 a dispute between Paisley Abbey and three women as to the ownership of lands held ultimately of the earl. But to my mind the precise and technical language with which the women's eventual quitclaim opens – "by royal letters we acted to draw into litigation (*per litteras regias trahere fecimus in lite*) the abbot and convent of Paisley before the earl of Lennox and his bailies in his court" – suggests strongly that the royal letters in question had directed that the particular action against the abbey take place in the earl's court, not that the outcome of the (slightly unusual) 1271 process before the sheriff of Dumbarton under a royal brieve had somehow led in a more general yet technical way to the case before the earl's court. The royal letters in the 1271 case certainly did not mention the abbot and convent at all. This does not, of course, mean that they were not part of a long-term litigation strategy by which the women hoped ultimately to regain the lands they claimed to be their inheritance, or that the later royal letters were (as I have suggested elsewhere in an argument disputed by Dr Taylor) in the form of a brieve of right addressed to a lord's court rather than a sheriff's. But it does mean that the king could intervene in the courts of lords, even those of such high standing as an earl. That is at least not inconsistent with the supervisory role performed by sheriffs (and justiciars) mentioned above as discussed in Dr Taylor's fourth chapter.

The fifth chapter continues with an interesting analysis of the relationship between secular and ecclesiastical jurisdictions in the thirteenth century, suggesting that these were more troubled than those between royal and aristocratic courts. It has been suggested elsewhere that the expansive jurisdictional claims of the Church even before 1200 may have been a trigger for developing secular justice thereafter in a more regular and disciplined way. Royal prohibitions on ecclesiastical courts hearing cases about secular land were known by the 1220s. Dr Taylor says of one such case that the prohibition was ultimately unsuccessful; but the case was in fact settled in a document sealed by the king himself as well as the contending parties, with the witnesses looking, as Dr Taylor herself remarks, "far more like a major royal assembly" (p 341) than the ecclesiastical court before which the action had begun.

Finally in this long chapter, Dr Taylor considers the significance of the rule that no freeholder could be made to answer for his lands except by action begun by the king's brieve. As she rightly points out, it is problematic for the general argument of her chapter, "for the existence of such a rule would have had the potential to cut across the jurisdiction of others, particularly lay aristocrats, bringing their business into royal courts" (p 345). But she argues that the evidence for the brieve rule before its statutory statement in 1318 is "rather scarce and ambiguous" (p 346). As with nearly everything else about the thirteenth-century common law of Scotland, the evidence for the brieve rule is certainly scarce. We have before 1318 (1) a statement in a manuscript (to be dated around 1270) of the *Leges Quatuor Burgorum*, that "if anyone is challenged for his lands or tenement in a burgh, he need not answer his adversary without the lord king's letters unless he freely wishes it"; (2) a case in Aberdeen burgh court in 1317 in which the rule was successfully invoked

by a defender, showing that it was indeed law in the burghs; and (3) a remarkable comment in a letter sent in 1296 by Alexander MacDonald of Islay to King Edward I of England that "many people say that according to the laws of England and Scotland no-one ought to lose his heritage unless he has been impleaded by brieve and named in the brieve by his own name". Since such a rule had undoubtedly been part of English law for over a century, any doubt there may have been in MacDonald's mind must have concerned the position in Scotland. And, Dr Taylor points out, the brieve rule in the burghs did not compel the use of brieves in all relevant cases; it was therefore an optional rule. The 1318 enactment put the rule in much more mandatory form.

There seem to me to be at least two points on which this challenge may be met. First, the brieve rule, however it is framed, is an aspect of the king's protection of security of possession by requiring due process before any dispossession. The brieves towards which the rule pointed provided for a judicial process involving an assize or jury of the parties' neighbours. But the king did not generally force his protection upon those who were content to litigate without it or, perhaps, take other routes towards security (for example, before the Church courts, or through arbitration). Even after 1318 we know of plenty of cases about right and possession in land which proceeded without brieve, presumably because the parties were comfortable or confident in doing so, or because the brieve rule, however mandatory and general its 1318 expression looks, was known not to apply for some reason. So, for instance, the disciplinary jurisdiction of lords over tenants failing to render the services due for their land was unaffected, so long as it was exercised through due judicial process.

As far as the MacDonald letter is concerned, we need to remember that, so far as we can tell, the development of royal brieves in the thirteenth century had been at least somewhat haphazard and not at all systematic; but, as Dr Taylor's work shows with a wealth of detail, by 1296 there were indeed a number of them about and they were being used. The late Toby Milsom's insight, that the writ rule in England began, not as a legal rule, but as a statement of fact, may also be useful for thirteenth-century Scotland, explaining exactly why the rule in the *Leges Quatuor Burgorum* is framed as it is as well as the way in which MacDonald expressed himself.

This long review of a very important book has naturally concentrated on points of disagreement, or doubt on which I am not quite persuaded. While I fully agree that the pre-1300 Scottish "state" is to be seen as a partnership between the king and his aristocrats, and that its common law was very different from its English counterpart, I think that Dr Taylor may nonetheless somewhat underplay the power and supervisory reach of the king of Scots vis-à-vis the jurisdictions of his nobility. A key component in this may have been the support, encouragement and example provided by the Church, which was surely a third partner in the governance of the kingdom even outside the ecclesiastical sphere. At the same time, I think Dr Taylor's overall thesis consistent (and rightly so) with a Scottish paraphrase of Milsom's celebrated dictum about King Henry II and the early development of the English common law: the kings of Scots and their advisers did not mean to cut across the grain or mean to depart from the framework of their world. While it is not to be

denied that other motivations of self-interest and self-aggrandisement were always in play, king, nobility and Church generally worked together to preserve the kingdom in peace and what they saw as justice.

It is therefore only to do right and avoid default of justice to end by stressing how significant and valuable Dr Taylor's book is in putting a host of issues about this process into play, and in providing extraordinarily wide coverage alongside detailed and innovative analysis of the sources. She is to be congratulated and thanked, not only for a remarkable contribution to our knowledge and understanding of medieval Scotland and its systems of governance and law, but also for the stimulation which her work will undoubtedly provide for further investigation and reflection on the sources she has done so much to make accessible to the rest of us.

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