THE PUBLIC RECORDS OF SCOTLAND

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PREFACE

These chapters are the substance of the Rhind Lectures delivered by me in 1911. I regret that my health has not permitted such a thorough revisal as I could have wished; but I am deeply indebted to Professor Hannay and other friends for a considerable number of valuable notes, which console me for the loss and deliver me from the snare of finality even at the cost of self-esteem.

Last but not least, I have to thank Mr. Henry M. Paton for his learned and laborious toil expended upon the Index.

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CHAPTER I

THE ADVENTURES OF THE PUBLIC RECORDS OF SCOTLAND

The word Record, in the sense in which I am to use it, implies a recording authority; it may be the supreme authority, it may be only the bailie of a burgh or the steward of a manor. The proper subject matter of record is the proceedings of the recording authority. But every authority naturally places among its archives its title deeds as well as its acts; therefore we may, without any overstraining, call by the same name the archives of a religious house or a college, and even the evidents of a landowner or a houseowner. These are records because they are title deeds; they may derive their validity from an external source, but their quality as record comes from their place of deposit. To us a record may be interesting mainly from scribblings on a fly leaf, or caricature sketches on the margin; but such accidental adjuncts are not record; nor are diaries or chronological notes record. So, to take a concrete instance, the charters of Melrose Abbey are record, the chronicle of Melrose is not record; the register of the great seal is public record; an original great seal charter, in possession of the owner of the land to which it refers, is private record. In this sense then history is not record;

and record is not history, but part of the raw material for history. These chapters on the records of Scotland are chiefly though not exclusively concerned with public records, that is, records framed by public authority though they may relate to private affairs; and among public records mainly with those under the charge of the Lord Clerk Register and his deputes, because, among other reasons, that is the class with which I have had the best opportunities to become acquainted.

Thomas Thomson, the first and the greatest of modern Scottish record scholars, in his fourth annual report as depute clerk register, 1810, states that not a fragment of record relating to public affairs remained then in the Register House of date prior to 1306, the date of accession of Robert Bruce to the throne. Later on, the interest which Thomas Thomson's work excited brought about the recovery of much that was supposed to be lost; at present the Register House boasts the possession of three pieces of public record of date before 1306. A very small salvage from so great a wreck! For that things were very different once, is certain. Most of our information on this head comes from the *Instruments and acts concerning the muniments of Scotland*, which fill twelve pages of the first of the twelve volumes of the Acts of the Parliaments of Scotland. These writs are nine in number, the earliest dated 1282, the latest 1304. A tenth, dated 1296, has since turned up, and was epitomized by Mr. Bain in his well-known calendar. Some of these are inventories, and tell us a little about the nature of the contents of the Scottish Register House at the end of the Time of Peace. The others are orders, and help us to guess something of what became of them.

They belong to five different dates. The first to 1282; it is an inventory of the muniments in the king's treasury at Edinburgh (meaning, as the other evidence proves, Edinburgh Castle), taken by three clerks of King Alexander III. at the king's command. It gives a detailed list of documents affecting the rights of the crown, which are classed under five heads. Papal bulls, matters touching England, matters touching Flanders, matters touching Norway, and lastly, charters formerly granted to subjects and now given up. Notice that, though relations with France are not entirely unrepresented, there is no class of matters touching France. The ancient alliance had not yet been discovered. The list concludes with an intimation that many other writs had been seen by the makers of the inventory, and had been sealed up in boxes, coffers and bags. We may conjecture that these boxes, coffers and bags contained the rolls which appear in the other inventories; whether they contained any other national muniments we cannot say. Each of the specially named writs has a descriptive title except one, of which William of Dumfries, whom we know from other sources to have been clerk of the rolls, made a mystery—he would not let his two colleagues see it till he had acquainted the king with the tenor thereof. The earliest writs mentioned are a Bull of Pope Lucius III. (who died in 1185), confirming the liberties of the Scottish church, and Richard I.'s letters of 1189, restoring the independence of Scotland. The inference is that the records went back to the reign of William the Lion, if not to the very beginning of that reign. The whole number of documents enumerated is something over 170. Of these, several are still known to us by copies; the number which I have been able to

identify with extant originals is just seven—all preserved in the Public Record Office, London. How this happens will be explained further on.

The second date to which our information refers is 1291; Edward I. had been duly recognized as lord paramount of Scotland, had undertaken to adjudicate between the rival claimants for the office of vassal king, and wished to obtain light on the subject from the Scottish records. So he sent his officers to examine the records, at Edinburgh or wherever they might be found, to take possession of all writs relating to the right of the claimants or in any way affecting the king or kingdom of England, and to convey them to Berwick-on-Tweed. There they were placed in a chest, the key of which was entrusted to the constable of Berwick Castle. The inventory taken on that occasion includes not only state papers (or rather state parchments) but also rolls of the most varied character, and a selection of the clothes, relics and other valuables which were kept in the royal wardrobe. How these latter could bear upon the question at issue or affect the interests of England does not seem clear. Mr. Livingstone, whose preface to his invaluable Guide to the Public Records of Scotland I am following closely, considered that the contents of the chest thus deposited in Berwick Castle were not included among the muniments afterwards delivered to John Baliol, but remained at Berwick till 1296. I must add that where Alexander III.'s clerks found order, Edward I.'s clerks nine years later found, or made, chaos.

The third date is 1292. The lord paramount's decision had been given. John Baliol had been preferred to the coveted post of king of Scotland (so he called himself, in imitation of his lord paramount—his predecessors

and successors were kings of Scots). The records of his kingdom had been taken out of Edinburgh Castle and sent to Roxburgh, where some of them were needed for an audit of Scottish public accounts then being held by a body of English magnates. At Roxburgh, therefore, they were formally handed over to King John. And those guardians who had administered the affairs of the kingdom during the interregnum were at the same time ordered to hand over to the new ruler the records of law courts held during their tenure of power. This description would cover rolls of parliaments held by the guardians, if any such there were. The indenture specifying the records handed over at Roxburgh is now in the Register House, the only one there of the series—all the others are in the Public Record Office. It is one of the three documents already mentioned as having found their way to the Register House since 1810. There were two coffers, one containing, it is said, the accounts of the whole kingdom of Scotland, the other containing as well accounts as other matters. From these three inventories, of 1282, 1291 and 1292, vague as their terms often are, we can learn something of the records to which they relate. In the first place, they were in 1282, and for how long before that we cannot tell, kept in the castle of Edinburgh, where also their successors were in their turn deposited till the seventeenth century. Next, the treasury where they lay was like the English treasury a hundred years earlier, at the time of the composition of the dialogue concerning the exchequer, like the strong room of many country houses at this day, a receptacle for everything that was to be kept permanently under lock and key. There was the cash box (it is not mentioned but there must have been one, at least in 1282);

there was the royal wardrobe, including the crown jewels, relics and other valuables; the household accounts; the state archives; the chancery enrolments; the account rolls of the sheriffs and other officials; the judicial records; collections of customary and of statute law; and even a chronicle or two.

The fourth date is 1296. King Edward had dispensed with King John and taken the fief into his own hands. Once more the records were carried to Berwick. Thence the bulk of them were sent off to London, along with such valuables as had not already been lifted, and (according to Mr. Livingstone) along with the articles selected in 1291 and till then retained under the care of the constable of Berwick Castle. All these were deposited in the royal wardrobe at Westminster. Such rolls as were judged necessary for the conduct of King Edward's government at Edinburgh were returned there; these last were exchequer accounts, some of them going back as far as 1218.

Lastly, in 1304, when Scotland was at length completely and (as it seemed) finally subdued, Stirling Castle alone still persisting in its historic but hopeless defence, the king orders the keeper of his wardrobe to send some more account rolls back to Edinburgh, being doubtless, like those sent there in 1296, found by the officials indispensable for reference.

What was sent to London in 1296 was still there in 1323, as appears by Bishop Stapleton's calendars, which embody a list of some of them, and a notice of the remainder as contained in "two forcers of leather bound with iron, four hanapers covered with black leather, nine wooden forcers, eighteen hanapers of twigs and thirty-two boxes" (I adopt Mr. Livingstone's translation).

"Of the intentional destruction of any of the public records of Scotland there is no evidence," says Thomas Thomson—all that was among the English records in 1323 would be there still if there had been no neglect. It is true that in 1328 one of the conditions of the treaty of Northampton was that all muniments touching the subjection of the people and country of Scotland to the King of England, together with all other instruments and privileges touching the freedom of Scotland which might be discovered, should be given up and restored to the King of Scots so soon as they could be found. This description clearly covers only a small part of what had been carried away. I fear that King Robert's advisers were not Record scholars, and were indifferent to antiquarian or sentimental considerations. But the description would cover a great deal that is not usually considered as Scottish record—if the treaty had been observed, we ought to have received, for instance, the Treaty of Falaise, and the Ragman-Roll. But the conditions which had made it possible for Scotland to exact such terms changed vastly during the few years following; and so the treaty was practically superseded. That is perhaps fortunate from our point of view; for if the valuable records to which I have referred, if especially the homage rolls, where so many ancient families find their first known ancestor, had come into King Robert's hands, he might have been vandal enough to destroy them as memorials of a humiliating episode.

But what of the Records which were retained in Scotland for the needs of the administration? There is no mention anywhere of their having been carried to England, nor any record of any of them appearing at a later date in English custody. Edinburgh Castle was recovered

by the Scots in March 1312-13. It is at least possible that these Records were recovered along with it. And if we can rely upon a document of 1306, quoted by Mr. Livingstone, not only exchequer records but also certain charters and letters patent of the late kings of Scotland were in the hands of King Edward's chamberlain of Scotland in 1306. It is certain that no record of either Chancery or Exchequer prior to 1306 now exists in the Register House; but we must allow for Cromwell, for the disaster of 1660 to which I shall refer immediately, for fires, and for prolonged neglect.

I conclude this section with summary lists of Scottish Records, prior to 1296, now extant in the Public Record Office, London; of those now in the Register House; and of those which can be proved to have been there subsequent to 1306, though they have long since disappeared.

Scottish Records now in the Public Record Office.

1. Charter of Richard I., restoring the liberties of Scotland, 1189.
2. Charter of same, fixing the allowances to be made to Scottish kings visiting the Court of England, 1194.
3. Bull of Honorius III., recognizing the independence of the Scottish Church, 1218.
4. Bull of Innocent IV., forbidding Scottish causes to be tried outside Scotland, 1245.
5. Bull of same, as to money paid for redemption of Crusaders' vows, 1251.
6. Contract of Marriage between Eric, King of Norway, and the Princess Margaret, 1281.

7. Edward I.'s Charter, restoring the Manor of Aldenestone (Alston in Cumberland) to Nicholas de Veteriponte, 1282.

These seven are clearly recognizable in the Inventory of 1282; the first and the third are certainly documents touching the freedom of Scotland. To these should be added:

8. The above described Inventory of 1282 itself, which besides being an obviously Scottish record is actually specified in the Inventory of 1291.
9. Acknowledgment by the magnates of Scotland of the Maid of Norway as heir of the kingdom, 1284.

There are also a few documents dealing with private rights in the reigns of Alexander II. and III., most of which are printed in *Acts of Parliament of Scotland*, vol. i.; and many relating to the administration of public affairs by the Guardians of the Realm during the interregnum, which are printed in Stevenson's *Historical Documents*. It is superfluous to add that the Public Record Office possesses many other documents of purely Scottish interest; such as the Bruce Charters of Annandale. But these are here omitted as not having at any time been in public custody in Scotland.

As has been seen, there was no public record anterior to 1306 in the Register House in 1810. At present there are three such: two Parliament Rolls of John Baliol, 1293, and the Indenture of 1292 above described. There is some reason to think that all three were once in English custody, and were there allowed to go amissing. It is seldom that negligence leads to so fortunate a result as the restoration (through the generosity of some

forgotten benefactor) of a Record to its rightful owners. And who can say how many more Scottish records, strayed from public custody in England, may lie concealed in the cabinets of collectors or elsewhere?

Lastly, to prove that our public repositories contained at a period subsequent to 1306 records prior to the War of Independence which are now lost; the Register of the Bishopric of Aberdeen has preserved Letters Patent of King Robert II. granted to the Bishop of Aberdeen, dated 1382, which cite a number of records bearing on the Bishop's much disputed claim to second tithes. These cited records include sheriff rolls for 1264 and 1266, and a rental of Alexander III., King of Scotland. These, therefore, must have been still in Exchequer in 1382. Next, these same sheriff rolls of 1264 and 1266, and others of 1288, 1289 and 1290, are included in an Inventory of Exchequer Records made by Sir John Skene in 1595; and extracts from all of them were made a few years later by the first Earl of Haddington, which are printed in Vol. i. of the *Exchequer Rolls*. Finally, an Index to the Great Seal Record compiled in the minority of James VI., now issued as part of a record publication, and to be more fully described later on, includes one small fragment of a roll of one of the Alexanders, Alexander II., I think, which contained only five charters. Of one of these five the text is preserved in a certified extract made between 1554 and 1579, extant in the Gartmore Charter Chest.

During the War of Independence few records can have been kept. The Great Seal Register and the Exchequer Rolls reappear after Robert Bruce was peaceably in possession of his kingdom, and both those records were fairly continuous down to the time of the Commonwealth, though the series of both is grievously imperfect now.

It is probable that the Household Accounts were also kept regularly, but few are preserved prior to the sixteenth century; and as to judicial records, we cannot prove that any court, royal or seignorial, kept records except the High Court of Parliament, in those days to be regarded rather as the Supreme Court of Justice with legislative functions than as a legislature with judicial functions.

As to the records from Robert Bruce onwards, we can supplement our information as to the two principal classes of these, the Chancery and Exchequer Records, by old lists and inventories, as to which I will go into more detail when I come to deal with the departments to which they refer.

With regard to the State documents, and to the early records of Parliament, we have no such means of judging; but it is certain that they too, owing to their form, were specially liable to suffer from depredation and from seventeenth and eighteenth century neglect. At what date the machinery of the Chancery of Robert Bruce was brought into working order I have failed to ascertain; the one existing Great Seal Roll of Robert Bruce is apparently of the year 1321, and most, if not all, of the lost rolls appear to have been later, probably none earlier.

The first recorded Exchequer Audit was in 1326, and even in Sir John Skene's time the regular series of accounts only began in 1327. With regard to the Chancery and Exchequer Records then, it may be said that they were kept with sufficient regularity all through the time of the Bruces and the Stuarts up to the civil wars; except during periods when the whole administration was disorganized by the national misfortunes—one

such period is described in a Chamberlain Roll as 'the time of the King of England' (that is, Edward III.), during which he uplifted the whole national revenues for his own behoof and that of Edward de Baliol (and indeed during a great part of the reign of David II. the revenue from the southern counties did not come in, or only came in occasionally, to the Scottish Exchequer), and such periods sometimes resulted in the partial loss of the records of the period immediately preceding—thus, while the Chancery Records of David II. appear to have been in Charles I.'s days fairly complete from his return to Scotland in 1341 to his capture at Neville's Cross in 1346, the Exchequer Records not only for 1346 and for almost the whole period of the king's captivity, but also for 1344 and 1345, were amissing even in Skene's day.

After the return of James I. from England there were great changes in the system of keeping the records; and tradition in Sir Thomas Craig's time ascribed to that king the importation from England of the " order of the Chancery," as to which actual evidence is wanting. But these matters are to be dealt with afterwards.

Similarly, the civil wars of the time of James II. cause a serious blank in the Great Seal Records (not in the Exchequer Records) of his reign, and that the Great Seal Register of that period was partly burnt we learn incidentally from a charter of James IV. When we come to the minority of James V. we are on surer ground; the Exchequer Audits can be counted, and any irregularities explained by the state of the country—the Great Seal Records have some blanks, some of which may be attributed to the loss of portions of the Register at an early date. An interesting event in the history of the Register is the building of a new Register House in

Edinburgh Castle;[1] the Treasurers' Accounts for 1540, 1541 and 1542 contain various payments for the mason work, roofing, woodwork, glazing and plastering of the new building. Edinburgh was burnt by an English army under the Earl of Hertford in 1544; on that occasion some Chancery Records perished, but so far as appears no part of the Great Seal Register. A few quires of the Register of the Acts of the Court of Session are recorded to have perished on the same occasion. The religious revolution and the civil wars of the early years of James VI. interfered with the records so far as they interfered with the administration. But I do not know any evidence of any destruction of records at that time.

At this time we can place the first signs of awakening interest in the old records. In the Register House there is preserved a MS. volume (formerly in the possession of George Chalmers, and afterwards of Thomas Thomson), which contains a list of the contents of all the Charter Rolls then extant, and of the first thirty-one volumes of the Great Seal Register. The writer was evidently ignorant of Latin, and was doubtless working to order. He seems to have begun in Queen Mary's reign; one volume, the thirtieth of the series, is noted to have been given into the register (presumably from Chancery) on 24th November, 1561. In volume thirty-one, the last with which he deals, the last date is 1566—the volume concludes with an Inventory of the contents of six coffers, containing chiefly Exchequer Records; the last date in this section is 1579. I shall return to this volume in the chapter on the Great Seal Register—

[1] See *The Black Friars of Edinburgh.* By W. Moir Bryce. (*The Book of the Old Edinburgh Club.* Third volume, 1910, page 45.)

meanwhile, as I have said, it is the first indication that the officials were beginning to interest themselves in the older records under their charge.

Sir James Macgill was Clerk Register at the time this Index was executed, and probably it was executed under his orders. About this time the first printed edition of the Acts of Parliament appeared—it did not go back beyond the reign of James I. and it has no very high reputation; but at least it led the way. Sir John Skene, our earliest legal antiquary, was made Lord Clerk Register in 1594, and has left a volume (for the use of which I am indebted to the late Lord Binning) containing an Inventory of the Exchequer Records compiled in 1595, with copies of a few ancient charters from the records and other sources. A little later the records attracted the attention of the Earl of Haddington, to whose zeal for legal antiquities, which neither official duties nor the cares of State could smother, we are indebted for most of what little we know in detail of the since lost Great Seal and Exchequer Records. In the time and perhaps under the auspices of his brother, Sir John Hamilton of Magdalens, Lord Clerk Register from 1622 to 1632, another Index of the early Great Seal Rolls was made. This was published in 1798 at the desire of Lord Frederick Campbell, then Lord Clerk Register, edited by one of his deputies, William Robertson, hence known as Robertson's Index. Like its predecessor, it seems the work of an ill-educated clerk working under orders; sometimes Lord Haddington's notes show that the indexer had quite misunderstood his text; but the work as we now have it has mistakes of a class which can only be due to a copyist, so perhaps the atrocities of the Latin are not due to the first compiler.

All this time the Records were in Edinburgh Castle, safe from all dangers except neglect. With the capture of that fortress by Cromwell's army in 1650 begins the second great crisis in their history. First they were carried to Stirling Castle; when that too fell into the hands of the invader the records were carried off to London and lodged like State prisoners in the Tower. According to a note by James Anderson, editor of the *Diplomata Scotiae*, quoted in Thomas Thomson's fourth report, the seizure of the records by the English "made some take what they would of them, thinking it no trespass or wrong in such a case." The Privy Seal Register was carried off by its keeper to the Highlands and successfully kept out of English hands; but owing to the want of public money available to reward such services this record was not restored to public custody till 1707. The parallel and more romantic story of the escape of the Regalia is too well known to need more than casual mention here. In 1657 the volumes, nearly sixteen hundred in number, concerning private rights only, were sent back to Edinburgh, and these, except for rebindings, are practically now as they were then. But the State papers, Records of Parliament and the Privy Council, and a vast mass of record warrants and other papers and parchments, remained in London till 1660. The story of their shipping back to Scotland, and of the loss of eighty-five hogsheads of them at sea, is only too well known. The hogsheads seem to have contained papers and parchments only—no records in book form perished in that way so far as appears—certainly the Records of Parliament and of the Privy Council escaped, also the Treasurers' Accounts; and these were not in the surviving hogsheads which lay unopened for so long.

In 1662 Parliament ordered the removal of the Registers of the Court of Session and others concerning private interests to be moved into " two laigh rooms under the Inner Session hous, and that only the Registers of Parliament, Great Seal and such public warrants as may concern H.M. in the interest of his crown or the public government of the kingdom " should remain in Edinburgh Castle.

In 1676, on the occasion of Sir Archibald Primrose's transference from the post of Lord Clerk Register to the Presidency of the Court of Session, an Inventory of the Records was made by order of the court. That Inventory, which deals with records in book form only, shows the Parliament and Great Seal Registers in the Castle, all others in the Laigh Parliament House. The Act of Sederunt ordered that the Records of the Exchequer and of Chancery should be inventoried as well as the others, but this was not done. In 1689 the Records were still as in 1676, but soon after those remaining in the castle must have been moved down beside the others—they appear so in the next inventory, which was made at some time between 1701 and 1707. From 1707 to 1784 the history of the Records is history of unavailing struggle by the few against the utter indifference of the many. In 1722 the city of Edinburgh was allowed by Act of Parliament to levy a duty of 2d. Scots on every pint of beer and ale sold there ; the money to be applied, among other purposes, for " building a Hall or convenient place for keeping the Records under the charge of the Lord Register of Scotland, convenient offices for lodging the Records, Writs, Securities and Instruments which are under the care of the several clerks of Session, the Clerks of Justiciary and Commission for valuation of Teinds,

the Clerks of the said City, the Sheriff and Crown Clerks of Edinburgh, the Keepers of the Signet, Chancery, Privy Seal, Great Seal, General Register of Sasines, General Register of Hornings and Inhibitions."

But no money was available for any such building; the other purposes were more urgent, it appears. It took a great deal of petitioning to get the magistrates to put up a new press for records and warrants which, in default of press accommodation, had to lie on the floor to their great prejudice, or even to rectify matters when a conduit pipe for the roof was broken. For binding the records there was evidently no money—the need was urgent, complaints chronic, but nothing seems to have been done till Thomas Thomson came. Still, the officials did what they could. In 1752 the Court, being informed that there are several warrants of the Privy Council of Scotland lying in ane open and deserted garret in the writers' court, exposed to be taken away by all that are passing that way, and likeways to the rains, grants a warrant to the Lord Register to transmit all such warrants and records as are to be found in said garret to the laigh house, and recommended they should be put in order and report made to the Lords on the subject—the latter was evidently regarded as a counsel of perfection; the documents were rescued, but not put in order. Every now and then a few stray records were recovered from private hands, sometimes impounded in the hands of a bookseller or auctioneer—that could be done without using public funds.

In 1723 the keepers of the Records made a representation stating their hours of attendance (9 to 12.30 and 2 to 5), the absence of a salary and the smallness of the income from fees (which they say was £200 sterling

before the Union, but after it barely £20). In 1721 the keeper tells the Lords he had made an Exact Index of all the Rolls and Books to 1670, which had occupied him five years—whether he was encouraged to proceed does not appear. He had also looked into one of the few hogsheads which had escaped the shipwreck of 1660, and had found a good number of very ancient and valuable writs, some whereof concern the Institution of the College of Justice, many Popes' Bulls and other writings of great curiosity; and that ten hogsheads had not yet been looked into. But it was not till 1753 that anything more was done in that matter—five hogsheads were then opened under a remit from the Court, the documents which to the Committee seemed important were taken out and roughly classified, and the rest put back into the hogsheads. The Court recommended the Committee to go on with the remaining five, but this project seems to have dropped. No wonder that all who know the facts agree in thinking that of causes of loss of records not the least powerful and fatal has been neglect.

All this time there was a crying need not merely for a proper repository for the always increasing body of records under the care of the Lord Clerk Register, but also for many classes of more or less valuable records which were very insecurely kept in scattered offices or in officials' private houses. But nothing could be done for want of money.

At last the Government were induced to grant £12,000 of the money realized out of forfeited estates for the purpose of building a Register House. We may say, therefore, that one of the results of the last of Scotland's attempts to assert her separate self had for one indirect result the erection of this secure hospital for the battered

veteran relics of the old regime. The sederunt books of the Board of Trustees appointed for this purpose are preserved in the Register House, and make interesting reading. The first site proposed was in Heriot's Hospital Gardens; this the writers disapproved as too remote. In 1769, out of five sites proposed, one was chosen, lying partly on ground which the city agreed to give gratis, for the reason that it would stimulate the feuing of the New Town. The foundation stone was laid by Lord Frederick Campbell, Lord Clerk Register, in 1774 —every care was taken that the building should be of the most solid and least inflammable character; the records were removed there from the Laigh Parliament House. And the rooms not required for them were allocated to various offices between 1788 and 1790. In 1806 Thomas Thomson was appointed Depute Clerk Register, and at once a new spirit was abroad here, as it had already been in England for some time. All sorts of necessary reforms were taken in hand, money was forthcoming to bind dilapidated volumes, stringent regulations were laid down for the guidance of framers of current records, anomalies of custody were partially corrected with the aid of the Court of Session (whose control Thomas Thomson and his successors have always regarded as their safety). Inventories were arranged for, and Indexes of the Records which might be accessible for daily use by business men (the working lawyer owes his daily tools to Thomas Thomson's reforms); last, but not least, the series of record publication was inaugurated: reforms from which we know or can easily learn much of the inside of the records and of the details of the national history.

To facilitate consultation of the records by those who need more than they can get in print, the Historical and

Antiquarian Department was added to the Record Office staff in 1864; its special duties are to facilitate the researches of students, and to superintend record publications.

The first Curator was Joseph Robertson, a name venerated by all Record students, and more deeply venerated by those who are best able to judge. His successor, after a short interval, Dr. Thomas Dickson, is too well remembered to need any words of commendation from me; but, as in private duty bound, I must not omit the name of him from whom I imbibed what little I could assimilate of his vast stores of learning; the man without consulting whom no one for many years dared to publish a book on certain subjects. The Historical Department is in a way an anomaly, for it keeps for historical purposes the same records which the General Record Department keeps for other purposes. But on the whole there can be no doubt that its activity (supported by the labours of the able editors of the Record publications) has fully justified its existence. In 1891, my friend, the late Mr. Matthew Livingstone, was appointed Deputy Keeper of Records; it is to what was done under his supervision, and largely by his personal efforts, that we owe the fact that, though many of the older Records are still unindexed, none are unknown and hardly any unarranged. He crowned his services by the publication of that Guide to the Records, from which I have conveyed so much for this chapter, and mean to take more hereafter.

To obtain room for the increasing number of records, and for the reception of classes of record newly created, additional accommodation from time to time becomes necessary. In 1861 the new Register House was

opened, in 1903 a third Register House was provided for the Sasine Office.

It remains to say something of the system under which the records have been framed and kept, and specially of the Lord Clerk Register. From David I. onwards we encounter, in the testing clauses of charters, officials styled the king's clerks. Frequently, like the earls and bishops, they are mentioned without any indication of any special department to which they were assigned; but that their functions were specialized at an early date, if not from the first, appears from such designations as Robert of the Chapel (that is, the Chancery), Hugh of the Seal, Simon of the Liverance, Richard of the Prebend (Prebend, the household daily allowances), and at least once before 1170, Richard, clerk of Chancery. I do not remember any early example of the designation of clerk of the Rolls; at the view of the Treasury in 1282 there were three king's clerks, but one of them, William of Dumfries, was evidently the expert by whom the others were guided; and in 1288 and onwards he appears clerk of the Rolls—the first on record so styled (it is believed). Possibly in the lifetime of this William, more likely after his death (for he died before July 1292), an account was compiled of the Scottish king's household and of the machinery of administration so far as the king's court took account of it, which is preserved in a copy in a MS. at Corpus Christi College, Cambridge. It was printed in the Miscellany of the Scottish History Society in 1904, edited and explained by the late Miss Bateson with her usual wealth of learning and thoroughness and lucidity of treatment. Whether the statement (*roll* it calls itself) was drawn up for the guidance of Edward I. in 1305 as Miss Bateson believed, or for that of

Alexander II. or John Baliol as she thought possible (for myself I venture to think the beginning of John Baliol's reign, that is 1293, the time that best fits the data), is immaterial for my present purpose. In any case, it represents the constitution of the household as it stood at the end of the time of peace; that the author slipped in a few reforms of his own may be taken for granted; the advice that the chancellor, chamberlain and justiciaries should be chosen by the advice of the magnates of the realm is doubtless a suggestion of that kind. But for the machinery, we have no reason to doubt that the system described was the one with which the author had been familiar; until the contrary can be proved we may assume that the functions assigned in the manuscript to the king's various ministers were those which they actually exercised at the court of Alexander III. What we are told about the Chancellor, the Chamberlain and the Auditors of Exchequer quite harmonizes with what we know from other sources. According to this authority the duty of the Clerk of the Rolls is to control all the charters and muniments issuing from the Chancery, and all the accounts of the Exchequer, by his rolls which shall be called the royal rolls in chief, so that the king may know the fees and the farms due to him from his realm in their entirety. It follows that the Clerk of the Rolls was the custodian of the Rolls of the Chancellor and the Chamberlain. The household expenses, though the Chamberlain had an organizing and supervising power, were controlled by another official, called in this MS. the Clerk of the Prebend, the same apparently who later was called Clerk of Audit, *clericus probationis*, of the king's house. Thus already before the end of the thirteenth century the rule had become at least partially established

which Thomas Thomson lays down as the first principle of record-keeping—that the framing and the custody should be in separate hands.

When political conditions once more admitted of a settled administration the Clerk of the Rolls appears regularly as one of the Auditors of Exchequer—as a rule (unless he is a bishop or any other great dignitary) he is named last till James II.'s reign, when he begins to creep up the list. On the accession of Robert II. he becomes Clerk of the Rolls and Register—as to the meaning of this double title I have heard theories; my own theory, subject to correction, is that if the *Rolls* and the *Register* are to be considered as separate Records, we should understand by the Rolls the record of Parliament, by the Register the record of the Great Seal (often so called while it was kept in Roll form); the revenue records formed the little register, referred to in 1367 for information as to the munitions of the king's castles. In James III.'s reign the title becomes Clerk of the Rolls, Register and Council; he was also Clerk of Parliament, from what period I do not know; and when the Lords of Council began to appoint a Session, and Parliament to appoint a Committee of Lords Auditors of Causes and Complaints to perform their respective judicial functions, the Clerk Register was a regular member of both. When the Session was replaced by the Court of Session the Clerks of that Court were the Clerk Register's deputes.

The changes introduced in the sixteenth and following centuries added greatly to the Clerk Register's importance. First, he was given control over the Notaries Public, whose protocol books, the forerunners of the land registers, as will be explained further on, were issued from his office: then there was a similar provision

as to the Registers of Hornings and Inhibitions; then, and most important of all, the establishment of the General and Particular Registers of Sasines under his supervision.

And his authority, since 1806 usually and since 1879 statutorily, exercised by the depute Clerk Register, has of itself introduced great and beneficent changes; while it has fallen to him, and will continue to fall to him, to see to the adaptation of the departmental machinery to still more drastic changes ordered by the legislature. Not that he is Keeper of all the Records of Scotland; he is not even Keeper of all those in the Register House. But the effect of the revival of care for Records and study of Records which has taken place under the Lord Clerk Register's auspices has been felt and is felt far beyond the range of his authority. To the example of his subordinates, the keepers and editors of records, and, of course, the contemporary movement in the same direction in England, I attribute the steps taken by the owners of historic collections to put them and keep them in order, and to make this material available to students by publications issued under their own auspices or reports by the Historical MSS. Commissioners. And where the new spirit has penetrated with the most difficulty, still it has penetrated; local records are now probably better kept than ever before. Only in each locality we need what only a few favoured centres possess, a band of students properly equipped for record study. For the source whence we may hope for the supply of that need, we look to the classrooms of Professor Hume Brown, Professor R. K. Hannay, and their successors.

CHAPTER II

STATE PAPERS. EARLY LEGAL RECORDS

The vicissitudes to which the Records of Scotland have been exposed, which I have tried to give some account of in the first chapter, bore harder on loose documents than on Records in book form. In the most important of all our Records, namely, original documents relating to the public affairs and to relations with other countries, we are consequently relatively poorer than in Records concerning private rights. For Treaties and Letters of Sovereigns are not usually recorded in book form. The Inventory is given in brief in Mr. Livingstone's volume, and is itself accessible to anyone who cares to look over it in the Register House. Like the Inventory of 1282 it has classes of Papal Bulls, of matters touching England, matters touching Flanders, with which Burgundy and the Empire are included, and matters touching Norway, with which Denmark is included. But the internal State papers are the most important of all; and there is now, of course, the class which was so strangely absent in 1282, namely, matters touching France.

The principal State papers are shown in glass cases. They are the 1292 Inventory of the Records already spoken of; the Letter of the Barons to the Pope in 1320, with its high patriotic sentiments and its fine array of

seals; the Declaration of 1371, that John, Earl of Carrick, afterwards Robert III., was heir to the Crown;[1] the Act of Settlement of the Succession in 1373, and the Treaty of the Union in 1707. Besides these, there are declarations of the Nobility and Prelates in favour of Robert Bruce, some letters of Queen Mary, two of Oliver Cromwell, and many others not necessary to specify. Only a fragment saved from the wreck; when we think of what is lost we are almost ashamed of it: when we take it for what it is worth we can still be grateful. The Papal Bulls are nearly all in favour of churchmen and abbeys: among the few that are of national interest is that by which James V. is taken under the protection of Pope Leo X., and the Bull providing Lord James Stewart, the future Regent Murray, to the Priory of St. Andrews when in his seventh year. The English collection begins with the unfulfilled Treaty of Northampton, 1328. The Treaties end with that between Queen Elizabeth's representatives and the Lords of the Congregation in 1560.

There are many papers as to Border disputes, but the English Border papers exist in London to show us what a small fraction of ours survive. There are documents relating to the ransom of our Scottish kings taken by the English: David II. taken in battle in 1346, and James I. taken at sea in 1406, before international law came into existence, let us hope. There is a paper as to the release of the Solway prisoners in 1543; there are a few safe-conducts to Scotsmen; a paper as to the abortive project of marriage between James IV. and a daughter of Edward IV. in 1474, but not his marriage contract with the

[1] This document is well known as an object lesson in restoration; it was sent to a London expert faint but legible, it came back a piece of blank parchment.

daughter of Henry VII., though the treaty of perpetual amity which resulted from the same negotiations is here. Then there is the division of the debateable lands in 1552, and more as to other debateable lands in 1603. On all, or nearly all, of these matters we can only supply fragmentary information to duplicate or supplement the rich stores of English Record.

The Treaties with France begin in 1326 and end with the marriage of King Francis and Queen Mary. We have also the arrangements for the unhappy marriage of Princess Margaret to Louis XI. of France, and the grant made during James V.'s visit to France, extending to Scottish kings the French kings' right to release the prisoners in every town he entered; and several grants of commercial privileges to Scotsmen in France. As to the Low Countries and Germany, we have, among others, a grant of trading privileges in 1427; the marriage contract between James II. and Mary of Gueldres; and James V.'s oath as a Knight of the Golden Fleece. The Scandinavian section includes the Treaty with King Haco of Norway in 1312; the marriage contract between James III. and Margaret of Denmark, to which we owe the possession of the Orkney and Shetland Islands; and that between James VI. and Anne of Denmark, to which we owe the reigning dynasty. The list is much more remarkable for what it has not than for what it has, and even what it contains is not always really Scottish Record; sometimes an old endorsement, sometimes the name of a modern donor, is there to remind us that, however suitably placed in the Register House, it does not owe its preservation to Scottish archivists. Since the Union of 1707 the only records relating to affairs of State that are deposited in Edinburgh are the Oaths of Allegiance taken

by Sovereigns at their accession; the extant series begins with William and Mary. Among the warrants of the Parliament and the Privy Council there are many valuable original papers; the Parliament series will some day make a supplementary volume to the folio Acts of Parliament; the Privy Council series is being printed along with the Register.

When we turn from original documents preserved as records to official registers I must begin with two observations; first, my arrangement is not logical but genealogical; two records which were once one are in juxtaposition, though in subject quite diverse, and therefore in Mr. Livingstone's Guide coming under separate sections. The second relates to the materials of the first volume of the Acts of Parliament; valuable as they are, great as is the amount of genuine old law which they contain, only an infinitesimal fraction of them can be regarded as record in the strict sense. The twenty-six MSS. used in volume i. of the great folio edition and described in that volume—MSS. differing widely in date and in value—have this in common, that none has any official authority. An exception may perhaps be made for the Laws of Robert Bruce, transcribed in the ancient Register of Arbroath at the time when Bernard, Abbot of Arbroath, was Chancellor of Scotland. Of the others the Register House happily possesses the two oldest and the most valuable, the Berne MS. and the Ayr MS. But, speaking generally, all are lawyers' collections, and their statements as to the authority and date of their contents must be received with caution. The Inventory of 1292 includes two rolls of the laws and assizes of the king of Scotland and of laws and customs of Scotland, and of certain statutes promulgated by kings of Scotland;

these may or may not have been better authenticated than what remains to us. Thomas Thomson did what he could to sift the evidence, but the comparative method was impossible in his day; even now many years may elapse before it can be satisfactorily applied.

More certainly authentic are the fragments of early legal proceedings in the King's Court, collected chiefly from the monastic chartularies: these, when they are not really charters, relate to the judicial rather than the legislative functions of the Court, and are preserved in the original rollments, or engrossed in the registers of the houses which they affected and which were concerned to preserve them. The collection in the Acts of Parliament may be called an attempt to discriminate the remains of the activity of the King's Court or General Council of the Kingdom (the two expressions seem to me synonymous) from those of the King's Council who managed the daily affairs of the king and kingdom, and some of whom, at least, must have been more or less responsible for royal charters that were not in essence charters by progress, to use the modern technical term.

The regular Parliament Register begins in 1466. It is in book form, which was authorized by Act of Parliament in 1469. The change from the roll form has so far justified itself in that, while the record before 1466 is all but non-existent, from 1466 onwards we have only a few gaps to lament. One volume for the latter part of the reign of James IV. appears to have been still in its place in 1676; it was lost certainly before the Union perhaps when the Parliament Records were flitted down to the Laigh Parliament House. For the other gaps earlier neglect is responsible. Before 1466 we have just six rolls surviving in the Register House; two of

John Baliol; two of David II., and two of Robert II. One other roll of David II., a very small one, is in private hands; it was exhibited at the Historical Section of the Glasgow International Exhibition in 1911. The two John Baliol rolls, as stated in the previous chapter, came into the Register House after 1810; how they came there I have failed to discover. Except three Acts for the creation of new sheriffdoms the proceedings are all judicial. The other rolls seem to have escaped through their having been in the possession of the first Earl of Haddington, at one time their official keeper, so that they were not carried to England during the usurpation. The loss of the bulk of these rolls is perhaps the heaviest of all the misfortunes which have befallen our records; there can be little doubt that it happened in the shipwreck in 1660. Two volumes of nearly contemporary transcripts, the little Haddington MS. which we owe, like so much else, to Tynynghame, and the Black Book, a large MS. returned to Scotland from the State Paper Office in 1795; two fifteenth century manuscripts of very secondary value, and the 1566 printed edition of the Acts of Parliament from James I. onwards, these are the sources of the printed Acts of Parliament after Robert Bruce and before 1466. They are accessible in a standard edition, and are well known to those interested in the subject.

Next to the Records of Parliament come those of the Conventions of Estates, which are said to have had no power except to impose taxation, but which seem to have behaved themselves as Parliaments called *ad hoc* in some emergency. The Convention of 1689, the last of its kind, was formally turned into a Parliament. A few Records of Conventions remain, some in a special register (1598-1678), some in the Register of the Privy Council.

Of Committees of Parliament, the celebrated Lords of the Articles kept no records; the Committee of Estates, who practically ruled Scotland during the Civil Wars, recorded its proceedings in eleven volumes still extant, of which only what was judged to relate to public affairs was printed in the Acts of Parliament. The Committee was legislative and executive in one, and had to deal with numerous private grievances. These volumes have much not in print that is useful to enquirers into family history. For what other Committees have left I refer to Mr. Livingstone's book.

But there was one Committee which cannot be passed over, that called the Lords Auditors of Causes and Complaints; intended at first to exercise the function of audit and report, it came almost to take the place of the whole body in all ordinary suits, and even to act by commission after Parliament rose. It is alluded to in 1341, and may have existed much earlier. Its functions are clearly defined in an Act of Parliament of 1369. This Committee continued to be appointed till the institution of the Court of Session; and even after that they still for a time existed as a Committee to hear appeals, but it does not appear that in practice such a Committee was kept up. In 1578 an appeal from the Lords of Session, who had given a decision which was alleged to involve a serious innovation in the law, was referred, not to them, but to the Committee for Revising the Laws; and we hear little more of appeals to Parliament in law suits till after the Revolution, when the right of such appeal was asserted in the Claim of Right.[1] In 1695 it was enacted that a Committee of

[1] It had been the occasion of a historic conflict between Bench and Bar of the Court of Session in 1674.

five of each Estate to Parliament should be appointed to hear appeals, and a few such there were. This Committee is interesting historically; it anticipated, in a way, the modern function of the House of Lords *qua* Court of Appeal. The proceedings of the Lords Auditors, so far as preserved, begin in 1466, being recorded among those of Parliament. Down to 1494 they are printed separately in one of the Record Commission volumes; the remainder are among the other Parliamentary Records in a volume known as Robertson's *Parliamentary Proceedings*, which was printed but not published.[1]

Besides the King's Court, or General Council, there was before the War of Independence a small Council who attended the king and looked after the daily administration; of these the Chancellor was the President, as the Cambridge MS. tells us. A Commission of Parliament was appointed in 1369 to do general business, and in 1370 a Committee to treat of certain special and secret affairs of the king and kingdom before they came to the knowledge of the Council General. This was the Lords of the Articles; not the Privy Council, who were never a Parliamentary Committee. But in the reigns of Robert II. and Robert III. there are sundry notices of a real Privy Council with administrative functions, and it appears that they exercised judicial functions also, for by one of the Acts of James I.'s second Parliament, 1425, it was ordained that the Chancellor, and with him certain discreet persons of the three Estates to be chosen by the king, should sit three times in the year as the king chose to command, who should determine all causes that might be determined by the King's Council.

[1] Supplemented by the volume (*Acta Dominorum Concilii*) edited for the Stationery Office by G. Neilson and H. Paton in 1918.

This, which seems to be the first trace in record of what was afterwards called the Session, indicates that the Council had, even before 1425, a recognized jurisdiction within a sphere which was defined, though perhaps not very clearly defined. It is possible that James I., having been educated in England, had some idea of creating something analogous to the English Court of Chancery; if so, it came to nothing. In an Act of 1457, which lays down very definite regulations for the Session, the Clerk Register not the Chancellor is the *ex-officio* member, the sphere of their jurisdiction is defined so as to exclude any power of deciding on heritable rights, and their jurisdiction was, to speak technically, cumulative with that of the ordinary judges (explained in an Act of 1447 to mean justice, chamberlain, sheriffs, barons, provosts and bailies of burghs, and others).

The extant Records of the Session begin in 1478, and are printed down to 1501; though they, representing the Council, had a limited jurisdiction, and the Lords Auditors, representing Parliament, had an unlimited jurisdiction, the proceedings of the two bodies look very much alike; sometimes the case was begun before the one tribunal and concluded before the other; sometimes the two tribunals sat together. But the exclusion of heritable rights from the jurisdiction of the Session was quite a reality: many protestations that such rights are not to be prejudiced by the Lords' decision appear in the Record. The Acts of Parliament throughout indicate that the Council continued to exist as a body distinct from the Session; its jurisdiction, which in 1487 was limited to certain special cases, was in the next year restored to its old extent. In 1489 a Privy Council is created with very extensive administrative powers, and

in 1504 a Council which is to sit continuously wherever the king is, and hear causes daily when they shall occur, so that there shall not be so great confusion of summonses to call at the Session. They were, I take it, to hear what we would now call the Summar Roll.

In applying this legislation to the study of the records we find that, though it is likely that these Acts took effect, the courts all kept their records by the same clerk, who saw no need to discriminate their proceedings, consequently they are intermingled. But it is important to note that the Court of Summary Jurisdiction of the Act of 1504 was in constitution, if not in function, the Privy Council of 1489, and towards the end of James IV.'s reign administrative Acts of the Privy Council sometimes appear mixed up with judicial proceedings. During the minority of James V. such Acts bulk largely there, and throw much light on the history of that anarchical period; they do not disappear even after the establishment of the Court of Session.

The separate Register of the Privy Council begins in 1545, but even after that date Acts relating to State affairs continue for some years to appear among the Acts of the Lords of Council and Session. It has at various times been in contemplation to select from the Acts of Lords of Council previous to 1532, and of the Lords of Council and Session thereafter, the entries relating to public affairs and make of them a supplementary volume of the Privy Council Register.[1]

The Privy Council Register from 1545 to the Union of 1707, with the loose papers relating to its proceedings,

[1] As to this and other matters which I have briefly touched, full details will be found in Hill Burton's Introduction to the first volume of the Privy Council Register.

ranks next to the Acts of Parliament in value as material for the public history of Scotland. This Record returned from England in 1660 with the loss, doubtless, of vast numbers of warrants, but of only a few volumes of Register. From these lost volumes we have copious extracts, again saved to us by the most learned, most diligent, and most accurate of our older legal antiquaries, the first Earl of Haddington. Till Thomas Thomson's time only part of the series was in the custody of the Lord Clerk Register; the record from 1646 to 1651, if it ever existed, perished early. From 1651 to 1660 we were governed by the English; and nearly all the record from the Restoration to the Union, with several volumes of the earlier part of the Register, remained in the hands of an assistant clerk's representatives till 1729. It was then by Royal Warrant handed over to the Keeper of the Signet and in 1746 to the Clerk of Justiciary. These volumes were restored to their proper place in 1811.

No wonder that we miss a good deal: various volumes at various times have been recovered from private individuals; the volume relating to public affairs from 1678 to 1682 was in the Harleian Library—the late Deputy Clerk Register succeeded in securing its restoration to Scotland by the Trustees of the British Museum in 1910. This Register has for long been in course of publication under the direction of the Lord Clerk Register. The first volume appeared in 1877; the thirtieth, coming down to 1684, in 1915. How necessary the authorities consider the competent editing of this Register to be appears from the names of the successive editors—Hill Burton, Professor Masson, Professor Hume Brown, all historians, all historiographers royal. It must be owned that the Register has an inconvenient habit of failing us at

the most interesting points; witness the want of it after 1646 and after 1685; from 1685 to the Revolution it was not booked, and except for 1686 the warrants, that is, the loose papers destined to form the material of the book record, have mostly disappeared. Throughout its existence the Privy Council retained a loosely defined jurisdiction not only in State affairs but in private affairs, mostly those involving breaches of the peace; *causes celebres* like the siege of the Redcastle in 1579 and 1581, and the burning of Frendraucht in 1630, find place in this Register. After the Restoration it often intervened in cases of disputed guardianship of minors; its most generally interesting proceedings of a semi-private nature are those relating to the Covenanters, and, in a less degree, those relating to the Jacobites after 1689.

To return to the Records of the Session. It must not be supposed that they contain anything like a complete account of the proceedings of the Court. The reports of cases are always brief. Sometimes they give only the beginning of a law suit, sometimes only the end, often only a bit in the middle. Even the stages represented in the Record are very summarily reported. One may find the same case on the same day noted in Balfour's *Practicks* in illustration of a point of law which is not mentioned in the record. Down to 1532 the record is called the Acts of the Lords of Council. After the establishment of the Court of Session the name changes to Acts of the Lords of Council and Session: a few years later it changes again to Acts and Decreets. This distinction of names is modern and purely arbitrary, and does not correspond to any changes in form, but it must be taken account of by those who are consulting the record.

The Court of Session differed from the Session which preceded it in that it was unlimited in jurisdiction ; as to the details of its organization, the extent to which these were copied from the Parliament of Paris and the special features introduced from the Roman Court, I refer to Sheriff Aeneas Mackay's *Practice of the Court of Session*. This series of volumes was among those brought back to Scotland in 1657, but perhaps some volumes were then overlooked. At all events many volumes are lost, many badly mutilated, and many look as if they had been under water.

The proceedings of the courts after 1532 are much less incomplete in the record than earlier ; but apparently a Decree ran the risk of suppression if the person interested neglected to pay clerk's fees. Besides the book records there are considerable remains of loose papers from which the record was framed : these, I presume, came out of some of the surviving hogsheads, and occasionally they supply what is not in the Record, but their arrangement as yet is imperfect. From 1564 onwards the record is in three parallel series, corresponding to the three Clerkships of Session. The result is that we must hunt three records instead of one for any special information. Thomas Thomson, among his other reforms, got this triple system abolished in 1810 ; he also inaugurated the indexing of the record which now keeps pace with its formation, but, as yet, no attempt has been made to carry the indexing further back, still less to make any list convenient for consultation of the numerous unrecorded processes as to which the Register House possesses papers. In this department there is plenty of room for a new Hercules, but, in spite of these drawbacks, in a sense one might say because of them, the Records of the

Decreets of the Court of Session are a veritable museum of legal antiquities, and the happiest of happy hunting grounds for the genealogist and the local historian.

I turn to a bulky and important branch of the Records of the Supreme Court. In 1457 the enumeration of matters falling within the sphere of the Session includes Obligations and Contracts. Very early in their history the Session began to receive obligations and contracts to which they interponed authority, thereby making them decreets of the Court. The earliest examples are of this sort: A appears in court, grants that he owes a certain sum of money to B, and obliges himself, in court, to pay it by a certain day ; or A and B appear in court and make an agreement in presence of the Lords which thereby becomes their decreet. An example of the next step is as follows: William Stirling of Braikie, having granted a bond under his seal voluntarily interdicting himself from alienating his heritage, appears in court of his free will, rehearses the words of the bond and agrees that the king's letters be direct thereupon. Another instance: Heuchan the Ross of Kilravock, grants in court that he owes a sum of money to Mr. Edward Cunningham and is content that the king's letters be direct to distrain him, his lands and goods for the sum.

The practice, so far as it relates to Contracts, is the successor of the 'final concord' in presence of a Court of Law, so familiar in English Record and of which numerous Scottish instances exist in original writs and in chartularies; the Inventory of 1292 includes 'Feet of Fines raised in Justice Ayre in Tynedale'; and with regard to bonds it is very much on all fours with the English method of obtaining judgment in court on the debtors' writ of cognovit, by means of which Messrs.

Dodson and Fogg succeeded in extorting their costs from the reluctant Mr. Pickwick.

But the special Scottish development, though not a great innovation in law, has given birth to a large and valuable class of record. First, instead of simply acting himself in the Books of Court, the granter of a bond began to compear and handed in his bond for registration; the bond was thus made a part of the record of the court. Sometimes the clerk pasted it into his volume, sometimes he copied it into the volume and kept the original deed as his warrant. The latter practice became the prevalent one. For a generation or two it was still necessary for the granter of the bond or the parties to the contract to appear personally in court; or else it was their attorneys, not themselves, who appeared as the contracting parties. But soon after the institution of the Court of Session we find deeds presented by procurators and recorded in virtue of a clause in the deed bearing consent to registration and appointment of a procurator for that purpose; every such recording imported a decreet of registration and a warrant for summary execution against the debtor in the bond or defaulting party in the contract; and so the deeds were quite logically entitled to a place among the Decreets of the Court.

Gradually the practice grew more uniform. In the early years of Queen Mary some of the volumes of the Register consist almost entirely of deeds; at length, in 1554, the clerks began to enter the deeds in a separate Register. The Register of Deeds was and is a branch of the Register of the Court of Session. It was kept by the Clerks of Session, and latterly by their nominees, till 1821, when the nomination of the Keepers of this

Register was transferred to the Lord Clerk Register. But the Register is still usually cited as 'the Books of Council and Session.'

Down to Thomas Thomson's time, therefore, its history is the same as that of the Register of Decreets. Till 1811 the three offices kept their three parallel Registers of Deeds; since 1st January, 1812, the Register has been kept in a single consecutive chronological series. Registration in the Register of Deeds has never been compulsory, but its value to the business community is evidenced by its growth. Down to 1811 the average number of volumes per annum was six, at present it is over eighty. The Register from 1770 onwards is indexed; for the older part a Calendar of the first forty-four volumes was made, most of it under the superintendence of Pitcairn, editor of *The Criminal Trials*. The first twenty-five of these forty-four volumes have been lately indexed, but it was found that before indexing the Calendar needed thorough revision, and the Register House staff is not sufficient to overtake the vast amount of work of this sort that needs to be done. A beginning has been made with an Index of the second series, beginning in 1661; at that date it is found that a large volume of typewritten Index is filled by the Index of the deeds of a single year. Of the original deeds recorded before 1651 a number exist; a large number absolutely, but a small number relatively to what ought to be there. For part of the Commonwealth period there are no warrants: the English authorities saw no use of retaining the original deeds after copying them, such not being the practice of their own country.

From 1662 onwards the great bulk of the warrants is preserved. Where an authentic extract from the

Register of Deeds is required it is the practice, if possible, and very properly so, to make it from the warrant if discoverable. It is difficult to speak justly and adequately of the contents of this Register. Of course the great majority of the deeds are bonds by forgotten people to forgotten people; but the number of those which from their contents, or from the parties to them, are of permanent interest is enormous, and many are of unique importance in clearing up some point of local or family history. In the new *Scottish Peerage* there must be thousands of references to the Register of Deeds, and it is certain that the contributors to that monument of industry did not, either individually or collectively, read the Register through nor do more than skim a few casual parts of it. I myself have been able to supply many scraps from this source to several of my fellow-contributors, picked up, not by systematic study, but by casual observation.

From the Register of Deeds it is hard to say what one may not learn. We may find there unexpectedly the contract for the building of a historic bridge, or a historic castle; or, it may be, the setting up of a parish school, with details of the modest inducements offered to the first schoolmaster; or the contract for the building of a church or the purchase of a peal of bells; or an arrangement between the patron of a living and his presentee, sometimes of a very dubious character; or an agreement between neighbours for draining a bog or setting up a race meeting; or a contract for raising a regiment of Scotsmen for service in a foreign country. There are many deeds relating to trade, especially the grain trade; apprenticeships with all sorts of curious conditions; alliances contracted to foster feuds; letters of slains

meant to quench them, an intermarriage not infrequently thrown in as one of the conditions of peace. Marriage contracts of course are amongst the commonest, including some between high personages. The contract between Queen Mary and Bothwell is there in the record, but the original signed by the parties has disappeared.

Besides the Registration of Deeds for Preservation and Execution there was introduced in 1698 what is called the Registration of Probative Writs for Preservation. Probative writs are those which are correct in form but which bear no consent to registration. This has been the means of preserving a few ancient charters which otherwise would not be on record, and which in some cases have since been lost; but, it being provided that such deeds should be returned to the parties after being copied, I fear that it has also proved a convenient way of getting forged deeds on record without depositing the original deed by which the forgery could be detected. Accordingly, by the Act of 1868, it was provided that every writ recorded in the Register of Deeds should remain in public custody.[1] Obviously the officials in charge of this Register cannot be expected to apply any critical tests of genuineness. It has always been open to a litigant to allege, and prove, if he can, that a recorded deed is forged. Not many years ago the recorder of a forged will was punished like the presenter of a forged cheque; to record the deed was in technical language to utter the forgery.

The Register of Deeds itself is an inexhaustible store of information about the private life of our forefathers; a social historian ought to read it through;

[1] With reference to forged Deeds in connection with notarial transumpts see pages 101, 102.

the original deeds preserved constitute a collection of memorials of every Scotsman of modern times of the respectable classes, and of many others. From experience I should say that at least one signature of every man in any way prominent who survived 1580 could be found there. But for nearly two hundred years before 1770, two years after the Restoration excepted, the only guide to the searcher is the minute book, which consists of entries of this sort :—' Obligation, Smith *v.* Brown ' ; the searcher may have to look up hundreds of such references without finding one relative to the ' Smith ' or the ' Brown ' he is looking for ; and even in the periods where we have a more detailed Index we may not always easily find what is really there. The record searcher has occasionally to wish himself a Sherlock Holmes.

To sum up : harking back to what was said in the previous chapter, the Lord Clerk Register was Clerk of Council. As Clerk of the Great Council he presided over the Records of Parliament. As Clerk of the Little Council he presided over the Books of Council ; when these were subdivided into three, the Register of Privy Council, the Register of the Court of Session and the Register of Deeds, he presided over all three. So far, therefore, I have been dealing with the records of the Lord Clerk Register's own department.

The clause consenting to registration of a bond often specified other Courts of Record besides the Supreme Court, and the right place to register was determined by this clause of consent. Other Courts of Record, that is, Courts entitled to receive deeds for registration, were the Commissary Courts (coming in place of the old Church Courts), the Sheriff Courts, the Courts of Royal Burghs

and, till 1748, the Courts of Regality. The registration of deeds in Regality Courts of course ceased when Heritable Jurisdictions were abolished—in Commissary Courts it was abolished in Thomas Thomson's time; within Burghs it has long been restricted to certain special classes of deeds; in Sheriff Courts it is still lawful, and is largely taken advantage of.

Contracts were recorded for preservation and for execution against defaulting parties; Bonds for execution only.[1] Ancient law provided no means of enforcing a decree of court. Those who interest themselves in primitive institutions will remember the practice of bringing pressure to bear on an obstinate debtor by sitting on his door-step till one starved, thereby bringing upon him the wrath of the gods. The history of legal diligence begins with the bond containing a clause whereby a debtor submitted himself to the jurisdiction of a Church Court; if he failed to pay after due citation he was excommunicated; if he contemptuously disregarded the excommunication for a certain period the secular arm dealt with him, if he persevered to the last, he was outlawed and his goods forfeited. Of the antiquity of this practice there is no doubt. How far back it goes in Scotland it is impossible to say, as the records of our ecclesiastical tribunals have disappeared.

A good instance, dated 1365, is among the Inchaffray Charters: the granter of the deed and his wife bind themselves to perform a certain action under pecuniary penalties, and submit themselves in the matter to the jurisdiction of the Bishop, Dean and Archdeacon of Dunblane and their officials, who were thereby empowered

[1] A very clear account of the matter is in Walter Ross's *Lectures on the Law of Scotland*, 1792.

without any process of law to compel them to the observance of the bond by every kind of ecclesiastical censure. Among the Charters of Coupar Abbey I find similar clauses inserted in deeds of 1303 and 1321, and earlier instances could doubtless be cited. On the production of such a deed to the Church Courts the granter would, as I have said, be excommunicated after due warning, and thereafter dealt with harshly or mercifully according to his own attitude.

The King's Court had a corresponding way of enforcing its own decreets—the process of horning. It is first mentioned in the Statute of King Robert III., where certain persons having been denounced rebels at the King's horn for slaughter, all the King's subjects are strictly forbidden to assist them or intercommune with them, but, on the contrary, they are to pursue the rebels with all their might to arrest or death. The use of the horn in this matter appears from a Statute of James I. ordaining the Sheriff to pursue murderers and raise the king's horn on them, imposing penalties upon the country in case it did not rise in support of the Sheriff on such occasions. Thus, the horn was a hunting horn, the Sheriff had to hunt like wild beasts those who had put themselves outside the law. But it was not the view of our ancestors that every failure to pay one's debts involved outlawry; the early part of the Register of Deeds usually contemplates the issue not of letters of horning against a debtor but of letters to distrain him; that is, decreets were to be enforced not against his person but his property. But if he had undertaken by a registered bond not to pay a debt but to perform a certain act, then his failure was failure to obey the king, it was a sort of rebellion. In such cases consent to letters of horning

was included in the clause of consent to registration, and the decree of registration authorized their issue in case of disobedience.

According to Ross, whom I am here following, the result of the fact that the Church Court's diligence had extended to the debtor's person, while the Civil Court's diligence reached his property only, had thrown most of the business of the country in that department into the hands of the Church; so the abolition of the Church Courts injuriously affected creditors. For that reason Parliament, in 1584, authorized hornings for non-payment of money. Of course this does not imply that a debtor put to the horn might be killed with impunity. The difference between simple distraint, in Scots called poinding, and horning was, in the first place, poinding authorized only distraint of goods to the value of the debt, horning implied (till 1746) forfeiture of the debtor's whole moveable estate; and, in the second place, when a debtor remained at the horn letters of caption could afterwards be obtained for his imprisonment. In 1579 Parliament had instituted Registers of Hornings to be kept in the Sheriff Courts. One put to the horn for what was called Civil Rebellion was outlawed so far that he could not sue in court, and his goods were forfeited. To render such a person liable to be seized or killed by anyone with impunity one required to take out letters of fire and sword, which was done in cases of real or alleged revolt against authority.

In 1581 another Register was instituted by Act of Parliament, the Register of Inhibitions, that is, of Letters intended to prevent a debtor making away with his lands or goods, even though no decreet had as yet been obtained against him. Inhibitions proceed on a statement that

the debtor, well knowing that he will be legally compelled to pay, is about to make away with his property, and, accordingly, public proclamation is made whereby he is prevented from doing so. These Registers of Hornings and Inhibitions, though made up in the Sheriff Courts, were to be regularly transmitted to the Clerk Register. In some counties the two were kept together, in some counties separately. From 1597 onwards they were required to be kept in books specially issued to the Sheriff Clerks by the Clerk Register and marked by him; but in practice, before the nineteenth century, this rule was not always observed, and in some Sheriff Clerks' offices untransmitted volumes of this Register are to be found. In 1610 General Registers of Hornings and Inhibitions were set up, where letters could be registered against debtors in all parts of Scotland, and against Scotsmen abroad. These were a branch of the Record of Session, and as such belonged to the Clerk Register's department; while the particular Registers were a branch of Sheriff Court Record, specially by statute put under the Clerk Register's authority.

These Records are rich in evidence of family alliances and quarrels, and particularly of conjugal quarrels. Now and then, like the printed Privy Council Register, they contain curious narratives of blood feuds. For instance, the following is abridged from a Perthshire Horning of the year 1580; the feud which it records was of sufficient importance to find a place in some of the histories. 'For so muckle as it is menit and shown to us' (that is, the King) 'by our right traist cousin and counsellor, William, Lord Ruthven, our Treasurer, and our Advocate for our interest, that where by the common law and others laws municipal it is expressly provided

that the persons of councillors of princes suld no less be preservit and made sure of their lives nor the self prince; where through the said Lord Ruthven lately upon the 29th day of October last by past departet furth of his dwelling place in Perth towards the place of Kyncardine before the marriage of our cousin John, Earl of Mar, there to have awaited upon us and our service as being within the said place for the time, our said cousin being only accompanied by six horsemen in the haill and destitute of all armour and weapons for the time, being persuaded with himself that na manner of person would presume to lay in wait or make any pursuit of him and his company, the same being sa near unto our person,—nevertheless Laurence, Master of Oliphant' (and fifty or sixty others whose names are given) 'after divers brags boasts and menaces openly made by them against our said cousin, sundry awaitings of him, his friends and servants, and pressing to have bereft them of their lives by umbesetting of the high gates to that effect at divers times of before, on 29th October last by past they, accompanied with divers others their accomplices, with convocation of our lieges to the number of twenty-four horsemen and fifty hagbutters or thereby, all bodin in warlike manner, being surely advisit that our said cousin was to pass the day foresaid with sic few number in his company to the said place of Kyncardine be the common and high way aboun the town of Gask to the ford of Kinkell as maist commodious passage towards the said place, finding thereby occasion and convenient time to execute their wicked enterprises devised by them and Laurence Lord Oliphant within his place of Dupplin against our said cousin, they planted their hagbutters in the narrow and privy parts of the said way betwixt the

said town of Gask and the ford of Kinkell on the water of Earn lying in wait for our said cousin's bycoming, like as they had nocht faillit to have performit their bloody enterprise, were there not that by only providence of God the said water of Earn for the time being great, he and his company were forcit to pass by another way over at the cobbell of Dalreoch, and sa escapit, but the saidis persons, naways satiate therewith, upon the first day of November instant having receivit sure knowledge that then, after the completing of the said marriage our said cousin and his company, destitute of all armour defensive except their swords alanerlie were to return in sober and quiet manner hamewards be the said cobill and boat of Dalreoch to his aun dwelling place in Perth, ignorant altogether of their malicious minds, they to the number of fifty hagbutters and sixteen horsemen, with great convocation of our lieges to the number of two hundred persons or thereby, all bodin in the maist substantius warlike manner, having at the last being informit be their espies of our said cousin's approaching in the highway by the place of Dupplin, after lang consultation held by them within the said place for fulfilling of this ungodly enterprise, having by Laurence Lord Oliphant's advice directit ane great number of his tenants and soldertis to umbeset the high gait in all privy places of the high way before them, the said master of Oliphant and the remnant of his company issuit furth of the said place upon them in their bycoming, sett upon them or ever they were circumspect at the Knowe aboon Dupplin and as weel behind their backs as before their faces at all parts invadit them for their slauchter; shot and dischargit ane vollie of hagbutts in their faces tending maist shamefully to have slain and murdered them therewith, like as they pursued our said cousin and his

company continually, skirmished and pricked with their spears, shooting their culverins, pistolettes and certain hagbuts of found, for the space of two mile and ane half or thereby, viz. fra the said knowe to the common muir of Perth beside the burn of Pitheavles far outwith their boundis where they maist shamefully under free conference held on horseback with Alexander Stewart of Schuttingleyes Lord Ruthven's kinsman and one of his company as bloody murderers shot him with ane poisoned bullet in the body and therewith maist unmercifully slew him, and immediately after the said slaughter the persons committers thereof returnit again hot to the said place of Dupplin where the said Lord Oliphant abiding to hear the success of their said wickit enterprise maist joyfully received them.'

Then follows the charge to the Messenger at Arms to summon the parties to answer for the crime, and on their failure to appear to put them to the horn. Then come the Messenger's attestations that each of the accused persons had been duly summoned, and, finally, the denunciation of them at the Market Cross of Cupar Fife by open proclamation, with three oyeses and three blasts of the horn; here no longer the hunting horn, but the means of drawing attention to the proclamation. In later times the proclamation itself went out of use, though the Messenger at Arms continued to give the certificate that it had been done in due form. That the Messenger's Minute should be in due form was very necessary. The mere fact that no proclamation had been made did not affect the validity of the proceedings, but if the Minute stated that the proclamation had been made at the wrong Market Cross that would have been a fatal flaw. It is competent to this day to raise Letters of Horning with

this same certificate of imaginary proclamation; but practically the process is superseded by more modern methods.

I need not dwell further on these registers, nor on the registers of Apprisings and Adjudications, by which a debtor's landed property was transferred to his creditor temporarily or, if unredeemed, permanently. These are usually of private interest only and the interest is of the painful sort in which one sees an old family getting into deep water; though occasionally we there see the rise of a family then new now old. The process has never ceased, and if it seems to some of us that certain modern legislation is calculated to quicken it unnecessarily, we must remember that acceleration all round is the pride of modern life.

Of early Courts other than Parliament the Chamberlain ayre has left us no records, and the Chamberlain himself will come in more conveniently elsewhere.

The Court of the Constable who presided at Trials by Battle left no records. If records there were, I suppose that they would be of unique interest. What is known of this matter is set forth by Dr. George Neilson in his little book on the subject, and some details are added in the Cambridge MS. since published.

In much later times the Earl of Erroll, hereditary Lord High Constable, asserted his right to jurisdiction in the case of breaches of the peace within the verge of the Court. Several trials for such offences are recorded on loose papers in Lord Erroll's charter chest. These belong to the Restoration period.

The assertion of the Constable's right earlier brought him into collision with the Magistrates of Edinburgh, who also claimed right to punish the same offenders and

had the advantage of having at hand a prison to keep them in. Transactions on the subject between Lord Erroll and the Magistrates in 1501, 1521, 1560 and 1580 will be found in the published *Extracts from the Burgh Records of Edinburgh*. The Constable in later days could only levy fines at his Court. The Slains Charter Chest contains a little account by the Constable's procurator fiscal of his receipts and expenses while Parliament sat in the years 1702 and 1703. Here are extracts :

PARLIAMENT 1702.

Paid for scouring 51 partizans at 6 pence each and expense in carriage of them, £16.

Paid 15 guards of the Parliament House door at 4 pence each to 12 of them and 5 pence each to 3 of them for 12 sederunt days that Parliament, 1702, sat, in all, £37 16s.

PARLIAMENT 1703.

Paid for scouring 51 partizans that were in the Parliament House since last Parliament only with chalk and oil, to save the usual expense of 6 pence each to a cutler or gunsmith, 1 shilling Scots the piece, George Leith having paid John Simson gunsmith for dressing the other half of the partizans that were in the Castle, £2 11s.

Paid a porter for carrying to the Parliament House 15 Lochaber axes borrowed from John Ross of Noock, storekeeper of the Castle to be made use of the first day of the Parliament to complete the lane, 4 shillings.

Paid 6th May being the day of the riding and first meeting of the Parliament in drink and money to some who held partizans, besides all those that were gratis volunteers, a dollar—£2 18s.

June 29th and 30th paid each of these two days by my Lords' order upon occasion of the business between my Lord Belhaven and Forgland, twenty guards—£8 6s.

Item, disbursement of contingent expenses upon procuring

Intelligence. The total expenses were £258 8s. That is, £21 and odd sterling.

The fines levied amounted to £112 13s. Scots, something over £9 sterling, so that the expenses exceeded the receipts by nearly £12 sterling.

The Constable's judicial office was thus a source of honour but not of profit. The affair between Belhaven and Ogilvy of Forglen, whom the Lord High Constable had taken into custody for unbecoming expressions and other undutiful behaviour in Parliament, duly appears in the Minutes of the Parliamentary Proceedings.

CHAPTER III

RECORDS OF CHANCERY, TREASURY AND THE HOUSEHOLD

The Instruments[1] by which the Sovereigns of England made grants and expressed their intentions to their people were of three kinds, called respectively Charters, Letters Patent and Letters Close. By the first their more solemn acts were declared, by the second their more public directions promulgated, by the third they intimated their private instructions to individuals. The contents of the Royal Treasury of England, as enumerated in the Dialogue concerning the Exchequer, included in 1179 an innumerable multitude of privileges—that is, I take it, of duplicates retained by the Chancellor of the king's solemn acts, public and private orders.

In France a similar practice prevailed: Giry tells us that in accordance with a practice which goes back to the Merovingian period, certain royal deeds were in the time of Louis VII. (middle of twelfth century) still preserved by depositing a copy either at the abbey of Saint Denis or in the treasury of Notre Dame at Paris.

Philip Augustus having lost at the battle of Freteval in 1194 all the documents in his baggage, ordered his chamberlain to reconstitute and organize the archives of

[1] *v.* Duffus Hardy's *Introduction to the Charter Rolls.*

the crown. This was the origin of the Trésor des Chartes, which from the first was kept in book form.

In England an analogous change of practice was made at nearly the same time.

King John ascended the throne in 1199. In his first year begins the series of Rolls of Charters; in his third year the series of Rolls of Letters Patent; in his sixth year the series of Letters Close. These in England are called the Chancery Enrolments. Scotland in the organization of the Chancery followed England still more closely than in other departments.

By 1282 the Inventory of that year shows that enrolment was then the only recognized way of keeping a record of issued charters; the original royal charters in the Treasury are not duplicates, but cancelled charters given up by the grantees.

So in David II.'s reign a revocation of grants to the prejudice of the crown is accompanied by an order to surrender the writs by which the grants were made.

Miss Bateson remarks that the passage of the Cambridge MS. relating to the Chancellor has a very English sound. Besides his presidency of the King's Council, and his legal duties, it is there said that he ought to know the Chancery forms, and that the old fee for the seal of each writ shall be taken and not more.

Did Scotland follow England so far as to have the three classes of Charter Rolls, Patent Rolls and Close Rolls? We can recognize chancery enrolments in more than one item of the Inventory of 1292, but the descriptions are too vague to argue upon. In 1306 Edward I. ordered his chamberlain of Scotland to search the charters, letters patent and close of the late kings of Scotland for grants to the abbot and convent of Dryburgh; but the wording may

be due to the preconceptions of an English clerk. The Chamberlain's report in reply says only that he has inspected charters and rolls.

What we can be sure of is that in the Charter Rolls of Robert I. and his successors Letters Patent are mixed with Charters proper. Letters Close are not quite absent; the charter of Robert I. to Thomas Randolph of the Earldom of Murray was recorded in the form of a letter to the Chancellor directing him to frame the charter, of which the form is engrossed in the letters; the celebrated Emerald Charter to James Lord Douglas is recorded in the same form.

And the Great Seal Registers of David II. and Robert II. contain a few Letters of Pension, addressed to the Chamberlain, to be shown to him and thereafter retained by the grantee. But, while the Chancery of England tended more and more to supersede the Charter form by the Letters Patent—till in 1516 the Charter Rolls were discontinued entirely—the Chancery of Scotland preferred the Charter form for grants of land, Letters Patent being reserved for licenses or grants of office, and Letters Close, from James I.'s time onwards, being under the Quarter Seal (as to which more further on).

At all events the Great Seal Register of the Alexanders was undoubtedly kept in roll form; and after the wars it retained that form till the return of James I. from captivity in 1424.

The record for the period from Robert I. to 1424 is represented by twelve rolls and a book. As is well known, a much larger number of rolls was extant in the seventeenth century; the rest are supposed to have perished in the shipwreck of 1660. The exact number cannot be given—a roll often consisted of several mem-

branes sewn together—a comparison of the two surviving indexes with each other shows that many membranes which in 1579 were detached had by 1629 been sewn together; and one of the existing rolls is composed of what comprised five rolls when Robertson's Index was made.

Of many of the lost rolls of David II. the contents are known by their having been transcribed into a book which still survives; of the 276 charters of David II. which it contains, 253 can be recognized by the old Indexes as having formed parts of lost rolls—the remaining 23 may be assumed to have been transcribed from rolls lost at an earlier date. The same book contains 51 charters of Robert II., 39 of which are also preserved on rolls still extant. It is curious that while all the rolls of David II. are lost, all but one of Robert Bruce, and all of Robert III. (except one, and another which consists partly of charters by him and partly of charters by Robert II.) are extant now just as they were in 1579, with the loss of one small roll which by the Indexes seems to have been a duplicate of part of one of the rolls still existing. In the surviving Robert I. roll, and (as appears from extant copies) in many of the lost rolls of that king, the charters are as a rule undated: in the later reigns dates are only occasionally omitted.[1]

However much we may regret what is lost, there is very great cause for thankfulness that so much survives; and that it is accessible in the meticulously careful print edited by Thomas Thomson in 1814. Being printed in what is called Domesday type, with all the contractions of the original MS. preserved, though, of course, they can

[1] I am speaking of the Register only; as to the dating of original charters, see page 60.

only be conventionally rendered, it is not agreeable to peruse.

I have edited a reprint in modern type; but I despair of attaining the high standard of typographical accuracy set by my great predecessor—for one cannot study Thomas Thomson's work without coming to feel his greatness.

One innovation I have introduced is the marking of the beginnings of the several membranes of which each roll is composed: that inattention to this matter may mislead may be proved by an example. In the Mar Peerage case a point, happily not of much importance, was to be proved by an old MS. note from a Charter Roll of Robert II., which the House of Lords admitted in evidence because the expert witnesses failed to identify the roll with any of the existing rolls. It was, in fact, a roll which is now sewn into another roll, but was formerly detached as the old Index shows; and the MS. note, so far as it differed from the printed text, was, of course, wrong.

After James I.'s return from captivity the Register was kept in book form, though this was not (so far as known) authorized by Act of Parliament till 1469. In 1425 an Act was passed to make registration of Great Seal grants compulsory, but it did not take effect. In order to effect the same purpose in 1477 the king ordained that all registered charters should be endorsed by the Clerk Register or his substitute, and that no unendorsed charter should make faith. This also was disregarded. Other attempts were made in 1621 and 1672.

The Great Seal Register at some periods is beautifully written, and at all periods always compares favourably with contemporary writing. The gravity of the recording

clerk is not, as in some other Registers, given away by metrical or other scribblings on fly-leaves and margins. But I remember one instance of a decorative capital letter containing a neat representation of a man hanging by the neck from one of the flourishes.

Of the later Great Seal Register an abridgement in octavo form is in progress; the portion prior to 1668 has been published. Its importance as our principal register of private rights, and as often throwing light incidentally on public affairs, is too well known to need remark. It has always been kept on parchment, and (except during the Usurpation) in Latin down to 1847; since then in English. One of the lost charters of Robert Bruce and one of David II. are noted to have been in French.

From the period after 1651 till the Restoration the language was the Scots vernacular as it appeared to English clerks. One who had studied the records of that time more closely than I have had occasion to do told me that the conquerors' attempts at Scots must have afforded a good deal of amusement to the natives.

In the fifteenth century record a deed in the vernacular is occasionally engrossed in a royal confirmation; and when lands have to be described particularly by their boundaries, these are often in Scots; so the Great Seal Register is not destitute of philological value.

From 1608 onwards the charters which conveyed redeemable or liferent rights, commissions, patents for inventions, letters of remission, legitimations, birth brieves and such like, have been engrossed in a separate Register on paper.

This is being abridged along with the parchment register. Its most important contents (during the earlier period of its existence) are appointments to offices such

as were made under the Great Seal, including, in the days of Episcopacy, bishoprics.

At first patents were really nothing but grants of monopolies to those who had court influence to obtain them; but in later days, down to 1852, when separate patents for Scotland were abolished, that part of the contents of the Register would doubtless reward study.

Further, the heir apparent to the Crown, when of age, keeps a Register of his own Seal. There are Princes' Registers extant of Charles I., George II., George IV. and King Edward, before their accessions; and of Prince Frederick, son of George II. and father of George III.

In Scotland in the earliest times royal charters have no date, but usually bear the place of granting; from 1195 sometimes, from 1199 always, they are dated by month and day of month, without year; in 1221 we have a few charters dated by the Annus Domini; from 1222 onwards the year of the king's reign (without A.D.) is usually added, but it is not, I think, quite safe to assume that a charter without this is earlier than 1222.

Of Robert Bruce's charters a few are undated.

David II.'s charters have the often discussed peculiarity that from 1352 onwards the regnal year given is one year short of the real regnal year—yet to this rule we must recognize exceptions, for two of his charters in the Great Seal Register bore dates which if understood on that principle would fall after the king's death.

The last word so far on this question is a communication by the late Marquis of Bute to the Society of Antiquaries of Scotland some forty years ago; perhaps it may yet be possible by a more complete collection of the evidence if not to clear up the mystery at least to arrive at a better understanding of the matter.

Most of the later charters of Robert III., and I think all those of Robert and Murdoch, Duke of Albany, have the Annus Domini, as well as the regnal year, or year of the governor.

James I.'s charters have the regnal year, not the Annus Domini; James II. and his successors have the Annus Domini appended to their charters, but not to other chancery writs; a Precept of Clare Constat in favour of an heir may occasionally be difficult to assign to the right James; a writ appointing a Procurator for a litigant (which in old days had to be done by crown writ) is often nearly impossible, even with the aid of the handwriting, to assign with certainty to the right sovereign. The trustworthiness of the nominal place of granting a charter is often a difficult point to decide—in the earlier times it is complicated by the frequently untrustworthy character of the copies we have to rely upon; in Robert Bruce's days, besides the charters which seem to be dated at the place where the king was, there are a great many dated at Arbroath, of which place the Chancellor was Abbot. Some of these doubtless prove nothing as to the king's whereabouts; two charters of Robert Bruce, granted the same day, are dated one at Arbroath the other in quite a different part of the country.

In later times certain classes of Great Seal writs were as a matter of rule dated in Edinburgh, while others were supposed to be dated from the king's actual residence.

After the Union of the Crowns it was only actual royal gifts that were dated by the Sovereign's residence, all charters by progress, to use the legal term, were dated at Edinburgh.

In the oldest days we may suppose that the Chancellor and his clerk simply wrote out the charters and letters from oral instructions.

The Chancellor soon came to be a great man in the State; the first who held a bishopric with the chancellorship was William Malvoisin, Bishop of Glasgow from 1200 to 1202—before him three chancellors had risen to be bishops; so the business duties of the office were delegated to subordinates.[1] The chancellor was too great, and his underlings too small, to be trusted with the unchecked control of the Chancery.

The check applied, in Scotland as in England, was the introduction of the Privy Seal warrant, without which, the Cambridge MS. says, nothing should pass the Great Seal, except writs of course.

Alexander III. is the first of our kings who is known to have had a privy seal. As we know that certain magnates of Scotland possessed privy seals early in the thirteenth century, it is *a priori* likely that Alexander II., if not William the Lion, may have possessed the like; King John of England did so, as Mr. Hubert Hall mentions. There is among the Melrose Charters a Privy Seal of Alexander III. appended to a charter, without any explanation in the testing clause of the reason why it was substituted for the Great Seal. And among the ancient correspondence in the Public Record Office there are one or two letters of Alexander III. to which he affixed the Privy Seal, explaining that the Great Seal was not at hand.

In England (for it is to England that we must look for the explanation of Scottish chancery forms even long

[1] It appears that William the Lion managed to do without a chancellor from 1178 to 1188, and again from 1207 to 1211.

after the War of Independence) the increasing volume and complication of State affairs brought the Privy Seal, which had at first been a purely personal seal, into such regular use as a seal of business, that Edward III. began to use a smaller seal for less formal mandates—at first what is known as the seal of the griffon, and later the signet.

David II. promptly followed his example, for an Act of Parliament of 1370 refers to letters under the small seal or signet. The notices we have of Alexander III.'s Privy Seal show only its use as the conveniently portable seal which the king carried with him—once he uses it when on pilgrimage to St. Cuthbert's Shrine at Durham. But in the Cambridge MS. the Privy Seal is spoken of as 'the key and the safety of the Great Seal,' and the king is advised to entrust its custody to one of the wisest and most vigilant of the realm. This is clear proof that in Scotland, as in England, the Privy Seal warrant for the Great Seal writ had already come into use.

In the Public Record Office there are Privy Seal Warrants for Letters Patent of the reign of Henry III., and from Edward I. onwards a long series is extant; but from the nature of the case these remained in the national archives, and none of the Scottish ones have lived through the long series of trials to which our records have been exposed. However, two precepts of Robert I. to his chancellor for charters, and at least two by David II. to a similar effect, one dictating the terms of the charter, the other not, have survived in copies. Of the use of the signet as the king's personal seal we have proof in the case of James I.'s well-known autograph charter to William Douglas of Drumlanrig, sealed with the signet used in sealing of his letters, of which a representation is

to be seen in Anderson's *Diplomata*—the signet, not the letter, has now disappeared. The first signet of which any extant impression is known is (Mr. Rae Macdonald tells me) that of James III. affixed to a summons of 1476; of the use of the signet warrant for the Privy Seal letter we have no evidence till the Privy Seal Register begins, 1497.

Sir Thomas Craig tells us that according to tradition the Order of Chancery as used in his day was introduced from England by James I. on his return from captivity. According to this Order every royal grant of land, whether a new grant or a charter by progress (to use the technical term), was complete in six stages. (1) The signature, written in later times at least by a writer to the Signet, in the vernacular and subscribed by the king, or in the king's minority by the regent, or by the king and council according to the form in use at the particular time; (2) the Signet Warrant, a translation of the preceding into Latin, to which the Signet was affixed; (3) the Privy Seal Warrant, on parchment, and sealed with the Privy Seal; (4) the charter itself sealed with the Great Seal; (5) the Precept of Sasine following on the charter, directed to the sheriff, or to some person or persons specially commissioned to act as sheriffs in this part, and sealed with the Quarter Seal; (6) the Notarial Instrument of Sasine. The signature bore its true date, the Instrument of Sasine bore its own date, the intermediate writs all bore the same date as the signature, though they must always have taken some time to pass the Seals, and sometimes a writ was stopped at the Seals and perhaps allowed to pass a considerable time afterwards. The witnesses' names were not appended to the writs preceding the Great Seal charter; thus it is no wonder

that the testing clauses of royal charters are not always trustworthy. Fortunately in earlier times, when we have often to rely upon such testing clauses for evidence of date, the sequence of writs was probably not so long. After the Union of the Crowns the system in so far altered that, though the date of the signature was still the date of the charter, the Clerk in Chancery noted upon the charter the date at which it was written to the Great Seal, and the date of sealing. Original charters in the Register House up to 1602 inclusive bear no such memoranda—of 1603 and 1604 the Register House has no original charters—for 1605 onwards the memoranda appear, and Stair considered them essential.

In how far, and what sense, is Craig's statement as to the origin of the Order of Chancery correct? It is pretty clear from what has been said already that the various steps were introduced by degrees—first the Privy Seal as a check upon the Great Seal, in the thirteenth century both in England and Scotland; second, the Signet as a check upon the Privy Seal—Mr. Hubert Hall in his Formula Book gives an example of the time of Richard II. of a Signet Letter, followed by a Privy Seal Letter, followed by Letters Patent. But Mr. Hall gives no example of a Signature[1] as a warrant for the Signet Letter, though he does give an example of the Sign Manual as a warrant for Letters Patent without the interpolation of the Signet and Privy Seal.

The likelihood then is that the Signet as warrant for the Privy Seal was, like the Privy Seal itself, introduced from England before 1497—but as to how long before that date there is no evidence. That the Signet existed as early as David II. is proved; that he or any

[1] Sign Manual is the corresponding English term.

of his successors before James IV. used it as a check upon the Privy Seal is not proved. But that tradition is right, or nearly so, in ascribing this introduction to James I. appears likely from what follows. Though the Cambridge MS. dwells upon the great importance of the Privy Seal being put into competent hands, there is no appearance at that period of any official styled Keeper of the Privy Seal—the keeper was simply one of the king's clerks. In 1360 Robert of Dumbarton, elsewhere styled king's clerk, is styled secretary, the first occurrence, I think, of that title in Scots record. During the remainder of the fourteenth century the Exchequer Rolls show the terms secretary and keeper of the Privy Seal were then synonymous; and at the end of Robert III.'s reign we have mention of a keeper of the Privy Seal in the secretary's absence. Even in James I.'s time we cannot discriminate the offices satisfactorily—John Cameron, afterwards Bishop of Glasgow and Chancellor, seems for a time to be styled promiscuously by either title. But from 1444 onwards we find in the testing clauses of royal charters and in lists of auditors of exchequer a keeper of the Privy Seal *and* a king's secretary; the former holding rank above the latter, as the Keeper of the Great Seal above him. In later times we know that the Signet was in the secretary's charge; the keeper of the Signet and the writers to the Signet were his subordinates. So the suggestion is that till about 1444 the Signet was either kept by the Keeper of the Privy Seal or was in the king's own hands; and that at that period a new official, the secretary, was appointed, to whom the Signet was confided as a check upon the Privy Seal.

It may have been at the same time that the artificial

rule as to dating, to which I have alluded, was introduced ; the before cited early Privy Seal warrants do not seem to have given their date to the charters ; and the Register House possesses a Privy Seal warrant for a Great Seal charter in 1429—the warrant is dated 20th, the charter 26th May, which (if one of them be not a clerical error) may have been the real dates of the two sealings. As to the Signatures, we know that James I. had a Sign Manual —the Register House has a page of a Letter Book of his, in which each letter is said to be given under his signet and sign manual.

It may well be that the introduction of the Signature in Chancery was contemporary with or not long posterior to that of the Signet. But from what has been said it appears not likely to have been introduced from England ; and there is a small matter of detail (small details are often very much to the point in such inquiries)—the Sign Manual of the kings of England was always at the top of the document, the Signature of the kings of Scotland till 1603 was always at its foot. Naturally, after 1603 the English practice was adopted in Scottish documents ; the old Scots practice perhaps came from France. The king's signature after 1603 was usually applied by a stamp, technically known as the cashet ; the writs which passed the cashet were always dated at Edinburgh, or else Holyrood ; other writs, after having been approved by the lords componitors, were sent up to England, and, with a docquet by an officer of State explaining its purpose, was submitted to the king, who superscribed it himself. The writ in that case was dated from wherever the king happened to be.

The signature was marked with the amount of the composition payable for passing the writ—this is also

recorded in the accounts of the Lord High Treasurer to whom the money was payable; of course there were fees to pay, and writing to pay for, at each of the other stages. The Privy Seal Register usually notes the fee paid for each writ therein recorded, unless as often happened it was remitted for personal reasons. The Great Seal and Chancery fees were occasionally a source of controversy between the officials and the lieges—something on this head is to be learnt from the Privy Council Register. In Balfour's *Practicks* the fees are said to be: for the Signet, 5 shillings, for the Privy Seal, 10 shillings, for the Great Seal, 40 shillings; except infeftments of baronies, lordships or earldoms, which paid 40 shillings, £5 and £10 respectively; prelacies after the Reformation paid at the same rate, because, the author tells us, they paid high at Rome under the old regime. The writing of each deed had to be paid for besides. Then the Instrument of Sasine could, of course, not be had for nothing: it would be no easy matter to estimate the total cost of an infeftment in those days. An item which one would hardly have suspected was the fee to the usher of the king's chapel, that is, chancery. This was a hereditary office in a family called from their office de Capella, and was attached to a third part of the lands of Craigmillar, afterwards to those of Airlie in Forfarshire.

The last de Capella parted with the office in 1376, and eventually it was acquired by Sir John Bellenden in 1565, being then styled the office of keeper of the door of the Exchequer House. David II. in 1363 issued a Precept for a Great Seal Charter in favour of the then de Capella, which specified the fees exigible by the hereditary usher.

This is printed from a transumpt in the Historical MSS. Commission Report on the Duke of Roxburgh's MSS. The list is as follows: for every charter of new infeftment, half a merk of silver; for every confirmation in the larger form (that is, engrossing the confirmed charter), half a merk; for every confirmation in the lesser form, 40 pence; for every letter of remission, of presentation to a church, of warren, and every other letter of gift, 2 shillings; for every letter patent of course, 3 pence; for every letter close, 1 penny. Item in Exchequer for every sheriff that renders account, 2 shillings; for each bailie, 12 pence; for each custumar, 12 pence; and for the Chamberlain for his robe, 40 shillings; and the checker table with its cover, which of old was wont to contain a third part of a piece of cloth with the moveable forms and stools situated in the checker house. The Exchequer Rolls, it may be said in passing, show that a regular allowance was made for these Exchequer perquisites down to 1580, the sum being paid to the acting usher, presumably the nominee of the hereditary usher. Later on the usher receives a lump sum yearly on account of this and his other rights.

The six steps, which our ancestors judged the necessary safeguard against fraud, were gradually reduced in number by their posterity. No. 5, the Precept of Sasine, was in 1672 merged into the Great Seal Charter; it had for a time been a necessary sequel to a conveyance by a subject, but had been reduced to a clause in the conveyance itself over a hundred years before the same step was taken in Chancery. No. 3, the Privy Seal Precept, disappeared in 1809. Nos. 1 and 2, the Signature and Signet warrant, were replaced in 1847 by a draft prepared by the party and revised by an official.

No. 6, the Instrument of Sasine, was superseded in 1858. So now the process is nearly as simple as it was in the days of David I.

Now as to the registers which preserve the earlier stages of the process. The Privy Seal Register begins in 1497, though it contains a few writs of earlier date. To all appearance the object of keeping it at first was as an account book of fees; consequently, we may be fairly sure that every fee-paying writ is entered, and in fact many warrants are there for charters which probably (in some cases demonstrably) passed the Great Seal, but are not in the Great Seal Register. To each writ is added a note of the fee for sealing, when such was exacted. The entries for several years were extremely brief: by degrees they lengthen, till they go near to rival the length of the Great Seal entries themselves. This Register consists of two classes of writs—those which had passed the Signet and were intended to be warrants for Great Seal Writs; and those which did not need to pass any seal beyond the Privy Seal. These latter did not pass the Signet; the signature was the warrant for the Privy Seal Writ. A paper in the Register House, of the first half of the seventeenth century, gives a full list of the two classes; I content myself with Mr. Livingstone's summary in his excellent edition of the Register for the first thirty and odd years of its existence. 'The Privy Seal alone was necessary to the authentication of various classes of crown letters or grants, such as gifts of pension, of feudal casualties, of escheats and other moveable property or rights, leases of crown lands, letters of protection, commissions to minor offices of court or state, presentations to benefices, and many others. The warrant for the affixing of the seal in these cases was a letter under the

sign manual of the sovereign. To the completion of other Crown grants such as charters, remissions, legitimations, and various letters patent, the attachment of the Great Seal was required, and the Privy Seal was applied to a precept which was merely a step in the process of procuring the Great Seal.'

Mr. Hubert Hall in his Formula Book gives English instances of a Sign Manual serving as warrant for Privy Seal Letters. There are cases in Mr. Livingstone's volume where a Privy Seal warrant for a Great Seal Charter follows, not on a Signet Warrant, but on a Signature; showing that in James IV.'s time at all events the practice was not yet absolutely fixed.

As a rule, the Letters that passed the Privy Seal only were in the vernacular and on paper. There were exceptions: presentations to benefices were in Latin. The Scottish procedure, cumbrous as it seems, is not quite so cumbrous as that established in England by the Act of 1535—Mr. Hall gives an example of the procedure under that Act, extending to nine stages. In England there was also a practice in certain classes of grants of shortening the procedure by a warrant authorizing the omission of several stages; and in Scotland this was introduced after 1603; it was the usual course for Patents of Peerages to pass the seal *per saltum*—that is, the Signature was the warrant for Peerage Patents, omitting the intermediate stages. In early Baronetcy Patents no such shortening was allowed. They ought to appear in four different records: (1) in the Register of Signatures to be shortly referred to; (2) in the Privy Seal Register; (3) in the Great Seal Register; (4) in the Register of Sasines—because a baronetcy was in the eye of the law the adjunct of a grant of land in Nova Scotia,

of which possession had to be given just as of land in Scotland. The Privy Seal Register, having escaped removal to England in 1651, is, though not free from blanks, the best preserved of all our early records.

The original Privy Seal warrants for Great Seal charters, that is, the documents from which the Latin Register of the Privy Seal was framed, are extant from 1667 onwards. The Signet Warrants, representing the step preceding the Privy Seal Writ, have never been kept in book form, but a large number of originals remain; these are technically called Privy Seal Warrants, and the series begins in 1628.

The first step to a grant under Great or Privy Seal was the Signature. The Signatures were booked in a Register of which many volumes are lost. The first extant begins in 1561, the last ends 1642. This record, as it gives the writs in the vernacular from which the Latin was translated, is sometimes of use to clear up doubts of the meaning of a word or phrase in the Latin. But it may disappoint—I recollect an instance. A feu charter of certain lands in Islay, granted in 1588, provides that the feuar is to pay yearly sixty ells of cloth of colour white, black and *groseus*. The Signature for *groseus* gives *green*. But the same words occur in another feu charter of the same lands in 1617; there the Signature for *groseus* gives *gray*. The point is—if the cloth was white, black and *green*, it was of the colours which made up the local clan tartan, the use of which would thus be carried back to the sixteenth century; if it was white, black and *gray*, no such inference can be drawn.

The corner-stone of the record system is that the record should be preserved in a different office from that where it is framed. This is exemplified in the records

I have been dealing with. Each step of the Order of Chancery was framed in one office and passed on to another to serve as the warrant for the next step—and the record, so far as kept in book form, was transmitted to the Clerk Register. As has been seen, he was the controller of both Chancery and Exchequer, and therefore the keeper of the records of both. So the Great Seal Record was and is framed in Chancery and the volume transmitted to the Clerk Register when finished. The Director of Chancery (the title goes back to 1440 at all events) at one time claimed to be independent and under no obligation to transmit his records; in 1732 the matter was argued out, both parties citing ancient history from the veracious pages of Hector Boetius.

As regards the Great Seal Register the question is long ago at rest. But there are records in Chancery which remain there, two of which are too important to pass by. Upon the Great Seal Charter followed the Precept of Sasine [1] commanding the sheriff or his deputes, or a specially constituted sheriff to give possession. When the lands were to be delivered not to a grantee under a charter, but to the heir of a deceased owner, the procedure was thus: a brieve (in England called the brieve of mortancestry) is issued from Chancery, ordering the sheriff to impanel a jury to ascertain of what lands the ancestor died possessed, whether the person taking out the brieve is the heir, and certain other points. The jury's verdict was sent back (retoured is the technical phrase) to Chancery, and thence (if the land was held of the Crown in Chief) the Precept of Sasine (technically called the Precept of Clare Constat) was issued, commanding the sheriff to give possession. In such cases

[1] Letters of Attorney is the English equivalent.

there was always a casualty, substantial or nominal, due to the Crown, which the sheriffs had to collect and account for in Exchequer. These sums for which the sheriffs answered were entered in a register called the Responde Book, and this is kept in Chancery, and the greater part remains there. The oldest parts of it have been transmitted to the Lord Clerk Register. The extant part begins in 1513; there is a Minute Book going back to 1437. This record is of value as partly supplying, in the case of lands held directly of the Crown, the want of the earlier part of the Record of Retours.

The Record of Retours is that in which the juries' verdicts on the brieves of mortancestry were engrossed. It is both framed and preserved in Chancery, and, though in the Register House, is not under the charge of the Clerk Register. So far as extant, it gives a complete account of the heritage of all who died in feudal possession of heritage, of the heirs, the date of the ancestor's death, the retoured value of the lands (which bears no very close relation to the true value), and the superiors of whom they are held. It is not necessary to say more of its value for genealogical purposes, though when the relationship between heir and ancestor is remote, its evidence must be received with caution. And for other purposes also this record has to be so used, especially in the abridgement published by the Record Commissioners, which gives neither the names of superiors nor the date of the ancestor's death. The feudal system renders it possible for the same land to appear in an indefinite number of proprietors' titles. A holding it of the Crown, B of A, C of B, and so on to G perhaps, the real owner. The abridged Record of Retours will not as a rule enable us to distinguish between proprietor and superior: even

the original record is very puzzling sometimes. The Record is continuous (with one gap of a few years) from 1600; before 1600 it is very incomplete. The published Abridgement comes down to 1700. Abridgements of the later portion, by decennial periods down to 1860, annual since then, are printed for use in the Register House. The portion down to 1860 is nominally on sale, but very few copies have been acquired by private individuals.

The proper seal of Chancery Precepts is the Quarter Seal—writs sealed with it sometimes have for testing clauses *Teste meipso*, but usually *Sub testimonio Magni Sigilli*. Of this seal the Director of Chancery was the proper custodian. It can be proved that the *testimonium Magni Sigilli* was the Great Seal itself in earlier time, up to and including the regency of Murdoch Duke of Albany. But the Quarter Seal appears almost immediately after James I.'s return to Scotland. It consists of the upper half of the Great Seal, obverse and reverse, appended in old times *par simple queue*, as the French say, that is, on a strip of parchment cut lengthwise at the foot of the writ (latterly it came to be appended on a tag like the Great Seal). Applied as it always is to writs addressed to some special person or persons, that is, to letters close, it seems obviously a reminiscence of the broken seal which one sees on the backs of old letters, just as the blue lines on a modern registered envelope are reminiscent of disused blue tape. It is not known to have been used in any other country but Scotland. But in England they had a seal called the half-seal, which was applied to certain Commissions, and the nature of which no English scholar has yet explained—except by an improbable guess which only serves as a stop-gap. When the

question comes to be properly studied I think it may turn out that the half-seal is the original of our Quarter Seal. The disuse of separate Precepts of Sasine greatly restricted the use of the Quarter Seal; and the few writs to which it is still appended are not now sealed at all unless by special request of the parties. I am informed that the Quarter Seal was never once used during King Edward's reign.

The English Exchequer was an elaborate institution at an early date; its rules, already time-honoured, were written down for contemporaries and posterity by Richard, son of Nigel, before 1179. As usual, Scotland followed England. But there is no evidence and no probability that our Exchequer had or needed such an elaborately organized system as that described in the Dialogue concerning the Exchequer. Of tallies, of the two Exchequers upper and lower, of the array of officials and their prescriptive positions at the Board, we hear nothing. In the Cambridge MS. two *ex-officio* auditors only appear, the Chancellor and the Chamberlain; with them sat other auditors specially commissioned by the king. The fourteenth century accounts indicate that two other officials, the clerk of audit and the clerk register, were always or almost always auditors, as were the treasurer and controller in later times.

In Exchequer the Chamberlain was in early days the principal person: his duty, according to the Cambridge MS., was to guide and govern the burghs, the king's demesne lands and his poor husbandmen in demesne; to intromit with the wards, reliefs, marriages and all other issue of the realm for the profit of the Crown, except with those given or assigned to others by the king; to make wholesale purchases, to arrange (with the king's

consent) where the king was to reside, and fix the state of the household according to the time of year, that so the wants of the household might be supplied without eating up the country. Further, the Chamberlain had to arrange with the sheriffs for the delivery of the supplies collected as rent, or bought, within their sheriffdoms, at such times and places as they were needed—this latter duty in the Chamberlain's absence devolved on the Clerk of Liverance. Being thus collector and expender of the king's revenue, the Chamberlain was the principal power in the state till the changes introduced by James I. Exchequer audits were held once a year (not twice as in England), the place of holding them being fixed for the convenience of the people.[1]

The mode of holding an audit is described by Dr. Thomas Dickson in his preface to the first volume of the Treasurer's Accounts. The summons to each accountant to appear on a certain day before the auditors, the Exchequer itself, that is, the table with its cloth (usually green, sometimes black, bound at the edges with leather and divided by lines into squares—*scaccarium* apparently means simply a chess board, the counters (*nummi* or *jacturalia*) provided for the auditors' calculations,[2] though known to us only by later descriptions, are evidently survivals from older days.

Of Exchequer Rolls prior to the War of Independence we have none; the earliest existing roll is the account

[1] Miss Bateson interprets the words to mean that the writer of the original of the Cambridge MS. wished the Audit to be held always in the same place; if so, his suggestion was not adopted for centuries afterwards.

[2] The method of using them is described in the Introduction to the Clarendon Press Edition of the *Dialogus de Scaccario*.

of the Constable of Tarbert Castle on Loch Fyne, 1326; the regular set begins 1327. But the Inventories of 1291, 1292 and 1296 tell us of a great body of accounts, written on rolls which were classified, but not so strictly as the English rolls.

The 1292 Inventory begins thus: In one bag were contained 23 rolls, large and middle-sized, of the accounts of sheriffs, bailies, farmers, thanes, burghs and others. There were also rolls dealing with special classes of revenue, *e.g.* rolls of fines made by the people of Scotland with their kings, as well in cows as money; rolls of the proceeds of the Justice Ayres and other perquisites; rolls of the aids laid upon the barons of the realm and the collection thereof, rolls and memoranda of divers ordinances concerning the household of the king and queen. The first quoted item would bear the interpretation that these ancient rolls were classified like their extant successors—the sheriffs' accounts in one roll, the bailies' in another, the burghs' in another, and so on.

But though the rolls themselves (of their dates we only know that some of them went back at least as far as 1218) are gone, it appears from the evidence cited above that they were not quite all gone in the first half of the seventeenth century; it was the confusion of the time of the Usurpation that completed the devastation. This is true whether we suppose that they were shipwrecked in 1660, or that some patriot saved them from Cromwell by appropriating them. The rolls which Lord Haddington quotes are principally the accounts of Sheriffs, but they include also those of *ballivi ad extra* (that is, officers put in charge of a special estate, either royal demesne or in the king's hands temporarily for some special reason), farmers, keepers of castles, foresters,

justiciars. There are even accounts of a mason and of a carpenter. Last, but not least, there is one Chamberlain's account, rendered in 1264; this is the only case in which Lord Haddington has preserved the names of the auditors, who naturally were all specially commissioned, neither the Chamberlain himself nor the Chancellor being included. Only the burgh accounts are unrepresented; they were probably on separate rolls.

These extracts are a veritable mine of miscellaneous information, as to which it is best to refer to Dr. Burnett's Preface to volume i. of the Exchequer Rolls; from which I quote a few sentences: 'These fragments are the more valuable from the extreme scantiness of the material for the history of the period. They show Alexander III. to have owned castles, manors or halls in nearly every county of the Lowlands; and it was the practice of the king to move with his court from one of them to another, looking after the administration of justice, consuming the agricultural produce of the adjoining demesnes, and occupying his leisure with hawking and field sports.' It was with a view to the progresses that the Chamberlain or Clerk of Liverance had to regulate the supplies so as to avoid either a glut or a famine. The risk of the latter, even for people of large means, in those days when conveyance was so slow and commerce by land so limited, is well explained in Miss Bateson's *Mediaeval England*. The Chamberlain classes his receipts under three heads: the fermes of bailiaries, that is, the receipts from sheriffs, bailies *ad extra*, farmers, thanes, etc; the fermes of burghs; and common (meaning, I take it, miscellaneous) receipts, with fines and feudal casualties. The burghs contribute only £675 out of £5313, just over one-eighth of the whole.

The extant series of Exchequer Rolls (as is observed in the preface to the first volume of the printed edition) goes further back and is less incomplete than most departments of the public records. Down to James I. the main accounts are those of the Chamberlain. The under-collectors of the revenues were the sheriffs, the magistrates of burghs, the custumars, and the bailies *ad extra*. These paid the proceeds either to the Chamberlain or to others by his order. The accessibility of these accounts in print, and the admirable prefaces of Dr. George Burnett, dispense me from going into detail about them. I need only say that while the other classes are so well represented, some misfortune has deprived us of the bulk of the sheriffs' accounts (of which the Inventory of 1595 contains an almost complete series from 1327). Of the few surviving accounts of the Keeper of David's Mint it is useless to try to glean anything after Mr. Cochrane Patrick. But the accounts of household officers, in view of what the Cambridge MS. tells us, are worth dwelling upon. In the first place there is the hereditary lord high steward, then the knight his deputy, the steward of the king's house—these render no accounts ; they have authority, but handle no money. The clerk of prebend was to the household what the clerk of the rolls was to the Chancery and Exchequer. He controlled, and therefore kept the accounts of the Clerks of Liverance, of the Wardrobe and of the Kitchen Clerks who take their names from their position ; Richard de Prebenda, Simon and Galfrid de Liberatione occur in early records. Two Richards de Prebenda and a Galfrid de Liberatione became Bishops of Dunkeld. The Clerk of Prebend appears in the extant accounts as clerk of audit, *clericus probationis domus regis*. Like the Clerk

Register, he had no accounts to render, but he is a usual auditor of Exchequer down to the end of Robert III.'s reign. The Clerk of Liverance, whose duty was to deal with all the king's provisions, and to make the liverance (that is, the distribution of food) in the hall and outside to render according to his due, and to account in Exchequer for all the victuals and expenditure of the king's household. We have several accounts of Clerks of Liverance in the end of Robert I. and during the reigns of David II. and Robert II., which quite bear out the Cambridge MS., and the Clerk of Liverance was frequently an Auditor of Exchequer.

The clerk of the wardrobe, to quote the same authority, had the keeping of the relics, jewels, vestments, robes, treasure, and of all apparel and furniture belonging to the king's hall, chamber and chapel; also of the spices, wax and all manner of minor things for the king's body. He received these articles in gross from the Chamberlain, rendered account in Exchequer, and had allowance according to the evidence of the Rolls of the Clerk of Prebend. Of Wardrobe accounts we have a few of the times of David II. and Robert II., for the details of which, full of antiquarian interest, I refer to the printed Exchequer Rolls.

The Clerk of the Kitchen was to see to the kitchen and larder, to answer for the larder as well as the meat, settle accounts nightly with the other officers (his subordinates, I presume), and have allowance in Exchequer on the same principle as the Clerk of Liverance. The accounts of the Clerk of the Kitchen only survive from the very end of Robert I. and beginning of David II.'s reign. A little later the Clerk of Liverance, judging by his accounts, seems to have taken on the duties of the Clerk of the

Kitchen also, including the poultry which, I do not know why, does not figure in the Clerk of the Kitchen's accounts —perhaps it had a clerk to itself.

But James I. introduced changes from England. All the household officers above named disappear; the Chamberlain, though still a high officer of State and retaining his judicial functions, ceases to be either receiver or disposer of the revenue. The main sources of revenue are now dealt with by a new official, the controller; and another new official, the treasurer, was created. The controller's accounts, as well as those of the immediate collectors of the revenue, are published down to 1600 in the Exchequer Rolls volumes; these also contain the rentals of Crown lands, and the Responde Books already described, down to the same date. The human interest, so vivid in the earlier accounts, tends to disappear, and accounts tend more and more to resemble a modern cash ledger. But a close study of the Exchequer accounts, published and unpublished, would yield abundant material for social history, especially the history of foreign trade. The Lords Auditors of Exchequer were a Court of Law empowered to hear cases relating to the royal revenue, and a few of the records of their actings in that capacity in the late sixteenth and early seventeenth centuries are preserved. They are not interesting reading, but may occasionally be useful. It was out of this record that Cosmo Innes considered himself to have proved that a 40 shilling land of old extent is equivalent to a ploughgate, or eight oxgates.

There was also a Register of Deeds kept in Exchequer which has perished—only a few of the original deeds therein recorded survive. For later Exchequer Records

it is best to refer simply to Mr. Livingstone's Guide—they have suffered grievously in many ways, one of their latest misfortunes having been a fire in 1824. Another has been, it is said (perhaps falsely), indiscriminate throwing away of records supposed valueless—some of which did not strike those who picked them up as valueless. The existing records down to the Union are believed to be all in the custody of the Lord Clerk Register; of the others, some are in the Register House, some in Exchequer. A thorough and systematic investigation of the whole ought to be undertaken, but labourers are few.

The Treasurer, created first as I have said by James I., perhaps in place of the Clerk of Audit (for his first title is treasurer of the king's household) received the feudal casualties (or the amounts realized by selling them), the fines and escheats of the sheriff courts, the compositions due for writs issued from Chancery, and the profits of the Mint; he had to defray the miscellaneous expense, including alms-gifts of the king, queen and royal family, liveries of servants, part of the stable expense, and some expenses of king's messenger, munitions of war, and upkeep of the king's castles and horses. The Treasurer's Accounts begin in 1473. They are in course of publication (in selections) in the Rolls series: the first volume, edited by Dr. Thomas Dickson, with a preface which is our best authority on so many points connected both with the records and with the private life of our ancestors, is too well known to need to be spoken of here. The continuation, edited by Sir James Balfour Paul, is published down to 1566. There is no record which gives us so clear an insight into the daily lives of the successive sovereigns—for their movements, their amuse-

ments, their clothes, their charities, their hospitalities, we have here first-hand authority. These accounts have the further advantage of being in book form, and (from the discharge side of the accounts) in racy old Scots. They have suffered a little from the long delay in providing a proper General Register House—some volumes have been restored to public custody by the heirs of the official custodians, some have not at present been so restored. The series (which, like the Exchequer Rolls, diminishes in interest in later times) comes down to 1635. Another record, the accounts of the Masters of Works, supplements the information in the Treasurers' Accounts relative to the royal residences. I earnestly hope its publication may be soon authorized.

As I said, the earlier organization was swept away by James I.; the Steward of the Household may perhaps be said to reappear in the Master of the Household, whose office eventually became hereditary in the Argyll family: they had no concern with the revenue. But in the sixteenth century we have some valuable records now to be quoted. The most celebrated are the Inventories of Queen Mary's Jewels, so admirably edited by Dr. Joseph Robertson. There is also a series of volumes relating to the daily household expenses, Liber Emptorum, the book of purchases, kept in Latin. It begins in 1511, and comes down to 1553. Not only does it satisfy curiosity as to the daily supply of food and drink, but it has often marginal notes of events that affected the court—several of hospitality shown to distinguished visitors.

Then there is the Liber Domicilii Regis, the Account Book of the Royal Household; the first volume, beginning 1525, is in the Advocates' Library. There are ten

in the Register House, coming down to 1553. Extracts from some of these were printed for the Bannatyne Club.

Then for the period when Mary of Guise was in Scotland, and for part of her daughter Queen Mary's time in her own kingdom, we have a record called *Depenses de la Maison Royale*. This, being kept in French by Frenchmen, has the puzzling French way of beginning the year at Easter, elsewhere unknown to Scottish record. This and some fragmentary accounts of the Stable during the same period, and a number of loose relative papers, are first-rate evidence for the movements of the queen about the kingdom, and as such worth the attention of historians. Dr. Hay Fleming is, I think, the only historian who has yet utilized this source. This record, though its sameness makes it impossible to publish, may some day prove a rich mine in the hands of an inquirer into economic history.

After the Restoration there is another record called the Treasury Register, of a quite different character—it extends from 1667 to the Union, and is chiefly valuable as the best source of information for the conduct of military affairs during the period which it covers.

CHAPTER IV

THE LAND REGISTERS OF SCOTLAND. THE NOTARY PUBLIC

The old system of land registration, which prevailed in Scotland, as in England and in feudal countries generally, was by entry in the court book of the manor; not of the deed but of a memorandum of the transaction in the Court, which owed its validity to its publicity. In different countries this system, which goes back to the thirteenth century, developed differently. The Scottish development, with which we are to deal, undoubtedly came to us from abroad. It was not an exact copy or adoption of any foreign institution, but home grown. By the Land Registers of Scotland owners of property enjoy a certainty of title which many generations of learned lawyers have failed to evolve south of the Tweed; and, in the opinion of some who are highly qualified to judge, the system is capable of being without any revolutionary change reformed into a cheapness and simplicity such as one associates with newly settled lands at the Antipodes. Before tracing the historical evolution of these registers, it is as well to admit at the outset that the ease with which a trustworthy record was established was due to circumstances not all of which can be regarded as happy circumstances for the people. Sir Thomas

Craig writes rather bitterly of the pressure which had been put upon the customary tenants to become feuars —if they did not they ran the risk of being treated by the law courts as tenants at will. And there is other evidence to the same effect. But this harshness resulted in an assimilation and simplification of our land tenures which made universal and compulsory registration possible. Out of the confusion of subordinate and seignorial jurisdictions, the weakness of the central authority and a widespread lack of reverence for authority of any kind, there emerged uniformity and security. But the necessary condition was that though the local law, though even the national law, and its administrators might not always command respect, the conception of a higher law should impose itself, a law of nations so universally received and so consonant to reason as to seem not unworthy to be called a law of nature.

The forerunner of our land registers is the notarial instrument ; and the notary public is a survival or revival of Roman Law.

The diffusion of Roman Law, says Giry, whose account of the matter I abridge, produced in the twelfth century, first in Provence and Languedoc, then in the whole region afterwards known as the country of written (as opposed to customary) law,[1] a considerable reform in the mode of framing contracts, and in the part played by notaries. These became what the *tabelliones* had been under the Empire—public persons. *Tabelliones* or notaries public (the two titles were synonymous in the middle ages though not in classical times) had the privilege of giving to the deeds which they formed the

[1] That is, speaking roughly, the country where the Civil Law became the Common Law.

character of authenticity, by the addition to them of a docquet analogous to the Roman *completio*, and the application of their sign manual. Lords who had seignorial jurisdiction, bishops and communes created notaries public, and conferred on them the right to execute instruments within their territory. The pope and the emperor, in virtue of the jurisdiction which they claimed over the whole world, not only created notaries public, who claimed the right to act as such in all countries, but in addition they granted as a favour the prerogative of creating notaries Apostolic and Imperial. After the reunion of the southern provinces to the French crown the kings of France began to create notaries royal. From the second half of the twelfth century, and onwards throughout the middle ages, the great majority of private deeds in the south of France were framed by notaries public. In the large towns they sat in their shops, received acts done in presence of witnesses, and entered them in their registers. These registers are preserved in great numbers from the thirteenth century onwards, and constitute an almost inexhaustible mine of historical information of all sorts and of the greatest value. So far Giry.

In Scotland it is probable that there were always notaries attached to all great households. Mr. Joseph Anderson has pointed out to me that in 1231 Patrick, son of the Earl of Dunbar, granted a Letter of Attorney to three persons, one of whom he describes as 'my notary who carries and keeps my seal'—evidently what may be called a notary private. It is not likely that the notary *public*, the privileged framer of Instruments, appeared in the north so early. And there is no evidence that in those days notaries public were created by royal

or other local authority, either in England or Scotland. As to imperial notaries I can show no evidence so early. But it is likely that the imperial notaries were neither far before nor far behind the papal ones; the indications are rather that the imperial came first. The Calendar of Papal Registers issued in the Rolls series shows that the earliest instance of a faculty to create a notary public granted by the pope to a bishop is in England in 1279, in Scotland in 1288. The earliest surviving Scottish notarial instrument which I have seen is of 1291—it is taken on the settlement of a dispute between the monks of Melrose and the parson of Dunbar, and the notary was Nicholas called Campion, by imperial authority notary public. Seven years later there is an Instrument taken on the injury done to the Muniments of Scone Abbey during the war; the notary was Robert de Garwald, notary public by apostolic authority.

That at this time there was a great influx of notaries appears from the Registrum Palatinum Dunelmense in the Rolls series. In 1312 the Bishop of Durham takes notice of the great numbers of self-styled imperial notaries in the country as to whom nothing is certainly known; and forbids them to practise until they shall have produced satisfactory evidence that they are really notaries. Eight years later the matter attracted the attention of the central government. Edward II. in 1320 by Closed Letters to the Archbishop of Canterbury and the Sheriffs of London summarily forbids imperial notaries to practise in England, England being no part of the Empire. Henceforward we hear in England of apostolic notaries only, and it was only in connection with church courts that their services were called into requisition—the king's judges consistently and

persistently refused to recognize the notary as a public person, or his attestation as in any way superior to that of any other witness.

The notary public was a bit of Roman law, and of Roman law English lawyers would have none. *Nolumus leges Angliæ mutari.* Their view is sympathetically stated by Professor F. W. Maitland in the Preface to his translation of Gierke's *Political Theories of the Middle Ages.* In England, he says, we see a very early concentration of justice and then the rapid growth of a legal profession. When the new learning was in the air, English law was and had long been lawyer's law, learned law, taught law. In Germany there were no such conditions, consequently the Roman law was received as the common law of Germany. In Scotland there were no such conditions, and so the Roman law had great influence upon the law of Scotland. Even England ran some risk of the same *misfortune*—a glance towards Scotland, says Professor Maitland, would show us that the danger was serious enough. It was averted by the continuous existence of the Inns of Court. For good or for evil, Scotland lay open to the Roman law, and consequently to the notary public.

Yet I do not find evidence of any great influx of notaries during the fourteenth century. Perhaps it was the poverty of the country which kept them few, perhaps it is only the loss of records which gives the impression of their fewness. The Register of the Bishopric of Glasgow contains several during that period—one of 1342 has the year of the pope's pontificate, and the notary's diocese expressed; these are omitted in the earlier but regularly inserted in the later instruments. But it is only in the fifteenth century that notarial instru-

ments become numerous. For a time they are of the most varied character. There were instruments taken on leases, on indentures, on personal obligations, on celebration of a marriage; instruments of institutions to benefices or to parish clerkships; on the result of a lawsuit, or in some step in procedure, or on some admission of the other side. If Dogberry had not been (though resident in Messina) an Englishman, he would certainly have asked a notary public to write him down an ass.

I give a couple of illustrative instances from Lord Kinnoull's charter chest: 'In the name of God, Amen. By this present public Instrument be it known to all that in the year of God 1517, the 17th day of May, in the 5th Indiction, in the fifth year of our most Holy Father and Lord Leo X., in the presence of me notary public and witnesses underwritten appeared discreet men Sir James Young and Sir William Johnston chaplains, who of their own motion and on certain knowledge confessed and declared that Henry Bruce died at the city of Brescia under the banner of the most Christian King of France in the month of May in the year of our Lord 1516; and added that they on their return from Rome to the city of Milan learnt that the said Henry was killed by the shot of a certain cannon: and in verification of the premises the said Sir James confessed that he had received from the treasurer of the said most Christian King 5 francs of the money of France to pray for the safety of Henry's soul. On all which John Bruce in name of Hector Bruce, John's father and Henry's heir as he alleged, asked of me notary public underwritten a public Instrument or Instruments. Done at Edinburgh in the Church of St. Giles.' Then follow the names of

witnesses and the notary's docquet, attesting that he had seen, heard, known and taken note of what had taken place.

'In the year of God 1530, on the 10th day of January, in the presence of me notary and witnesses appeared an honourable man John Bruce of Cultmalindy in presence of a noble and potent lord William lord Ruthven his overlord who had his marriage, and with becoming reverence earnestly required his lordship to provide him with a suitable and agreeable spouse, and to name the lady as is the custom in such cases. To which lord Ruthven replied that he would provide such a spouse for the said John within 40 days next following. On which John asked an instrument. Done within the collegiate church of St. Giles of Edinburgh at 9 o'clock forenoon or thereby.'

It will of course be understood that this matter of a marriage was simply a matter of money between superior and vassal. Our courts never at any period coerced any one into any marriage, though sometimes the young man preferred to take the wife provided for him rather than pay a heavy fine. In such cases the lady, though his equal in rank as the law required, was usually his senior by some years. The following example of the exercise of the liberty of the subject in this matter comes from a Protocol Book in Edinburgh Council Chambers:

'15th June 1494, in presence of me notary public and witnesses a noble man William lord Ruthven and Isabel his spouse earnestly required and implored Margaret Ruthven their daughter to contract and complete marriage in face of the church with John Oliphant grandson and heir apparent of Laurence lord Oliphant, whereto he lord Ruthven and his said spouse stand obliged, as in

Indentures made thereupon is more fully contained, considering that he John and she Margaret are now of lawful age to contract and complete such marriage. Which Margaret Ruthven in answer said that she would not complete nor contract marriage with the said John. And lord Ruthven asked why she would not complete the said marriage. And she Margaret again answered and said because she had no carnal affection nor favour for him John, and that she declared this to her said father and mother a year ago and more. And then the said lord Ruthven for himself and his said spouse protested that the said Margaret's dissent and refusal to complete such marriage should not turn to their prejudice or scandal since the failure to complete the said marriage did not lie with them, but they were ready and prepared for it so far as in them lay according to the letter of the said indentures as they asserted. On which the said William lord Ruthven asked an instrument for himself and his said spouse. Done in the burgh of Edinburgh in the said lord Ruthven's chamber at 8 o'clock forenoon.'

Instruments of Transumpt of an old deed, or of a deed of which an authentic copy was needed, were quite common ; having been executed not for a temporary purpose, but for permanent preservation, they had a better chance of survival. But historically the most important class of notarial instruments is the Instrument of Sasine. That Sasine of lands should require to be proved by a notarial instrument is a conception which seems of home growth in Scotland ; and the earlier specimens were so worded as to show that the circumstances under which instruments were taken were judged to be exceptional. To take one early instance: on 1st July, 1395, William of Megill lord of that ilk grants the lands of Drumkilbo

to John of Tyri his esquire. On 14 February thereafter John of Tyry lord of Drumkilbo appears before William de Megill lord of that ilk, and alleges that he holds the lands of Drumkilbo of the said William in blench ferme, paying therefore yearly one pound of pepper. The superior replies that he is informed by the elder men of the country and his own near friends that the fact is so. John then asks for Sasine, and it is given him. The superior receives the sasine ox, and the sergeant of the barony received John's hood (*capucium*) for his fee. The sasine ox occurs often in such documents, but the sergeant's fee is not so well known. The two seem to correspond to the cow and upmost cloth exacted by the vicar from a deceased parishioner's representatives. There is no allusion to the charter, though the *reddendo* therein is as stated in the Instrument; and the whole is authenticated not only by the notary's docquet, but by the seal of the superior.

In the Register House we have a Certificate by the Steward of the Earldom of March in 1420 that he has given a Sasine; and another of the same sort in 1428. A similar certificate, of the year 1410, is printed in Erskine's *Institute*. These are under seal, and not notarial; they could be paralleled from English records. The older practice in the two countries is identical—the lord grants his charter, and gives sasine thereupon himself, or (if he is not present) by his bailie to whom he grants what we call a Precept of Sasine; the English call it a Letter of Attorney. Sasine is given before the *pares curiae*, whose memories are the evidence of the fact.

The innovation which gradually crept in during the first half of the fifteenth century—by James III.'s time

it was the established practice—consisted in the substitution of the notary's court for the lord's court, and of the authentic record under his sign and subscription manual for the oral evidence previously judged sufficient. The tendency of the notarial system, says Giry, was to monopolize the functions of the Courts of Record throughout Christendom. In Scotland, as in Southern France, the attempt was partly successful. But when the Courts of Justice began themselves to have notaries for their clerks, and to keep regular and permanent records from which extracts could be had; when they went on to become Courts of Record and interpose their authority to deeds, so that a deed registered in Court could be thus preserved, and execution had upon it if required —the unattached notary was unable to compete. In the earlier days of the Register of Deeds it is not uncommon to find a bond or contract in form of instrument recorded; but this was no more effective than the simple registered bond. Finally a statute of 1584 following on earlier statutes intended to enforce the sealing of Deeds (a practice which, since deeds had come to be in practice authenticated by the signature of the parties, was going out of use), enacted that sealing should not be necessary for deeds intended to be registered—registering being "ane greater solemnity nor sealing." Thus even the advantage of rendering a seal unnecessary ceased to be peculiar to the notarial instrument.

But Instruments of Sasine were in a different position; they usually recorded transactions which took place not in a Court house, but on the ground of the lands to which they related; it was a cumbrous proceeding to hold a regular Baron Court at every time and in every place at which a sasine had to be given, whereas the notary as

public and authentic person in such cases could be ubiquitous; indeed, he could hold his Court and give sasine in cases where the granter of the conveyance had no power to hold a Court at all, and could only have transferred possession by going to the overlord and resigning in his disponee's favour. Moreover, the notary's record of proceedings was preserved in a book and could be referred back to when necessary. Hence, once it became a fixed rule that the sasine required to be proved by writing, the notary and his instrument became a necessary institution.

In old times, as has already appeared, there were two classes of notaries in Scotland, notaries by imperial authority, and notaries by apostolic (papal) authority. In 1469 an Act of Parliament forbade imperial notaries to practise thenceforth in Scotland unless they had been examined by the ordinaries and approved by the king. This Act declared that since the king has full jurisdiction and free empire within his realm, he may make notaries whose instruments should have full faith in all contracts civil within the realm; 'they to be examined before their ordinaries and have certification of them that they are of faith, good fame, science and lawté according for the said office.' After this Act we still occasionally find imperial notaries acting, but the legality of their doing so was more than doubtful. Instead, the style, which even earlier is often 'by apostolic and imperial authority,' becomes frequently 'by imperial and royal authority'; also 'apostolic and royal,' or 'apostolic, imperial and royal.' I cannot undertake to say that 'notary by royal authority' never occurs, but it is not common—probably it was felt that his instrument might come before some Court where he would not be

recognized as notary unless he had either the emperor's or the pope's authorization. Before 1469 the majority of notaries were imperial; for many years preceding the Reformation they were all apostolic; occasionally apostolic and royal.

By what means were these papal, imperial and royal authorizations conferred? First as to royal authority. It was conferred, and began to be so immediately after the Act of 1469—the Register House has an instrument of a notary by imperial and royal authority dated 1473. But of the process of creation before 1563 I can give no account; all evidence as to examinations before the bishop has of course perished along with the bishop's registers. As to imperial notaries, Giry tells us how the emperors granted the power of creating notaries to certain persons and their heirs, and quotes an example of the creation of a notary at Grenoble in 1441 by one who had inherited a faculty to that effect, granted by the Emperor Frederick II. in 1208. The most ordinary channel probably was the Count of the sacred palace of the Lateran. Du Cange *sub voce Comes* quotes a charter of the Emperor Charles IV., in 1370, whereby he created Amizino de Bozullis doctor of laws, and John de Bozullis, citizens of Pavia, and their children and descendants, Counts of the sacred Lateran palace, with power to create notaries, invest them with the office by pen and penner, and to grant legitimations to the children of any below baronial rank. Selden in his titles of honour quotes several creations of such counts palatine—some with much more extensive powers (such as conferring degrees and laureating poets). And he gives a charter of 1306, granted by Roger de Monte Florum, by the grace of God count palatine, granting to the prior of St.

Swithin at Winchester the power to create two notaries and to invest them by pen, penner and parchment; he examining their sufficiency and taking oath of them to be true to the Roman See, the Empire and the Count himself. To this my attention was drawn by Dr. George Neilson. These Counts Palatine probably in later times went beyond limited delegations of that sort, and created viscounts to perform their functions—perhaps there were vice-viscounts too.

Unfortunately I can only cite one example of a Scottish creation of an imperial notary; it is in an early protocol book at Stirling, and I owe the copy of it to the late Mr. W. B. Cook. It bears that Sir William Crag, chaplain, having commission from the emperor, on 29th November, 1482, admitted Sir Dugall Cosour, priest of St. Andrews diocese, to be a notary and a public and authentic person, and invested him in the office, by the usual pen, penner and parchment and also by putting a ring on his finger—this last detail, borrowed from the form of investiture in benefices, was probably an unnecessary addition. Sir Dugall swore to exercise his office faithfully and to be faithful to the Emperors or Kings of Rome. In the record the statement that Sir Dugall had been found fit is scored out; and Sir William mentions no intermediate source of his commission. This is thirteen years after imperial notaries were forbidden to practise; doubtless the intention was to obtain admission as royal notary also; but I have not met with any of Sir Dugall's instruments.

As to apostolic notaries there is more evidence. The Papal Register contains numerous faculties quoted by the popes to bishops to create a fixed number of notaries. The Register of Richard de Kellawe, bishop of Durham, in the Rolls series, contains a creation of a notary public

by that bishop in 1314, in virtue of a faculty from the pope; the notary is admitted by the usual symbols, and takes the oath of fealty to the Holy See, and of fidelity in discharge of his office, both in great detail; including a promise to insert contracts in his protocol, and not maliciously to defer executing a public instrument thereupon, saving his just and usual salary. The majority of notaries in the sixteenth century in Scotland were not created in that way. Of the Protocol Book of Gavin Ross, the earliest we have in the Register House, a Calendar has been issued by the Scottish Record Society; on its contents Dr. David Murray has based a valuable little book, *Legal Practice in Ayr and the West of Scotland in the Fifteenth and Sixteenth Centuries*. It begins with a Bull of Julius II., dated 25th June, 1505, creating John Baptista Brochis clerk of Imola, his writer (*scriptor*) and familiar, a Count and Knight of the Sacred Lateran Palace, with power (*inter alia*) to create notaries. Then follows the Count's creation of Sir John Bell of Glasgow diocese to be a notary, and also to be his vice-count, with power to create notaries, etc. The pages containing this are badly torn, but enough remains to show the purport. Gavin Ross does not give his own creation as a notary; before 1563 notaries kept their instruments of creation separate, as the record to be immediately quoted shows. In all probability Sir John Bell was his creator, which explains the preservation of this bit of evidence.

Later in the same protocol book there are two creations of apostolic notaries public and judges ordinary, by John M'Tere, chaplain, viscount of Mr. John Greig, Count Palatine. Had Mr. John Greig been created Count Palatine by the pope, or was he also a delegate?

'In the St. Andrew's *Formulare* is the creation of John Lauder as apostolic notary by Andrew Forman's secretary, acting as *vicecomes* of a *comes et miles Palatinus*.' I omit some Acts of Parliament intended to bring notaries under more strict control, and an Act of the Provincial Church Council of 1549 to the same end, which seem to have been ineffective. At last after the Reformation in 1563 a stringent statute was passed, forbidding anyone to act as notary, on pain of death, unless created by royal letters and afterwards examined and admitted by the Lords of Session and their sign and subscription registered. Accordingly, in November 1563 begins the Register of the Admission of Notaries, which still continues, though of late years not in book form.

The Register House possesses some of the protocol books produced in 1563; these are duly signed on each leaf by a Clerk of Session. But it is not till after 1570 that we find regular conformity to the law which required all protocol books to be marked by the Clerk Register before being issued to the notaries for use. For some years the bulk of admissions are those of notaries who had been so under the old regime; each of them states when and by whom he was created notary, produces his instrument of creation (or declares that he has lost it), and his protocol book, and is admitted by the Lords; then follows his docquet, with his sign manual. Every one of them is notary by apostolic authority. The creation is occasionally by the Archbishop of St. Andrews as Papal Legate, but in the ordinary case it is by some one quite unknown to fame, by his name always a Scotsman, and (if he does not confine himself to alleging 'apostolic authority') always styling himself either Count Palatine or protonotary apostolic.

One wonders whether the pope was really so open-handed in his gifts of the dignity of Counts Palatine—surely most of those who so style themselves can have been no more than vice-counts. Still more is this true of the protonotaries apostolic. These were of two sorts: the protonotaries participant and the protonotaries titular. The former were a strictly limited and highly privileged class. Among their privileges was the right to create notaries. But it does not appear that the protonotaries titular were so empowered. Were the protonotaries created *ad hoc*, for the purpose of creating notaries? At all events, such was the system.

It will be seen that the notary, important as were his functions in Scotland, derived his authority as public and authentic person (as it is in some creations), judge ordinary (as it is in others) from foreign sources through obscure channels. The difficulty which the bishop of Durham felt as to this in 1312 must have been often felt in Scotland also—when an instrument was challenged in court, the notary was called upon to produce his title, but a self-styled notary might, with luck, go on for years unquestioned. And it may be doubted whether the notary maker's title was ever questioned. Perhaps the courts thought it wiser not to be too inquisitive; to make a notary's protocol admissible in evidence after his death, all that was required to be proved was that he was 'famous and legal,' that is, I suppose, that he was in practice. There certainly was one deterrent to imposture —anyone convicted of having acted as notary without being one was severely punished—there are cases of men being hanged for that offence in Pitcairn's *Criminal Trials*. The inefficiency and dishonesty of notaries was practically an even more serious matter; forged

instruments were common enough to constitute a serious evil; the notarial instrument of transumpt was specially liable to be used to give a semblance of authenticity to a fabrication. All attempts to improve matters in these respects by invoking royal and episcopal authority only led to a greater demand for the papal authorization which the bishops could not well question.

The Council of Trent dealt with this evil, but too late for Scotland. After the Reformation it appears that at first little respect was had to their trial before admission. An Act of Parliament in 1587, on narrative of the great evils within the realm caused by the admission in great numbers of incapable notaries, ordained that no new notaries should be created for five years thereafter; and also laid down regulations on the subject which I suppose must be taken as superseded by the Act of Sederunt of the Court of Session passed in 1595. This provided that the applicant must have some means of living besides the exercise of the office; that he must be above twenty-five years of age (this was afterwards reduced), be able to write well and correctly, and to understand and form an Evident in Latin or English; that he must have been servant or prentice for five years to some honest and famous notary, whose testimonial of his honest and dutiful behaviour and diligence must be produced. The examiners were to be one judge, one clerk of court and one of said clerk's servants. Those regulations have doubtless been often altered—I am informed that not so very long ago the admission of notaries was in the hands of a very select and exclusive Notaries' Club, and that the intrant notaries' fees (with much money arbitrarily raised from the Club members by ingeniously devised fines) were spent upon a great feast. This part

of the ceremony at least sounds like a survival from the middle ages—it disappeared within living memory. There is plenty of matter relating to notaries public —their signs manual for instance would make an interesting study. But it is their relation to the records of Scotland which we are interested in.

It has been seen that the notary's oath of 1314 bound him to enter his instruments in *protocollum*. These protocolla, says Giry, exist in France in great numbers from the beginning of the thirteenth century onwards; in some provinces called protocols, in others they had other names. There were two classes of them, one containing the short notes taken at the time, the others containing copies of the instruments as extended. In Scotland also the books were called protocols—in modern days our practice is to call the instruments protocols and the books protocol books. The earliest we have are far more modern than the French examples—only a few, kept by the clerks of royal boroughs, go back beyond 1500—in Stirling the series begins in 1469, in Aberdeen in 1484, in the Canongate in 1485, and in Edinburgh in 1500. There is also an early Protocol Book of the chapter clerk of Glasgow, printed for the Grampian Club; this naturally differs widely from the others in its character. Of protocol books of unattached notaries I have seen none earlier than that of Gavin Ross already cited, beginning in 1513. There may be earlier books in private hands. The earliest we have are distinctly of the short note class, the later ones commonly contain full or nearly full copies of the instruments. At this date, while instruments of sasine are already numerous, they are not yet the notary's main business; in the first Stirling Book they seem to be about thirty per cent.

of the whole—half a century earlier they would probably have not exceeded two or three per cent.; by James VI.'s reign instruments of other sorts had become the exception.

While the instruments of sasine had become universal, and notaries' protocol books were coming more and more to consist of them exclusively, the evils arising from fraud, and the need of registers to correct them, were increasingly felt; much more so than in England, where the Courts Baron and others did provide some sort of record of ownership. From 1503 onwards several Acts of Parliament were passed, the object of which was to make the sheriff court books a record of sasines of lands within the sheriffdom. It is perhaps rash to say that these took no effect, the sheriff court records of the period being so ill preserved; but it is certain they did not answer their purpose. Of the most comprehensive of those Acts, that of 1555, Craig tells us that in his time it had been completely forgotten. Sir James Elphinston, afterwards Lord Balmerino, was the only person who remembered its existence. Parliament next tried to make the protocol books serve as a Register; in 1567 it was enacted that deceased notaries' protocol books should be brought in to the sheriff of the shire, and those within burgh to the provost and bailies, for custody, just as a little earlier the Provincial Council of 1549 had ordered the notary's books to be brought in to the official of his diocese. In 1587, and again in 1617, it was enacted that protocol books should be brought in to the clerk register for custody.

As regards burgh protocol books, the Act of 1567 appears to have been to some extent effectual—the series of protocol books in the custody of burgh clerks is in some cases nearly complete; but the clerk register has

never succeeded in enforcing the Acts for bringing protocol books in to him. The Register House possesses altogether about 160 of them; the city of Edinburgh has close on 200. And several of our 160 contain nothing or hardly anything besides the notary's admission. Giry mentions that the difficulty of reconciling the rights of a dead notary's representatives with the public interest, which proved as serious here, arose and still arises in France. In 1599 an Act of Convention of Estates established a Register of Sasines and Reversions (that is, rights of redemption of mortgaged lands) under the superintendence of the Secretary of State; for this purpose Scotland was divided into seventeen different districts, each of which was to have a register kept by a deputy of the Secretary; all such writs not recorded within forty days were to be null. Lands held burgage were not included, and writs recorded in the Register of Deeds were excepted from the operation of the Act. By an Act of Privy Council in 1604, a clause of registration in this register was ordered to be inserted in all sasines and reversions. Of only seven of the appointed districts is there any part of this register extant. It lasted only till 1609, when another Act of Convention abolished it as 'that unnecessary register, serving for little or no other use than to acquire gain and commodity to the clerks, keepers thereof, and to draw his majesty's subjects to needless, extraordinary and most unnecessary trouble, turmoil, faschery and expense.'

The king's letter recommending this Act shows that he was acting under the influence of George Home, Earl of Dunbar; the secretary during the whole time of the existence of the register was Lord Balmerino; its establishment may have been due to his influence. At

the time of its abolition he was about to be disgraced on account of an imprudent letter for which he was at least officially responsible. Whether the object was simply to discredit Balmerino, or under cover of weakening him to serve some powerful persons who considered the register to be against their interests, has not been ascertained. At all events, only eight years later came the Act of 1617, which instituted the General and Particular Registers of Sasines (the General Register being available for any sasine of land in Scotland, the particular Register only for land in the district for which it was kept). This system exists still. It differs from the system of 1599 in some details, and specially in putting the register under control not of the Secretary but of the Lord Clerk Register, a gain logically because thereby this new register was put in the same keeping as the older established registers. All register volumes had to be issued by him, and when finished to be returned to him for permanent custody.

Craig tells us (by the chronology he must be referring to the Secretary's Register, but his remark applies equally to the Register of 1617) that the suggestion for the Register of Sasines came from England, where an Act of Parliament of 1536 ordered the enrolment in a Court of Record of all bargains and sales affecting land. The lawyers found a way of evading this necessity of enrolling. In England there are no written instruments of sasine, the fact of possession having been given is (as it was anciently in Scotland) the one thing necessary. The Act of 1536 was held not to apply to leases for one year; so it became customary for the seller of lands to grant to the buyer a lease for one year, and having thereupon put him into possession, then

grant him a release of all the seller's right in the land. It was the prevalence of the written instrument of sasine which made such by-paths impassable in Scotland.

For this reason, and also because the register naturally consisted mainly of notarial instruments, it is strictly correct to say that it is to the notarial system that we owe our land registers. The register was not suitable for rights which do not need sasine to perfect them. The Udal land of Orkney (which passes without formal written conveyance, buyers and sellers simply going, if they please, before a court whose decree is the title) does not enter the register. Nor do the vestiges of what in England is called copyhold tenures enter the register—the only instance of this which has been recognized in courts of law is that of the kindly tenants of Lochmaben, who by a decision of 1726 are recognized as entitled not only to transmit their holdings to posterity, but to sell and burden them without consent of the Court of the barony—the decision appears from pleadings to have proceeded upon what in England is called the custom of the manor. Dispositions of the tenants' rights were produced dated as early as 1594. The rental book showed that disponers had regularly been entered there without question, and instances occurred of disputed points of possession having been settled by juries of the barony tenants. Entries of new rentals used to be part of the proceedings of the baron court—for the last half century (no baron court having been held) they have been simply intimated to the Lord's agents and by them recorded. I owe these details to the courtesy of the agents of Lord Mansfield.

However we may deplore the wiping out of ancient rights of this kind all over the country, it is obvious that

it is only the relative insignificance of such peculiarities of tenure which prevents them being a serious drawback to the value of the records. Later statutes extended the system so as to include deeds which were not at first registrable. In 1681 a statute ordained the royal burghs (which in 1617 as in 1599 were excepted from the operation of the statute) to keep a sasines register of their own. These registers are under the control not of the Lord Clerk Register but of the burgh magistrates. In 1845 the old ceremony of giving sasine on the lands by delivery of earth and stone, or other appropriate symbols according to the nature of the subject transferred, was dispensed with; in 1858 the notarial instrument of sasine itself gave way to a simple conveyance. It will be noticed that whereas in 1599 all sasines had to be registered in the locality, in 1617 the option was given of registering them locally or in the general register at Edinburgh. The earlier Act provided that lists of all recorded deeds should be posted up in the towns where the registers were kept—an experienced official, since dead, told me that in his opinion the general register, by superseding inconvenient local publicity, greatly facilitated the introduction of the system.

But the result was that when lands were sold, the purchaser to satisfy himself that they were unencumbered had to search both the local register and the general register. This was abolished by the Act of 1868, in virtue of which the whole register is now kept in one central office at Edinburgh—the separate Burgh Registers, however, still subsist.

In 1857 the registration of long leases was introduced; thus the register has ceased to be a register of feudal rights only; and now rights like those of the Lochmaben

tenants can be put on the register—some of them have been so put. The register is now, in fact, compulsory for feudal titles, voluntary for non-feudal titles. Should future land legislation create new non-feudal rights on a large scale, with fixity of tenure and right to sell or mortgage, either these must be made to enter the register, or the registers will lose their value.

The system has lasted long, and has proved wonderfully adaptable to modern changes of circumstances and of idea. But the searches necessary to satisfy a buyer that there are no encumbrances cost money, and the smaller the value of the property, the heavier in proportion is the expense. In 1863 a new system was proposed, that for each county a book should be kept; as soon as any deed is sent in for registration a page in this book to be set apart in all time coming for the *search sheet* of the particular property to which it refers. In this page, or its continuation, should be entered a short minute of all future deeds affecting the property or any part of it. In this way, if one wishes to find out how and to what extent any property is encumbered, it is only necessary to turn up the page in the search sheet and further search is superseded. This system was gradually introduced in practice between 1871 and 1876; it does not supersede the register, but it is there. To quote the report of the recent Royal Commission, 'It is no part of the records. But it is an official experiment which has now reached what may be termed practical completion.' It has been modified from time to time as experience suggested: and those officials of the Sasine Office who are best qualified to judge are the most fully convinced that it points the way towards important reforms.

A committee appointed by the late Lord Balfour of

Burleigh in 1896 inquired into the working of the system —it was subjected to sharp criticism by some whose familiarity with the existing register makes their judgment highly valuable—but I should say that so far as this criticism is not merely a criticism of points of detail, they have established no more than that, again to quote the Royal Commission, ' there is much necessary information which the search sheet does not profess to disclose.' At all events the search sheet still is kept side by side with the register.

The Sasine Office view, as expounded by two members of the late Royal Commission to be immediately referred to, comes I think to this—that the Search Sheet, completed by further investigations for which Sasine Officials are if necessary to be given facilities, would provide a ready made search of encumbrances relating to every heritable subject in Scotland, and thereby save in every case that part of the cost of transfer, and also it is claimed examination of the titles, preparation of an inventory thereof, and in many cases the cost of a deed. This is a subject for the expert conveyancer on which experts differ most emphatically.

This Royal Commission was appointed to consider the advisability of a drastic change, namely, the sweeping away of the present Register which is a register of conveyances, and the substitution of Registration of Title. This is the system introduced by Lord Halsbury in England, and passed by Parliament in 1897 : it exists in Australia and in some continental countries ; and in the Punjab, where its smooth working under most difficult conditions is convincingly set forth by Sir James Wilson [1]—the whole land of the country to

[1] Paper on recent economic developments in the Punjab, read to the Royal Economic Society on 9th February, 1910.

be recorded in holdings identified by a map; the proprietor's title to be not merely as at present reasonably secure when proper precautions are taken, but absolutely guaranteed by the State on payment of a small insurance fee (this last is not an essential, for in some countries the system exists without it); transfer of land to be managed in the government office, on request of the parties, by a few strokes of the official pen; searches dispensed with; deed dispensed with, and lawyers dispensed with.

The members of the Commission, eminent and learned men and experienced in law and in affairs, were all more or less agreed that there is nothing in our law to make the introduction of such a system impracticable—some of them were in favour of introducing it at once—those whose opinions carry (as I venture to think) the most weight, were not quite so sanguine. There is in such proposals a danger of raising a host of questions which might otherwise sleep for ever—there is a danger of doing as our ancestors did—correcting anomalies at the cost of doing injustice; there is a danger that in its most attractive aspect, namely the lessening of costs, the new system may fail to answer expectations.

The principal report therefore recommended beginning with reforms of the present system whereby its expense may be reduced; and of trying the new system as an experiment in some one section of the country before introducing it universally. The abolition of the Burgh registers, and the transference of the whole registration business to Edinburgh, are, in the opinion of the Commissioners, necessary incidents of the proposed change; to this strong opposition would assuredly be offered; and no one can read Dr. David Murray's vigorous

onslaught on the whole project without being convinced that there is a great deal more than mere local sentiment to be reckoned with. In such a case as Glasgow, where ancient and complicated rights coexist with a modern body of highly trained lawyers, such transference may possibly not be harmful; it cannot be beneficial. But the alternative of decentralizing the land registers would certainly have results unacceptable to the Treasury. And while the division of the country say into three districts, of which Edinburgh, Glasgow and Aberdeen should be capitals, might make for efficiency, anything like a resuscitation of the old system of division by counties would be not only expensive but disastrous.

CHAPTER V

ECCLESIASTICAL RECORDS

THE episcopal registers of England are a mine of history, secular as well as sacred, and the best of all sources of information as to the private life of our ancestors on its religious side. A number of them have been edited, and a Society now exists founded for the purpose of printing them. But in Scotland we have nothing of that kind to show. The muniments of the Sees of Glasgow and Dunblane, carried to France by the last Roman Catholic bishops, may have included records of the sort—if so, the French Revolution has probably made an end of them. The nearest thing to an exception is the protocol book of the Chapter Clerk of Glasgow for the beginning of the sixteenth century, alluded to in the previous chapter: unless we may reckon in this category the list of churches dedicated by David de Bernham, bishop of St. Andrews in the thirteenth century, edited some years ago by Canon Christopher Wordsworth. The materials of the great work of Joseph Robertson, *The Statutes of the Scottish Church*, had to be gathered together from chartularies and other MSS. where they could be got; for the editorial part we need fear no comparison with the corresponding English series, but the relative poverty of material is painfully obvious.

The mediaeval records of the taxations of benefices are also scattered; some are at Rome, some at Durham or Carlisle, some in the Advocates' Library, a few in the Register House, others scattered in all sorts of places: no Joseph Robertson has yet arisen to deal with them as a whole. Of the proceedings of the Church Courts the Register House possesses five volumes recording the Acts of the Courts of the Officials of St. Andrews in the sixteenth century,[1] and an Act Book of the Official of Dunblane beginning in 1550. Three of the Registers of Wills, those of St. Andrews, Dunblane and Glasgow, also go back to a few years before the Reformation.

The only considerable extant records of the old Church are the Chartularies of the Bishoprics and of the Religious Houses; the value of these has been long fully recognized. It was largely from them that Professor Cosmo Innes drew the material for his well-known books on our early social history. In the *Scotch Legal Antiquities*, published in 1872, he gave a list of those then printed, and of those at that time still in manuscript. Of the nine mentioned in the latter category, five are now in print; so are collections of the Charters of the Abbey of Kinloss and the Priory of the Isle of May, and the charters of the Blackfriars of Perth, not named by Professor Innes. The Charters of Lindores and of Inchaffray have been re-edited for the Scottish History Society from materials more complete than were available for the previous editions.

These last volumes are for many of us indissolubly associated with the revered and beloved memory of

[1] A selection from these was printed for the Abbotsford Club, which is especially useful as illustrating the working of the Canon Law in matrimonial causes.

Bishop Dowden, editor of the former and principal editor of the latter, without whom they would never have been undertaken, and to whose learning and patient labour their value is due. His Rhind Lectures, delivered 1901, and published in an enlarged form afterwards as the *Medieval Church in Scotland*, remain the authoritative text-book on the subject.

Of the four chartularies of Professor Innes' list still unprinted, that of the Friars of Aberdeen is expected from the New Spalding Club ; for that of Holm Cultram we look to some one of the band of competent charter scholars of Cumberland who have given the world so much excellent work already. The very unsatisfactory abridged Register of Coupar Abbey, printed by the Grampian Club, will some day, I hope, be supplemented by the considerable collection of original deeds relating to that Abbey, discovered a few years ago in the Charter Chest of the Earl of Moray ; but the discovery came too late to be utilized in this generation.

The department of church record which is common to ancient and modern times is the register of Wills. It might perplex a modern to understand why these should be classed along with Church Records ; but before the Reformation they were within the sphere of the church courts, and it was the officials' duty to see that, even if there were no legacies to pious purposes, a suitable sum should be spent on prayers for the soul of the deceased—besides there were the dues to pay—the quota (in Scots the *quot*).

The outburst of the Reformation swept away the whole fabric of Church Courts : but in 1563 the Commissary Courts were set up in their place, for confirmation of wills and decision of matrimonial and slander causes.

They had also jurisdiction in small debt cases, and were Courts of Record. They were not abolished till 1876, when their functions were transferred to the Sheriff, their registering of deeds having been abolished, and their consistorial jurisdiction transferred to the Court of Session at earlier dates.

The Commissariot Districts coincided more or less with the bishops' dioceses, though some dioceses were subdivided. The dioceses were thirteen (a fourteenth, Edinburgh, was set up by Charles I.); in Roman Catholic times there would be fifteen officialates, St. Andrews and Glasgow being each divided into two archdeaconries. The modern Commissariot Districts were twenty-two. The Commissaries in the time of Protestant Episcopacy were under the bishop, and they and their subordinates were appointed by him. As we have seen, there are only three Commissariots whose records go further back than the Reformation; some begin at much later periods; and in none are the records anything like complete; especially lamentable is the fire of 1721 which destroyed the earlier commissary records of Aberdeen, the place which may be called the home in Scotland of carefully and correctly kept record.

Except that the language of the record changes from Latin to the vernacular, there is no striking breach of continuity at the Reformation. Each entry of a testament contains the names of the executors, the inventory of the moveable estate, as a rule the date of death, sometimes the day, sometimes only the month, and a copy of the Will if Will there was. The genealogical value of those registers is sufficiently obvious. Indexes of them were compiled as a labour of love by the Rev. Hew Scott, author of *Fasti Ecclesiae Scoticanae*. These have

been superseded by the much superior indexes issued by the Scottish Record Society, by which Mr. Francis Grant, Lyon Clerk, has earned the gratitude of all record students of to-day. Partly because of the accessibility of these indexes, they are of all our older records the oftenest consulted. The Edinburgh Register was available for testaments from any part of Scotland, and for testaments of those who died abroad: the other registers were only for the testaments of those who belonged to their special districts. It is only with moveable property that they are concerned—that is why one sometimes finds the testament of a person of rank and substance in which the estate is entered as less than nothing: *debita excedunt bona.* Though Scottish wills have been so largely drawn upon for family history little use has been made of them as yet for social history; a study of the inventories of moveable property which they contain, systematically made—made, I should say, by districts—would throw as much light on our ancestors' ways of life in all parts of Scotland at all periods since the Reformation as any book that could be written. There are two other branches of Commissariot Records besides Wills; their Registers of Deeds and the Registers of Acts and Decreets of their Courts.

The records of their small debt jurisdiction cannot be expected to yield much beyond a few personal details occasionally of use to the investigator of an obscure genealogy. The point of interest about them is that they were the inheritors of the jurisdiction of the courts of the officials of the old Church which, as I have tried to show, began earlier than the King's Courts to administer the sort of justice which the commercial community required of the Burgh Courts, which served

the same purpose, not for the community, but for a privileged class. The Commissary Courts in this respect, therefore, were a survival; they still were able to attract some business, till in the interest of unification they were suppressed.

The consistorial jurisdiction of these courts, that is, their jurisdiction in matrimonial cases, cases of legitimacy and of slander, has left behind it a set of records of painful interest. Under the Canon Law when married people were determined to be quit of one another, marriage being indissoluble, the only resource was to prove that the marriage was and had from the beginning been invalid by the Canon Law; under the reformed system divorce is granted for misconduct. The former system afforded more scope for legal ingenuity, the latter certainly provides tastier food for the scandalmonger. It is ugly enough that a man should bind himself to find a flaw in another man's marriage or pay a penalty in case of failure—I have seen a contract to that effect in the Records of the Session in James V.'s days. But the ugliness of divorce court literature is more glaring; and the Commissary Court Records from the Reformation onwards provide such reading in abundance.

The other branch of consistorial jurisdiction consists of cases of slander; in these sometimes gentlemen and ladies of good position are credited with the use of language which to-day would startle the slums. If the growth of delicacy implies the improvement of morality we may indeed congratulate ourselves. An Index to the Consistorial cases in the Edinburgh Commissariot Register from 1658 to 1800 has been issued by the Scottish Record Society. The Commissariot Records of Edinburgh up to 1829, of the other districts up to 1823,

are in the Register House—the later records are in local custody. The printed Indexes above referred to come down to 1800.

The Reformation, the consequent dispersal of the property of the old Church and transference of a fraction of it to the new, produced a whole class of record; the first measure taken was to take one-third of all ecclesiastical benefices for the Crown, to be applied (partly) to the support of the reformed ministry—Knox's comment is too well known to need quoting. This process is recorded in the Book of Assumptions, which contains rentals of benefices and a calculation of the third to be assumed by the Crown. What remains of this is partly preserved in the Register House, partly in the Advocates' Library. The collection of the proceeds is recorded in the accounts of the collector of those thirds. Then there is a register of the assignation (out of the thirds) of stipends to the reformed clergy, and an account of the disposal of the superplus, which was devoted to other purposes; a record of abridgements of feu charters of church lands, of which the Register House possesses only two odd volumes; and a record of minutes of such feu grants, made up in obedience to an Act of Parliament of 1597. It should be explained that the holders of benefices were (when they were not deprived for special reasons) allowed to retain the unappropriated two-thirds for their lives; as the benefices fell vacant they were conferred by the patrons on other persons, sometimes ministers, mostly laymen. In 1587 all benefices were annexed to the Crown, saving the rights of the existing holders: this, of course, was undone to a great extent by the subsequent erections of great benefices into temporal lordships, and to a further extent by the

restitution of Episcopacy—into later developments I do not enter.

Of the records of the Reformed Church, those of the Court of Teinds, though most of them are not in the custody of the Lord Clerk Register, are in the Register House. The stipends provided for the Protestant clergy out of a fraction of the thirds of the lesser benefices of the old Church were apt to fall below the living wage. Various efforts were made to improve matters for them by raising more money out of those who were in possession of the teinds (Anglicé, tithes), but none were to much purpose till Charles I. took up a scheme whereby both they and he might be made comfortable. By holding the terrors of the law over the grantees of church property he brought them to terms. So far as the church was concerned, the result was that the teinds were handed over to the owners of the land from which they were drawn, under burden of the stipends of the clergy and of an annuity to the king. To the tenants the benefit was even greater than to the clergy. It put an end to drawing the teinds *in corpore*, a potent engine of oppression in Scotland then, as it is said to have been in Turkey, later. It is one of the little ironies of history that this measure, which (as modern historians agree) did more than any other measure of his to transfer powerful support from his side to the side of his enemies, has had the effect of putting the finances of a Presbyterian established church on a tolerably sound footing—assuredly not an object for the attainment of which he would have cared to alienate the nobility of Scotland and risk the forfeiture of his Crown.

The Court of Teinds, now merged in the Court of Session, presides over the valuations of teinds, augmenta-

tions of stipend out of the teinds remaining in the land-owners' hands; erections of new parishes and the like. The earlier records are very imperfect, many having been destroyed by fire in 1700. They include, among other matter valuable for local history, a volume of statistical accounts, naturally somewhat meagre, of various parishes in Scotland in 1627; these were printed by the Maitland Club. These records are primarily of value to the ministers, for whose convenience it may be said they are retained by the teind clerk and not transmitted to the Lord Clerk Register. Fortunately, most of the Scottish local historians being ministers, historical study does not suffer appreciably.

Of the Records of Presbyterian Church Courts in ecclesiastical custody many are in print—the early General Assembly Records in the Book of the Universal Kirk. Those of the Commissions of Assembly during the Civil Wars and Commonwealth have been printed by the Scottish History Society. Of the Synod and Presbytery Records some have been printed, usually in selections. The information they contain relates of course primarily to the religious state of the country, as to which they now are the primary source of information, as the Episcopal Registers were of old. Sometimes one comes on information about important events and prominent individuals, and often on information about popular observances and superstitions. The policy of the clergy of the old Church, from the days of Gregory the Great downwards, was to christianize such things and enlist the ancestral attachment to them in the service of a truer religion. The Reformation was less tolerant.

The same remark applies to Kirk Session Registers, few of which are in print—one which goes back to the

very earliest days of the Reformed Church, the Register of the Kirk Session of St. Andrews, is admirably edited by Dr. Hay Fleming for the Scottish History Society. Kirk Session Records also preserve ancient beliefs; but only occasionally does anything of abnormal interest occur. The main effort of the kirk sessions throughout has been to create a healthier public opinion as to the relations of the sexes—consequently there is on the whole a deadly monotony about their proceedings: what does not refer to this unsavoury subject is often extremely interesting, but it has to be picked out; and we moderns, who have been brought up to suppose that everybody will do the right thing if he has scope for free development, have difficulty in sympathizing with the very different view taken by our forefathers.

The Church Records have always suffered from the lack of any general control of their custody or any universal appreciation of their value; the Session Records especially having always been in the care of the minister. Of late years a change has come; the General Assembly has collected information, and in its proceedings issued a list of all extant ecclesiastical records, which have been reprinted in a convenient form for reference by the Rev. Thomas Burns in his *Lectures on Church Property*, 1905. One is thankful to believe that a sense of corporate responsibility has awakened: but even so some centralization of custody for the older records would be a safeguard against possible misfortunes—at present one man may dilapidate in a day what has been carefully safeguarded for centuries. With regard to one portion of the Church Records, which is of the utmost importance from a non-ecclesiastical point of view, this danger has been recognized by the State and effectually guarded against by

taking it out of church control altogether. But the history of the Parochial Registers must be dealt with in more detail.

The first Register of Baptisms, or rather of godfathers and godmothers, was, the books tell us, instituted in Spain to stop the use for evil purposes of the principle of the Canon Law, whereby sponsorship involved spiritual relationship and thereby could be alleged to annul a marriage. But the true founder of parish registers was an Englishman, Henry VIII.'s much abused minister, Thomas Cromwell. He instituted registers not only of baptisms but also of marriages and deaths ; and it was from England that the institution has spread all over the world. The first suggestion of any such register in Scotland is in the fourteenth century Synodal Statutes of St. Andrews, when it is ordered that incumbents are to bring with them in writing every year the number and names of all who die in their parishes, that the bishop might learn how their last wills are being given effect to, especially their bequests to religious purposes.

The object of this statute is obvious. But after the establishment of Cromwell's registers, the General Provincial Council of 1552 enacted that the curate of each parish should have a register wherein should be entered the names of infants baptized, with those of their reputed parents, and of their godfathers and godmothers; and also of proclamations of banns of marriages; which registers the Convention ordained to be treasured among the most precious jewels of the church.[1] Whether this statute, passed at a time when the old church was on the point of falling, took any effect at the time does not

[1] I use Dr. Patrick's translation.

appear; the one Scottish Parish Register which professes to go back to 1553 is referred to later.

The authorities of the Reformed Church at first contented themselves with renewing the ancient enactment as to registers of deaths, by way of helping the Commissaries in seeing to the administration of estates—the reason given in 1565 is 'that pupils (Anglicé, infants) and creditors be not defrauded.' It was not till 1616, after the establishment of Protestant Episcopacy, that the General Assembly, and thereafter the Privy Council, enacted that every minister should keep a Register of Baptisms, Marriages and Burials, under the supervision of his bishop. 'If this Act had been effectually carried into execution,' said Thomas Thomson, 'it would have given to the people of this country a record truly invaluable.' But, though the Assembly's Act threatened the minister not fulfilling it with suspension from his ministry, it was not carried into effect; a Canon of the Scottish Church, enacted in 1636, had the same fate. And when the actual extant registers are examined, we find that, though no register begins before 1561, a good many were in existence long before 1616. We must therefore conclude either that the statute of 1552 was really acted upon in places, and that the registers begun under the old regime were kept up under the new; or that ministers familiar with the English system introduced it of their own motion in their own parishes. Throughout, one is constantly made to realize that no effective supervision by bishops or Assembly was ever exercised over these registers. Mr. John Macleod, whose knowledge of these subjects was unequalled, told me that in country parish registers of the seventeenth and early eighteenth centuries there are often signs of careful and periodical revision by

the minister of the parish. In the first half of the nineteenth century a few attempts at Presbyterial supervision are recorded. Perth Presbytery inspected its parochial records in 1826, and again in 1853. St. Andrews Presbytery, while the Rev. Hugh Scott was its clerk, held an annual inspection from 1846 till the change of system. There may be other cases of the same sort elsewhere. But one finds that the Presbyteries could only recommend; the session clerks did as they pleased. The system on which the records were kept, the care or want of care bestowed on them, was due sometimes to the minister or reader, usually to the session clerk.

The whole number of parishes in Scotland whose records begin before 1600 is twenty; and of these very few indeed are preserved continuously to the present day. By the Act of 1854 they were taken out of ecclesiastical custody and placed in the Register House; they are under the charge of the Registrar General, till lately the same person as the Depute Clerk Register. By the courtesy of the officials of the department I have been allowed to consult many of these registers.

Their imperfections are grave, for many reasons—in the first place, as I have said, the way they were kept depended entirely on the keeper; every register therefore is more valuable at some dates than at others. In the next place, even before the Revolution, Nonconformist ministers had begun to baptize and marry their own people, and doubtless the Roman Catholics practised this throughout, though in times of persecution many outwardly conformed in this as in other matters. Only after the Revolution denominational loyalty could be observed in this without fear of unpleasant consequences. It was only natural that when many of the baptisms were

performed by the non-established clergy, the session clerks could not always secure the registration of such in the parish register—often, no doubt, they had no desire to do so. It was only to be expected that the bitterness which accompanied the Disruption of the Established Church in 1843 should have increased the number of such cases; and done something to make more urgently needful the change which was made by the Act of 1854.

In the case of marriages one would have expected that the registers would be more complete—they are mostly registers of proclamations of banns; and till long after the Registration Act any marriage celebrated in Scotland without proclamation of banns in the parish church was legally clandestine, and no clergyman could take part in it without rendering himself liable to transportation. Yet, while in England (as I learn from Mr. Cox's interesting *English Parish Registers*) the registers of marriage are more complete than those of baptisms, in Scotland the reverse is the case—the baptism registers are decidedly the better kept. As for death registers, which, as I have said, are the only registers which the Reformed Church enjoined its ministers to keep for the first half century of its existence, it is another proof of the non-existence of any effective control over the local officials, that in many, perhaps most, parishes there is no death or burial register at all before 1855: where there is one it usually only covers a few years, and often it consists only of the account of payments made for the use of the mort-cloth kept by the parish for use at funerals. In small or thinly populated parishes it is common to find the Register of the Kirk Session used to record baptisms, marriages and burials (or mort-cloth dues). In others the baptism

register is kept apart; the others form part of the session register.

One result of this is that many session registers were taken possession of by the Registrar General as being the parish registers of which he is now the statutory custodian: others, in which the amount of such matter is not large or important, are understood to be still in ecclesiastical keeping. It is clear that these records, for the statistician, for instance, who desires to estimate the population, must be taken with great caution. On the other hand, the very want of homogeneity gives each register, and each section of each register, an interest of its own. Even as they stand, they can be used as documents of social history, evidence not complete but strictly contemporary. I think the earliest may occasionally throw light a little backwards on the ways of the Pre-Reformation Church.

For instance, there was no fixed and universal rule of the Church as to the number of sponsors at a baptism—in England the mediaeval practice was two men and one woman for a boy, two women and one man for a girl: this is the prescribed rule of the modern Anglican Church. The old Scottish statutes say (I think) nothing about it; but when we find that at Aberdeen, always in such matters the most conservative part of Scotland, from the beginning of the register to 1584 every boy had two godfathers and one godmother, every girl one godfather and two godmothers, we have good ground for inferring that the ancient Scottish practice was the same as the English.

In this register and most others the sponsors are called witnesses; Mr. Cox mentions that the same often occurs in England. The only cases in which I have noted the regular use of the name godfathers are at a later part of

the same Aberdeen Register, from 1623 to 1704, and in the Register of the Parish of Glasgow from 1609, when it begins, to 1651. There are probably many other instances. No godmothers are entered at these periods, nor any female witnesses in any Scottish Baptism Register I have examined after 1600. The last Aberdeen entry where the word godfather occurs shows that its meaning had been forgotten—it names four persons as the "principal godfathers or gossops." The early Perth Register uniformly names two male witnesses who in one entry are alluded to as gossips; and in one case the father's testament alludes to the person who is the first witness to the baptism as the child's godfather. It will be remembered that in John Knox's Liturgy the Baptism Service recognizes one godfather, but he is not a sponsor; he makes no promises on the child's behalf, and though he is called (as in the Anglican Prayer Book) a Surety, he is evidently so called as surety not for the child but for the father. The godparents are called sureties in some English registers, as I learn from Mr. Cox's book. In Scotland the name appears in the early part of the Register of the Parish of Errol, which begins in 1571; the sureties there are commonly three men and three women, the latter usually not named.

The list of registers marks this Errol Register as beginning in 1553; but the part before 1571 is plainly either an extract from some curate's note-book,[1] or else a compilation from family records—the baptisms it records are all those of the children of landed gentry or substantial tenants. Among the baptisms in this section

[1] Mr. Cox informs us that some of the English Registers have entries of this sort going back to 1514, though the Registers were not instituted till 1538.

are those of an Earl of Erroll, and of the first Earl of Kinnoull. Errol was one of the parishes which had a separate register of baptisms, but recorded its marriages among the proceedings of the Kirk Session; so the Kirk Session Register is in the Register House. Of various curious entries I choose this one:—"7 June 1590. It is ordainit that na person in this paroche sall send for or reseiff ony sik persons as are nocht notourly known for medicinaris to use their counsel befoir they schaw the Minister and Elders thereof, under pain of public repentance as consultaris with witches, and presenting them to the civil magistrate." The wizard is gone; but his descendant, the unauthorized practitioner, is still with us in town and country.

A more lengthy example of the vigilance of the Church in such matters occurs in 1704, in the Register of the Parish of Innerwick in East Lothian. James Denholm in Oakengall was charged with enquiring after and consulting of charmers or inchanters to discover the theft of some money, and to recover the same. The Minister told him the sin wherewith he was charged, the bruit whereof has filled up the whole shire and neighbourhood. He granted to the Minister that it was the Session's duty to enquire into such scandals. The Minister demanded of him if he had sought for and consulted any such charmers or inchanters for the recovering of his lost money, and who they were. Denholm owned to having consulted one John Hume in Edinburgh, who owned himself a practitioner but refused to exercise his skill for Denholm. Another, George Cathcart, had been looked for but not found. The Minister asked him if he had consulted any in Haddington. He answered yes, one Robert Allain, who came once to his house and made use

of a pair of scissors in a dish, giving bread and drink out of it to all his family and also to all others that were present. The Minister having represented to him at some length the nature of his sin, how heinous and dangerous, and in effect a renouncing of his baptism and taking on with the Devil, asked him if he would submit himself to the will of the Session, or if he would oblige them to bring his affair to the Presbytery. Denholm answered that he would be obedient to the Session. Upon which he was removed. And being called in again, the Minister told him that the Session appointed him to sit three several days before the pulpit during the public worship in the forenoon, in order to his being rebuked for his several times reiterated sin, and to be absolved from the scandal on the third Sabbath upon the evidences and signs of his repentance. The record does not satisfy our natural curiosity on one point—was the money recovered or not ?

Here is a specimen of the activity of the Errol Kirk Session in another department. On 14th May, 1592, they discharged all bringing of Mayes as the fashion was and pastimes on the Lord's day, especially before the last sermon after noon.

It is, of course, a familiar truth that much of what is known of ancient pastimes comes from the records of the efforts of the reformers to suppress them. Some curious Perth records, for instance, were printed in the Miscellany of the Spottiswoode Society from the extracts made by the Rev. James Scott, Minister of Perth, whose MS. is in the Advocates' Library. Some of the parish registers contain notices of more or less important events, local and national ; a whole series of such notes from the Register of Aberdeen is printed in the Spalding Club

Miscellany. The Canongate Register has the proclamation of banns of Queen Mary and Darnley, and their marriage; and the murders of Rizzio and Darnley. The St. Andrews Register records that on 21st October, 1638, the communion was again celebrated after the old way, the communicants sitting—the kneeling posture having long been enforced by the Perth Articles. In 1650 the same register records the visit of Charles II. The Scone Register has a notice of the Battle of Killiecrankie, which even at that distance prevented the holding of service. The Register of Arngask in Perth and Fife shires has notices of the '15 and the '45. More than one register has a note to mark the change from the old style to the new in 1752. That of Cadder, near Glasgow, has a graphic account of a riot provoked by measures taken to raise militia for national defence in 1797.

As already said, the character of the session clerk determined the character of the register. Sometimes the most elaborately worded and most carefully written entries relate to that functionary's own family affairs—the information thus supplied would be priceless if any descendant rose to eminence. Sometimes the clerk's taste tended to the gruesome—here is a passage from the Register of Urquhart in Morayshire; the year is 1773: "This year Keneth Leal belonging to Elgin was executed and hung in chains on the moor betwixt Elgin and Fochabers on an eminence (visible from all parts of the country) near the public road, for robbing the mail. He did no harm to the postboy further than knocking him off his horse. An immense concourse of spectators attended; and it being summer and autumn that he hung, no one would taste the fruit that grew within several miles of him all round, which therefore was utterly lost,

though there never was a more abundant crop." A successor in office in the same parish records in 1810 the hanging of a lad of nineteen or twenty for the murder of a little girl called Elspet Lamb. 'His body,' says the register, 'may be seen hanging in chains very distinctly from both sides of Urquhart, but particularly from the west side of the churchyard, standing on Elspet Lamb's grave and looking. It is remarkable that the places where three great criminals were hung in chains are distinctly visible from each other,' and he goes on to particularize.

Sometimes the clerk was a joker of jokes in and especially out of season. The Register of Ochiltree, Ayrshire, in 1704, records the baptism of 'George Something, lawful son to what ye call him in Mains of Barskemming.' The Register of Strontian, Argyllshire, after recording a marriage, adds this note: 'There has been something very odd about the above parties. They first contracted and then split, then agreed and with much singularity married. Were not married passing five days when the weaker vessel set sail and steered her course for her mammy.' Another and more striking example of the inconstancy of woman is in the Register of North Yell, Shetland. '1823 James Sinclair and Barbara Brown were married on Sunday the 25th May by the Rev. Charles Cowan. The circumstances under which the above couple were placed immediately before their marriage are so singular that they deserve to be mentioned. Charles Rusland in Vigon contracted with the above Barbara Brown on the forenoon of Saturday the 24th May, lodged his Pawns (his pledge that he would fulfil the contract), received a line from the Minister, paid the usual fee, and directed the proclamation of their banns to be made on the morrow. The

parties and their friends assembled at Vigon to the contract feast in the afternoon. In the evening James Sinclair, who had formerly paid his addresses to the young woman, went to Vigon accompanied by a lad whom he sent into the house to induce the woman to come forth to speak to him. His plan succeeded. She left the guests under some pretence, slipt out of the house, met James Sinclair, and went off with him. They proceeded directly to the precentor's house, lodged a line for the pawns, and paid the fee for the calling of their Banns also on the morrow. The precentor was perplexed. Next morning early, however, he proclaimed their banns thrice in the kirk at Cullivoe ; Charles Rusland, contrary to the advice of his relations, making no objections. When the Minister came to church about 12 o'clock noon, and heard the case, he caused the precentor to call their banns again three times when the congregation had been seated in church, and after sermon married them as above.' Clearly Mr. Charles Rusland was no sportsman, and did not play the game.

Objections to banns sometimes occur : at St. Madoe's, Perthshire, in 1594, it was objected ' that the man was an idiot and nocht of wit and judgment to govern himself, and the woman ane proud young and bangster hizzie who had coght him in his simplicitie.'

Naturally there are the births, marriages or deaths of distinguished men : Adam Smith, Robert Burns, Sir Walter Scott, Thomas Campbell, David Wilkie, Thomas de Quincy, etc. : and Shelley's marriage in Edinburgh, the origin of the Harriet problem and the chatter about Shelley so obnoxious to Professor Freeman. The Marriage Register of Stirling, which goes back to 1585, is exceptionally interesting, not only on account of the

large proportion of considerable people whose marriages it records, but for other details. There is, for instance, the marriage of George Fall and Geills Fall, Egyptians, married in the kirk by the minister upon their earnest suit.

Contracted couples were solemnly admonished to discreet behaviour during their betrothal; and sometimes also admonished 'that there be na playing be menestrals and dancing be the saidis parties nor nane of their company that is with them on the day of their marriage publicly on the gait nor other places neither on the day nor nycht under the pain of ten pundis.'

Though the parish registers before 1855 are not safe guides to the seeker for population statistics, they may well yield statistical facts of other sorts. For instance, at the present day, if one peruses the marriage notices in a Scottish paper in May one notices a remarkable paucity of marriages, and a great rush at the beginning of June. And it is believed to be traditionally unlucky to be married in May. Whatever may have been the case in Italy in the days of Publius Ovidius Naso, the old registers are distinct evidence that no such belief prevailed in Scotland before the nineteenth century; May in that respect is about the average of other months.

In some places at some dates there is a marked cessation of marriages during Lent, according to the old pre-Reformation rule; in some places not—doubtless the attitude of the minister affected the practice of the people considerably. The long delay between birth and baptism, now usual, came in slowly: in the seventeenth century (if both dates are recorded) the interval is hardly ever more than a day or two; in the middle of the eighteenth century it averages about a week.

Another detail in which the modern usage differs from the old is the number of baptismal names; it will be remembered that Macaulay in one of his essays quotes an ingenious friend who connected the prevalence of double names with the prevalence of Jacobinical principles. The inventor of this theory would certainly be strengthened in his belief if he lived now—both double names and revolutionary ideas have grown amazingly. Throughout the eighteenth century one finds frequent examples of a surname being given as a Christian name. Hope, Primrose, Wallace, would serve for either boy or girl. The double name, long prevalent in Italy, was, I suppose, not unknown in Scotland in the sixteenth and seventeenth centuries, though I do not recall an instance; Camden knew of two Englishmen only with double names.

In Edinburgh, of the children baptized in 1760 about one per cent. had double names (one of them was christened Caius Julius Caesar); in 1790 about seven per cent.; in 1820 nearly twenty-five per cent.; at present the double names must be in a very large majority. These little calculations are only given as specimens of what the older registers might tell if properly interrogated. What the modern registers tell, those who care to see need only look at the Registrar General's Annual Reports; with a little more or less conscientious study of them anyone can set up as an authority on social questions.

CHAPTER VI

RECORDS NOT IN CHARGE OF THE CLERK REGISTER

THE Records dealt with in the first four chapters are, or ought to be, with few exceptions, in charge of the Lord Clerk Register's Department. Of those considered in the fifth chapter some are there, some not. This chapter is almost entirely concerned with outside records; some of them are subject to his general supervision, some are in his charge *de facto* but not *de jure*; most are altogether outside his sphere.

First, as to one or two judicial records. Going back to the Cambridge MS., we have there accounts of three great officers of state who held courts, the Chamberlain, the Justiciar and the Constable. Of the Chamberlain as a collector and administrator of revenue I have already spoken; of the records of his judicial activity, which as regards his power over the burghs was very much a reality, we have little or nothing, except an elaborate account of the procedure in holding his Ayre, printed in the Acts of Parliament. The extracts from the Records of Edinburgh give a set of acts of his court in 1450; those of Stirling have an example of the judicial ratification by a married woman of her husband's deed in Chamberlain Ayre in 1476. The Records of

Lanark mention a Chamberlain Ayre in 1503; an Act of Parliament of that year provides that appeals from burgh magistrates to the Chamberlain should be tried before the court of the Four Burghs. The representatives of the Four Burghs, it appears from the evidence, were all along the jury who decided cases in the court over which the Chamberlain presided. When the Court of Session became the recognized Court of Appeal there was no further need for appeals in the Chamberlain's Court, and the Chamberlain's regulative functions seem simply to have ceased to be exercised. The Duke of Lennox, hereditary High Chamberlain, in 1633, obtained a Royal Commission, implying that he hoped to resuscitate the office. But Stair says that in his day it was quite neglected.

The Justiciar was never in Scotland quite so great a man as he had been in England in the earliest days after the Conquest; with us he always was a layman. His jurisdiction was both civil and criminal, he and the sheriffs were the dispensers of Royal Justice outside the King's Court. The Cambridge MS. speaks of justices of fee; hereditary justiciars we had none so far as is known, but the office may sometimes have been granted as a fief, that is, by letters patent for life or for a fixed term. The Justiciar was to be chosen by the advice of the magnates, according to the Cambridge MS., which means that the office was in the king's gift. They had to possess the knowledge and power to maintain law and justice for rich and poor, and maintain the king's right in all points appertaining to the crown: and their circuits in the thirteenth century, as later, were twice a year, once on the grass and once in winter: the coroners were appointed by them and they had to

enquire into the conduct of the sheriffs and sergeants of fee.

The Inventory of 1292 makes mention of some Rolls of the profits of the Justice Ayre and other perquisites. It is the criminal jurisdiction of the Justiciar which gives a living interest to his office. The existing Justiciary Records begin in 1488: valuable as they are, the selection of them printed in Pitcairn's *Criminal Trials* is greatly enhanced in value by the mass of illustrative matter added by the editor. That work stops at 1625. Below that date the records are little known; except that two volumes containing the records from 1661 to 1678 were printed by the Scottish History Society from a transcript. These records have never been in the charge of the Lord Clerk Register, who had no place as such in the Court of Justiciary. Till 1800 no public accommodation was provided for them, and they were kept by successive custodians in their private houses. In 1800 they were placed in the Register House. They are now in the Justiciary Office in Parliament Square. I have occasionally had to look at these records and have always found the officials most willing to assist me, but there is no proper accommodation in that office for historical enquirers.

A book on the lines of Pitcairn's dealing with the records subsequent to 1625 would be, if competently edited, second in interest only to his work. One record volume was restored to public custody a few years ago; others, it is said, are still in private hands. The long promised handbook by the Clerk of Justiciary will, I hope, some day rekindle interest in the subject.

The Lord High Constable's jurisdiction as presiding

over the Court of the Verge, that is, the court in which breaches of the peace committed within a certain distance of the king were judged, and who also shared with the Marischal the oversight of combats of chivalry, has been so lucidly explained by Dr. George Neilson, and by Miss Bateson in the Introduction to the Cambridge MS. so often quoted, that I need say no more. But the visit of Charles I. to Scotland in 1633 was an opportunity, in those days of awakening interest in antiquity, for revival of several things of which little had been lately heard—among other points, the exact duties and privileges of the constable and the marischal had to be defined and delimited. The verge, which in the Cambridge MS. and in the so-called 'Laws of Malcolm Mackenneth' (whose remarkable parallelisms with the Cambridge MS., duly pointed out by Miss Bateson, suggest that the two are not far apart in date), extends twelve leagues round the king, was in the seventeenth century recognized to extend only four miles round the king, or in his absence round Parliament. Within this radius the Earl of Erroll, Hereditary Lord High Constable, asserted his right to punish breaches of the peace. Several cases tried in his court are noticed above, pp. 51-53.

The Lord Lyon and the records of his court have been so learnedly and so exhaustively dealt with by the present holder of the office in his published Rhind lectures[1] that I will only say that at the time of the revival, if I may call it so, the office was in the hands of Sir James Balfour, one of our most industrious antiquaries, but alas! also one of our least trustworthy. His zeal as a collector, for which we can thank him with less reserve than for the

[1] *Heraldry in relation to Scottish History and Art.* By Sir James Balfour Paul, Edinburgh, 1899.

information preserved to us in his own writings, has unfortunately led to a separation of the Lyon Office Records into those up to his time, the most important of which are among his collections in the Advocates' Library, and the later records which are in their right place in the Lyon Office. In excuse for him we may truly say that the Lyon Office was one of those which for long had no home, except the Lyon's or Lyon Clerks' own houses—it was assigned rooms in the Register House in 1788, but seems not to have retained them long, and its final settlement there was not till 1833. It has never been under the Lord Clerk Register.

Of Sheriffs in Scotland we have very early evidence; Gospatrick the sheriff, apparently of Teviotdale, is a witness to a charter of Earl David, before he became King David I. But of their functions before the War of Independence we only know what the Haddington Extracts from the Exchequer Rolls tell us, and what we can pick out of ancient so-called statutes, and out of the few extant brieves addressed to them. Mr. Ross in his lectures drew attention to the fact that their powers as set forth in *Regiam Majestatem* are in some respects wider than those of the English sheriffs. But the assize of King David which forbade them to decide any case without the verdict of a jury, represents the true ancient law. Dr. Littlejohn observes that in the earliest sheriff court volume preserved at Aberdeen, 1503-1511, the juries decide everything; the next volume begins 1557, and by that time trial by jury in civil actions had ceased to exist. The Cambridge MS. lays it down that the sheriff should be elected by the county (providing only that he should be a man of substance); that is, as one of the English parallels cited by Miss Bateson

indicates, by the county court. This I think is new information.

It is not at all likely that the king uniformly refrained from interference; probably the working of it was what we see in the election of parish clerks by the parishioners in the fifteenth and sixteenth centuries—sometimes a real election, sometimes the parish simply asked to ratify the choice of the local magnate, sometimes its consent taken for granted. Another document in the same MS. gives a list of the sheriffdoms as they stood when the list was compiled—the internal evidence points to about the same date which I assign to the Cambridge MS., the end of the first interregnum or beginning of the reign of John Baliol. At all events, if the list was written after the holding of Baliol's Parliament in 1293, it ignores the three new sheriffdoms then created, of Skye, Lorne and Kintyre; Edward I., in 1305 does the same, it must be allowed. It is curious to find that, whereas the Cambridge MS. treats the office of sheriff as an elective one, Edward I. in 1305 admits two sheriffships of fee, both of very small counties, that of Selkirkshire granted by William the Lion to the de Sinton family and that of Kinross, apparently hereditary in the family of that name. Robert Bruce and his successors, acting on a settled policy it would seem, greatly increased the number of hereditary sheriffships; by Charles I.'s time practically all sheriffships were hereditary. That monarch did what he could to assert the crown right of nomination.

From the point of view of James I. (which on this subject, as is well known, differed greatly from that of his four predecessors) a hereditary sheriff was doubtless a lesser evil than a lord of regality; but it was a

constant practical inconvenience to the lieges that their judge ordinary should be a neighbour, as likely as not at feud with them. The records of the Supreme Court are full of applications for exemption from a sheriff's jurisdiction. Sometimes the king granted such exemptions under the Privy Seal; sometimes the court ordered the sheriff to appoint an unsuspect depute to try the case; sometimes they simply remitted it to the sheriff principal with advice to administer justice fairly.

The oldest sheriff court records now extant are of the sixteenth century; and only in a few sheriffdoms do they go so far back; Aberdeen, Linlithgow, Haddington, Perth and Fife is, I think, a complete list. The principal branches of sheriff court records are, the Act books which record the daily proceedings of the court; the Register of Deeds, similar to that of the Supreme Court (apparently such registration was as ancient in the sheriff courts as in the books of the Lords of Council, though no records of so early a date are preserved in the former as in the latter). Then the service of heirs to their ancestors was as a rule carried out in the sheriff court—(occasionally when there were special reasons against holding the inquiry locally, a court for this purpose was held elsewhere, and a practice grew up of sending such cases to be heard before the macers of the Court of Session as sheriffs in that part specially constituted)—then there was the annual fixing of the fiars by which grain payments were commuted into money; the criminal jurisdiction of the sheriff, the proceedings of the freeholders of the county; and sundry minor records. Naturally some of these branches were recorded in separate books at some periods, and at others they appear mixed up with proceedings of a different character.

The earliest existing book of record in any sheriffdom is at Aberdeen; it begins in 1503. The sheriff court records of Aberdeenshire down to 1660 have been edited in abstract, with copious specimens in full, by Dr. David Littlejohn for the New Spalding Club; and this book, with the brief and very purpose-like editorial matter it contains, is by far our best source of information with regard to sheriff courts, their business, and their procedure. Dr. Littlejohn has been able to prove that at least one earlier volume of records once existed, going back to 1491; and he gives reasons for thinking that the want of early record, and the incompleteness of the record, even up to 1750, are caused by the fact that such records as were kept were regarded as the sheriff's private property—one interesting extract from a lost volume bears that the sheriff clerk had borrowed the volume from which he took it from a former sheriff. This cause must have operated in all parts of the country, —and even in 1808 the reports sent in by the sheriff clerks to Thomas Thomson show that in three sheriffdoms out of four there was then no public place of deposit for the records.

Of the special branches of those records above mentioned the fiars do not appear in the sheriff court books of Aberdeen till crop 1603; in Fife they are struck for crop 1574; in Perthshire for crop 1583—the series of court books in all cases is so imperfect that one cannot be in the least sure that these were the earliest fiars struck in those courts. But it is certain that in older days the fiars were struck, not before the sheriff, but in the Church Courts. We have a reference to the fiar and ryding book of the Abbey of Kelso for crop 1543; and references to the fiars of Glasgow are numerous. The earliest I have

seen refers to crop 1522, but refers to it in terms which show that this fiar was already recognized as the standard of prices throughout the district. In Aberdeen, Dr. Littlejohn has shown, the fiar of the consistory of Old Aberdeen was produced as evidence of the price of grain for crop 1556, and this fiar was struck at all events as late as 1575. Fiar in this sense is the Latin *forum*, used (like the French *marché* and the English *cheap*) in the sense of *price*.

With regard to the criminal jurisdiction of the sheriff it is remarkable that very few cases of serious punishments inflicted occur. There are enough, however, to make it clear that the power of life and death was not only possessed but exercised. Dr. Littlejohn's explanation of the want of such records in the earlier books is worth citing. 'This is to be accounted for by the absence of the necessity for keeping a record of any punishments except fines, on the principle that when delinquents were put to death or banished they were finished with, whereas fines had still to be recovered.'

So far as I know the only other sheriff court whose proceedings have been the subject of detailed study is that of Renfrew. Mr. Hector, sheriff clerk, a generation ago published two series of selections from the Judicial Records of Renfrewshire; which may be said to be complementary to Dr. Littlejohn's book. The Renfrewshire records begin about the date when Dr. Littlejohn's account of the Aberdeenshire records finishes: and whereas Dr. Littlejohn has aimed at compiling a solid book of reference, Mr. Hector has done his best to be readable, and has fairly succeeded—the abundance of commentary makes a curious contrast with Dr. Littlejohn's self-effacing practice. But while there is probably

no county in Scotland whose Sheriff Court record could make a book any way comparable to Dr. Littlejohn's, every county has in its sheriff clerk's office materials for volumes like Mr. Hector's.

Turning from the sheriffdoms to the burghs is a change indeed. The county, in Scotland at least, has not and never has had a vigorous corporate life,—each burgh had and, we may say, always has had. Miss Bateson explains how common action was forced upon the burgesses, however far apart they might be in origin. Sometimes they were attracted by the franchises offered by some great lord to whom well established markets on his own estate had come to be a necessity.

In Scotland we have, I think, no proof that any but royal authority, direct or delegated, could create boroughs. David I. gave leave to the Canons of Holyrood to create the burgh of Canongate, and William the Lion gave the like to the bishop of Glasgow to create the burgh of Glasgow. The bishop of St. Andrews in creating the burgh of St. Andrews declares that he has acted by licence of King David, who had given Mainard the Fleming, the king's own burgess of Berwick, to St. Andrews and the bishop in free alms. The bishop proceeds to appoint Mainard as the first provost: so that at that time even a substantial burgess (as Mainard evidently was) could be granted away by the king just like a villein.

It is to be noted that none of our older burghs, unless St. Andrews be reckoned an exception, has any charter of creation. King Malcolm's charter to St. Andrews, and King William's to many royal burghs, are grants of privileges, and presuppose the existence of the burgh; and even the St. Andrews charter can be read (Sir Archibald Lawrie so reads it) as a notification

of an act already done. The earliest charter of creation of a royal burgh that I know of is that of Dumbarton by Alexander II. in 1222.

The burghs of Scotland had an organized judicial and regulative court, that of the four burghs, Berwick, Roxburgh, Edinburgh and Stirling. As we have seen, it was in this court, presided over by the chamberlain, that appeals from burgh magistrates were heard. When Berwick and Roxburgh ceased to be permanently part of Scotland, Lanark and Linlithgow were substituted for them by Act of Parliament in 1368. The Court of the Four Burghs is still alluded to under that name in an Act of Parliament of 1503, but already in 1405 the Court had enacted that representatives of all burghs south of Spey should attend their parliament; and the Convention of Royal Burghs (the records of which, as printed, go back to 1552) still sits annually, though I believe it is now a purely deliberative body.

In very old days the northern burghs, Aberdeen and the others north of the Mounth, had a confederation (hanse) of their own. This we only know from a single charter of William the Lion, which refers the institution back to the days of David I. Of this we hear nothing afterwards. But from the Court of the Four Burghs undoubtedly proceeds the collection of Burgh Laws, which claims to have been confirmed by David I. In like manner there is a roll of the laws of Newcastle-on-Tyne, printed in the preface to the Acts of Parliament as written down in the reign of Henry II. and said to be the customs which they had in the time of Henry I.

In custumals of that sort it is of course now a recognized axiom that the date is the date at which they were written down; as to the exact antiquity of each item we

must be guided by other evidence if it can be got. That the Newcastle custumal is less developed and therefore earlier that the *Leges Burgorum* is obvious; and Professor Cosmo Innes observes that 'these privileges of the Scottish burghs were evidently little more than a declaration of the Common Law as settled by common consent and immemorial usages'; and he shows that some of the *Leges Burgorum* are simply taken from the testimonies of the customs of particular burghs as preserved in other MSS. In these cases we may see the code in course of formation; and Miss Bateson's invaluable volumes issued by the Selden Society lay a foundation for the study of burgh customs by the comparative method. But putting it at the lowest, the code of laws of the Four Burghs, as we have it, is not later than the time of the Alexanders, and represents a body of custom which had been growing up in Scotland since the days of David I.; much of it having grown up long before in other countries, and brought here by immigrants. For that the influx of foreigners is responsible to some extent for the rapid growth of the Scottish burgh system—that it was they who inoculated the infant communities with the corporate spirit which so soon made them a power in the land may be taken as certain.

In Scotland (differing in this from England) clan loyalty is indigenous; feudal loyalty, though originally imported and now only a survival, has taken a deal of killing; communal loyalty (till quite modern times) was peculiar to the burghs. The records of burghs are of several classes; the records of the council as a governing body, with which may be ranked the records of the admission of burgesses; the judicial records of the burgh court, civil and criminal, and of the Dean of

Guild's Court; the Burgh Register of Deeds, still existing though limited in scope; the protocol books of the burgh clerks, which in later times become the burgh Registers of Sasines—in earlier days they include many sasines of land outside the burgh, and many instruments not of sasine; the registers of charters granted by the burgh to its vassals; and the municipal accounts. How far these classes are kept apart depended upon the circumstances of the particular burgh; in Edinburgh from 1487 the Register of Burgesses has been kept apart from the Council Register. The former is, of course, of great genealogical value, but it is the latter which one means when one says that the Burgh Registers are of transcendent value for social history.

Aberdeen leads the way—its records go back to 1398, and even before that an old inventory tells us that in 1591 there remained a number of court rolls on parchment, for each year a scroll, containing (according to the inventory maker) nothing of consequence and, at all events, written with many contractions and very tiresome to read. Posterity, alas! has no means of testing the correctness of this statement; but the extant records are a complete series from 1398 to the present time, one fifteenth century volume excepted. In Edinburgh we have extracts from lost records going back to 1403, but the earliest extant volume begins 1551; Stirling in 1552 had records going back to 1444, now the earliest extant volume begins in 1519; the records of Peebles begin in 1456, those of Lanark in 1488; those of Glasgow in 1573, but earlier records existed in the eighteenth century.

From all these records copious extracts are accessible

in the admirable volumes issued by the Burgh Records Society; in the case of Aberdeen the earliest part had already been dealt with by the Spalding Club; of the records of Banff and Elgin, both going back to the sixteenth century, extracts have been printed by the New Spalding Club, which has also produced a similar volume relating to Inverness, a burgh which owing to its position with a purely Highland hinterland has a history of a different kind from the others. Less exhaustive accounts we have of a number of other burghs, some in society publications, some in published local histories; but many burghs, notably Linlithgow and Haddington, deserve more systematic histories than they have yet got.

That these records often throw side lights on political history is most natural (the references to Flodden and the Flodden Wall in the Edinburgh Records are a good instance), but their main value is for the history of the burghs themselves; their vigorous and sustained efforts to maintain their liberties and dignity, to compel their fellows to play fair, and to subordinate private interests to the common good. As to the first point, there is in 1456 a strong protest by burgesses of Edinburgh before the king's council against the election of a bailie who had not been put on the leet by the council.[1] Again, in the same category we may place the resolution of the burgesses of Aberdeen that none of them should make any " firmas " to their bishop elect, under heavy penalties, because he had showed himself unkindly in refusing the contribution which

[1] The dusane as they were then called in Edinburgh and also in Peebles—why so-called I find no authoritative account. They were never so few as twelve.

his predecessor had made to the building of the choir of Aberdeen; and the attempt of Glasgow to forbid its citizens to appeal from the burgh court to the bishop. Under this head too we may place the ordinance, found in the records of Edinburgh and Aberdeen, that all the neighbours, merchants and craftsmen, should have weapons at hand in their shops to come to the aid of the magistrates when any sudden tuilyies or bargains happen. The Aberdeen statute goes further, and orders the inhabitants not to abstract themselves from their neighbours 'quhen they see them want help, or to be in point of suppression, and namely by dwellers outside the burgh.' It is hard to believe that such a regulation in such a community could make for tranquillity. But it is certain that Aberdeen, and much more the small burghs, had to walk very warily if they wished to escape serious molestation from powerful neighbouring gentry; even Aberdeen generally spoke fair when dealing with a Gordon, a Forbes or a Leslie.

Defence of the good town from the foreign foe was the duty and privilege of the burgess. But national patriotism is sometimes a bad second to local patriotism. When James IV. thought it his duty to break a lance in England on behalf of Perkin Warbeck, Aberdeen quietly resolved to commute their share of the service for a money payment, and keep their weapons for use nearer home; a year or two later when the English were expected to land, it was decided that the town should 'keep them obscure,' if the magistrates thought that course expedient, and not defend till they were attacked. But, if the English proposed to land on the north parts of the haven, all manner of men with horses, artillery and all other defensible weapons should be

ready to resist them for the safety of our cathedral kirk, my lord of Aberdeen's palace, our masters the canons, and their families and habitations.

It was in the same way that work upon the local churches and bridges, and the upkeep of the schools, always appealed to the burgher spirit. And even at the religious revolution, pride in the old structures did something to save some of them from the storm, though counteracting causes arose later on, and there also, as in the case of the records themselves, sometimes what lived through the gale has died of the frost. Liberty involves the right to keep one's own property in order; and the Edinburgh burgess of old was convinced that Leith was his property—the natives had to be kept in their places. No burgess was allowed to take a Leith man as his partner; on one occasion the Leith men had bought up so much malt that the price of ale was exorbitant, so it was ordered that Leith malt be let severely alone by every good burgess of Edinburgh.

The other head is exemplified in the constant wars waged, by the councils as well as by Parliament, against the forestaller who bought up merchandize before it came to the market, the regrater who bought in the goods to resell to his neighbours at a profit, and the disloyal brother who gave his name to transactions in which an unfreeman had the real interest. In this matter the burgess, being *ex officio* a tradesman, was torn between the burgess instinct which demanded solidarity and the tradesman's instinct which was essentially competitive. And it was the latter that won, even before science discovered and proved to the satisfaction of our grandfathers that the true panacea for the

commonweal is the enlightened self-interest of the individual.

But an Edinburgh statute of 1462 gives a good idea of prevailing views: 'It is statute that the victuals that comes in and the timber at the port of Leith by strangers shall be bought in the tolbooth as manner is of before, for a certain price, and if it beis not bought, that no neighbour take in hand to buy the saids victuals or timber to retail again upon the neighbours, and gif any does, the said victual and timber shall be taken by the officers and distribute among the neighbours at the price that is bidden before in the tolbooth; that gif any man of other boroughs would buy the saids victuals to have furth of the town, the neighbours to buy it at that price that they give therefor, to be distribute amongst the neighbours. Item, that no neighbour or other take upon hand to warn any strangers of the price of the victuals in the country, nor that nae neighbours shape them to buy any victuals or to bid any price therefore before their entry, and whoso does in the contrary or breaks this statute shall pay to the kirk work of St. Giles ilk person singularly by himself one chalder of wheat without remission.'

There was a constant quarrel between merchants and craftsmen; no one could in the eye of burgh law be both. A delegate sent to the Convention of Royal Burghs had to prove that he was not a craftsman before the convention would admit him. But the merchants upheld the craftsmen stoutly in what was considered their proper place. In 1489 the magistrates forbade outlandish folks using the cooper craft, passing from house to house, having neither stob nor stake within the toun nor yet watching and warding or bearing taxes

when imposed—such could only be allowed if they were received by the masters of the cooper craft, and paid their dues to the craft and to their altar, St. John's altar in St. Giles Church.

As to cleanliness, I fear that in ordinary times very little was said—of bringing water supplies to towns, we hear, I think, nothing till a few years before the Union. But in 1511 Aberdeen had a thorough cleaning out in anticipation of a visit from the Queen—on that occasion the burgesses declared that they would receive their sovereign lady as honourably as any burgh in Scotland, except Edinburgh allenarly, and make as large expense thereupon as the provost and council devise, for the honour of the toun and the pleasure of his good grace.

Everywhere, whenever an alarm of pestilence arises strenuous measures are taken. Swine and dogs are turned off the streets (in ordinary times pigsties apparently were not forbidden at all events under the outside stair), beggars are expelled, vagrant children are whipped or put in the 'nether hole,' reception of strangers from unknown or suspected quarters is forbidden, regulations for cleansing or destroying infected clothing or furniture are enforced by heavy penalties. In at least one instance all the infected in Edinburgh are ordered down to Leith Sands, there to wait till they can get passage to Inchkeith—once there, no communication with the mainland is allowed.

Such regulations were enforced mutually by the burghs against one another in times of panic—country places had not usually such vigorous rulers, though doubtless the barony courts might lawfully have passed acts of that sort. Smaller burghs very likely sometimes

exercised sterner discipline than their large neighbours —Banff paid a scourger for keeping out the poor, and once fined a man for keeping a large family idle, ordering him to send two sons and a daughter out to work. An Aberdeen statute is severe upon night walkers who listen outside houses and make bad use of the information they thereby acquire ' whereof great scathe often cometh.'

Of amusements there is everywhere occasional notice. In Edinburgh pipers were kept, whom for the honour of the town the citizens were to remunerate properly. Of the Edinburgh Abbot of Narent, the Aberdeen Abbot of Bonaccord, there are notices kind and unkind —both appear later, after James IV.'s marriage to an English princess, as Robin Hood and Little John.

The records of these subjects are in print—only the sources ought to be more systematically explored than is as yet possible. When every burgh's records are as well-known as those dealt with by the Burgh Records Society it will be possible to study characteristic local differences and draw general conclusions.

The burghs of course have been at all periods the inlets of foreign commerce; but the burgh records themselves do not throw much light on the progress of this; such notices as occur seem intended not so much to further their own commerce as to avoid furthering that of the unfreeman.

Of the customs accounts of the burghs rendered in Exchequer, there is a series from Robert Bruce's time onwards, not so very incomplete; the ledger of Andrew Halyburton, conservator of Scottish privileges in the Low Countries at the end of the sixteenth century, printed in the Rolls series; the account book of David Wedderburn, burgess of Dundee, a century later, printed

for the Scottish History Society, with Dundee shipping lists of the same period; a later Inverness record of similar character also printed by the Scottish History Society; a few fragmentary customs accounts in the Register House, of which there is a list in Mr. Livingstone's Guide; the records relating to the Scottish staple at Campvere and elsewhere in the Low Countries, collected in several works, none quite complete; and sundry records of early international complications arising in trade disputes, in loose papers in the Register House, and in the records of the Supreme Court, often doubtless traceable in foreign records also (where these can be inspected), sometines serious enough to appear in histories. These would be the sort of material which a student of that subject would find readiest to hand. But probably no one yet knows how much burgh record rooms really contain of this kind.

For internal trade the best early materials are among the records in the Register House, of the proceedings of the parliamentary committees that dealt with the subjects; the records of the Newmills Cloth Factory, ably edited for the Scottish History Society by Professor W. R. Scott; and especially the chapters on this subject in the histories of the City of Glasgow.

Of the Universities I need say little; the oldest of our Universities, St. Andrews, is the only one that has not yet made its earlier records available to the public. St. Andrews having been founded just before the time when many of the French University towns fell into the hands of our old enemies, the records of its first years ought to be of surpassing interest, as it must have had for the moment something like a monopoly of Scottish students. But I fear the extant records are far from

perfect. Scotland has never been big enough to forget its smallness, and the records of the education of Scotsmen in all ages have to be sought not only in our own Universities but outside Scotland—in Oxford and Cambridge probably before the wars; then in Paris, Orleans and other French Universities; later all over the Continent (the records of Leyden are particularly full of Scottish students from the sixteenth century onwards); for the last century and a half largely at Oxford and Cambridge again.

Scotland was particularly rich in local seigneurial jurisdictions, some of them of the most extensive character. William the Conqueror, while he could not rule his barons despotically, did his best to keep the whip-hand of them. Robert Bruce was by birth Earl of Carrick and Lord of Annandale, and his political ideas never transcended his early milieu—his charters show him desirous to rule Scotland by raising his supporters into a powerful nobility, who speedily became more formidable to the Crown than the older nobles had ever been. The five Jameses all found to their cost what powerful interests adverse to a consolidated kingdom of Scotland had been raised up. All the five tried to muster political forces strong enough to withstand the feudal oligarchy—none succeeded. So it happened that while in Robert Bruce's own day Scotland could fight England on equal terms, in the sixteenth century the contest was the clash between the earthenware pot and the iron pot. Bishop Stubbs says, speaking of the English kings' arbitrary dealings with the nobles, 'the interests of the crown and people were one'; in Scotland the same was true, but the other side was, till 1603, the stronger.

The courts of the great feudatories have left no records earlier than the sixteenth century; two scraps quoted by antiquaries, the record of a baron court of Camnethan in 1390, quoted by Andrew Stuart, and the record of the baron court of Longforgan in 1385, quoted in the third report of the Historical MSS. Commission, have both disappeared from their proper custody. Probably neither was more than a "Rolement" given out by the clerk of the court to the party interested, but of which no court record was kept. The barony courts were of various character. Some barons by their charters could hang and drown, most could only imprison, many (such as the barons of Urie and Stitchill, whose records have been printed by the Scottish History Society) had no prison at their disposal except the stocks.

As a rule the barony court records are hardly worth printing in full; they mostly consist of fines inflicted for non-attendance at courts, or for some trifling breach of the peace; occasionally entries occur which throw a little light on the local conditions. One of the earliest Baron Court Books we have in the register house is that of Carnwath, beginning 1523. It is remarkable for the strong position taken up by the court as to the necessity of keeping the barony clear of roving bands of marauders—the most serious conceivable offence against good neighbourhood was sheltering or conniving at the sheltering of any such. There are early and interesting records of the kind at Drummond Castle. An early barony court book of Forbes has supplied some pages of extracts to a Spalding Club volume.

Our wealth in this, as in nearly every other department of record, is poverty indeed beside England's; but both are alike in this, that they deserve to be studied on

system, and exhaustively. Wholesale printing would be useless; but a few volumes of extracts from all extant barony and regality court books would be priceless. The regalities, of course, had wider jurisdiction than the baronies, and their criminal records are more cheerful reading to a person of primitive or sporting instincts. But few entries are so amusing as the one from the regality record of Huntly, printed by the Spalding Club, where the women of the regality remonstrate so seriously with the bailie for interfering with their old-time practice of making a wife-beater ride the stang—their only protection against their husbands, they assure him. Of private charter chests our best knowledge comes from the publications of the great book clubs, those edited by Sir William Fraser, and the reports of the Historical MSS. Commission. Between them, these have disclosed a wealth of record one would never have anticipated; and even yet we know practically very little of some of the most important—including almost all those reported on in the early Historical MSS. Commission Reports, which were evidently meant to be preliminary only. I have seen something of several full of valuable matter, not as yet adequately known. The very fact that the cohesion of Scotland was so imperfect makes the study of its history inadequate unless it includes the history of its component parts. And the history of these is often better recorded in private repositories than in the public records, central or local.

The Register House, like the British Museum and the Public Record Office in London, has gradually become possessed of a considerable collection of private charters and other deeds; none of these answer to the definition

of record with which I started, all being out of their proper custody, and having either fallen to the central repository as waifs and strays, or else been presented or deposited by the owners. The Register House, considered as a record office, is not the place for such; but considered as a place of study, which like other such institutions it has now become, it is rendered infinitely more valuable by their presence. We are hereby equipped with a series of deeds of all periods from the twelfth century onwards; they are few compared with the riches of the great London repositories, but that very circumstance has proved advantageous; for chronological arrangement, impracticable there, is here possible. It was not the least of Mr. Livingstone's many and great services that he carried this out, and framed a calendar of the earlier portion, which after his retirement was continued by others. From such a series one both learns and unlearns. In this volume I have cited it occasionally, but I have been guided by it at every turn.

For records safety is the paramount consideration; next to that comes accessibility. Everything in the Register House is open on payment of fees; the rules for remitting fees are always under consideration with a view to making them as liberal as is practicable. All records that are public property are now I think so housed as to run the irreducible minimum of risk from all causes but one—that one is the one which in past times has been their deadliest enemy, neglect. The automatic growth of modern record tends constantly to produce in all repositories a chronic pressure on space. In the conflict between the old and the new the old

must go to the wall; and it would be vain to expect any sympathy from high officials, who are in the ordinary case neither archivists nor Scotsmen. In Edinburgh, and in the other large centres, there will I hope always be public sentiment strong enough to avert disaster. But what of places where no intelligent interest is taken in such things? What neglect has done before it will do again. Centralization would be a cure; but it would take local records out of the reach of those who would be their most capable and ought to be their most interested students.

What is to-day needed for the safety of the records is a body of men and women students in every record centre. To this end, first every record scholar in remote places should consider himself a sort of missionary. He has to diffuse what he himself already has, remembering that what is wanted is not to give students what they can get for themselves, still less to please partizans political or religious (for that purpose fact can never compete with fiction), but to help the man of ordinary intelligence to see the interest of the subject. Secondly, of all Sir William Fraser's services to learning the greatest perhaps was the last, I mean the foundation of his professorship of Ancient Scottish History and Palaeography. In that class-room any one can obtain the equipment required for record study; the supply is available, and it lies with those who already have it to do their part to increase the demand. In France, where the school of charters is an established institution, it is I believe expected of every archivist that he be a certificated charter student. It ought to be so here too, and if we use aright what we have it will be so here.

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