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~~THE~~ ORIGIN

~~OF~~

THE OFFICE

of

SHERIFF IN SCOTLAND:

its Origin and Early Development.

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THE OFFICE OF SHERIFF.

ITS ORIGIN AND EARLY DEVELOPMENT.

The early history of the judges in Scotland has not so far been investigated; in fact, the historian has left the functions of the sheriff at periods prior to the eighteenth century in a condition vague and indefinite. Although the historian has neglected him, the etymologist has fixed the origin of the title beyond doubt by the quotation from the first half of the eleventh century where the name occurs in the form 'scirgerefa' (N.E.D.).

The origin of the office dates from Merovingian times when an official known as 'graf' whose latinized title 'comes' appears in the law of the Ripuaires, circa 790, and elsewhere as 'Comes aut Grafio' (Fustel de Coulanges: Institutions Politiques de l'ancienne France). The Graf, an official of great power and influence, was entrusted with the administration of a province - Pagi-civitatus. The Carolingians followed and improved upon the established system. The 'comites aut grafen' had a check placed upon them by the appointment of vicecomites (vicomtes) or missi, who, with 'judices' assisted the comte, and in his absence officiated in his stead. The vicecomites or missi had also the duty of returning to the Imperial Exchequer two-thirds of all fines, leaving the remaining one-third to the comte. (Fustel de Coulanges, Instit. Politiques, p. 429). The Comte is generally/

generally understood to be the area of a comte's jurisdiction, but Coulanges maintains that the comté meant, not a geographical unit, but an office and an honour. (1) It was the comte and his agents whom the emperor addressed in his diplomas, and through whom he communicated his demands to his subjects. The execution of the laws and the maintenance of public order were entrusted to the comte. He was also responsible for the collection of the emperor's dues and taxes, and the proper maintenance of roads and bridges. He was the local representative of the emperor, led the territorial army which he kept ready for the field, and, in fact, acted in his own district with all the powers of the emperor himself. There was no Provincial Assembly, and for long no check upon the administration of the comtes.

The Capitularies of Charlemagne frequently refer to abuses and excess of power on the part of comtes. To remove these evils Charlemagne appointed missi, who were independent of all save the emperor. The missus was later (c. 774) termed Vicecomes. (Glasson, Hist. du Droit de la France, Vol. 2, p. 478). During the subsequent reign of Louis le Debonnaire the term vicecomes superseded that of missus. In England the Normans found an official corresponding to the Frankish 'graf', and called in the south by the somewhat similar name, /

(1) "Un comté n'est pas une propriété: c'est un office et un emploi, ministerium. C'est en même temps une dignité, honor. (Inst. Pol. p.)."

name, 'gerefa', in Northumbrian English, 'graefa'. This official, called a vicomte in Normandy, retained the Latin form of that title in written documents, being styled vicecomes, but he was a 'sheriff' in the vernacular. On the authority of the New English Dictionary, we are told that gerefa and graf were probably not connected. The gerefa was a person in authority in a shire, a wapentake, a hundred, a burgh, or a small township, (1) but the scir-gerefa, the most important of these officers, seems to have fixed the title 'sheriff', while the port-gerefa becomes the port-reeve.

While the Normans were establishing their vicomtes or sheriffs in England, the Celtic kings of Alba adhered to the judicial customs of their ancestors. Below the king, and rendering an uncertain degree of allegiance to him, were Maormors who, as lesser kings, were invested with the rank of supreme judges, the ordinary duties of a judge being entrusted by the Maormors to Toisees or Toschachs; and Brehons.

Into this administrative scheme David, youngest son of Malcolm III and Margaret of England, fresh from the Court of his brother-in-law, Henry I, introduced the Sheriff. To the Foundation Charter of Selkirk Abbey in 1120 "Cospatrick Vicecomes", the earliest recorded Sheriff north of Tweed, is a witness: (2) No place name is added but/

(1) Greve autem nomen est potestatis Est enim multiplex nomen; greve enim dicitur de scira, de wapentagiis, de hundredo, de burgis, de villis.

(2) Lib. de Calchou, No. 1.

but from the fact that (circa 1126 - '47) reference is made to the 'lands of Crailing in Roxburgh gifted to Jedburgh Abbey by Cospatrik the sheriff; ⁽¹⁾ and that sheriffs were given lands in their sheriffdom ⁽²⁾ it is fairly clear that Roxburgh was the sphere of Cospatrik's activity.

Later - after David's succession to the throne - sheriffships are established in Berwick (1128), ⁽³⁾ Scone (1130), ⁽⁴⁾ Stirling (1125) ⁽⁵⁾ Edinburgh (1140), ⁽⁶⁾ Forfar, ⁽⁷⁾ Inverness, ⁽⁸⁾ Aberdeen ⁽⁹⁾ (1136), Linlithgow, ⁽¹⁰⁾ Haddington, ⁽¹¹⁾ (ante 1140).

It is important to note that these, and every one of the sheriffdoms instituted before 1292, were at a Castle of the King. Wherever he had a Castle there the/

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- (1) R.M.S. App. 1. Nos. 92-94; Reg. Glas. No.
 (2) Hist. MSS. Com. Rep. p.
 (3) A.P. 1: 359.
 (4) Reg. de Dunf. No. 29.
 (5) " " " No. 6.
 (6) Ibid. No. 11.
 (6) Reg. de Dunf. No. 11.
 (7) Lib. de Seon. No. 17.
 (8) Reg. Moray. p. 10.
 (9) Reg. Epis. Abdn. p. 3.
 (10) Reg. de Dunf. No. 11.
 (11) Reg. Prior St. And. p. 191.

the King installed a Constable and a Sheriff;⁽¹⁾
 but where a royal castle already stood and a new
 one was built in its vicinity - as at Dundee, Jedburgh,
 and Caerlaverock - the King gave jurisdiction to the
 sheriffs already installed - at Forfar, Roxburgh and
 Dumfries - and did not create new sheriffs for the new
 castles.

The Castle was the capital of the Sheriffdom.
 There the sheriff resided, there he held his Head Court
 at which all freeholders of the province had to be
 present whenever the court was held; and there those
 owing service at the periodic Weaponslaws probably
 mustered.⁽²⁾ For above all the sheriff with the barons
 was charged with the military fitness of the men of his
 district.⁽³⁾ If the baron failed the Sheriff had to
 make good⁽⁴⁾ by collecting penalties. He led his
 men/

(1) Cf. Dr. Neilson: Garrison Origin of Burghs. Jurid. Rev. XIV. p. 136.

(2) No details are extant of 12th and 13th century Weaponslaws; those shown in the muster roll of Annandale, held on 15th August 1541 on Birrenswark Hill are probably not unlike their predecessors: - The lard of Holmendis - 100 men; lard of Wormonby - 16 men; lard of Wamphray - 80 men; lard of Mouswald - 80 men; lard of Johnstoune - 100 men, etc. etc. etc. Sum total, 1,312 men. (Hist MSS. Com. Annandale Papers p. 66.)

(3) A.P. I: 473.

(4) A.P. II: 18.

men to battle ⁽¹⁾ and kept the castle in repair ⁽²⁾ by a levy of duties on the vassals. ⁽³⁾ In the castle the sheriff kept all the records of the lands and owners in the sheriffdom.

So strong is the sheriff's relationship with the castle that he is occasionally termed "Sheriff of the Castle". ⁽⁴⁾ Moreover, the references to the Sheriff in the cartularies of the 12th and 13th centuries are to the/

(1) Sir Patrick de Graham, Sheriff of Stirling in 1282-1292 fell at Dunbar "a goodly knight all dressed in harness meet" lamented and applauded even by his enemies. Sir Duncan Balfour, Sheriff of Fife, fell in one of the battles of 1298 against the forces of Edward I. (Hailes Annals.) Sir Walter Ogilvy, Sheriff of Angus, was killed in a fight with the highlanders at Gasclune in 1342. Sir Alexander Ramsay, distinguished for his capture of Roxburgh Castle from the English and rewarded for that service by obtaining the sheriffship of Roxburgh, was murdered by a rival claimant, the "Knight of Liddesdale", (Sir William Douglas) who though he succeeded to the office, was in turn murdered.

(2) See Exchequer Rolls, Vol. I. pp. 5, 38-39 etc; Cal. Doc. Scot. II passim.

(3) This duty, maintained at the expense of the Crown Vassals, continued to be enforced in the sheriffdoms of Edinburgh, Berwick, and Haddington - the respective amounts being 6/-; £1. 17; and £2. 8. 5¹/₂ - till 1708 or 1720 (Clerk & Scrope, History of the Exchequer, p. 159). The Church saw to it that they paid no more than their legal dues.

The Abbey of Paisley, liable in 5 chalders of oats or wheat annually for upkeep of Dumbarton Castle, had been troubled by the 4th Earl of Lennox for a larger sum

On their appeal to the King the Earl was ordered to cease trying to extort more than the legal dues. (Reg. de Passelet pp. 177-8.)

(4) Viccomes de Castello Puellarum (Reg. de Neubotle p. 122); Custodiam castri nostri de Stryveline cum officio viccomitatus eiusdem. (R.M.S. I: 67).

the Sheriff of the Burg⁽¹⁾ which may mean the fort or castle or the part adjacent to the castle. ~~These~~, it is the sheriff of Forfar in Angus; sheriff of Kincardine in le Meryns. (Antiq. Abdn. & Banff. IV: 605): Sheriff of Kinross, not of Fothryf; Sheriff of Crail⁽¹⁾ - until 1212, when the Sheriff of Crail was styled Sheriff of Fife.

No shires in the modern sense existed in 13th century Scotland. A "shire" then was a small area - Clat, Gatemile, Kelland, Rate, Davyot, Coldingham, Kirkcaldy were instances; but the early shires in Scotland had no connection with the sheriff.

The oldest "Description" of Scotia (1165) which we have, divides the country into Earldoms, not shires:— Angus with Mearns; Athole and Gowrie; Strathearn with Menteith; Fife with Fothrif; Mar with Buchan; Moray and Ross; Caithness. In the map (1292-96) preserved in the British Museum no reference to a shire appears. We find there Tynedale, in which are the castles of Roxburgh and Jedburgh; Lothian, with the castles of Berwick, Edinburgh and Stirling; Fife, with the Burgh of St. Andrews, and the castle of Leuchars; Angus, with the/

(1) Besides the references given above there is one as late as 1372 when the Burgh of Cupar is designed "Burgus sive Vicecomitatus de Cupar". (A.P. XII (Supp) 16). In France in the 12th century, the vicecomites were in the habit of adding to their title the name of the most important domains contiguous to their heritage. The vicomtes of Poitiers for example were styled Vicomtes de Thouars; the Vicomtes of Toulouse, Vicomtes of Bruniquel. (Luchaire, Manuel des Inst. France p. 283).

the castles of Dundee and Forfar; The Mounth, a vast place without vegetation; Mar; Buchan, with the castles of Elgin and Spynie and the burgh and castle of Aberdeen; Moray; Ross; Caithness; Orkney; Ayr; Galloway, with Annandale; Dumfries Castle; Kirkeudbright. (Chron. Picts and Scots, pp. 136; 214.)

The sheriff, who began his career in the castle, divided with the constable (whose office was frequently held by the sheriff) certain specific duties. ⁽¹⁾ The

Constable had jurisdiction in all cases of riot, disorder, bloodshed and slaughter committed within four miles of the castle; ⁽³⁾ all other disputes were referred to the sheriff. (Hist. MSS. Com. 5th Rep. p. 623; Spald. Club. Misc. Vol. 2. p. 226.) In England the sheriff's room in the castle was called the "Shire House". (J.H. Round in Eng. Hist. Rev. Apl. 1921.) In Scotland, until Tolbooths ⁽²⁾ were built, it held the Head Court and the prison ⁽⁴⁾ of the sheriffdom. Freeholders as a rule held their lands on condition of rendering one or more suits at the head court, - a duty, unlike/

(1) A most important duty imposed upon him was the payment to certain Churches of the 10th - sometimes the 8th - penny of all fines, escheats, etc., derived from the Sheriff's Court. See e.g. Reg. de Dunferm. No. 50; Reg. Mag. Sig. I, 306.

(2) The Mercat Cross was a favourite place for the Sheriff's court. Clackmannan sheriffdom in 1592 having no Tolbooth, held its court at the Mercat Cross, a fact deplored by the Sheriff who petitioned Parliament for a Tolbooth. (A.P. III. p. 582). Elsewhere Churches, Churchyards (forbidden by Act - Frag. Coll. c. 20. A.P. I: 752) Standing Stones, Moothills, houses were made temporary courts.

(3) David Chambers in his *Histoire Abregée*, (1579) states: "Le connestable est juge ordinaire en toutes plainetes criminelles, faictes dedans deux lieues près de la cour royalle."

(4) It is noteworthy that so late as 1511 the Sheriff of Wigtown /

unlike suits elsewhere, which required no summons. The sheriff held his head court thrice a year.

The introduction of the sheriff meant no sudden abrogation of the old Celtic customs; the time-honoured usage of the country was followed by David I and his royal successors in the rules made for the Courts of his sheriffs,⁽¹⁾ Barons of Regality, and other courts. Brehons⁽²⁾ and Toschachs⁽²⁾ were not retired but continued in office. As these officials closely/

Wigtown (Patrick Agnew) and McLellan of Gilston were ordered (by judgment of a Justice Eyre) to be warded in separate Castles. The procedure following sentence is peculiar. The prisoners were to obtain within 8 days from the Keeper of the Signet "letters of Reception" which were to be delivered to the constable of the Castle within a week thereafter. (Transcripts of Rec. Just. Eyre in Reg. House III: 145)

(1) Ass. Dav. XIV, Xv et passim. A.P. I: 320.

(2) The *Breive* (Brehon) of Lewis was in office there in the 17th century. (Scot. Hist. Soc. 2nd ser. XII. p. 272) [*containing transcript of 17th cent Ms. "The Quill Troubles of the Lewis"*]

(2) Cf. system of *Taoisechs* of the ancient Irish (Annals of the Four Masters; and O'Curry: Manners and Customs of the Ancient Irish I: cexliv). In Wales the *Twysawgs* were the chief princes. (*Ibid*).

closely affect the Sheriff - either as subordinates or associates - merging, in some cases, into Sheriffs - some notice of their office is necessary for the proper understanding of the sphere of the Early Sheriff. The Toschach - chief or captain in the Celtic system, had his title altered in the Scoto-Norman period to that of thane⁽³⁾; his rank, indicated by a wergild of 100 cows, was next below an earl^(s) (140 cows) (Reg. Maj. IV: 55) and his consent appears to have been necessary to any deed of the Earl's, whose charters contain the formula: "Militibus et Thainis Concedentibus"⁽⁴⁾. In the early period of the sheriff's career the Thane was a Stewart⁽⁵⁾ with a court of his own⁽⁶⁾, Macbeth, thane of Falkland, being described⁽⁷⁾ "Judex bonus et discretus".

The courts of the thanes continued to administer justice side by side with the sheriff courts after the introduction of sheriffs in Scotland. In the 12th, 13th and 14th centuries the thanages were the fiscal units/

(3) Antiq. Abdn & Banff. I: 546, 549. - Finlay, Thane of Glentiit is alternatively termed Finlay Toschach (Reg. Moray. XXviii). The lands of Dunning appear in early records as a thanedom belonging to the Earls of Strathearn and the officer who administered them is twice mentioned - once as Steward and, again as Thane. (Hist. MSS. Com. 3rd Rep. 406). A descendant of the thanes - Alexander Thane - granted several charters from Dunning in the 16th century. (Ibid.)

(4) Lib. de Insula Miss. XXVII.

(5) Lib. de Seon; Buchanan Hist. Bk. VII p. 86; Hist. MSS. Com. 3rd Rep. 406.

(6) Lib. See. Cruicis, pp. 51-52.

(7) Reg. de Dunf. Nos. 1 & 19; Reg. Prior. S. Andr. p. 117.

units of administration, the equivalent of the later baronies⁽¹⁾, and in several instances they seem to coincide with the sheriffdom which is superseding them, the thanages of Aberdeen, Kincardine, Stirling and Scone being merged in the respective sheriffdoms of these places. The mention of tithes "tam thanagiorum quam burgorum" in Reg. Episc. Abdonensis. I. p. 18 seems to imply that burghs were not included in thanages. In the early times of the sheriff the thane, as steward, accounted to the sheriff for the dues of his thanage. (Ex. R. I. pp. 8, 11 etc.) Where villeins omitted to pay the tithes of the church to the thane, the sheriff was bound to enforce payment. (A.P. I. p. 91.)

Several instances are recorded of a thane being promoted to the office of sheriff,² the latest being the Thane of Cawdor who, in 1405, was appointed Sheriff of Nairn by Robert III. (Thanes of Cawdor, p. 5). Again, the thane of Rathen is recorded to have been appointed in 1261 Prepositus of Elgin. (Reg. Moray. p. 138; Cal. Doc. Scot. I. No. 2371).

The Toshacheadoir, the immediate subordinate officer/

(1). Thanage of Fermartyn. By W. Temple. Aberdeen. 1887.

(2). Dufoc, or Dufotir, thane of Callander, was (circa) 1147, appointed Sheriff of Stirling. [Reg. de Cambusk. N^o 190].
Thomas Wyseman, a thane, circa 1247, was Sheriff of Elgin. [Reg. Moray. pp. 34, 113-4, 132, 276].

officer of the toshach or thane, retained his native title in the era of the sheriff as an alternative for that of "Serjeand" or "Mair"; the "doer" of the Toshach became one of the Sheriff's officers⁽²⁾ and summoned defaulters to the court. (Reg. Maj. 1. caps. 5 (cl. 3) and 7). Skene (De Verb. Significatione) refers to a grant of this office by David II. in favour of J. Wallace, Armiger, "quod officium Toshaderich dicitur, vulgo ane mair of fee"; and, as tosheadoir, he is found in Nithsdale before and after A.D. 1400 (R.M.S. I. App. 2, 1920), as well as in Kintyre in 1554 (Hist. MSS. Com. 4th Rep. 476), and in the Lennox country (Cartul. de Levenax, p. 92). So late as 1685 the name of the office is retained; for in that year the "mairship or toshderich" of the shires of Argyle and Tarbert reverted to the Crown on the forfeiture of the Earl of Argyle. (A.P. VIII. 493).

Of the "Lawman"⁽¹⁾ or "Logman" of the Norse settlement/

(2) Sometimes, probably more frequently, an officer of the Justiciar - Exch. Rolls. Vol. vi p. 70 - where payment to the Toshdrach far exceeds that of Mairs.

(1) Both Lawmen and Dempsters held office in heritage and in many instances bequeathed to their descendants the name of the office as surname. The Lawmen's descendants are found in Western Scotland in the 15th and 16th centuries, generally holding the office of coroner, under the names Lawmondson and McLamont. (cf. Hist. MSS. Com. 4th Rep. 478-9.) John of Lawmondson was in 1479 Sheriff Depute of Argyll. [Acta. Dom. Conc. p. 34]. The ancient name of Dempster is similarly derived from the demsters or judices of Angus. The surnames of Mair and Serjeant were probably derived from the offices represented. Tosh, McIntosh were undoubtedly due to the Roisec or Toshach.

In ancient Ireland the Lawmen were chief judges; the Rathmen or Rath were "advisers".

[O'Curry: Manners and Customs of Ancient Ireland, Vol. I. ccLxxv].

settlements in the Western Isles, in Argyle, Bute, Caithness, Orkney and Shetland not much is known. They officiated in Orkney so recently as 1540 when they were superseded by the sheriff, but the old laws as pronounced by the lawmen governed both Orkney and Shetland until 1611. (Spald. Club. Misc. V: 37). Two instances there are of the descendants of Lawmen officiating as Coroners ⁽¹⁾ and one as sheriff-depute. In pre-sheriff times he had declared the laws; his assessors, "Rothismen" ⁽¹⁾ probably left the name of their meeting place in Rothesay. That the Lawmen were of exalted rank may be inferred from the fact that the logman of the Sudreys was son of King Gudred and was in 1098 carried off by Magnus, King of Norway, during one of his raids. (Orkneyinga Sagas, p. 70). The curia of the Lawmen, where their parliament or Thing was also held, was on a hill - Logsberg or Hill of Laws - invariably situated near a stream. Viscount Bryce describes the Logsbergen of Iceland in A.C. 900, mentioning that these were always placed near running water, a convenience for trials by Ordeal. (Studies in Hist. and Jurisp. Vol. I. pp. 327 -). The meeting places of the lawmen in Scotland, some of which are recognisable in Dingwall, Thingwall, Thingwa and Tynwald, had likewise each a stream adjacent. There is dubiety whether or nor the Moothills of Alba and Cumbria were used in pre-Norman times as courts. The Editors of the Reports of/

(1) See footnote (1) on p. 12.

of the Ancient Monuments Commission incline to regard the moots as belonging to the early Norman Settlement under David I, by analogy with the moots found in England and France; but the Moothills of Fife, Perth ⁽¹⁾ (notably the Skait of Crieff), of Dumfries, Kirkeudbright and Wigtown, present features similar to those of the Lawmen and were used by Sheriffs and Barons as Courts. These were excavated to a depth of from five to eight feet on a hill; the walls were of earth and stone, with a trench surrounding; and the necessary stream was at hand. There was no roof, to which circumstance may be ascribed the expression, "in plena curia" ^(x) common alike to court records of the thirteenth and twentieth centuries.

The judices: - Brehon and Dempster - officiated in Alba and in Cumbria, ⁽²⁾ ⁽³⁾ and were probably a hereditary class like the Deemsters of the Isle of Man. The Dempster and the Brehon were judices and under that title appear in the Church Cartularies until the 14th century. The judices of the Frankish Empire, Fustel de Coulanges derives from the Roman Empire "où il/

(1) Regarding the record of Barony Court (the oldest extant) the "Hund hill" of Longfargound in 1385 Dr. John Stuart remarked that this hill was one of the Moot hills of early Celtic times. (Hist. MSS. Com. 3rd Rep. 410).

(x) Cf. Pollard: Evolution of Parliament, p. 33.

(2) E.G.: - Beolin and Keraldus, in the Mearns, circa 1222. (Reg. de Brech. II. p. 1).

(3) Leysing and Oggu, judices of David I, in Cumbria. (Reg. Epis. Glas. I).

(4) Duncan, Judex du Regis, 1250 - '79. (Reg. de Aberb. pp. 87, 90, 167).

il avait désigné les gouverneurs des provinces. Il resta usité dans toute la période mérovingienne. Quand nous rencontrons le mot judex dans les lois ou dans les textes historiques il ne faut pas croire qu'il s'agisse simplement d'un magistrat de l'ordre judiciaire Le judex est un duc, un comte, un vicarius, ou un centenier, e - a - d. un agent de l'administration". (Institut. Politiq. de l'Ancienne France 349-351).

The judices of Alba and Cumbria present a striking resemblance to the Frankish judices. Constantine, Earl of Fife, was, circa 1128 "magnus judex in Scotia"; and, with his assistants Dufgal, "judex senex, justus et venerabilis", and Meldoinneth judex bonus et discretus", was in request as arbiter and judge in law-suits; and among the great privileges pertaining to his house, he had a code of laws for his province of Fife long after the Scoto-Norman laws obtained elsewhere. Of Oggu and Leysing, judices in Cumbria, ⁽¹⁾ nothing now is known beyond the fact that they accompanied David I on his tours of inspection and their names are found in the deeds of their royal master as witnesses to several of his Foundations: - notices that imply a high degree of rank.

The Judices of Galloway in the 13th century are found pronouncing not only legal decisions but declaring/

(1) Reg. Episc. Glasg. No. 1.

declaring what the laws shall be throughout the
Province. ⁽²⁾

Several of the pre-sheriff judices are continued during David's reign as Judices Regis; others - like Kineth, Meldoinneth and Ewayn, all of Scone - received appointments as sheriffs. ⁽²⁾

It is evident that David I, in making so much use of the Celtic officials and in permitting the retention of the old customs, was not so much bent upon a revolution of the legal machinery as upon a better fiscal arrangement. Under the Scoto-Norman economy the Kings contrived as far as possible to make the two officials, the thane and the judex, into one sheriff. Where the sheriff was not originally either thane or judex the king sometimes retained the thane or judex as the subordinate of the sheriff. ⁽³⁾ The thane collected the royal dues, presented them to the sheriff, who then accounted for the revenue to the Chamberlain. If the thane neglected to obtain the legal tithes from the villeins the sheriff was to compel him. (A.P. I: 91) The judices who had not obtained appointments as sheriffs sat as Dempsters - their value to a sheriff ignorant of the ancient legal customs being most important. ⁽⁴⁾

The/

(2) A.P. I. p. 378; ^{2°} Reg. de Dunf. N^o 29; Reg. Prior. S. Andr. p. 132.

(3) The sheriff of Kincardine (Regd. le Chen) was in 1264 in charge of the thanage of Fermartyn. (Ex. R. 1.21)

(4) Holyrood Charters, No. 1; Reg. de Dunf. No. 50; Reg. Prior. S. Andr. Inchaffrey Charters (Scot. Hist. Soc.)

The development however of the country in the rise of burgs and the settlement there and in the country generally of Norman immigrants or their dependants necessitated fresh additions to the older laws. To meet these requirements the King issued laws in which, while retaining, where convenient, the "Assisa Patriae" he endeavoured to do justice to all. Here he was probably assisted by the churchmen, whose services are rewarded by certain tithes from escheats of courts being paid to their establishments. ⁽⁴⁾ It is impossible to ascertain how many ecclesiastics held office as ~~king~~ sheriff; one in David's reign at least seems certain - Adam, King's Chaplain at Roxburgh is almost without doubt Adam the Sheriff of Roxburgh. ⁽¹⁾

The Church had her courts independently of the sheriff; so, too, had the Barons of Regalities. Both Church and Greater Barons in their Rights of Regality could try cases involving the Four Pleas of the Crown, a privilege denied the sheriff, unless he were given permission by the Justiciar, the sheriff's superior judge in civil and criminal causes. ⁽³⁾ The sheriff's/

(1) Sir Arch. Lawrie's Early Scottish Charters, pp. 99-100 154. Later instances of clerics holding office as Sheriff are: Ralph (Radulfus) "Clericus et Vicecomes de Scone" during the reign of Alexander II [Reg. de Penmure, II: 153] [Lib. Scot. 142] and Bernard (de Linton) Abbot of Arbroath, Sheriff of Forfar under Rob. I. [Lib. de Ab.

(3) The Sheriff was an executive officer of the Justiciar whose advent to the Sheriffdom the Sheriff had to proclaim 40 days beforehand and on whom he had to attend during the Justice Eyre. Execution of the Justiciars sentence was frequently entrusted to the Sheriff. In 1493 the Justiciar of Berwick directed the Sheriff to flog a boy. (Transcripts of Rec. of Justice Eyre in Reg. Ho. Vol. I, No. 20.) There are several cases of the two offices combined in one person - e.g. Argyle and Orkney, at certain periods.

(4) See fn. 4 on preceding page.

sheriff's ^{court} was superior to the ordinary Baron's only. The sheriff could try causes on appeal from the Baron, but not from the "Regalities" ⁽¹⁾. The sheriff, however, had to be reckoned with whenever he held his court every 40 days. Thither Bishops and Earls and Barons of the Province - as well as the parties to the action - had to go. (Ass. Dav. XXV.) Appeal to the King was disallowed except where the Sheriff of the Bailies had failed. Those attempting to avoid the lower courts by taking their case straight to the King were fined 8 cows. (Ass. Dav. XXIV).

The respective jurisdictions of Chamberlain, Sheriff, Church, Bailies - and later of Stewarts - resulting/

(1)

The origin of the Regality is found in the Seigneuries of France where, as in Scotland, the seigneurs enjoyed along with considerable territory "des droits regaliens". (Luchaire: Manuel des Institutions francaises p. 235). - rights which conferred on their lords privileges as abundant in the territory as those enjoyed by the King in his own realm. The grant of a Barony of Regality in Scotland conferred on the donee the fees, fines, customs, Advowson of Churches, dum itineribus et curiis justiciarie, camerarie, et vicecomitatus ac ipsorum itinerum et curiarum finibus, amerciamenis, exitibus et eschaetis. (Reg. de Moray. No 194). Sometimes the grant included the privilege of a Mint. (cf. Art. by Dr. George Macdonald in Proc. Soc. Antiq. Scot. ~~Ass. Will XIX 10~~ p.) The Regalities were not under the jurisdiction of the sheriff but of the Baron of the Regality. According to Clerk & Scrope (Hist. of Exchequer in Scotland), the Lord of Regality could not officiate as judge but had to delegate the duty to a Bailie. The right to deal with cases of the Four Pleas of the Crown was taken from the lords of Regalities before 1559 (Discours Particulier p. 22). Sir Geo. Mackenzie, however, observes that the question was not clearly settled. (Laws & Customs p. 404).

resulting frequently in claims of replegiation⁽¹⁾, were still further complicated by the functions of burgh prepositi⁽²⁾ or Ballivi, who were subordinate royal officers.

The Prepositus is defined in Fleta, Bk. 2. Cap. 76, as "Is qui sub senescallo vel ballivo, res dominicas aut/

(1) The potent threat of excommunication was sometimes made by the mediaeval Church instead of the ordinary claim to repledge being adopted. The Abbot of Paisley, e.g., in 1294 threatened the Earl of Lennox, his Stewards and Bailies with excommunication if the action brought against the Abbey were not dropped from the Earls Court. (Reg. de Passelet. p. 201 - 204).

In a dispute of 1383 which was compromised, the vassals of the Earl of Moray complained that the Bishop of Moray had threatened them with the direful punishment of excommunication - a charge denied by the Bishop. (Reg. de Morav. No. 169).

Churchmen contented themselves by resorting to the forms required for repledging from one court to another. In the Sheriff Court of Banff, 26th May, 1364, "certain reverend fathers compeared in a case affecting three serfs. The Mair having shown the Brief of Replegiation to the Sheriff, the Assize declared, by the Dempster, that the serfs were liegemen of the reverend fathers. (Reg. de Moravia No. 148).

A claim of replegiation in 1509 by the Bailie of Cunningham against the Sheriff of Ayr was decided by the Privy Council against the Sheriff. (Hist. MSS. Com. Eglinton MSS. p. 21.)

Cases between ecclesiastics and laymen as to ownership of serfs were of frequent occurrence in Sheriff Courts. In a Fifeshire dispute of 1352 the Sheriff decided in favour of the Church party. (Reg. de Dunf. No. 379.)

(2) The origin of the Prepositus or Prévôt in France, Luchaire (Instit. Monarch. 540) ascribes to the Capets who, in turn, had borrowed the idea from ecclesiastical establishments whose Prévôts had the care of property far removed from the Abbey. Glasson (Hist. du Droit, VI: 310) points out that the Bailli was not only a judge of appeal from the Prévôt but also that official's superior in matters of administration and discipline: he **it** was who appointed the Prévôt and took his oath.

aut regias curat in villis vel pagis et agriculturæ pecudibus, pasturæ et eiusmodi *ix* invigilat". This definition corresponds exactly with the duties of the Scottish prepositus in 12th to 14th century sheriffdoms. The privileges accorded by William the Lion to royal burghs did not include that of electing the prepositi, ballivi or mairs. So late as 1327 Adam Pylche is designed "Prepositus et Sub-vicecomes de Inverness". (Exch. R. I: 59; R.M.S. I: App. 2: 711); and in 1375 Robert II - not the community - granted to John Wynd the office of Mair of Aberdeen. (R.M.S. I: 626).

The royal prepositus, who thus relieved the sheriff of the duties of collecting cess, giving sasine, &c. in the burgh, accounted for these to the sheriff who returned the amounts to the Exchequer until 1327, when the Prepositi were made responsible. ⁽³⁾ All this intervention of a royal official in their affairs irritated the royal burghs who set about obtaining the privilege of electing their own Prepositus and of having him constituted "Sheriff within the Burgh". Perth in 1394 was the earliest to obtain this right. (R.M.S. 1593-1608, No. 1098); Aberdeen had it in 1454 (Hist. ^{Edinburgh, in 1482 [Charters of Edinb. p. 157]} MSS. 5th R. 630; Haddington in 1542 (Wallace-James: Charters); Lanark in 1540 (Lanark Records, p. 394); Edinburgh/

(3)
(Exch. R. I, p. 59).

Edinburgh secured it in 1482; ('Charters of Edinburgh', p. 157.); Dundee in 1641 (Charters of Dundee, p. 66) — the privileges ^{of} which were to lead to disputes between the burghs and the Constables, as well as the sheriffs.

Through all these conflicting jurisdictions successive kings and parliaments continue to apportion certain rights and duties, always looking to the sheriff as their principal fiscal, military, and executive officer. William the Lion in the course of his long reign made many improvements on the judicial system introduced by David I. Besides renewing the provision for a session of the sheriff's Court every 40 days, in which Barons and Bishops of the sheriffdom had to be present, William ordered the attendance there of the Stewards of Bishops, Abbots and Earls. (Ass. Will. XIX). Summonses had to bear upon them the charge against the defender. (Ibid. XXX). The sheriff had to be summoned to every court held by Church ⁽¹⁾ and Baron, but, that done, his absence did not invalidate the proceedings except in cases of "life and limb". William required the sheriff to be in attendance at court whenever the king visited the sheriffdom, and to remain in attendance, unless permission to leave was expressly granted. (Ass. Will. XXVI.) The sheriff could deal with Pleas of the Crown when the Justiciar gave permission. (Ibid. XIX). /

(1) The Province of Fife, under the jurisdiction of the Earl, sent its "judex provinciae" to the court of the Abbot of Dunfermline to see that law and justice were duly observed. (A.P. I: 85).

XIX). The sheriff was further enjoined to see that justice was done to poor as well as rich, "especially kirkmen and husbandmen". (Ibid. XLII.) An unsuccessful litigant impugning the judgment of the Court had, if argument failed, ~~to undergo~~ Ordeal of Battle. ⁽⁴⁾

The additions which William made to the existing sheriffdoms were Banff, ⁽¹⁾ Kincardine, ⁽²⁾ Ayr, ⁽³⁾ and Nairn ^(3^a) (Invernairn); but he had a scheme for the re-organisation of all which seems at first hard to understand. In his law of Claremathan he specified the places to which warrantors of stolen ~~ga~~ cattle were to report their loss. They were: Scone for Gowry; Cluny for Stormonth; Rait for Athol; Dalgynch for Fife; Kyntouloch for Strathearn; Forfar for Angus; Dunnott-er for Mearns; Aberdeen for Mar and Buchan; Inverness for Moray and Ross. (Ass. Reg. Will. III & IV.) No town in mentioned south of the Forth; the sheriff of Edinburgh is ignored; subjects in Lothian and Galloway have to travel to the Brig of Stirling, long famous for trials by battle. The reason for assigning Galloway to Stirling may have been that Galloway had mairs, (Ass. Will. 23, 24.) but no sheriffs. But Lothian, or Edinburgh, had a sheriff. Under David I. Linlithgow/

(1) Reg. de Morav. No. 14.

(2) Charters of Inchaffray (Scot. Hist. Soc). p. 265.

(3) Charters of Ayr; Reg. de Passelet, p. 22;

(3^a) Reg. Morav; Antiq. Abdn. & Buff. II: 283.

(4) Reg. Maj. A.P. I: 628. Sir Philip Hamilton Grierson has noted similar provisions in ancient Germany and in the Assizes de Jerusalem. In the latter "whoever falsified the judgment of the Court was bound to do battle with all its members. If he vanquished them all in a single day, they were hanged; and he was hanged if he failed so to do". (Scot. Hist. Rev. XV: 215.)

Linlithgow, Edinburgh, and Haddington were three separate sheriffdoms. In William's reign, and until 1451, Linlithgow and Haddington were constabularies within the sheriffdom of Edinburgh. Why was not the sheriff of Edinburgh appointed, rather than the sheriff of Stirling, for Lothian and Galloway? The reason lies probably in the fact that the Sheriff of Stirling from 1180 - 1226 - Alexander de Stirling - also held the office of Justiciar of Lothian (Inchaffrey Charters, p. 268.)

Another anomaly of this reign is the conversion of the sheriffdom of Crail ⁽¹⁾ to that of Fife. Galfrid is sheriff of Crail in 1195. He is still in office in 1212, but is then styled Sheriff of Fife.

This province is not to be confused with the earldom, which became a Royal Stewartry in 1455, and was administered as such till 1747.

The changes made in the reign of William constitute a distinct advance on David's provision for the sheriff courts. All the details relating to the procedure to be followed in court, the summoning of the sheriff to the courts of Regality, of Barony, the reasonable requirements of summonses, the demand for equity: - these are all indications of an enlightened administration./

(1) In the case of every other sheriffdom in existence before ~~1291~~ 1292 the name of the sheriffdom is derived from the burgh of the King's oldest castle.

administration. Not so necessary or enlightened seems the rule which required a dissatisfied litigant who desired to intimate his intention to appeal to do so "without turning his feet". "And gif he turnis the taes of his fet quhar the helis stud before that he gayn say that dome be certane resonis and that be witness by the court afterwart he sal nocht be hart till agayn say that dome all thoct that dome be plainly in the self fals". (Attrb. to William, A.P. I. p. 260; Frag. Coll. A.P. 1: 742). William laid down rules to be observed in Trials by Duelling. (Ass. Will. XXII (3) Frag. Coll. c. 29); and recognised the decrees of the Judices of Galloway regarding "breakers of the King's Peace", (A.P. I: 378) all which provisions continued in force throughout subsequent reigns. (1)

The adaptation of Glanville's code to Scottish needs as given in Regiam Majestatem may have been later than William's time, but the Regiam Majestatem presents certain features strongly suggestive of this reign./

(1) Quoniam Attachiamenta, coeval probably with the later years of William, contains in addition to the older rule, the following points: If the aggrieved were absent from the Court which pronounced doom, found security with the Coroner and lodged his appeal within 40 days, his case would be retried. If successful the suitors of the inferior court were fined - one fine being imposed upon the Baron's Court; but if a Sheriff's Court - each suitor was fined £10 this distinction being due to the fact that the Baron's was a 'vulgar' court whereas suitors in the Sheriff's Court represented Barons "quos leges conduntur in regno debent esse magis discreti ad cognoscendum leges conditas per seipos quam populus laicus aut vulgaris." A.P. I: 649.

reign. Scone is mentioned as a place of warranty in both Ass. Wil. and Reg. Maj.; and yet, in point of fact, Scone disappears as a separate sheriffdom some time circa 1228. William Blund was sheriff of Scone and Perth about that time. (Reg. Prior St. And. p. 227.) Perth thereafter takes the place of Scone. In recapitulating, as William did, the statute of David against Cattle Stealing, Regiam Majestatem takes no notice of Ass. Wil. c. 24. A draftsman later than William's reign would surely have done so.

Though the Lateran Council had in 1215 decreed the abolition of trial by ~~compurgation and trial~~ by ordeal of water and of hot iron, its actual disappearance from the Scottish Code was not accomplished until the reign of Alexander II. ⁽¹⁾ In consequence of that Act the Visnet comes into more prominence. The Visnet Assize or Jury, an important feature of the Sheriff Court, has its origin in the reign of David I. Then it was the duty of the Sheriff to leave the court while the Visnet considered its verdict. That done the Sheriff returned to receive from the Forspeaker of the Visnet, their decision. While there was no set rule fixing/

(1) A. P. I, p. 400

An instance of the retention (by Church courts) of Compurgation, so late as 1549, occurs in Aberdeen, where two accused "purged" themselves of a charge against them by their own oaths and by the oaths of certain compurgators. (Antiq. Abdn. & Bnff. IV: 487).

fixing the number of the Visnet, there was a regulation requiring unanimity from 12 of them. If this could not be done by the originally selected Visnet they were increased or altered until the requisite minimum was obtained. The suitors, not the judge, decided the case before the Court; but exception was made to this rule in actions where the suitors "were ignorant of the law". (Quon. Att. c. 12, A.P. I; 650.) The suitors whose judgments were reversed on appeal were, ^{as a rule, fined,} each liable to a fine of £10, "because barons ought to know the law". (A.P. I: 649). The practice of the Sheriff trying causes without a Visnet did not begin until the early years of the 16th century (Littlejohn Sh. Ct. Rec. of Abdn. I. XXXVI). An exhaustive account of the Visnet is given by Sir Philip Hamilton Grierson in Scot. Hist. Review, Vol. XV, pp. 15 - . The Visnet did not, however, apply to Fife or to Galloway where Celtic customs continued: the latter province being expressly exempted from the Act of 1244, "Establishing Indytements" "because their laws are different". (A.P. I. 403.) Questions of Disseisin which, though allocated by David to sheriffs, had been since then in the province of the Justices, were by Alexander II permitted to the sheriff (A.P. i: 400.) Persons charged with robbery, theft, ravishing, manslaughter, or any other misdeed could be challenged to answer by Battle at the Brig of Stirling by Knights, Knights' sons, or freeholders. Such challengers/

challengers might do battle vicariously by a champion. "Carles", who were not freeholders, had to fight in person, unless their overlord chose to intervene. (A.P. I: 400.) In this reign the Laws of the Marches between England and Scotland were examined by twelve English and twelve Scottish knights, and by the Sheriffs of Berwick, Roxburgh and Edinburgh, and the Sheriff of Northumberland.⁽¹⁾ The additions to the sheriffdoms made by Alexander II were Peebles, Selkirk, and probably Dumfries. (Reg. Glasg. No. 150: Lib. de Calchou, No. 218).

The third Alexander abandoned the policy of his predecessors in the organisation of Southern Scotland. William had tried to break up Galloway by cutting off Carrick;⁽²⁾ and giving to it separate jurisdiction. Alexander II had demarcated Dumfries and Nithsdale: Annandale which had been in the De Brus family since the time of David I was further set apart as a lordship or Regality for Robert de Brus by Alexander III (Nat. MSS. Scot. I: 39); Wigtown was erected into a sheriffdom and placed under Alexander Comyn, Earl of Buchan. (Exch. R. I: p. 22.) The castle which that king built at Kirkeudbright was placed under the care of John Comyn, son and successor of Alexander, as sheriff. (Ex. R., I, p. 39, 48, 49).

Galloway/

(1) A.P. I. p. 414.

(2) In 1186 Carrick was gifted to Duncan, son of Fergus lord of Galloway (Hist. MSS. Com. 5th Rep. 613.) who, between 1225 & 1230, was created Earl of Carrick. (Lib. de Melros.).

Galloway was thus brought into the established order of Regalities and Sheriffships; but as events proved the attempt to introduce the ordered system of sheriffships with Anglo-Norman laws was for more than a century later premature. Thomas Fleming, 2nd Earl of Wigtown, was glad to sell in 1372 both sheriffdom and earldom to Archibald Douglas, Earl of Galloway and Lord of Annandale. (Reg. Mag. Sig. Vol. I: No. 507.)

The reign of Alexander III is an important landmark in the history of the sheriff. To it we owe the earliest records extant of inquisitions taken by sheriffs and their suitors: (1259 - 1266). (A.P. I. pp. 97-102); The accounts rendered to the Exchequer show the revenues accounted for by the sheriffs and the nature of their expenses; some of them are instructive on account of their record of the preparations made to repel Haco's invasion; and the steps taken to fortify these castles; and the mobilization of men for the army. (Exch. R.I. pp. 18 & 89). For with all their judicial work the sheriffs were pre-eminently Military Officers and Overseers. Their territorial armies were kept in order by Weaponshaws which the sheriffs were bound to hold at stated times.

In his brief reign John Balliol created sheriffdoms. These were Bute, Kintyre, Lorn and Skye. Neither Balliol nor Sir William Wallace made any material change in the sheriffships, though, according to Blind Harry, Wallace appointed "Scherrais that cruell/

cruell was to ken, And Captans als, off wyss trew
 Scottis men". ⁽¹⁾ Edward I applied his mind seriously to the administration of Scotland. After 8 years of administration by approved Sheriffs, ^{and} Constables ~~from Scotland~~ - (except in the far north and west) he drew up the elaborate Ordinance of 1304 by which he adhered to the laws of David I and his successors, but expressly forbade the observance of the laws of the Bretts & Scottis - a vain decree. The Ordinance, the Writs and Returns to Edward's Exchequer from 1296 to 1307 form a landmark in the history of the sheriffs, showing not only the sheriffdoms and the revenues derived from each but the frequently misplaced reliance upon sheriffs selected because of their apparent loyalty to the English King. (Cal. Doc. Scot. II. passim)

The MS. discovered by Miss Bateson in Corpus Christi College seems to be the scheme of an English adviser - a serious departure from Scottish precedent, - proposed for Edward's approval. Had it been adopted there would have been, according to this document, - "In every sheriffdom a sufficient sheriff by the advise and election of the good people of the country". ⁽²⁾ In the Ordinance issued and recorded in the Public Archives and published in the Record Edition of the Scots Acts there is no mention of election of sheriffs by the people. So far is Edward from leaving the/

(1) Blind Harry: Wallace, Bk. VI: 791-2.

(2) Scottish King's Household (Scot. Hist. Soc. Vol. 44, p. 42.)

the appointment of these important officials to the desires of the "good men" of the sheriffdoms that he ordains that "The sheriffs be of those living in Scotland either Scots or English, the most sufficient, most suitable and most profitable for King, People and the maintenance of peace, and removable by the king's Lieutenant and the Chamberlain at their discretion."⁽¹⁾

The most important strongholds Edward entrusted to his own tried followers, leaving them to select the sheriffs of their respective sheriffdoms, for which appointments the English Guardians were to be responsible. Thus the Chamberlain, as Captain of Berwick Castle "mette dessous luy tiel pur estre viscounte de Berwyk pur qui il voudra respondre." The King's Lieutenant had in his charge the Castles of Roxburgh and Jedburgh. John de Kingston had charge of Edinburgh Castle, while Jue (or Ivo) de Aldeburgh was sheriff of Edinburgh, Haddington and Linlithgow; Peter Luband, constable of Linlithgow; William Bysset was Constable and Guardian of Stirling Castle and sheriff - the garrison of the Castle being under the command of the King's Lieutenant, and the Chamberlain, on their arrival in Scotland. The castle and sheriffdom of Dumbarton were again bestowed upon John de Menteith.

The other sheriffships be allocated to the Scots or Normans settled in Scotland prior to Edward's arrival^{and} who had taken the oath of allegiance to him, and/

(1) A.P. I: 122; ~~Fbid.~~ p. 121.

and who in most instances were in office during the Edwardian rule. ⁽²⁾ (A.P. I. p. 125.)

The creation by Robert I of Argyle as a sheriffdom in or about 1326. (Reg. Mag. Sig.) had far-reaching results. The growth of that ultimately wide administrative area was gradual. Lorn was merged in it in 1469, (after an agreement with Lord Lorn). (Hist. MSS. Com. 4th Rep. 474.) and Tarbert which, circa 1504, had absorbed the sheriffdom of Kintyre, was also added.

Robert I made a few changes in the constitution of the sheriffship: one, highly important, was the act forbidding Sheriffs and other officers of justice from acting in the courts of their sheriffdom as 'sustainers or maintainers of mutis'. (A.P. I: 472) The judges/

(2)

Cf. Lists in Cal. Doc. Scot. II.

The histories of some of Edward's Scots Sheriffs, as indicated by entries in the Calendar of Documents, are interesting alike for the light value of their oath of fealty and for the varied career of each individual. Mention may be permitted of three: Sir Simon Fraser, Sheriff of Peebles, 1264 - 1287, who ^{rebellious} was ^{in 1302} exiled by Edward ~~soon after Wallace~~ (Cal. Doc. II: N^o 1191) Sir Patrick de Graham, Sheriff of Stirling "a goodly knight who fell in Battle .." and Sir Malcolm de Innerpeffry, Sheriff of Clackmannan and Auchterarder, 1288 - 1305, who ^{for having} championed Bruce fought at Methven, was captured and imprisoned in the Tower of London. (Cal. Doc. II, N^o 1258).

judges - Sheriffs and others - had evidently (as in France) been in the habit of acting both as judge and advocate. (3) Robert I also tried to get his Galloway subjects into line by permitting them - if they chose - to submit to trial by Visnet instead of their customary Ordeals or Purgation. (R.M.S. I. No. 59); he required the sheriffs to attend to the summoning of Barons and freeholders to Parliament; (1) (A.P. I: 54) and to the publishing of the laws passed. (Ibid. 466). Robert's Chancellor was Bernard (de Linton), Abbot of Arbroath, and sheriff of Forfar; (R.M.S. I. App. I. No. 76); to whose care, in having them entered in the Abbey's Cartulary, we owe several of the Acts of that reign. (A.P. I.: 48). The Legislature sought to raise the standard of Justice by several measures, one directing Sheriffs to do nothing against the statute or the common law of the realm even though ordered by precept under the King's Great^{Seal} or Privy Seal or Signet (A.P. I: 509^a). The Sheriffs, however, to judge by the statutes directed against them were/

(1) For Form of Summons - see A.P.I.p. 104.

(3) In France "Les magistrats pouvaient aussi plaider pour autrui et même exercer la profession d'avocat avec salaire, mais en dehors de leur ressort" - Glasson VI, 349.

were prone to negligence and corruption, evils which continue in later times, in spite of the checks attempted - by the Court of the Justiciar and the Chamberlain (before which opportunity was afforded those having a grievance against a sheriff or against one of his officers to state his complaint); and by review of all decisions by Parliament. (1369, A.P. I: 508^b and 535^a.)

In the same period there came into prominence (though he is mentioned in the 12th century) the Coroner, an officer partly associated with the sheriff, partly with the Justiciar. The sheriff was bound to deal with all prisoners delivered to him by the coroner. ⁽⁷⁾

In spite of the number of sheriffs and of the efficiency of the Scoto-Norman system of laws, (of which the Visnet or Assize of Suitors was a central feature), Celtic legal practice prevailed in many parts of Scotland in the 14th century. Edward I. had tried to put it down in his Ordinance of 1304, and Robert I, who was not partial to it, had sought to supersede the Celtic system in Galloway by granting there "a good and faithful assize of the country with freedom from making purgation or acquittance according to the ancient laws of Galloway". (R.M.S. I. No. 59.) The Parliament/

(7)

Later - 1487 - the Coroner could demand assistance of Sheriff and Baron in the arrest of those on his porteous rōll and to get surety for their appearance at the next Justice Ayre. A.P. II: 176.

Parliament of 1384 went further and required the Earls of Carrick, Douglas and Fife to take the "great oath upon the Holy Evangelis"⁽¹⁾ that they would observe the ordinary laws of the land in their respective territories of Carrick, Annandale and Galloway, and Fife earldom.⁽²⁾ Each of the Earls took the oath, with a reservation in favour of himself and his family. The Earl of Fife granted back to the King, for the betterment of the law and good of the country, the privileges of the law of Clan Macduff. (A.P. I. p. 551.) Yet in spite of all this the old Celtic laws continued to be observed for more than two centuries after this date. The Earl of Carrick actually received a royal charter in 1455, conferring upon him the privileges attached to the head of Clan Kennedy, with right to judge in all matters affecting the Clan, of leading and controlling the said Clan, of weaponslawing and all other services belonging to the headship of the Clan. (Hist. MSS. Com. 5th Rep. 613.)

The Earldom of Fife had provided certain historic cases which turn upon this question of special jurisdiction/

(1) This was the usual form of Oath taken by the Assize and by others in court.

(2) A.P. I: 551.

jurisdiction. By the law of Clan Macduff all persons related to the Clan were to have no judge in any action, treason excepted, but the Earl of Fife only, the chief of the Clan. Members of the Clan had the right to appeal home to their own Clan, provided they found security to present "thaimselffis to judgment for thir thrie headis: (1) thai promisit to preif that thai war off the clane of makduff and thair-foir aucht to haif the former privileage; (2) Next that thai haif done no odius cryme quhy thai suld be exclutit from that privileage; Thridlie quhat-semeuir, conforme to the law the chief of the clane sall enjoyne, thai sall obey it". (Alex. Arbuthnott, Principal of King's College, Aberdeen, 1538-1583, quoted in Hist. MSS. Com. 8th Rep. 297.)

In 1391 Sir Alexander de Moray was indicted before the Justiciar at Ffulis for the murder of William de Spaldyne. Moray, represented by Sir Bernard de Hauden and John de Logy as prölocutors, protested that since he had been repledged to the Court of Robert, Earl of Fife, by reason of the law of Clan MacDuff the Justiciar had no jurisdiction over him. (Reg. Ins. Miss. L.). The Justiciar adjourned the Court in order that he might learn the opinion of the Chief Justiciar. Unfortunately the record of the issue appears to be lost. (Hist. MSS. Com. 3rd Rep. p. 417.)

Two other claims to be tried by the law of
Clan/

Clan MacDuff, one in 1420, the other in 1548,⁽²⁾ bear witness to the persistence of the old customs in the presence of a newer system of judicial procedure. The former of these two cases was the trial of Hugh Arbuthnott for the murder of Sir John Melville, the highly unpopular sheriff of the Mearns. Arbuthnott claimed the privilege of the law of Clan MacDuff, and the claim was allowed. It is satisfactory to find that the judges were able to settle the feud between the families of Melville and Arbuthnott. (Hist. MSS. Com. 8th Rep. 297.)

Such laws as that of the Clan MacDuff were not the only relics of the earlier age that remained in the court practice of the period covered by the three centuries from 1300 to 1600, and beyond 1600.⁽¹⁾ The Judex continued to act in the courts of Justiciar, sheriff, baron, and of Churchman throughout these centuries. Originally the sole judge and expounder of the tribal laws, and incorporated by David in his legal scheme, the Judex, before finally falling to a humble office, had sat along with the sheriff and other judges in their courts, probably as assessor, his presence valuable both for his knowledge of customary law and of the vernacular; /

(1)

The Chief of Clan Kennedy enjoyed till at least 1454, right to judge "in Calumniis quam in aliis articulis negotiorum" in all "pleas affecting the Clan. (Hist. MSS. Com. 5th Rep. 613.)

The Brehon also, styled "Breáve" is found doing duty in Lewis in the 17th century. (Highland Papers. Scot. Hist. Soc. 2nd ser. Vol. 12, pp. 272-274.)

The Scandinavian laws governed the subjects of Scotland in Orkney and Shetland until 1611 (Spald. Club. Misc. V: 37).

(2)

Balfour (Sir James) Practicks, p. 511.

vernacular; and it was he, and not the sheriff,
 who pronounced the doom. ⁽¹⁾ Until 1429 the Dempster
 was styled in all records "Judex". (A.P. II. 18). The
 family of Dempster of Caraldistoun who inherited the
 office borne in their name may have derived it from
 Keraldus, judex in Mearns, who circa 1236 (Reg. de
 Aberb. p. 162) had lands which retained his name in
 Keraldistoun. It would be conclusive could the line
 of Dempster of Caraldistoun be traced without ~~an~~ a
 break to the Kerald of 1230; but unfortunately the
 earliest charter of the Dempsters was lost before
 1379, when Andrew Dempster obtained charter from
 Robert II of the office "Judicis nostri in Parlia-
 mentis nostris quam justiciarie ac curiis vicecomitis
 nostri de Forfare" - which office (the charter proceeds)
 had been in possession of Dempster's ancestors "quod
evidencie sue de dictis feodis retroactis sunt dis-
tructe". (R.M.S. I. No. 758). Whether the Dempsters
 were lineally descended from Kerald or not, the official
 described in the Cartularies of the 13th and 14th
 centuries as judex is shown to be identical with that
 given later as "dempster".

The survival of the Dempsters in the
 Scottish Courts till the eighteenth century had no
 parallel in the English Courts, but the Deemster re-
 mained in the Courts of the Isle of Man after the Norman
 system/

(1)

In a Barony Court held in 1385 "through the mouth of
 Robert Louranson, then demstare of cure lorde the
 King's Court, (and of the Barony Court) it was gyffin
 for dome that (Hist. MSS. 3rd Rep. 410.)

system had been introduced, and still remains. The Deemsters were the sole repositories of the unwritten or "Breast Laws" of that Island, and Sir John Stanley caused these to be recorded when he was Lieutenant of the Island in 1417. According to the constitution the Lieutenant had to inquire of the Deemster the laws, and the penalties attached to infractions of the unwritten laws. (Manx Soc. Trans. III. passim.)

Unlike the Manx Deemster, the Scots Dempster has long since vanished from the courts. His decline and fall were due to his having outlived his usefulness as an expert in law and as an interpreter. (1) The later dempsters were mere legal furniture in the Scots Courts, retained for the formality of pronouncing doom, which being usually done badly and often ludicrously, these officers were eventually dispensed with altogether. (2)

This digression from the sheriff to one of his court serves to throw light on the state of the Judiciary in Scotland during the period under review. The legislation of the fifteenth century which deals with legal administration does not touch the Dempster/

(1)

In 1544 in the Barony Court at Dunrobin the Bailie "by the mouth of Murquhard Murray in the Irish or Gaelic tongue (*Hibernica Lingua*) explained the effect of letters under the signet of Mary Queen of Scots upon the question before the Court. (Hist. MSS. Com. 9th Rep. 191-2.)

Notarial Instrument of 1544 in

(2)

There is no account of the disappearance of the Dempster from the Sheriff Court. His dismissal from the Court of Justiciary dated from 1712. (Acts of Adjournal, March 31, 1712.)

Dempster, except in directing procedure in appeals from his doom. The judge having indicated his judgment or opinion the Dempster pronounced the doom. His opening pronouncement: "This Court schaws for law and I gif for dome" was uniform in every Court. In 1429 it was enacted that whosoever "falses a doom" shall not remove out of the place where he stands when doom is given nor speak to any-one till the doom is again called, ⁽¹⁾ and that shall be within the time that a man may go easily forty paces, and that to be counted after the consideration of the judge and court. And if he be again called by an advocate of the party, he being admitted once to speak for that party in court by name and surname, it shall not be necessary to rehearse his own name nor the Dempster's in the doom falsing, but only to say that the doom is "fals, stinkand, and rottyn in the selff". (A.P. Vol. 2, p. 18.)

The procedure of Falsing has recently been made available by Sir Philip Hamilton Grierson in his edition of Habakkuk Bisset's "Rolment of Courtis" written circa 1616 (Scottish Text Soc. n.s. Vol. 10, p. 179). There the 17th century lawyer drew up as "profitable and necessar for understanding of the "auld lawes" the "Auld Used Civile Procese", of which Falsing of Domes occupis 20 chapters.

The process of Falsing, based upon the Acts of/

(1) "Again called" = Appealed.

of 1429, 1471, and 1503⁽²⁾ required the Falsifier to ask an instrument of the falsifying of dome, upon which the judge caused the Rolment of all the process to be read in Court in presence of the parties, then closed it with "ane throch of paper" under the seal of the appellant or ^{under} a borrowed seal, along with the judge's seal; writing on the back of the paper: "Memorandum, this is the rolment of this courte, "Touching the falsing of the Domes that A of B. "forspeaker to C falsed in the said courte on (stated date)." ⁽³⁾

The judge also recorded on the back of the paper the reasons for the judgment. The document was lodged with the clerk of the Superior Court 40 days before hearing.

In the appeal court the falser of the dome had to give on paper his reasons against the dome, the instrument being then sealed and on the back the following: Thir ar the reasons that A of B assigned for him why the dome given in the court of E against him on (date) was evil given and weill again said.⁽⁴⁾ This document was then, with the other process, presented to the judge, who directed a precept to be served/

(2) A.P. II: 18: 101^b; The Act of 1503 changed the form of expression used in Falsing to: "I am grattumly hurt and injurit be the said dome therefore I appele and find ane borcht in the officiar's hand of the court to persew the said appellatione conformand to the law made of before" (Ibid. 246: 284).

(3) A good example of the procedure of Falsing is found in the Stewartry Court of Strathearn in 1475 when James Heryng "forspeaker for Wylzam Talzour says to ye Vilzam Reyd, demster of the Stewart curt that the dowme that thow has gyffyn with thi mowtht is of no wayll, is false and/

(4) Cf. French practice of same period where judgment on appeal was either (A) bene judicasse et (B) mala appellasse; or (12) mala judicasse et (13) bene appellasse. Dr Neilson in Acts of the Lords of Council II: 2241 - quoting from Olim.

served upon the mair to summon the judge of the lower court to appear at the higher court on a certain date to maintain the dome and to bring with him the rolment of the said court pertaining to the cause and with him the clerk, serjeant and suitors then present in court to make their record and to declare how the matter stands. The precept was read by the mair at the manor house of the questioned judge who was called upon to obey the summons. The officer then endorsed the summons with the statement that he had read the summons to the Baron in presence of certain (named) witnesses. At the time fixed for hearing the cause the forspeaker asked the judge to cause call the judge and the suitors of the lower court to maintain their dome against him. The judge then caused the serjeant to call thrice, after which - if there was no response ⁽¹⁾ - the clerk read the record of the summons and the evidence of its proper execution. The falser of the dome was then required to find security to be lodged with the serjeant "I find ane borgh in thyne hand serjeand and here ane borgh to follow my borgh that by the "reasons now read by the clerk of this court and as for fault of appearance of the baron of R. with his suitors summoned/

and rottyn in the self be cause it is gyffyn in the contrave of the cursse of comone law, protestand for may rasonis to schaw when myster is" etc. - then giving security to the Serjeant and attending to the other formalities required by law. (Hist. MSS. Com. 3rd Rep. 418.)

(1) A fine of £10 was exacted from absentee suitors (Transcript Justice Eyre Records III: 286).

"summoned to this court to maintain this dome given
 "against me in his court of R. on (date) touching the
 "cause of . . . that that dome was evill given
 "and weill again said". The Court then proceeded to
 business, first removing the falser of the dome who
 remained outside until the said dome was made ready,
 then recalling him to hear the judgment. When both
 parties were present the falser of the dome was called
 on first to enforce his reasons, followed by the judge
 and his suitors - defenders - whose reasons the falser
 might contradict but "neither of the parties may add
 or minute more reasons than those given into court."

The parties to the action had to leave court
 until judgment was about to be given when they returned.

If the new dome was against the falser of a
 dome given in the Baron court or of any other court the
 falser of the dome was subject in as many unlaws of that
 court where the dome is falsed as there were suitors
 that said with the dome in the first court, and in one
 unlaw of that court wherever it be where the dome is
 discussed and falsed; and had to find caution (borgh)
 for the said unlaws before leaving court.

All domes falsed in the Baron court had to
 be discussed before the sheriff in his court, and all
 domes falsed in the sheriff court had to be discussed
 before the Justice in his next eyre within 40 days;
 all domes falsed in the Justice Ayre were discussed in
 Parliament.

Falsing/

Falsing of Domes, the customary method of appeal to a higher court in the 14th and 15th centuries was one of the principal duties - if not the principal duty - of Parliament. Appeal to the King had been the privilege of the subject from the time of David I; in the 13th century to King and Council. (1) In the 14th century a more systematic scheme is evolved in the appointment by King and Parliament of lords auditors ad audiendum et terminandum supplicaciones et querelas que in Parlamento non fuerant terminante vicecomiti et ballivis. (A.P. I: 513: Lib. de Seon. p. 125.)

The earliest appellate Committee on Falsing of Domes "ad deliberandum autem super judiciis contradictis", (quia visum est et decretum quod pauciores possint sufficere, sunt subscripti electi via pro parte clerici) - 9 churchmen; pro baronis 25 laymen - is of A.D. 1368-9. (A.P. I. 506). Within a year of that enactment those elected "ad sedendum et deliberandum super judiciis contradictis" by Parliament were to begin in the King's Court in the Monastery of the Friars of Perth and to continue ut omnia judicia contradicta et pendencia et omnes questiones et querele que concernunt communem justiciam proponantur." (A.P. I: 507 - 8.)

Parliament was regarded as the supreme law/

(1) (1282) A.P. I: 10&: (1292) Ibid 114.

law court. "It is ordanyt that ilke Yhere the King
 "sal halde a parlement ^usaw that His subjectis be
 "servyt of the law the qwhilk sal begyn on the morne
 "efter all halow day for ther thre Yhere to cum".
 (A.P. I: 573.)

Professor Hannay has drawn attention to the similarity of the Court of Parliament to the inferior courts in the requirement of 40 days' notice before trial in summonses. In one of the earliest recorded instances (1368) of cases super judiciis contradictis, an appeal from the Justice Ayre of Dundee - protest was made that Parliament had proceeded per quatuordecim dies instead of quadraginta dierum spatium a tempore justiciarie. This protest was sustained, the matter being referred to the next Parliament. (A.P. I: 504-5.)

The Act of 1425 remodelled the constitution of the Court; the Chancellor and certain discreet persons of the three estates were to have jurisdiction over all complaints, causes and quarrels falling to be determined before the King's Council. (Dr. Neilson and Mr H. Paton, *Acta Dom. Conc.* II: xxi);

The process of Falsing of Domes died in the early decades of the 16th century. Bisset attributes its disappearance to the process of Reduction of Decrees and Sentences in the Court of Session; Stair states that Falsing of Domes was superseded by the "excellent method of proceeding by Advocation" (*Instit.* More's Edn. I: 241); but the fact that the records of the Justice/

Justice Eyres of the years 1493 - 1513 reveal an astonishingly small number of cases appealed by "Falsing" suggests that the decline began ^{earlier} ~~earlier~~ (1) a decline probably due to the facilities afforded the appellant from a sheriff's decision of proceeding to court of the King's Council (2) without the formalities of Falsing.

The fifteenth century from 1424 to the close is conspicuous and distinguished beyond all other centuries by reason of the many enlightened measures which were then passed and by the constitutional changes affecting Sheriffs and the lieges. Until about the middle of the century the acts made tended to the enlargement of the Sheriffs' judicial functions; after that time these became abbreviated. For some of these measures the Scots legislators were doubtless indebted to their ally France. The Sheriff, for example, like the Bailli of France, had from 1436 (3) to punish all robbers and murderers in his/

(1)

The Clerk of Parliament continued however to detail the Committee for Falsing Domes up to 1558.

(2)

A.P. II: 246, 254.

(3)

The Bailli "recherchera les larrons, les meurtriers et les punira selon leurs méfaits. (Glasson VI; 282-3) Until the Act of 1436 was passed thieves and murderers could not be punished unless a prosecutor appeared. From 1436 the Sheriff could deal with such malefactors without warrant.

his sheriffdom without waiting for private prosecutor or ^{for} written complaint; he had to provide poor litigants with an advocate (A.P. II. p. 8); the Bailli of France had from a much earlier time to exercise similar care. (4)

He was not to 'compound' with those convicted of theft (A.P. II. 23) nor engage in the sale of thieves, a species of 'trade' recognised by Barons of these times; (1) the Sheriff was to extend his jurisdiction deferring neither to Burghs nor Regalities (A.P. II: 24). Brieves were made of a less rigid type and exception could not (as previously was the case) be taken to the length or the brevity of their tenor. The only requisites were that the names mentioned be legible and free of blots and erasures. (2) (A.P. II. 17) Besides Brieves of Citation there were in 1429 letters of Summons which were to contain the six points necessary to be "rehearsed" in court. (3) From 1469 these had to bear the King's Signet and be sealed by the Summoner (5) and no brieves or letters or decrees were of any validity which did not bear the sheriff's or the Bailie's seal, (A.P. II. 95) a law evidently made/

(4) "Il doit veiller à ce que tout plaider ait un avocat même s'il est pauvre ou s'il plaide contre un puissant personnage. (Ibid.)

(1) Cf Charter by John of Monteith, lord of Knapdale, in favour of the lord of Lochaw conferring inter alia the right ~~con~~donee and his heirs of selling thieves. (Hist. MSS. Com. 4th Rep. 476).

(2) This Act seems to have been repealed in 1491 when it was "Statute that na Brevez be gevin to na pairties but eftir the forme of the brevez of the Chancellary usit/

(3) See footnote 3, page 46.

(5) " " 5 " " "

made to end the use of false documents. [Cf. Hist. MSS. Com. 5th Rep. 630]. The Sheriff's conduct, which, under an Act of 1369, could be challenged by an aggrieved person before the Justiciar and the Chamberlain with an Assize (A.P. I. 508^b; 535^a.) was made part of the regular routine of the Justiciar at his Ayres. The last day on these occasions was devoted by the Justiciar and his Assize to an investigation of the conduct of the sheriff. (1487: A.P. II. 177.)¹

Protection was also afforded the litigant who felt that his case before Sheriff or other inferior court had been unfairly dealt with by permitting him to appeal to the Lords of Session who, if they found that the Sheriff or other officer had "procedit wrangously/

usit in auld tymes of before" and the form be observit and kept without innovation or eiking of new terms - Any such brieves were to have no force. (A.P. II: 224).

(3) The six points were: (1) name of summoner; (2) name of person summoned; (3) name of him before whom the summoned will appear; (4) Statement of facts; (5) date when person summoned must appear in Court; (6) name of place where Court will be held. (Reg. Maj. I c 5. A summons, moreover, had to be served between sunrise and sunset; before witnesses; and never on a Sunday or Day of Festival. Q.A. XLV (A.P. II, 656).

(5) An appeal of 1470 by Thomas Allardes was made on the ground that the "Summoundis war not signet nor selit be the summoundare as it aught to be of resoune as wes actit in the last Parliament". (Hist. MSS. Com. 5th Rep. 630.) Another case occurred in 1497 when the forspaker of the Lord Ruthven (Sheriff of Perth Burgh) succeeded in his objection to a summons to which there was "nowther sele nor signet on the summyn". (Acta. Dom. Conc. II. p. 93).

(1) The Judges of the High Court of Justiciary still observe the ceremony of inquiring on the last day of each Circuit whether anyone has complaint to make against the Sheriff.

(1)
 wrangously, reduced and annulled the process, made the sheriff pay the expenses of the complainer and made him liable in punishment by the King. But if the complainer was found to be wrong in his complaint he had to pay the expenses of the officers and those of the other party. If unable to do so he was imprisoned. (A.P. II: 178).

The development of the shrieval system did not keep pace with that of the Regalities. Until 1385², when Bute and Arran were formed into one sheriffdom no sheriffship had been established since 1326, when Argyle was erected. Regalities, on the other hand, increased in numbers until in 1747 they are found with their divisions to number 184⁽³⁾; the extraordinary increase of this class of privileged Barony ^{being} ~~was~~ due in many cases to jealousy. Barons of ordinary Baronies resented being placed below Sheriffs. In some instances Sheriffs were lords of Regalities, sometimes Bailies. In the reign of Robert II a new order of Regality came into existence by the formation of Robert's princely and High Steward territories into Royal Bailliarics. Of these the chief were Cunningham, Carrick, Kyle, and Lauderdale; Renfrew alone was erected a sheriffdom (in 1408). Over each the/

(1) For an "unjust process" the Steward of Kirkcudbright was tried by the Justices in 1513. (Transcript of Records of Justice Eyre III: 207). *The result is not shown.*

(2) Cf. Hist. MSS. Com. Hamilton MSS. p.21.

(3) See Album of Claims for Compensation under Abol. of Herit. Juris. Act [Signet Library].

the King placed a Bailie, ⁽¹⁾ whose duties were those of a viceroy on his master's estates. France had supplied the model; there since the time of Philip le Bel Bailleries and Seneschaussées ⁽²⁾ were well-recognised units of administration. The latter order was also introduced to Scotland on a similar footing to that which obtained in France, where the estates of nobles which had been forfeited to the Crown because of treason on the part of their owners were administered by a Steward - often the deprived lord's steward - for behoof of the King.

This class of jurisdiction appeared in Scotland about 1440 - 1455 on the forfeiture of the Earldoms of Menteith, Fife and Strathern; Annandale, Ettrick Forest, Kirkeudbright. ⁽³⁾ (A.P. II: 66-67 Ex. R. VI: lxxvii, lxxxiv et seq.) All these jurisdictions continued independently of Sheriffs until the abolition of all heritable jurisdictions in 1747; their Royal Bailies and Stewards were of the same order as the Sheriffs in respect of attention or lack/

(2) Glasson: Hist. de Droit de la France VI: p. 305.

(3) The Burghs of Kirkeudbright and Wigtown were on the Douglas forfeiture, ^{converted} from burghs of Regality to Royal Burghs, their fermes being transferred from the lord of Regality to the Crown. (Ex. R. VI: cxi.) The Castles of Dumbarton, Inverness, Stirling, Urquhart, and the Palace of Linlithgow were also placed under Constables appointed by the Crown.

(1) Thomas Kennedy, Bailie of the King's lands in the earldom of Carrick in 1434 [Exch. R. IV: 594] is styled (in 1450) "King's Bailie" [R.M.S. N° 414].

lack of attention to duty; they held in heritage and without guarantee of qualification or fitness for office.

The absurdity of holding such offices in heritage was evidently felt by many at the time of formation of these jurisdictions when complaints against judges were rife. These complaints are the theme of an unknown Poet whose verses are given in Liber Pluscardensis under the title "Lament for Justice". These verses may or may not have been known to the framers of the historic measure of 1455: - "That there be na office in tyme to cum geffyn in fee and heritage, and that the offices that are gevin sene the decease of our Sovereign lorde that dede is be revokyt and adnullyt Exceptande x the Wardanry of the Merche, the whilk our Sovereign lorde has gevin till his s^{on}, Alexander Erle of Merche and lorde of Ananerdail". (A.P. II. 43).

And yet, notwithstanding this peremptory statute the Parliament of 1457 passed a measure requiring heritable sheriffs who had been convicted of neglect of duty not to lose their sheriffships but merely to lose office and profits for a year and a day; ⁽²⁾ those holding office otherwise than heritably to/

(2)

In that very year the heritable Sheriff of Cromarty - William Urchard - obtained Remission under the Great Seal for his "'depredations' on the land of the earldom of Sutherland in the company of the ~~late~~ late Earl of Ross and for all robberies, thefts, homicides, burnings and crimes whatsoever committed by him". (Cal. Charters Vol. II in H.M. Register House.)

to be dismissed. (A.P. II. 50.) Again, in 1469, somewhat similar penalties are imposed, and a like discrimination between the heritable and the non-heritable sheriff is made in the Act depriving the convicted heritable sheriff of office for three years and the non-heritable for all time. (the latter was evidently a holder ad vitam aut culpam.) (A.P. II: 94).

The Act of 1455, conspicuous in many respects, referred to by later legislators - and particularly by those enacting a similar measure in 1567, is an instance like so many other statutes, a model or an exemplar or a counsel of perfection and nothing more. Had the 1455 or the 1567 Act against negligent sheriffs been strictly enforced much of the subsequent legislation affecting the sheriffships would have been unnecessary.

That these Acts against judicial offices being disposed in heritage were not enforced one can understand; the heritable nature of the offices was deeply rooted; the sheriffs and lords of Regalities- the Magnates of the realm were in power in Parliament. Only when some of these had proved traitor or rebel were their lands and jurisdictions forfeited.

It would be a mistake, however, to regard every sheriffship as having always been heritable. An examination of the Rolls of Sheriffs of the 12th and 13th /

13th centuries shows almost all as non-heritable sheriffs. Forfar, (1) Seone (1) till merged in Perth; Perth till 1260; Edinburgh; and Fife, were of this class. The heritable nature of other sheriffships is made clear for the first time about A.D. 1260. Several sheriffships begin to assume the heritable character towards the close of the 14th century.

The sheriffship of Dumbarton, an important frontier of the Highlands, was in 1321 granted with an express reservation by the King to have it returned to the Crown whenever demanded, subject to payment of 50000 merks annually until it was restored to the family. (Lennox Book Vol II. 20-22).

The 15th century grants of sheriffships were not always to be held in heritage. William Abernethy, for example, who (1452) got that of Banff, held it durante voluntate regis. (R.M.S. II: 680); Sir John Ross held his (Linlithgow) (6) for life. (Ibid. No. 1112.)

Even where a sheriffship had been gifted in/

(1)

Forfar Sheriffs.

David de Hay, 1211-'19 (Reg. de Aberb. p. 43).
 Hugh de Cambren, 1219-1226 (Ibid. pp. 162; 263)
 Thomas Malherb, 1226-1239 (Ibid. pp. 163, 262)
 Sir William Auchterhouse, (Ibid. 200).
 William Comyn (Ibid. 5; 93; 262)
 William de Montealto, 1263 (Ex. R.I.; 26)
 John de Fellow, (Ex. R.I. p. 21).
 Sir Matthew de le Chene, 1277, (Douglas Bk. III, p. 6)
 Sir David de Betoun, 1290 - (Ex. R.I.: 49).

(6)

In 1451 the office was in the gift of the Queen. (R.M.S. No. 462: A.P. II: 60.)

Seone Sheriffs :- Maldonenus (Malothen) 1130 - [Req. de Dunf. N° 29]
 Eways, 1150-1164 [Req. Prior. S. Andr. p. 132].
 Makbeth, 1189-1199 [Req. de Aberb. p. 27]
 Wm Blund - 1228 " " p. 237.
 Perth " Wm Kyneth, 1163 - [Lib. de Seone p. 8]
 Wm de Hay [Req. de Aberb. p. 12].
 John de Moray, 1214- " " 148.

John de Hay, 1220-26 [Req. Moray. N° 29]
 Wm Blund, 1228
 David de Lochore 1255 [Req. de Dunf. 51]

in heritage the right of disposal was jealously maintained by the King. There are several instances of a holder who, having transferred his sheriffship to another, without first craving the consent of the King, found his disposition made null and void by the King in his displeasure granting the office to one of his own choice. Thus the Countess of Mar, heritable sheriff of Roxburgh, granted in 1405 a deed of transfer of her sheriffship to Archibald Douglas; but the King, on learning of this transfer, reduced the deed in favour of David Fleming of Biggar. (Hist. MSS. Com. 7th Rep. 727.) Apart from the King's displeasure, there was always the important element of money. While the King appeared to confer an office in heritage, it was not altogether a free gift, but one for which the recipient had to pay a specific sum or "Composition". The Exchequer Rolls detail many of the "Compositions" received for such grants.

The death of a heritable sheriff entailed upon his nearest lawful heir the purchase of a brieve from Chancery. This brieve addressed to a Baron as "Sheriff in that part" required him to hold an inquest as ~~to~~ the first step in the process towards the heir's obtaining sasine of the office. If the heir was a minor, a sheriff was appointed to act for him "in ward"⁽¹⁾ an exception to this rule being made in favour of minors/

(1) A brieve which had been served before the Sheriff of Lanark in 1491, was reduced because that official was not of "perfect age" and had not arrived at years of discretion [Acta Dom. Con. p. 195].

minors whose fathers had fallen fighting "under the King's banner". (Hist. MSS. Com. 7th Rep. 731.)

In the fulfilment of his ministerial duties the sheriff, having no fixed salary from the Crown, except what he derived from court escheats⁽⁷⁾ and the land/

(7)

From James VI's reign onwards the sheriff did not, as in former years, give a return to the Royal Exchequer of the revenues received from fines of his court. These were fixed at a stated sum and appeared in the Exchequer accounts as the Sheriff's "Book". In Purves' Revenue of the Scottish Crown (1681) the values of these Books of all the sheriffdoms are detailed. The highest - £40 - is given against the book of sheriff of Berwickshire; next in value - £30 - were the Books of the sheriffs of Elginshire, Aberdeen, Dumfriesshire, Fife, Peeblesshire, Wigtownshire, Forfar, Ayr, Renfrew, Perth; the Stewards of Strathearn and Kirkcudbright, the Bailies of Carrick and Cunningham. £20 was paid by the sheriffs of Ross and Inverness, Lanarkshire, Dumbartonshire, Linlithgow, Edinburgh, Haddington, Kincardine. The sheriffs of Selkirkshire, Roxburghshire, Clackmannan paid annually £10 for their Books; as did the sheriffs of Bute, Banff, Nairn, Sutherland, Caithness, the Steward of Amundale, the Bailies of Kyle, - Stewart and Sheriff of Bathgate. The sheriff of Cromarty was debited in £6 for his book. The sheriff of Stirling with as large a sheriffdom as that of Clackmannan paid a trifle of £2 as his equivalent for fines, a sum which suggests that the lieges there were more orderly than their neighbours elsewhere: or that more leniency had been the practice of the sheriff of Stirling towards defaulters. The sheriff of Argyll's Book is omitted. Clerk & Scrope assert that Sheriffs, Stewards, Royal Bailies also were rated at fixed sums for "old blench duties" - mentioning they were annually £1.14.6; for Haddington, £2. 3. 11; for Berwick, £1. 11. 1. (Hist. Excheq. p. 159). The actual Rolls in the General Register House seem to shew that details were in all cases given.

What appears to have been an extraordinary position for a Sheriff is revealed in the petition by the Sheriff of Perth to the Convent of Dunfermline in 1255 for a grant of 4 merks from certain of their lands in consequence of the lack of escheats of court. (Reg. de Dunf. 51, 52, 54, 108, 118)

land attached to the office, ⁽⁶⁾ made revenue wherever possible by exaction of dues from subjects requiring his services. What he derived from those paying Ward, Relief, Marriage, Non Entry, and other taxes one cannot ascertain; ⁽⁸⁾ he was ^{by the so-called 'laws of Malcolm MacKenneth'} entitled to £10 ^{of ~~the~~ ^{the escheats} ~~bank~~ ^{'unlaw'}}, ⁽²⁾ and from 1491 ⁽³⁾ 12^d from each £1 of debt recovered by distraint, ⁽³⁾ 4^d for each Act or copy of letters made [the statutory allowance provided by an Act in 1503. (A.P. II: 242, 250.)]. From the Fairs he was entitled to the best ox or unriden horse; and from 1456 to the "pick" of the merchandise of all doing business there - to be restored, however, to the owner ^{at the Court of the Fair} if he left the Fair with a "clean sheet", that is, with no crime against him. ⁽⁴⁾ (A.P. II.46)

The most famous of his "conveyancing" fees was the "sasine ox" which everyone receiving infeftment of lands was bound to give to the sheriff. The statutory authority for that, if ever there was one, is not known; but the practice continued from the fifteenth century. The sheriff's fee, for example, on giving sasine in 1633 to Lady Doune was fifty merks "in lieu of the old casualty of Sasine ox". (Hist. MSS. Com. Home MSS. p. 109). Vassals of small pieces of land paid/

(6) Hist. MSS. Com. Hamilton MSS. p. 23.

(8) That the sheriffs did charge is evident from an Act passed in 1597. There the sheriffs are stated to have been wont to force the subjects to pay in one manner one new taxation to thame for ingathering of the same alleging it to pertain to thame as Sheriffs". (A.P. IV: 145).

(2) A.P. I: 110. [The clerk's fee was 2/ for "ilk unlaw".]

(3) Ibid. II: 224-b.

(4) Even there the sheriff did not observe the rules of the realm. In 1469 an Act was passed, prohibiting under penalty of loss of office for a year, the "gret extortions" of the King's free lieges by the Sheriffs, Bailies and Constables in taking what "thai call thair dewties and feis" ... from burdens borne in men's hands or on their back. (A.P. II: 95).

paid £5 in place of the sasine ox. (A.P. V. 610.)
 Vassals of small Kirk-lands were, from 1690, exempted from payment. (A.P. IX. p. 200.)

Among its innovations the fifteenth century has to its credit the origination of a type of official which still survives, the "sheriff in that part". His function is the accomplishment of a specific duty for which the regular sheriff might not be available; such commissioners were constituted sheriffs ad hoc, "Sheriffs in hac parte".⁽¹⁾
 The first record which I have found of these appointments is of the year 1422. (Cal. Charters H.M. Register House, No. 256.) There the full designation - long ago dropped - is "Bailie specially deputed in that behalf", altered in entries in the records to "Sheriffs specially deputed in that behalf" and soon after to "Sheriffs in that part".

Much of the legislation of the second half of the 15th century is directed against the Sheriff, To check his delinquencies fresh measures are passed.
 With/

Footnote to p. 54 (fn. 8)

In 1478 the widow of a Sheriff obtained decree from the Lords Auditors for payment of the unlaw due to her husband in a case decided by him. (Acts of Lords Aud. I:)

(1) - Testimonial of Sasine of lands of Little Carcary, dated 24th May, 1479. Henry Fotheringham was appointed "Sheriff Depute of Forfar in hac parte" for the purpose of inflicting a vassal in certain lands. For "more security and witnessing of the sasine" he received a "sesing ox gray hornyt, and quhyt chekit". (Hist. MSS. Com. 7th Rep. 720.) Gilbert Carutheris "Sheriff of Dumfrece, specially appointed in that part" by the King 1484. (Hist. MSS. Annandale, p. 58.)
 MSS.

With complaints of spoliation - a common subject of litigation - the Sheriff had power to ~~deal~~ deal, though the repetition of the Act of 1438 in 1449 and 1457 — points to neglect of his duty towards complainers. By the last-named Act the lords of Session were to inquire into all spoliations committed between January 1, 1449 and January 1, 1458, after which the Sheriff would be the judge appropriate to such complaints, the lords of Session having the right to try cases of spoliation of moveable goods. Where the matter was one of fee and heritage the lords of Session were to call the Sheriff to make restitution of the ground to the complainer without prejudice to either party in the dispute. An inquest by the Sheriff to ascertain the last lawful possessor was followed by retour to the King of the finding.

Complaints of spoliation of tacks and mailings; actions of obligations, contracts and "all manner of debts and other civil actions affecting neither fee nor heritage" could be heard by lords or by Sheriff.

The delegation to the Sheriff of cases relating to Fee and Heritage was not apparently a success, for the Sheriff's jurisdiction in such cases was gone in the early days of the Court of Session.⁽¹⁾ The Act establishing the Court of the Lords of Session of 1457 has an important place both in the history of the sheriffs and in that of the College/

(1) Discours Particulier d'Escosse, p. 12; D. Chamber's Histoire Abregée [de l'estat d'Escosse, p. 8].

College of Justice. It was a measure improved by later statutes all tending towards the institution of the Supreme Court in 1532. Ambulatory, the lords of Session under the 1457 Act gave notice - three months ahead - of their intended visit to a particular sheriffdom; upon receipt of which notice the sheriff was to make due proclamation of the time of Session, and of the necessity for all intending litigants to take out their Summonses with 40 days' warning; the defenders to such actions to lodge their answers within 15 days.

There was no appeal from the Lords' decisions to King or Parliament (A.P. II: 48)

By litigants the lords of Session appear to have been preferred to the sheriffs;⁽²⁾ in 1474 the flow of law suits to the higher court had to be checked by a statute⁽¹⁾ enjoining that all complaints be heard in the first instance by sheriffs or other "Ordinaries", a measure repeated in 1487 with an exception in favour of Kirkmen, Widows, Orphans, Pupils, Foreigners; and of actions against or by 'Ordinaries'. (A.P. II. 177) This statute Parliament revoked in the following session by permitting "all parties in tyme to cum to raise and pursue Summonds/

(1) that all personis that hes complayntis persew to thair judge ordinar and wex not our Sovereign lorde nor his Consale with na complayntis bot gif it be on officiaris that will not do justice nor minister in their office efter the forme of law. (A.P. II: 107).

(2) Many of the complaints brought to the court of the Lords of Council and Session are directed against Sheriffs: the grounds of complaint being generally - Neglect of duty; partiality; Irregular procedure. Cf. Acta Dom. Conc.; Acts of Lords Auditors, *passim*

Summons before our Sovereign Lord and his Consale", a fact which shows how unsatisfactory were all the attempts to improve justice. (A.P. II. 183).

In 1503 Parliament tried to remove some of the gross evils of the average sheriff, viz: - the too ~~z~~ prevalent issue of an unjust award,⁽²⁾ the undue delay of a law-suit, the with-holding of a process for a bribe - by enacting that 4d only for each process was to be charged. (A.P. II: 250.)

The sheriffs were clearly being found inadequate for the service of justice. Several of the abuses and defects lamented by the Poet of Liber Plusecardensis, Legislature had redressed or had attempted to redress, the last item of the kind during the 15th century being the famous "Education Act" of 1496, by which Act the sheriffs in office were in due course to be succeeded by a more enlightened body; for the statute of 1496 required Barons to send their eldest sons to a Grammar School where they would remain until they had "perfect" Latin and then to a School for Law for a three years' curriculum. (A.P. II: 238).

What the result of this measure was it is impossible to learn. Doubtless it was no more successful in its results than were so many of the other enactments./

(2)

See case of Steward of Kirkeudbright, 1513. (Transcript of Justice Eyre Records III: 207).

enactments. We know that the heritable sheriff of Bute in 1549 could not write, - ⁽¹⁾ a defect due perhaps to that Sheriff having exceeded in 1496 the "age" limit; more probably because the Act had never been enforced. The illiterate sheriff of Bute may have been typical of the whole race of 16th century sheriffs. ⁽²⁾ It is nevertheless to the early 16th century that (with the exception of a few reports of 13th century Inquests) ⁽³⁾ we owe the earliest extant official Records of the Sheriff Courts. Imperfect as they are they reflect light upon their methods and upon the nature of actions brought before the courts. The Sheriff clerk having called the "suits" i.e. the names of those owing suit or suit and presence in the court and having noted the absentees for payment of fine, the Jury was formed, the court "lauchfully affermit" and the business of the diet proceeded ^{with} but these early records are disappointing; they do not show the arguments of prolocutors but briefly state the orders of the Sheriff. Cognitions, Loosing of Arrestments - Bloodwyts/

Notarial Instrument

(1) [^] Hist. MSS. Com. Hamilton MSS. p. 24.

(2) If not illiterate, Patrick Agnew, Sheriff of Wigtown was at least a violent law breaker. In 1510 he failed to "compeir" before the Justice Eyre of Kirkeudbright to meet the charge of homicide that had been made against him. For that his two cautioners John Gordon of Lochinvar and Kentigern Murray forfeited their security money (£100) and the defaulting Sheriff was declared 'at the horn'. (Transcripts of Records of Justice Eyres Vol. III: 128, in H.M. Register House).

(3) The Report of the Barony Court of Longfordgrund held in 1385 with its details of procedure (Hist. MSS. Com. 3rd Rep. 410); and the few reports of 15th-16th century cases found in Church Cartularies must also be excepted. [Reports of cases decided on appeal from the Sheriff's court during the second half of the 15th century are preserved in the Acta Dominorum Concilii and in the Acts of the Lords Auditors].

Bloodwyts & Spulzies are the ordinary classes of action brought to court. There are one or two picturesque touches in the dispensation of justice - as when the Sheriff, on direction of the Lords of Session, gives relaxation from process of Horning by tender of the wand of peace. ⁽¹⁾

The Sheriffs had lost their ancient wide scope of judicial work; the Court of Session had taken from them all cases relating to heritage; and all actions presenting difficulties or intricacy; but Sheriffs had jurisdiction in actions relating to Removing of Tenants (1555. A.P. II; 494).

Appeals from the sheriff to the Lords of Session though not permitted unless by way of Advocation ⁽²⁾ or where gross injustice or where the sheriff having acted ultra vires was alleged, were numerous ^(2a) /

(1) Transcript of Records of Justice Eyres, Vol. 2, No 354. Reference has been made to the Steward-Dep, of Fife giving wand of peace to a claimant for law of Clan Macduff. [Balf. 511]. Wand and book were symbols of a Sheriff's investiture. A parallel to the Sheriff's bestowal of the virgam pacis is found in the ceremony in the Parliament of 1542 of the restoration to power of the Earl of Angus. As a symbol of grace the Earl was handed sceptre and baton. (A.P. II: 419a).

(2) Discours Particulier d'Escosse p. 11; ~~see Morison's~~ MS. Diet. ~~Decis~~ of 1605 edited by R.L. Mackie, Scot. Hist. Rev. April. 1922 - (proof sheets)

2^a Mor. Dick. Decisions ;

numerous. In the criminal domain the sheriff's powers were likewise abbreviated; he had to forgo the right of sitting upon cases involving the Four Pleas of the Crown, which, till 1587, the Justiciar had passed on to the sheriff. ⁽⁷⁾ Cases of homicide were appropriate to his court if heard within three days of the commission of the crime. If that period elapsed before trial the case had to be sent to the Justiciar. ⁽⁸⁾ The character of/

(7) A.P. III. 459.

(8) David Chambers, an ex lord of Session, published in 1579, during his exile in Paris, an Histoire Abbregée de tous les Roys de France, Angleterre et Escosse. Concerning Sheriffs, he wrote: "En chacune province d'Escosse il y a un siege royal dict viconté pour ministrer justice, et tels juges, dictz vicontes, ont tel pouvoir, comme les presidens et pro consuls avoient entre les Romains, ou les baillifs et Seneschaux en France. Sans speciale commission les crimes de lese maieste, meurtre, rapt des vierges et l'action pour le dommage de feu volontairement allumé sont toujours entendus estre reservées à la presence Royale pour estre vuides, dicto en Ecossois, the pointes reservet to the croune, en Francois les pointes reservet à la couronne. Les causes de homicide, larcin fraichement faicts et tous proces civils, hormis les actions dictes en Ecossois of heritages, en François de choses immeubles, appartiennent à la cognoissance de ces vicontes; lesquels ayants haute justice, moyenne, et basse, donnent sentence aux crimes sans appel; et aux civiles cognoissent en la première instance; et iceux vicontes ont tous quasi leurs offices pour eus et leurs heritiers (David Chambers: Histoire abbregée (part containing De l'Estat d'Escosse p. 8).

An instance of a sheriff having tried a man accused of theft some considerable time after its alleged commission, occurred in 1643. In the complainer's petition it is stated: "Neither has it ever been heard . . . that the principal sheriff, far less a depute, could sit upon the life and estate of the subject without commission from the Council where the partie is not apprehended reid-hand". (R.P.C. 2nd ser. VII: 350.)

of the sheriff seems to have been no better than that of the average sheriff of the preceding century. Henryson's Fable of "The Dog, the Scheip and the Wolf", though chiefly aimed at the Church court, was also directed against the sheriff.

"This Wolf I liken to ane Schiref stout,

"Quilk byis any forfalt at the Kingis' hand

← The much coveted post of sheriff was, in spite of contrary Acts, sought after by competitors, frequently in most acrimonious fashion.

The Earl of Rothes and Walter Lindsay were rival claimants for the sheriffship of Fife in 1565-6. The Earl maintained that his right was derived from Queen Mary, who had granted the sheriffship for "eight score year or thereby". Walter Lindsay, on the other hand, appears to have had good reason for thinking the office his by heritage. This sheriffship which had been in the gift of the Queen of the reigning sovereign in 1451, ⁽²⁾ was settled upon the Earl for a term of 19 years. (Hist. MSS. Com. 4th Rep. 501)

Perhaps it was to remove such anomalies that Parliament in the following year (1567) decided to convert, whenever available, heritable sheriffships into appointments ad vitam aut culpam, but the Act was not always kept in sight. Here is the statute: - "Item, seeing that perfect and sure judgment proceeds of experience and knowledge they to whom the charge and authority thereof is committed ought to be experimentit/

(2) Reg. Mag. Sig. (1424-1513) No. 462.

"experimentit and wise so that the people submittit
 "under the judgment craving justice at their hands
 "be not hurt neither throw delay in ministering
 "thereof nor yet suffer any detriment or scaith throw
 "lack of knowledge in them that minister. Therefore
 "it is thought needful that the office of Sheriffship,
 "Stewartry, Crownership, Baillieries, Admiraltie,
 "Chalmerlainrie, Constabularie, Justiciarie, and other
 "office of judgment in this réalme perteining to any
 "person heritably whenever the same shall happene to
 "perteine to our sovereign lord and his successors on
 "their forfaulture or otherwise the same never to be
 "disponit heritably frathynefurth". (A.P. IV: 39).

And yet sheriffships continued to be granted in heri-
 tage to favoured subjects (Cf. Reg. Mag. Sig. 1546-80).
 And not only sheriffships but Regalities ⁽¹⁾ (powerful
 rivals to the sheriffships).

During the remaining part of the sixteenth
 and the first half of the seventeenth century the
 question of cutting off the heritable sheriffships is
 interwoven with the legislation designed to lessen the
 evils of the sheriffs that were.

The reign of James VI and I ^{modified} ~~is notable in~~
 the/

(1) The growth of Regalities was in great measure due to
 jealousy felt by one Baron towards a neighbouring Sher-
 iff or Steward. Moray of Abercairney (circa 1473), irri-
 tated at his subjection to the Steward of Strathern -
 Drummond of Cargill - applied for and obtained from
 James III a fresh erection of his lands as a Barony
 with exemption from the Steward's jurisdiction - though
 in this case right of regality does not appear. (Hist.
 MSS. Com. 3rd Rep. p. 418).

the jurisdiction of the sheriff . A check was placed upon corrupt sheriffs by Justices of the Peace ⁽¹⁾ who had power to revise and amend obviously bad sentences passed by the sheriffs and to report cases of "Collusion with Delinquents" to his Majesty's Council - a striking commentary on the average sheriff of that period. (circa 1617) (A.P. IV: 536). The Justice Ayres (except in Edinburgh) likewise negligent, had by 1587, fallen into desuetude. An Act was passed in that year for furthering criminal justice "over all the realm" requiring those cummoned as part of Assizes to be present under a penalty of £10 for absence. (A.P. III: 458-9) a fine increased in 1593 to 100 merks. (A.P. IV: 18).

The sheriff depute had also come under the searchlight of the Supreme Judicature. Parliament had at various times ordained Sheriffs to have deutes: the Act of 1540 required these to be gude and wise substantius men of best fame and knowlege understanding and experience and lease suspect who,, if continued in office more than a year, were to be sworn for the administration of justice at the Head Courts after Michaelmas. (A.P. II. 358)

The Act of 1617 was re-enacted in 1661. A.P. VII. p. 306.

(1)←

A curious parallel to the Justices of the Peace acting as a check upon sheriffs is found in England when they first emerge in 1195. In 1264 a "Custos Pacis" was assigned in each shire to conserve the peace and possibly to watch, possibly to supersede, the Sheriff, but with instructions not to interfere with his functions so as to diminish the revenue". (Stubbs' Const. Hist. II: 296)

The Act of 1617 was re-enacted in 1661. (A.P. VII: 306) According to Sir George Mackenzie the "jurisdiction of the Justices of the Peace was very much decayed;" but between 1707 and 1723 became "revived and exercised with great vigour". (Inst. 6th Edn. p. 31.)

Sheriffs Principal, ^{after} ~~who had~~ ^{ing} appointed their deputies had to send them on entering office to the Lords of Session for examination of their fitness. (1)

The relation of the sheriff to Parliament (2) in the 16th and 17th centuries is peculiar. Apart from the fact that sheriffs frequently sat in Parliament in virtue of their status as barons, they had the duty of summoning there all those in their respective jurisdictions who owed suit. From the reign of Robert I until 1585 they appear to have performed this function - probably by their deputies. In that year, however, they were relieved of the office - whether because of neglect or of partiality one cannot ascertain. In their stead a baron from each shire was selected to receive the precept from the King's Chancery authorising him to choose from the sheriffdom "twa wisemen being King's freeholders and weil esteemit"; (3) that Act was repeated in 1587 (3a) but cannot have been observed long as the old order was reverted to by 1595. (4)

The influence of the Sheriffs as Election "agents" was realized by Charles I, who, in 1627 and in 1629, on the eve of elections, ordered his council to/

(1) A.P. III: 457;

(2) During the occupation of Scotland by Edward I the son of the Earl of Angus was summoned to appear for an assault on the Sheriff of Edinburgh, - Hugh de Louthier - "the King's servant in the Parliament at Berwick". (Cal. Docs. of Scot. II: 830).

(3) A.P. III: 422; (3a) A.P. III: 509.

(4) Abdn. Sheriff Ct. Rec. I: 372.

to deal with the sheriffs and such others "whose power may procure most voices" in order that well-affected persons may be elected.⁽⁵⁾ The sheriff of Roxburghshire is commanded to convene the electors to tell them of the royal "plessure and direction" to elect certain named men "recommended by His Majesty". The sheriffs had been restored to political power.

One curious fact regarding the Sheriff in Parliament is that the sheriff of Perth or of Edinburgh or of Linlithgow - wherever the Parliament chanced to be held - was frequently present as an "Officer of Parliament" - his primary duty there being apparently Caller of the Roll and, perhaps, exactor of fines levied on absentees and latecomers.⁽¹⁾

The Rolls of Parliament of the 16th century do not always include him; and the strange protest made in the Parliament of 1584 by the Earl of Bothwell, Sheriff of Edinburgh, to "have his place in Parliament and room to sit as did his predecessors, with vote and other honours", (A.P. III. 290.) leaves one in doubt upon the nature of the vote, whether it was in virtue of his office as sheriff - or otherwise.

Cromwell's Commissioners utilised the Sheriffs in the several elections by requiring them to publish/

(5) Earl of Stirling's Reg. of Royal Letters I: 341; 203: 209.

(1) In its early days Parliament appears to have been ambulatory having no fixed locus. The Sheriff's duties naturally arose from the fact of his being the chief executive officer of the place.

publish the writs of Summons to Parliament and to make known the day of the election, returning to Chancery the names of those elected. (A.P. VI. (II) 812^b).

Sheriffs seem to have been suspected of making false returns, for an Act was passed ordering Sheriffs convicted of such an offence to pay a fine of 2000 merks. (Ibid. 813).

The question of the sheriff of Edinburgh's presence in the Parliament House during Parliament was called in question in 1685, and conceded - from which one infers that ancient precedent had not been regularly maintained by the sheriffs or their deputies of Edinburgh. The last recorded entry of the sheriff in the Scots Parliament is of the year 1693.

Thenceforth his functions were confined to his Court and the Mercat Cross, where he saw to the due proclamation of elections and the return of the candidates to Parliament. (2)

In their other ministerial and their judicial duties the Sheriffs were flagrantly culpable. Neglect of duty - in the collection of the royal dues in/ (2a)

(2) The interference of the Sheriff of Wigtown in an election of 1700 by acting as president of a meeting of barons in the face of a protest made by a freeholder nullified the result of that election. A.P. X: 203, 206, 220, 225.

(2a) An Act of 1597 recites that "because His Majesty has been defrauded of a great part of his taxation by reason that the Sheriffs who should be ingatherers of said taxation and are men of that power and authority, that none dare resist them in poynding for the taxation, therefore prohibits them from taking taxation and other dues except 40/- from each £1 land. A collector being instead appointed. (A.P. III).

The Reg. Privy Council has numerous entries of sheriffs/

in exacting "unlaws", in permitting rebels to remain at large, was punished by James VI and I and his Council. Charged under these heads the sheriffs and their deputies of Edinburgh, Peebles, Roxburgh and Selkirk were in 1600 dismissed from office. (R.P.C. VI: 69). Their plea was that their "undutiful discharge of the office" was due to lack of power and force to execute the office by the non-concurrence of the people of the sheriffdom. This plea led to the King's summons to all sheriffs to appear at his next "Convention" for the purpose of advising upon the likeliest remedy of this condition.

The remedy was not so easy a matter to discover. In 1613 James renewed his attack upon the evils, and, on the surrender to him of the sheriffship of Edinburgh by the Duke of Lennox the Council asked his Majesty to advise "how the said offices "may be servit in alltyme coming to his Majesty's "contentment and the weill of his subjects". James appointed three sheriffs, one to each of the territories - Edinburgh, Haddington, Linlithgow - where hitherto only one had been; and directed his Council: "Because divers and great abuses haif bene committit "in most of all the hereditary jurisdictions it is our "pleasour that ye maturlie consult and advise upon the "best/

sheriffs "put to the horn" for failure to account for their dues. For that the Sheriffs were not always blameworthy. In asking the Privy Council to relieve him of the Sheriffship of Elgin in 1637 on account of old age James Dunbar of Brigs deplored his "great losses incurred in transporting prisoners and uplifting His Majesty's annuities and other services". (R.P.C. 2nd ser. VI: 498).

"best and fittest means how the same may be reformit
 "and befor the admission of these new intrants to
 "their office that ye particularlie informe them of
 "the same." (R.P.C. X: 20-21.) Among the many
 entries concerning bad sheriffs it is pleasant to note
 eulogies to the good sheriffs - few though they were.
 One, of the year 1613, is in favour of Sir William
 Seton who, on demitting (after 18 years' service) the
 office of sheriff of Haddington, was complimented by
 the secret Council in having "verie faithfullie,
 "dewtifullie and carefullie, with good respect, credite
 "and repute, always and without offens, scandal or
 "reproach, behavit himself in the said office and
 "(having) done unto the Kingis Majestie and his sub-
 "jectis good and acceptable service thairin, theirfoir
 "exoners him thereof". (R.P.C., X: 30.)

It was immediately after, viz: - in 1614, that
 James intoduced as part of his reform an annual appoint-
 ment of sheriffs. (R.P.C. X: 215.) For many years he
 had directed his attention to hereditary sheriffships
 and their evils. In this respect James is an inter-
 mediate link between the legislators of 1455 and those
 of 1746-7. His opinions, expressed in Basilikon Doron,
 Book 2, p. 163 (written in 1599) were obviously fortified
 some years later by an academic debate on the subject,
 of which James was an auditor. The circumstances of
 this discussion were these: -

In/

In July 1617 James had paid a visit to Edinburgh University, and in characteristic manner summoned the Regents to his residence at Stirling Castle in order that he might hear them discuss in the 'learned tongue' matters of more or less moment.

The first subject on the list was: "That sheriffs and other inferior magistrates ought not to be hereditary." The King listened eagerly to the arguments for and against, and turning to the Marquis of Hamilton, then heritable sheriff of Lanark, remarked, "You see, James, your cause is lost, and all that can be said for it distinctly answered and refuted". (The Muse's Welcome, ¹⁶¹⁸ Edn. p. 226); and Dalziel, Hist. of Edn. Univ. Vol. 2, p. 69.)²

This discussion doubtless had its effect upon the subsequent policy of James, for a Commission was appointed that very year to consider and report upon the subject. (1)

(1)

Our Sovereign Lord continuing in that purpose and resolution bred in his royal heart in his young years for making of offices of judicatory in this Kingdom as they are in all well-governed states employments for men furnished with gifts suitable to the dignity and gravity of the places whereby many abuses may be taken away which is in heritable offices of that kynd can be avoyded, the rights thereof falling oftentimes to women, to children or to men who neither can discharge the place nor mak choise of sufficient deputtis . . . And his Mjesty unwilling to take said offices from the present possessours who and their predecessours had brukkit the samen money years as their inheritance without guid and competent satisfaction. Grants power and commission to the Archbishop of St. Andrews, the Bishop of Brechin, the Earl of Montrose, Lord Binning, Lord Scone . . . to travel and deal with the hail heretable sheriffs, stewarts and bailies anent the surrender of said offices. (A.P. IV. p. 549).

(2) 'The Muse's Welcome to ^{the High and mightie} King James', a compilation of John Adamson, Professor of Philosophy, records the discussion, but not the King's remark to the Marquis. Dalziel's authority for the story I have not succeeded in tracing.

subject. By royal decree in 1620 certain sheriffships were made non-heritable.

James was consistent in his efforts to improve the personnel of the sheriffship. When he learned that the heritable sheriffship of Elgin had in 1619 been disposed by the heritable holder to "one David Kinloch, merchant and burgess of Edinburgh", he cancelled the transaction for the reason that Kinloch was "a person altogether unfit and incapable of such a charge and burden, conscious to himself of his own weakness and insufficient to discharge the same." (R.P.C. XIII: 186.)

The same policy was begun by his successor, though sometimes, for lack of cash, it had to be departed from. By 1627 sheriffs "are ordinarily appointed for one year". (R.P.C. 2nd ser. Vol. 2. 117.) These appointments were often renewed, sometimes (as in Charles' reign) because the sheriffs had not settled their accounts, (R.P.C., 2nd ser. VIII: 17.) and sometimes where the holder appeared to be highly suitable. Kinloch's coveted post had been given to Simon Fraser, Lord Lovat, (R.P.C. Vols. 12, 13, 2nd ser. II: 238.) whose tenure was assured only by annual, biennial and triennial grants.

In accordance with James' Decree of 1620 converting certain heritable sheriffships to non-heritable ones the sheriffships of Aberdeen and Inverness were, in 1629, resigned by their respective holders, the Marquis of Huntly and Lord Gordon: (R.P.C. 2nd ser. III: 317-319.); and the sheriffship of Lanark by the Marquis/

Marquis of Hamilton. (R.P.C. 2nd ser. III. pp. 864-6). Pressure had been put upon Sir Wm. Douglas to resign his heritable sheriffship of Roxburgh, but it was quickly withdrawn on the counterclaim: 'Pay me first my compensation money', (£20,000). The family of Douglas was thus left with their heritage until the final dissolution of heritable jurisdictions in 1747, (Hist. MSS. Com. 7th Rep. p. 727,) when the debt was admitted and paid. (£2000) [Acts of Sed. Hay Campbell's Ed. ^{and} Album of Claims in Signet Lib.]

Those elected had, from James' reign, to appear before the Privy Council and take an oath to discharge the duties (de fideli administratione). If prevented by illness or other cause from attending this ceremony they were visited by a Commission, appointed for the purpose before whom the oath was given. (R.P.C. 2nd ser. VI: 523.)

Right on, until Charles's great troubles directed his attention to his Parliament, the greatest care appears to have been taken in the proper selection of the Scots Sheriffs. In 1635 the Privy Council "being careful that the subjects shall not be prejudiced of the due course of the law and justice pending the receipt of Report as to who shall be Sheriffs, Stewarts and Bailies of those places of which the nomination is in the King's hand" ordained those then in office to continue until discharged in the Council. (R.P.C. 2nd ser. Vol. VI. p. 111.)

The/

The close scrutiny of the Roll of Sheriffs, which was the practice in Charles's earlier rule, was altogether neglected from 1635 onward. In place of annual appointments he reverted to the ancient custom of gifting sheriffships in heritage. The Laird of Lag, sheriff of Dumfries, had to make way in 1637 for the Earl of Dumfries and his heirs. (R.M.S. 1634-51, No. 1123.) The Dunbars of Westfield, whose tenure of the sheriffship of Elgin and Forres had been terminated (apparently) in 1637, were then reinstated in their heritable capacity. (R.M.S. 1637, No. 789.) An exception to Charles's practice was the enforced surrender of the sheriffship of Stirling in 1637 by the Earl of Mar for a sum of £8000. (Hist. MSS. Com. Mar & Kellie, MSS. p. 195), that office being then conferred upon James, Earl of Callander for life. (R.M.S. No. 1700). The Earl of Dalhousie received in 1644 the Edinburgh sheriffship ad vitam (R.M.S. 1634-51, No. 1719.) - all in direct opposition to the earlier principle.⁽¹⁾ The Parliament of 1649 with a view to removing all sheriffs - heritable and liferent - (appointed since 1641) who were not/

(1) In 1642 Charles, on receipt of a letter from the Privy Council intimating suspension of a Sheriff Depute of Lanark, forbade the appointment of any Sheriff Depute for life; and ordered all existing appointments held for life to be recalled. (R.P.C. 2nd ser. VII: 333.)

not of the Covenant Party, passed an Act giving the sheriffships of Edinburgh, Dumfries, Stirling, Haddington, Berwick, Sutherland, Perth, Lanark, Aberdeen, Forfar, Ayr, Caithness, Banff, Fife, Inverness, Ross, for one year to supporters of the Royal Cause. (A.P. VI (ii) 316.)

Cromwell's intruded Government made but a transient change in the Shrieval system. Sheriffs who refused to take the oath prescribed by the English Commissioners were removed in favour of their supporters. To each sheriffdom two sheriffs were appointed, one a Scot, the other an army officer. (Scot. Hist. Soc. Vol. 40: ^[reproducing newsletter of Apl. 1652] p. 164_A) The Commissioners' scheme (a reasonable one) to make of Inverness and Argyle five sheriffdoms was frustrated by the powerful influence of the Earl of Argyle. (A.P. VI (ii) 759.)

With the Restoration the swing back of the pendulum is seen - Charles II granting sheriffships
 (1a) some for life (2) some in heritage without the slightest regard/

(1)

In one respect Cromwell's Sheriffs were far in advance of the Sheriffs before and after them. That was in banishing notorious persons 'beyond the Isle of Britane', instead of the usual practice of transferring them to a neighbouring sheriffdom. Cf. Littlejohn's Sheriff Court Records of Abdn. III. p. 160. There was, on the other hand, a more limited scope for the Cromwellian sheriffs in civil actions: causes relating to personal and real estate were not in their domain. (A.P. VI (ii) 787).

(1a) and (2)

The Earl of Lauderdale in 1660, was appointed Sheriff of Haddington for life. [R.M.S. No. 21] The Duke of Hamilton, was also in 1660, appointed to the Sheriffship of Lanark for life. Ibid. No. 14; and the Earl of Moray to the sheriffship of Inverness; (Ibid. No. 19.); and the Earl of Seaforth to Ross for Life, No. 235.

(2) For Grants of Sheriffships in heritage - see R.M.S. 1660-78
 (Partly) Nos 281, 441, 957 - 1047.

regard for the Acts of 1455, 1567 and the Decree and practices of his royal grandfather. There seems to have been no attempt made to improve the judicial organisation of the Shrieval system. The holding of a sheriffship was no disqualification for appointment as a Judge of the Court of Session. Sir John Scougall of Whytkirk was both Sheriff of Kincardine and a lord of Council and Session in 1665. (R.M.S. 1660-68, No. 808). Among the holders of heritable jurisdictions who claimed and was awarded £500 compensation in 1747 for loss of office was David Erskine of Dun Constable of Montrose and lord of Session. The jurisdiction of the sheriff in criminal cases included murder if the murderers were caught red-hand or immediately after the crime; and dealt with within three "suns"; in ^{cases of} theft - if the thief were taken with the "fang"; upon Citation ⁽²⁾, and in Bloodwyts, in which the procedure was by an Assize, with "the Procurator Fiscal in place of His Majestie's Advocate." If the accused confessed, the Sheriff could impose an 'unlaw' of £50, but where there was 'contumacious/

(2) Petty thefts were punished by the Sheriff but serious cases were in the province of the Justices. A case of theft of "a wedder and a ewe" and reset of a stolen cow, on which conviction had followed, was reported to the Privy Council by the Sheriff of Stirling for advice upon sentence. The Lords ordained Sheriff to sentence the thief to banishment of the Kingdom. (R.P.C. 2nd ser. VII. 16.)

(3) A.P. VI (ii) 787.

(4) R.M.S. (1660-68) No. 285.

'contumacious refusal to swear' the unlaw could not exceed £10. ⁽¹⁾ (Sir G. Mackenzie Laws and Customs of Scotland, 1678 edn. p. 415). (Recourse to the latter system must have been the popular rule with 'knowing' ruffians). In civil causes his jurisdiction (actions involving payment of money up to £4. 2. 4), included Removing, ⁽²⁾ but not actions concerning heritage. He was generally held in suspicion by Government and litigant alike; the complaint made by an accused against the sheriff-depute of Stirling in 1643 ⁽²⁾ of violent prejudice and of acting beyond his jurisdiction finds/

(*)

From a M.S. (circa 1605) in the British Museum, edited by Mr R.L. Mackie (Scot. Hist. Review April 1922) an English scribe describes the Scottish Sheriff and other inferior courts. 'The Sheriff and his Depute are Judges before whom any party within the shire may be convened and pursued for removing from lands, for spoiling of goods for violent objection of another and intruding himself in possession; and for payment of sums of money or such like matters. There is no appellation from this judicatory to the Session but upon the parties' complaint and trial of partiality of Sheriff or of Depute or upon charge of affinity between the Sheriff and the plaintiff. In which event, the writer added, letters of Advocation are obtained which stay execution of the Sheriff's decree until the Lords decide'.

(1)

Mackenzie's statement is altered in his Instit. 6th Ed. p. 28: - "I have altered £50 in the former editions to £10 the usual fine for contumacy".

(2)

This Sheriff was complained of in having tried an alleged thief who was not "apprehended reid-hand"..... "Neither has it evir beene heard . . . that the principall Sheriff, far less a deput, could sitt upon the ~~his~~ life and estate of the subject without a commission from the council. (R.P.C. 2nd ser. VII. 350)

finds numerous echoes in the second half of the same century. The Earl of Seaforth (a Mackenzie) used his office of sheriff of Ross (to which he was promoted in 1662⁽¹⁾) to oppress his tribal enemies of the name of Ross (R.P.C. 3rd ser. Vol. 2, 19); and elsewhere hard fighting was tried to decide possession of a sheriffship.³ ~~While~~ Credit ~~may~~ ^{is} be ~~given~~ ^{due} to ^{Charles II and} the Legislature of 1662 in trying to effect order out of the Sheriffs by Acts (1) for punishing Sheriffs convicted of acquitting guilty delinquents (A.P. VII, 307) and (2) by requiring Sheriffs to make every effort to suppress thefts and robberies. (A.P. VII, p. 383.) ~~Though credit must be given to~~ ~~Charles II, or his Ministers,~~ ^{and} for the attempt to improve Sheriff and other courts (by the appointment of a Commission in 1669⁽²⁾ to examine the forms of procedure, prices of writs; the fees and dues and the fixing of orders and rules deemed necessary for effective administration and the relief of subjects from illegal exactions and from oppression; (A.P. VII, 661).) ^{Nevertheless} The chief concern of that King and of his successor was not an earnest endeavour to raise the standard of the Sheriff but the maintenance by the sheriff of the royal prerogative in the matter of religious/

(2) There seems to have been no report issued by that Commission.

(1) R.M.S. 1660-63, N° 235

(3) E.g. in Caithness

religious worship.⁽¹⁾ Failure to enforce the penalties attached to attendance at Field Conventicles meant punishment for the sheriff; the collection of the royal dues from a variety of imports - a duty that, whether performed negligently or fraudulently, caused trouble to many a sheriff.

And yet in spite of the arrest of the sheriff's progress the seventeenth century is remarkable for many advances in law and legal institutions. An eminent authority has commented upon the importance of some of these, viz: - "The great Statutes of Prescription; the completion of our unrivalled system of Registers; the new Constitution of the Justiciary Court on its present footing, a great step in the progress of freedom; the law of Entail; new regulations for the conduct of Business in the Court of Session; the settlement of the law of Tithes; Rules for Division of Commonities and Runrig lands; Bankruptcy Law; Process of Ranking & Sale." (Lord Pres. Inglis: Address to the Juridical Soc. on Hist. Study of Law.)

The reign of William and Mary was not altogether favourable for a revision of the Scottish Shrieval system. The Government could not perhaps avoid continuing (as it did in 1689) the heritable sheriffship of Wigtown in favour of Sir Andrew Agnew who had been ousted in 1682 (on his refusal to subscribe to/

to the Test Act) by Claverhouse.

Nor could one expect that either the reign of Queen Anne or that of George I would produce improvement. Indeed the position of the Sheriffs was safeguarded by the Act of Security which, while decreeing the surrender - on the death of Queen Anne - of all commissions held by officers of state, specially exempted Sheriffs and Stewards. (1704 A.P. XI: 136-7). Feeling ran too high in Scotland to allow of any interference with its national courts and judges.

Though the abolition of the old order by the Crown's resumption of all sheriffships and other jurisdictions had been advocated by several persons of note prior to 1745⁽²⁾, it is doubtful whether anything less than the "Rising of the Forty Five" could have brought about a reconstitution of the Scottish sheriffships. The Act of 20 George II, cap. 43 $\frac{1}{2}$, was a larger, fuller, more comprehensive, and decidedly a much more effective measure than either of its predecessors of 1455 and 1567. With it disappeared forever the heritable sheriffs, the life-tenure sheriffs, the Lords of Regalities, the Bailies of Regalities, and the heritable stewards. The Vicomte d'Epée gave place to the Vicomte de Robe, the qualified advocate of the Scottish Bar.

The

(1) R.P.C. 3rd ser. VII: 306; A.P. IX: 65.

(2) Parl. Debates 1746-9 Vol. 3 p.16.

(3) The Act of 1747 was not passed without strong opposition both in the House of Commons and in the House/

The Act finally closed the six-century old career of the Earlier sheriffs - a period which at the end found the Sheriffs, Bailies of Regalities and Stewards possessing less judicial authority than that wielded by their predecessors of the thirteenth to fifteenth centuries; but on the other hand it was a period during which the sheriff's ministerial duties had enormously increased.

The early sheriffs, with the burden of so many offices, were not Admirable Crichtons nor always conscientious/

House of Lords. In the light of history the speeches made for and against the retention of ~~the~~ private jurisdictions make interesting reading, the most lucid, most logical, and perfectly convincing being that of the Lord Chancellor, Hardwick, who, in obtaining from the Lord President of the Court of Session, the information available upon the several tenures of the holders and the opinions of the Judges of the Court of Session upon the best means of improving the administration of law in these inferior courts, exposed the fallacy of the ~~Supreme~~ Scottish Judiciary in their reasons for retaining the Sheriffs, Stewards, Bailies, and Barons on their ancient basis.

The Lord President Forbes reported that Actions for sums of money under 130 merks (£7. 2. 4) lay in the Sheriffs' and other inferior courts; his suggestion that the infliction of the death penalty might be taken from the lower courts elicited the fact that very few instances of this power could be found among the Sheriffs and Barons in the exercise of their duties. The inviolability of Art. 20 of the Treaty of Union, which was urged in the Debates, was not insisted upon. They supporters of the old order urged upon 'due satisfaction' for the withdrawal of their offices.

conscientious officials in the discharge of their duties. Frequently convicted, and more frequently suspect, of partiality, corruption and of violent oppression; and of falsifying or neglecting their dues to the King's Exchequer, there has to be placed to their credit a long record of distinguished service to the King.

Many of the early sheriffs had efficiently carried out their primary duties as King's representatives in the maintenance of the royal castles and in the supervision and leading of the men of the sheriffdom when occasions for war arose. Not a few had fallen in action.

For such sheriffs, accustomed to the sword, seldom looking on parchment except to affix their seals, the difficulties in the accountant branch of their office must have been unsurmountable, but for their deutes, or to be exact, the deutes of the Deutes.

These active subordinates, ill-paid, and often unpaid, and if not obtuse, often dishonest and oppressive, kept down the standard of justice in the courts, while their ineptitude gradually led to the curtailment of the sheriff's jurisdiction in civil and in criminal matters.

Nevertheless it was not the inadequacy of the deutes but the menace of a Judge who was at once Chief Political Minister of his Province, Military Leader, /

and
 Leader, /legal administrator who held office in
 heritage and who was to those in his territory -
 a King. It was that that finally caused the de-
 parture from the ancient territorial system. The
 Act 20 George II, cap. 43, was the culmination of
 the Early Sheriff's development and of the rival
 Regality Baron. Thenceforward began the career of
 the modern sheriff, whose present position as judge
 and ministerial officer of his sheriffdom has been
 reached by a long series of subsequent statutes.

And, though 800 odd years separate the
 sheriff of today from the earliest sheriff north of
 Tweed, he is a continuation of that long, unbroken
 line of sheriffs, performing many of the duties of
 the early holders. The sheriff has his clerk; the
 former Serjeant or Mair is now the sheriff officer.
 From the office of the ancient coroner (Crownor) there
 has evolved that of the procurator-fiscal; the 'for-
 speakers' or 'prolocutors' are advocates or solicitors.
 The Assize or Jury still does duty but not quite on
 mediaeval lines. The Dempster alone is missing.

Without enumerating the almost countless
 functions of the present day sheriff one is reminded of
 his association with his ancient predecessors in his
 processions to the Mercat Cross whenever Royal Pro-
 clamations have to be made; and in his duties as
 Returning Officer in Parliamentary Elections.

By virtue of this continuity of service the
 Early Sheriff is represented by his successor of the
 present time who thus represents the most ancient office
 in the Scottish Judiciary.