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Fiefs and Vassals in Scotland: A View from Outside

In 1994 I published a book in which I attempted a reinterpretation of the evidence in medieval sources about fiefs and vassalage in England, France, Germany, and Italy – but not Scotland.[1] Its argument was that neither the relationship that medieval historians call vassalage nor the kind of property that they call fiefs took their shape from the warrior society of the earlier Middle Ages. Rather, the evidence suggests that they owed it to the more bureaucratic governments and estate administrations that developed from the twelfth century, and to the arguments of the professional and academic lawyers who appeared alongside. In so far as some of the obligations and terminology that historians associate with fiefs are to be found in earlier sources, they are found chiefly in documents that record the relations of great churches with their tenants. This may be partly because so much of our information about the earlier period comes from records preserved by churches, but we need to consider how far it is right to use the relations of bishops or abbots with their tenants as evidence of relations between kings and lay nobles, or between the nobles and their own followers. They were surely different. Although we have less evidence about the property of laymen before the twelfth century apart from what they held as tenants of churches, we have enough to show that the rights and obligations attached to land do not seem to have generally conformed to the feudal pattern, while such evidence as we have of political relations suggests that they were not based exclusively on the individual, interpersonal bonds medieval historians associate with vassalage. Before the twelfth century nobles and free men did not generally owe military service because of the grant – or even the supposed grant – to them or their ancestors of anything like fiefs. However they had acquired their lands, they normally held them with as full, permanent, and independent rights as their society knew. Whatever service they owed, they owed, sometimes in rough proportion to their status and wealth, not because they were vassals or tenants of a lord, but as what can be better thought of as property-owners, because they were subjects of someone more like a ruler. So far as words go, great men were

[1] S. Reynolds, *Fiefs and Vassals: The Medieval Evidence Reinterpreted* (Oxford, 1994).

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seldom if ever called vassals and their family properties were not called fiefs.[2]

The idea that the relations of vassalage and fiefholding dominated early medieval politics can be traced back, not to sources from the period, but to a tradition of historiography that started from the work of academic lawyers and historians in the sixteenth century, who used the texts of the late medieval academic law of fiefs both to argue about the politics of their own time and to help them structure their knowledge of the past. The law of fiefs or feudal law embodied in these texts originated in the *Libri Feudorum*, a compilation made in north Italy in the twelfth century, not as a statement of custom, but as a set of discussions about problems raised by a particular sort of property that was problematic just because it was not the normal sort of property. As a guide to the customary law of the earlier Middle Ages this later medieval academic law was misleading, all the more so since the legal training of many of the scholars of the sixteenth and seventeenth centuries who studied it as a key to medieval history inclined them to expect words to be used consistently through the centuries, and to deduce consistent rules and categories of property from them. Even Thomas Craig, with his shrewd caution about definitions, could not altogether escape the temptation.[3] In real life, outside the law, however, words change their meanings. Even at one time the same word may be used to denote different phenomena and different words to denote similar phenomena. In an age of customary law, without dictionaries or professional lawyers, the vocabulary of property rights and obligations is particularly bound to vary according to the drift of custom, the pressure of politics, and the variation of economies.

It is easy to understand why those who started their study of the Middle Ages from the law of fiefs were misled by their sources. What is more surprising is the way that medieval historians ever since – including some very great ones – have not looked harder at the confusion of words, concepts, and phenomena that are involved in the ideas about fiefs and vassalage that we have inherited from our predecessors. Historians who discuss what they call 'the concept of the fief' often start by discussing the history of the word *feodum* or *feudum*. These words, however, were used in a variety of contexts and senses in the Middle Ages, so that they seem to relate to rather different phenomena – that is, to different kinds of property bearing different rights and obligations. They therefore presumably reflected a variety of concepts or notions in the minds of those who used them. None of the medieval notions need have been the same as the notions in the minds of historians who use any of the words now. The historian's 'concept of the fief' as discussed in modern works of

[2] Except when the word fief was used in one particular context in 11th-century France (and then in England), which does not seem to have implied a category of property with distinctive rights and obligations: Reynolds, *Fiefs and Vassals*, 150-1, 162-4, 267, 348. For a Scottish example of this use, see below, n. 15.

[3] On definitions: Thomas Craig, *Jus feudale*, ed. J. Baillie (Edinburgh, 1732), 56, 59 (I. 9. 4, 13).

history is a set of notions about the attributes of pieces of property that historians have defined as fiefs, though some of them do not appear in the sources under any of the words that we translate as fief.

There is nothing wrong with starting from our own concept or notion, any more than there is anything wrong with using our own words. It is, however, vital to notice whether we are talking about our concept or theirs, or whether we are really talking not about a concept, but about phenomena – that is, the rights and obligations attached to what historians call fiefs, which need to be compared first to the rights and obligations attached to other property in the same society at the same time and then to property in other societies, including our own. More recent works about property in general and in different societies suggest that all property in every society carries some obligations, while rights in it are limited, if only by the existence of some kind of law to adjudicate about them. The word 'property' here is used to cover any objects (in this context mostly immovable) that are generally and/or officially considered in a given society to belong to a person or persons. Rights in land are often shared and can be envisaged as coming in layers – as do the rights in my apartment. In *Fiefs and Vassals*, rather than relying on distinctions between words like 'ownership' and 'tenure', 'allods' and fiefs', I made a checklist of rights and obligations to avoid falling into the trap of concentrating on one sort of right, such as inheritance, when looking at one sort of property and one sort of obligation, like liability to a particular sort of service, when looking at another.[4]

What emerged was that, from the twelfth century on, the various forms of the word fief came to be generally used for the property of nobles (except in England, where it covered all free heritable property, including that of some peasants). This new use of the word did not, however, apparently bring with it any general diminution of rights. Obligations were being increased at much the same time, since government was becoming more systematic and demanding, but that does not seem to have been generally connected with a deliberate change of categories. So far as military obligations are concerned, any association with fiefs seems vestigial. In France noble fiefholders had no fixed obligations. Even in England, from which the image of feudal knight service seems to be derived, the word fief on its own had no connotation of military service: hence the expression *feodum militis* or *feodum militare*. Only in England and Sicily, of the areas discussed in *Fiefs and Vassals*, did what the English call tenants in chief owe reliefs and only in England did they owe what are called 'feudal aids'. Reliefs, aids, and other casualties or 'feudal incidents' were the product of increasingly systematic government rather than survivals of an archaic vassalic bond.

As for vassalage, the word *vassus* or *vassallus* was used in the Carolingian empire for lay servants of kings, lords, or churches, who

[4] For my checklist: Reynolds, *Fiefs and Vassals*, 53-7, and works about ideas of property cited there.

served in armies and local government, and might or might not hold bits of their lords' lands. Neither then nor in the next few centuries do great lords seem to have been called the king's vassals. In the eleventh and twelfth centuries the word was used much less. It came back into use to mean fiefholder only as a result of its use in that sense in the *Libri Feudorum*. Since the academic law of fiefs did not get to England during the Middle Ages, the word vassal did not get into English law then – or later. It came into vernacular use in England by about 1400 in the quite different sense, found in French vernacular literature from the twelfth century, of a warrior or valiant man, generally with no implications of relation to a lord.[5] Apart from the word, the concept of vassalage as a close affective relationship between lord and man that bound medieval society together seems less prominent in medieval sources than in the writings of medieval historians. Great men of course had followers who were bound closely to them, and warfare must often have created strong bonds between those who fought together, but medieval sources do not suggest that the interpersonal, dyadic relation between lord and vassal was the main bond of lay society. On the contrary there is a good deal of evidence that collective bonds and feelings of community were taken for granted, even if, as always, some people offended against the norms of solidarity and public spirit.[6]

Such suspicions about what seemed an over-emphasis on what historians call vassalage were strengthened by further work on it after the publication of *Fiefs and Vassals*. A new introduction to the second edition of an earlier book called *Kingdoms and Communities* argued that the idea of the supreme importance of the essentially interpersonal, affective, dyadic bonds between lord and vassal originated, not in the Middle Ages, nor in the early modern study of the Law of Fiefs, but in the age of romanticism.[7] Since then I have extended my arguments about fiefs and vassals to the kingdom of Jerusalem and now, of course, to Scotland, while a piece on the use of feudalism in comparative history, as yet unpublished, broadens the subject out to include Marxist feudalism.[8] So far, though one reviewer called *Fiefs and Vassals* an offence against honest scholarship (*wissenschaftliche Redlichkeit*), the only scholar whom I know to have engaged seriously in print with any of its arguments is Professor F. L. Cheyette. He argued convincingly that what the book said about

[5] R. E. Lewis (ed.), *Middle English Dictionary: u-v* (Ann Arbor, 1997), 516, correcting Reynolds, *Fiefs and Vassals*, 385, 388.

[6] S. Reynolds, *Kingdoms and Communities in Western Europe, 900-1300* (2nd edn., Oxford, 1997), pp. xlv-lvi, and *passim*; Reynolds, *Fiefs and Vassals*, 17-47, 124-33, 189-92, 199-201, 331-3, 403-15.

[7] Reynolds, *Kingdoms and Communities*, pp. xvi-xxx. Also 'Afterthoughts on Fiefs and Vassals', *Haskins Society Journal*, ix (2001), 1-15; 'Carolingian elopements as a sidelight on counts and vassals', in B. Nagy and M. Sebők (eds.), *The Man of many Devices ... Festschrift in Honor of János M. Bak* (Budapest, 1999), 340-6; I also clarified a few points in a response to a review by Johannes Fried: *German Historical Institute London: Bulletin*, xix (1) (1997), 28-41; xix (2) (1997), 30-40.

[8] 'Fiefs and vassals in twelfth-century Jerusalem: A view from the West', *Crusades*, i (2003), 1-20.

supposed *fiefs de reprise* in early twelfth-century south France was wrong.[9] Apart from that, though the book has plenty of gaps, and probably mistakes too, I stand by what I have said.

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As for Scotland, it is necessary to start by pointing out, and not just as the kind of humility topos with which medieval writers introduced their work, that nearly all that follows about medieval Scotland comes from the work of Scottish historians and from the sources that they have cited in footnotes. It would have been better to make more use of all the work that has been done on the charters but one cannot become an informed historian of Scotland overnight and in old age. All that is possible is to suggest that historians of medieval Scotland might be interested to look again at some of the material in the light of the doubts about traditional interpretations that *Fiefs and Vassals* raised for other countries. Considering alternative interpretations, even if they are wrong, may stimulate other ideas that could be illuminating.

The first suggestion is that it might be worth approaching the changes that took place in the twelfth century without presupposing that any general and coherent pattern of feudo-vassalic relations and property rights existed outside Scotland ready to be imported by David I and his successors. Scottish historians generally make their comparisons with England and concentrate on the 'military feudalism' which is so distinctive there. But the very expression 'military feudalism' suggests that English phenomena are to be understood as a variant of a more general feudalism. Many of the features of that general feudalism, as described by Ganshof, Bloch, or Weber, however, so far as they can be found in medieval sources, were so haphazardly scattered between different areas and periods as to make it difficult to see them as part of a coherent whole, even if one dignifies it, as Weber did, by calling it an ideal type. The single label, even if combined with an adjective (like 'military') seems to have encouraged historians to fit their interpretations of the evidence into the framework sketched by Ganshof, Bloch, and Weber, and then, when evidence is lacking, to make assumptions to fill the gaps so as to fit the same framework. Much of what is called English feudalism, moreover, seems to me to be less the result of the import of ready-made ideas and arrangements from Normandy than of the development of English government in the twelfth century. Society and government were developing in Scotland then too, as they were, with local variations, in the rest of western Europe. Were the changes in Scottish society and government, like those going on elsewhere at the same time, the result rather of economic and demographic growth, and of increasingly systematic and literate government, law, and estate management

[9] O. G. Oexle, 'Die Abschaffung des Feudalismus ist gescheitert', *Frankfurter Allgemeine Zeitung*, 19 May 1995; F. L. Cheyette, Review of Reynolds, Fiefs and Vassals, in Speculum, lxxi (1996), 998-1006, and 'On the *fief de reprise*', in *Les sociétés méridionales à l'âge féodal: hommage à Pierre Bonnassie* (Toulouse, 1991), 319-24.

than of anything one could call the introduction of 'military feudalism' based on feudo-vassalic values? Comparisons, moreover, must be made not just with England: two-sided comparisons lead to misleading polarisations, and may be especially misleading if one focuses on aspects in which one or other society is unusual.

Of course England mattered. In Scotland change seems to have been initiated or encouraged by kings who had spent time in England and who brought men from there (or from Normandy and northern France) who looked to make fortunes here – and who also seem to have brought with them from England scribes who had learnt how to write charters there. Leaving aside the scribes for the moment, the immigrants who received grants of land were more or less different in culture, including language, from members of the upper classes in Scotland. One obvious difference was in arms, techniques, and styles of warfare, and some others will be mentioned briefly later. Whether, however, the newcomers also had significantly different ideas about property seems more doubtful if, rather than starting from assumptions about feudal tenure, one looks at the evidence of rights and obligations attached to noble and free property in the sources of the period. The immigrants' ideas about this presumably differed more from those of lords in the Highlands than in areas where agriculture was more likely to have produced the kind of rights and obligations attached to land that are found in agricultural societies elsewhere. That sentence is full of qualifications, since sources of information about society and government before 1100 seem to be so scarce. The work of G. W. S. Barrow, A. A. M. Duncan, and others suggests, however, that grants to communities of monks had been made since the tenth century, and probably earlier, and that mormaers had authority over parts of the kingdom where they may have received the dues that kings got from other parts.[10] How far one can draw a line in any of this between what we would call rights of government and what we would call rights of property is hard to say. In any area with settled populations practising some kind of agriculture, however, there were presumably people under the lordship of king, mormaers, or churches who had rights over land which they expected to pass to their children and from which they paid their dues in kind, service, or money.

Doubts have been cast on the heritability and security of the position or office of thane, but it looks like something whose holder might well try to pass on to his son, as did the holders of offices in other medieval kingdoms, but in which he had presumably less rights than he might have in his own property.[11] The sort of man who became a thane was

[10] G. W. S. Barrow, *The Kingdom of the Scots* (London, 1973), 7-69; A. A. M. Duncan, *Scotland: The Making of the Kingdom* (Edinburgh, 1975), 107-11; J. Bannerman, 'The Scots language and the kin-based society', in D. S. Thomson (ed.), *Gaelic and Scots in Harmony* (Glasgow [1992]), 1-19; G. Donaldson, 'Aspects of early Scots conveyancing', in P. Gouldesbrough (ed.), *Formulary of Old Scots Legal Documents* (Stair Society, 1985), 153-86.

[11] A. Grant, 'Thanes and thanages, from the eleventh to the fourteenth centuries', in A. Grant and K. J. Stringer (eds.), *Medieval Scotland: Crown, Lordship and Community:*

surely unlikely to have been without land that he had inherited (or possibly acquired) before he became a thane and in which he had rights, even if we see him as in some way unfree. Deciding whether someone was or was not free is and was, in any case, often difficult. In at least a good deal of the Lowlands, as in other parts of Europe, individuals or small family groups probably held and worked land in which, however subject it was to dues, services, and collective controls (including those exercised by groups of kin), they had rights that included some sort of inheritance and some degree of security, all protected by some sort of customary law. That customary law is real law, with normative force, is now generally recognised, as it is, surely, that there can be proper rights without professional lawyers to defend them.[12] There were, in any case, professional lawyers of a kind in Scotland in the form of the men later known as *judices*.[13]

The most obvious innovation in twelfth-century landholding was that grants of land were more and more often recorded in charters. What new or enhanced rights the charters conveyed is unclear. Written records may create more security but what they record may not be very different from what custom prescribed, while precision does not always profit the grantee more than the grantor. Twelfth-century immigrants who came in search of lordships no doubt wanted as much as they could get and wanted it on the most favourable terms but, like the Normans who went to England, they came from societies where ideas about rights of property and methods of judgement may not have been all that different from those they found. Unlike the Normans in England, moreover, they were not conquerors who could ride roughshod over the rights of locals. It is not surprising therefore that, although kings may have manipulated the rules in favour of their new subjects, there is apparently little evidence of direct expropriation of native Scots.[14] Under any medieval law I know about, confiscation of inherited land was supposed to need at least an allegation of crime. Is there any reason to suppose that this had not hitherto been the case in Scotland? Meanwhile, a good many older customs survived, though sometimes under the kind of new terminology that historians call 'feudal'.

The charters used a new vocabulary of *in feudo* (or *feodo*) *et hereditate* (or *in hereditate*) and sometimes specified the service of knights that would be owed. Although the word *feodum/feudum* still had a fairly wide range of uses in both France and England in the early twelfth century, statements that land in England was to be held *in feodo* or *in feodum*

[11] (*continued*) *Essays presented to G. W. S. Barrow* (Edinburgh, 1993), 39-81, at 40-1; K. J. Stringer, *Earl David of Huntingdon* (Edinburgh, 1985), 80.

[12] S. Reynolds, 'Medieval Law', in P. Linehan and J. L. Nelson (eds.), *The Medieval World* (London, 2001), 485-502, and works cited there.

[13] Barrow, *Kingdom of the Scots*, 69-82.

[14] G. W. S. Barrow, *The Anglo-Norman Era in Scottish History* (Oxford, 1980), 22-5; R. A. McDonald and S. A. McLean, 'Somerled of Argyll: A new look at old problems', *ante*, lxxi (1992), 3-22.

seem to have implied that it was both free and heritable.[15] By 1124 the phrase *in feod et hereditate* was becoming common form in England, tautologous though it was, so that David I's scribes, and possibly he and those to whom he gave land, may have taken it for granted as the correct form of words.[16] If it is right to doubt the evidence that land was not inherited in Scotland before, then the phrase may not have implied any new rights or obligations here, any more than it did in England. To say that land was to be inherited is not, however, to say how or by whom. Specific rules of inheritance, like other rules, were beginning to become more fixed in the twelfth century, though not because primogeniture always went with fiefholding. It often did, if one considers only noble or military fiefs, but the trend both for them and for other kinds of property may have been partly because at much the same time as the word fief was coming to be used of noble property, wider economic and political changes were taking place in Europe that tended to favour single inheritance.[17] It is not clear that there were any general 'feudal rules of inheritance' to explain why the earl of Carrick who died in 1256, anticipating that he would die without a son to become both earl and head of his kin, nominated a kinsman as head of the kin. What his action may show is rather that rules in general were becoming more fixed so that the conflict between different kinds of inheritance was becoming more obvious and harder to resolve. But they were only *becoming* more fixed: as in England and elsewhere a good deal of variation continued in practice. The apparently clear difference between systems of inheritance in the Carrick charter was thus less the result of the introduction of new, predetermined rules about fiefs than of increasingly professional government, record-keeping and law, which turned vague norms into legal rules and then invented ways of getting round them. As a result, the rules worked out in different kingdoms or jurisdictions varied: if the earl of Carrick had four daughters, as was said

[15] Reynolds, *Fiefs and Vassals*, 353-5, though the reference to Bracton at nn. 151-2 there is wrong: Henry de Bracton, *De Legibus et Consuetudinibus Angliae*, ed. G. E. Woodbine and S. E. Thorne (Cambridge, Mass., 1968-77), iii, 126-7, 274-5, makes it clear that, while some free holdings were not heritable, *feoda* were both free and heritable. For the use of *feodum* in what looks like the sense (found earlier in France and England) of any lordship irrespective of tenure (as above n. 2): Raine, *North Durham* [*ND*], appendix, no. 370: *per arbitrium ... aliorum tenencium ... de eodem feodo*.

[16] David's first surviving charter using it seems to be *The Charters of King David I*, ed. G. W. S. Barrow (Woodbridge, 1999), no. 54. It is not used in, e.g., no. 16 (1124-9, to Robert de Brus) but, as Professor Duncan pointed out to me, it is in no. 210 (1150-3). This granted him more land (or forest rights in what he had?) in Annandale *in feudo et hereditate illi et heredi suo in foresto. In feodo et hereditate* clearly became common form under William the Lion: *Regesta Regum Scottorum* [*RRS*], ed. G. W. S. Barrow and others, ii: index *sub* feu and heritage.

[17] Reynolds, *Fiefs and Vassals*, 220, 253-4, 296; J. Goody, *Death, Property and the Ancestors* (Stanford, 1962), 321-7, and *The European Family* (Oxford, 2000), 50, 58; W. Seccombe, *A Millennium of Family Change* (London, 1992), 96-103. Also, on the connection of feudalism with primogeniture: F. W. Maitland, *Collected Papers* (Cambridge, 1911), 172-5.

in the Great Cause arguments, his lands would in England have probably been divided between them.[18]

Neither the word *feodum* nor the whole phrase *in feodo et hereditate* implied the obligation to any particular form of service. John Hudson has listed over seventy charters, mostly from churches, but some from the kings or lay lords, that granted land in England *in feodo et hereditate* during roughly the first half or two-thirds of the twelfth century. Of these, nearly thirty required money rents, and less than half as many were for knight service.[19] Some of the rest mention other services, some mention none. Charters from kings to great men are more likely to have been for military service than those from churches to their tenants, but a few of the royal charters *in feodo et hereditate* were for money rents, while the grants from churches make it abundantly clear that the phrase was equally applicable to non-military services. In the absence of a comparable count for Scottish charters, it seems therefore improbable that feu-fermes in Scotland were a secondary development from knights' fiefs.[20] The way that military service was specified in some of the charters granted by David and his successors was clearly an innovation that came from England, but it did not come as part of a ready-made system there, let alone in 'feudal society' in general. Quotas of knight service are rarely specified in surviving English charters before the mid-twelfth century and may not have been generally fixed and agreed before 1166.[21] Later confirmations of David I's charters, like those about Annandale and Fife, may well have quantified services in a way that neither he nor anyone else need have thought about when he first gave lands and castles to trustworthy supporters like Robert de Brus or Earl Duncan.[22] The specification of knight service may have become customary in Scotland partly because it was becoming common form in England so that those who came from there expected to find it in charters, but it presumably had a practical purpose too. The small number of knights owed, together with the continued call-up of those owing 'common', 'forinsec', or 'Scottish' service suggests that this purpose was to provide leadership and a core of well-equipped soldiers within a bigger army. As time went on the difference between those who held property by knight service and those of similar status who held it in other ways presumably became less, especially at times when there were enough campaigns to develop and spread skills. The survival of knight

[18] J. Bannerman, 'MacDuff of Fife', in Grant and Stringer, *Medieval Scotland*, 20-38; H. MacQueen, 'The Laws of Galloway', in R. D. Oram and G. P. Stell (eds.), *Galloway: Land and Lordship* (Edinburgh, 1991), 131-44; E. L. G. Stones and G. G. Simpson (eds.), *Edward I and the Throne of Scotland* (Oxford, 1978), ii, 177-8.

[19] *Oxford Dictionary of Medieval Latin from British Sources* (Oxford, 1975-), 920; J. Hudson, *Land, Law, and Lordship in Anglo-Norman England* (Oxford, 1994), 94, nn. 133-5.

[20] Cf. G. W. S. Barrow, 'The beginnings of feudalism in Scotland', *Bulletin of the Inst. of Hist. Research*, xxix (1956), 1-31, at 21-5.

[21] F. M. Stenton, *The First Century of English Feudalism* (Oxford, 1961), 152-3, 158; Reynolds, *Fiefs and Vassals*, 350-2, 361-3.

[22] *Charters of David I*, no. 16; *RRS*, i, no. 63; *RRS*, ii, no. 80; *National MSS*, i, pl. L.

service in Scotland may be testimony as much to the conservatism of increasingly professional conveyancing as to its practical value: not enough was owed to be usefully adapted to fiscal use as was English knight service, but even in England the raising of money from those who held by knight service was fairly soon supplemented, if not superseded by more general taxes. Nor could the later adaptation of Scottish knight service to provide serjeants, archers, or other foot-soldiers have produced as many of them as were needed.[23] Armies recruited on a wider base must, like all part-time armies, have been liable to desert and difficult to use on long campaigns, but the continuance and development of the obligation to provide some sort of military service, whether called common, Scottish, forinsec, or simply 'due and accustomed', makes it, to my mind, a much more significant feature of Scottish history than anything that could be called 'feudal' service.[24]

Other obligations traditionally associated with what is called feudal tenure may not have been imposed at once. Although English kings were demanding reliefs from their tenants in chief by 1100, the kings of France, for instance, never established a similar custom and there does not seem to be any strong reason for supposing, without evidence, that the Scottish kings immediately copied the English.[25] Some of the reliefs and other casualties in Scottish records from the thirteenth century and later seem to have been paid by the kind of relatively humble people who paid succession dues in other countries. They do not, therefore, fit the feudo-vassalic pattern in the way that the English ones at first sight seem to do. This makes a distinction between reliefs and hereȝelds more difficult – and perhaps more interesting?[26] The first evidence of a Scottish relief (using that word) seems to come in a charter from the early thirteenth century.[27] In 1196, according to John of Fordun, when the constable of Scotland had died without children, Roland of Galloway married the constable's sister and paid to get his office and lands as well. This has been interpreted as a relief but, given the circumstances, it is not evidence that sons normally had to pay a due on succession.[28] They may have done, but rules about paying reliefs or doing homage before taking up an inheritance did not exist before they were made by kings, lords, and the officials or lawyers who advised them.[29] Maybe the regular taking

[23] G. W. S. Barrow, *Robert Bruce and the Community of the Realm of Scotland* (Edinburgh, 1988), 286-92; A. A. M. Duncan, intro. to *RRS*, v, 48-55; A. A. M. Duncan, 'The war of the Scots', *Trans. Royal Hist. Soc.* [*TRHS*], ser 6, ii (1992), 125-51, at 144-5.

[24] W. D. Sellar, 'Celtic law and Scots law', *Scottish Studies*, xxix (1989), 1-27, at 17-18; A. Grant, 'Service and tenure in late medieval Scotland', in A. Curry and E. Matthew (eds.), *Concepts and Patterns of Service in the Later Middle Ages* (Woodbridge, 2000), 145-79, at 150-1.

[25] *RRS*, i, 55; ii, 54.

[26] On hereȝelds: *Dictionary of the Older Scottish Tongue* [*DOST*] (Chicago, Aberdeen, Oxford, 1931-), iii, 106, rules out the connection with *heregeld* apparently suggested by contemporaries of Skene: J. Skene, *De Verborum Significatione* (Edinburgh, 1597).

[27] *Aberdeen-Banff Coll.* [*A. B. Coll.*], pp. 407-19. On the charter, see below, n. 56.

[28] John of Fordun, *Chronica Gentis Scotorum*, ed. W. F. Skene (Edinburgh, 1871), i, 278; Barrow, *Anglo-Norman Era*, 142.

[29] Reynolds, *Fiefs and Vassals*, index *sub* succession dues.

of reliefs, as of the casualties of ward and marriage, was part of the more systematic exploitation of the rights of government and property that was taking place in Scotland, as elsewhere, in the thirteenth century.[30] References to ward and relief in the fourteenth century may thus be evidence of innovation rather than of the survival of a time when lords had granted land to their vassals only for life.[31] That being so, it is not surprising that the rules were different in Scotland from in England, where relief was not owed after wardship, as it was in Scotland.[32]

As for what the English call the three feudal aids, they seem to have originated in the later eleventh century in France, where they were chiefly paid by commoners. Only in England do they seem to have been paid by great men to the king.[33] In one early thirteenth-century reference to them in a Coldingham charter they were to be paid by someone owing a money-rent, not knight service.[34] The only other evidence of them seems to be in Craig, who thought that lords in the Highlands got help from their vassals (his word, since, of course, he was using the academic law of fiefs) to pay for marrying their daughters. He also mentioned the aid for knighting the lord's eldest son and remarked that some said that vassals should contribute to their lord's ransom if he was captured in a war that he did not start. As Craig had already maintained that reliefs and the aid to marry a daughter were the only payments a vassal owed, it looks as though the 'three aids' as owed in England, or the four sometimes owed in France, had not caught on in Scotland.[35] There is no reason why they should have: they would perhaps have been more annoying to the payers than profitable to the recipients. Traditional dues like conveth and most of those subsumed under the word cain were probably easier to get, while other special levies, whether called aids, gelds, or anything else, even if subject to consent, were probably paid by enough people to bring in useful sums and be worth negotiating, if or when they were needed.[36]

[30] *Exch. Rolls* [*ER*], i, index *sub* relief; *Reg. Mag. Sig*, i, appendix 2, no. 335; *Coldingham Correspondence*, no. 239.

[31] *RRS*, v, index *sub* relief; *RRS*, vi, index *sub* wardship; C. Madden, 'Royal treatment of feudal casualties in late medieval Scotland', *ante*, lv (1976), 172-94.

[32] *ER*, i, 33; Craig, *Jus feudale*, 291 (II. 11. 23), where he also says that vassals had to help with the superior's relief when the superior came out of ward.

[33] Reynolds, *Fiefs and Vassals*, 312-14, 365-7.

[34] G. S. C. Swinton, 'Six early charters', *ante*, ii (1905), 173-80, at 175.

[35] Craig, *Jus feudale*, 291 (II. 11. 22-3). I could not find any evidence of a knighting aid, implied as possible by R. Nicholson, *Scotland: The Later Middle Ages* (Edinburgh, 1974), 22. He does not mention any tradition of a ransom aid when David II's ransom had to be paid in 1357: *ibid.*, 164, nor does there seem to be any reason to see William the Lion's aid in 1189-90 as a ransom aid as suggested in the introduction to *ER*, i, p. xc. The reference to aids in *Regiam Majestatem*, ed. Cooper, 181 (II. 73 = *II. 67* in *Acts Parl. Scot.* i, 621) is simply taken straight from *Glanvill*, ed. G. D. G. Hall (London, 1965), 111-12 (IX. 8).

[36] Duncan, *Making of the Kingdom*, 212-13, and *The Kingship of the Scots* (Edinburgh, 2002), 335; Nicholson, *Scotland*, 114-15, 175. On the various kinds of dues described as cain: D. Broun, 'Unfamiliar patterns of lordship in 12th- and 13th-century Scotland' (unpublished paper read at the Colloquium for Scottish Medieval and Renaissance Studies, 2003).

The earliest references I have found to the need to get consent to alienation of property seem in other countries to have nothing to do with anything that could be called feudal tenure. They concern the objection that members of a donor's family might make to gifts to a church of property that they expected to inherit. From the ninth century, churches in the Frankish kingdom began to record consents of wives and heirs in their charters so as to secure their titles against later claims. Then when churches in France no longer had effective protection from kings they began to get consents or confirmations from local lords who might offer it instead. By the twelfth century custom had hardened and lords were beginning to require those over whom they claimed authority, including people with alods or free inheritances, to get permission to alienate.[37] Although consents by kin in Scotland seem to have been relatively little studied, they are certainly recorded in some charters.[38] In what is so often called a kin-based society it seems likely that a systematic search would reveal many more. Whether there was ever a formal rule in Scotland that acquired property could be alienated more freely than what was inherited seems unlikely: it was not universal elsewhere and A. A. M. Duncan thinks the distinction had gone by the later twelfth century.[39]

Consents or confirmations by kings and lords suggest that alienation in Scotland did not regularly follow the peculiarly English pattern of what historians call subinfeudation, by which any one to whom free land was conveyed held it 'of', 'from', or 'under' the person from whom he had received it. As a result what is called the hierarchy of tenure in Scotland, as in France, Germany, and Italy, may have been rather a hierarchy of jurisdiction than of property rights, and may have had fewer layers than did the hierarchy of property rights in England. Great lords with significant jurisdiction certainly 'subinfeudated' land in Scotland in order to preserve their authority over their lordships. Bishops and abbots also 'subinfeudated', not only to preserve their jurisdiction but because they were bound by canon law not to alienate the property of God and their saints.[40] Others, however, may quite often have conveyed all their rights, with the consent of king or lord, by what historians call 'substitution'.[41] Royal dues and services from the land could be preserved, sometimes being owed by the old owners, sometimes by the new,

[37] Reynolds, *Fiefs and Vassals*, 105, 146-52, 183-4, 208.

[38] E.g., *Charters of David I*, 6-7; *Newbattle Registrum* [*Newb. Reg.*], no. 125; *Moncreiffs*, ii, 632-3.

[39] Duncan, *Kingship*, 78-9.

[40] Lay lords, e.g.: *Charters of David I*, 184; Stringer, *Earl David*, nos. 6, 55; Fraser, *Annandale*, no. 2; *Glasgow Registrum* [*Glas. Reg.*], no. 87; Swinton, 'Six early charters', 175; K. J. Stringer, 'Periphery and core', in Grant and Stringer, *Medieval Scotland*, 110 (no. 6); N. D. Campbell, 'Early charter at Inveraray', *ante*, viii (1911), 222. Churches, e.g.: *Kelso Liber*, nos. 102, 105-6, 108-12; *Glas. Reg.* no. 44; *Arbroath Liber*, i, no. 257. For the later Middle Ages: Grant, 'Service and tenure', 152-4.

[41] Subinfeudation could be used within a family: Duncan, *Making of the Kingdom*, 389. The 'subinfeudation' in *Glas. Reg.*, no. 45, is perhaps questionable in view of the term of years in no. 44.

without going through a hierarchy of property rights as in England.[42] The English pattern seems to me to have been peculiar, cumbrous, and explicable only as the result of bureaucratic and legal fossilisation of something that had somehow become customary early in the twelfth century: elsewhere, in countries where lords retained more significant jurisdiction over free people in the patches they established as their own, it seems that land was assumed to be held of, from, or under the jurisdiction of the lord in whose patch it lay. Perhaps that applied in Scotland too? If so, it may explain why Scottish charters seem to specify from whom land is to be held rather less regularly than do English ones. Where rent was to be paid by the donor it was presumably less necessary to say whom the land was to be held from, but, if it is right that the person from whom land was to be held was indeed less often recorded than it was in English charters, the reason may still apply.

The possibility that lordship over free land was primarily a matter of jurisdiction rather than of property rights may also suggest that some kinds of lordship could be as well, or better, described as 'territorial' rather than 'tenurial'. Although this article is primarily concerned with the twelfth and thirteenth centuries, it may be worth suggesting that looking at lordship in territorial or jurisdictional terms might mitigate the starkness of the choice between 'tenurial' and 'personal' that later medievalists seem to confront.[43]

Ideas about feudal jurisdiction are contradictory. One tradition, deriving from the *Libri Feudorum*, sees fiefs as automatically subject to the jurisdiction of their lords and to special feudal procedures in their courts, notably the judgement of their peers. Another derives from the way that academic and professional feudal law developed in the later Middle Ages, and above all from the view of French law under the Ancien Régime. This saw fiefs as distinguished, not by their subjection to a particular sort of jurisdiction, but by the jurisdiction their owners had over non-nobles living within them. Neither view seems to fit the evidence from before the later Middle Ages. Before the twelfth century anyone with enough property to have fairly high status was likely to exercise some kind of jurisdiction over the more or less unfree people on his land. Enforceable authority over the free and their land, however, generally depended on delegation, real or assumed, from a ruler. As for procedure, everyone was supposed to be judged by their neighbours or peers and appeal to the king seems to have been always supposed to be possible. I have not found evidence that there were separate courts for fiefholders or that procedure in cases about fiefs was different from that

[42] Royal services to be done by the new owner: e.g., *Charters of David I*, no. 158; *RRS*, ii, nos. 225 (despite exemption from *equitatu et exercitu et omni exactione et ab omni operacione* in the donor's charter: *Arbroath Liber*, no. 91), 241 (despite exemptions in *Newb. Reg*, no. 125). Royal services to be done by the donor: e.g., *RRS*, ii, nos. 214, 240, 243; *Arbroath Liber*, nos. 257, 261; Raine, *ND*, app. no. 357.

[43] Grant, 'Service and tenure'.

about other free, heritable property, unless or until the academic feudal law began to influence practice.

Scotland seems to fit that background fairly well, developing, like everywhere else, its own range of variations as custom became fixed. Many of the jurisdictions granted in twelfth-century charters may not, whatever the words used, have been in themselves new.[44] The lack of reference to suit of court before the thirteenth century is not evidence of the absence of assemblies and collective judgements before 1100. It seems possible that in Scotland, as elsewhere in western Europe, disputes were sometimes settled and crimes punished in local assemblies in which judgements were given by those present, or those of higher status among them, led by *judices* and, no doubt, often more or less firmly directed by the mormaer or whoever else presided. Writing about Wales, R. R. Davies suggests that the functions of the traditionally trained and quasi-professional *ynad*, who looks rather like the early Scottish *judex*, were complementary to collective judgements by members of the local community.[45] Suit of court, like so much else, came to be specified in the thirteenth century because it was then that systems were being formed and distinctions drawn. Around 1130 a specially big meeting of the *provincia* of Fife and Fothrif was summoned by the king to deal with a complaint of Culdees against Robert the Burgundian. The earl of Fife and two other men, one called a *judex*, decided the case, perhaps with the agreement of the assembly. In 1135 David I issued an order that suggests that he expected the earl and bishop to preside over assemblies of the worthy men of Fife, probably with a *judex* present who could be sent off to supervise the court of Dunfermline abbey.[46] When a church was given extensive jurisdiction it either took over the local assembly or withdrew its tenants from it, but exemptions from interference by royal or other officials from outside may often have needed renegotiation as royal government developed and rules of law and litigation became established.

Hector MacQueen has made a lot of this process clear.[47] It is necessary only to warn against reading the rules established – but still argued over – in the fourteenth century back into the twelfth or even the thirteenth. If the limits of jurisdictions, whether in terms of geography, or of the persons or cases that they included, were already fixed in the twelfth century, then Scotland was way ahead of the areas discussed in *Fiefs and Vassals*. When, in the 1220s, Patrick of Nawton renounced rights in land in favour of a man with whom he had presumably been in dispute, he did

[44] See the tentative suggestion of H. MacQueen, *Common Law and Feudal Society in Medieval Scotland* (Edinburgh, 1993), 36-7.

[45] R. R. Davies, 'The administration of law in medieval Wales', in T. M. Charles-Edwards *et al.* (eds.), *Lawyers and Laymen: Studies in the History of Law Presented to Professor Dafydd Jenkins* (Cardiff, 1986), 258-73.

[46] Lawrie, *Charters*, no. 80 (how far does the description of the earl and one of the other two as *judices* in this memorandum imply a definite office?); *Charters of David I*, no. 190.

[47] MacQueen, *Common Law*.

it in the court and presence of his lord, so that it seems reasonable to call the occasion a seigneurial court. But that may be too simple and definitive. The court was held in a churchyard on a day of peace. Also present were the king's chancellor, a *judex*, a royal clerk, the heads of two religious houses, and other worthy men, clerical and lay: did everyone know it was a seigneurial court rather than a specially grand kind of local assembly – or even, on this occasion, some kind of royal court? Were these distinctions clear in everyone's minds?[48] In the words of Maine: 'The distinctions of the later jurists are appropriate only to the later jurisprudence.'[49]

By the thirteenth century there is evidence of the kind of professionalism in administration and law that would produce these distinctions. As Timothy Reuter put it: 'By around 1200 we have begun to move towards a world in which political interaction was no longer confined to assemblies; governments were increasingly governing continuously rather than in brief spurts.'[50] One of the things that made continuous government possible was the growth of bureaucracy, in the sense that Max Weber used the word. Scottish royal government was nothing like as bureaucratic as English, nor would it necessarily have been better if it had been, but the surviving records of what Duncan has called 'chronic scriptomania' suggest that something like Weberian bureaucracy was developing here, as it was elsewhere in western Europe, quite apart from England.[51] Accounts of the collection of royal casualties and other dues were rendered and recorded, brieves were issued in standard forms, inquests were held and their findings reported back in writing. The common form of charters was becoming established, with differences from English (as well as other) charters that suggest that their drafters and writers formed a cohesive enough body to develop and pass on their own traditions.[52] There may not have been professional advocates practising in lay courts before the fourteenth century but there were surely people around who knew enough law to give informed advice in litigation and other transactions about property.

By the fourteenth century, over two hundred years before Spelman, as Maitland put it, introduced the feudal system to England as an 'early essay in comparative jurisprudence', it came to Scotland in the form of the use of the *Libri Feudorum* in actual practice.[53] Duncan's latest book shows how

[48] *Moncreiffs*, ii, 632-3; Barrow, *Anglo-Norman Era*, 136; MacQueen, *Common Law*, 38, 42.

[49] H. S. Maine, *Ancient Law* (London, 1905 edn.), 230 (in c. 8).

[50] T. Reuter, 'Assembly politics in western Europe from the eighth century to the twelfth', in Linehan and Nelson, *Medieval World*, 432-50, at 433.

[51] Duncan, *Making of the Kingdom*, 132. His playing down of bureaucratic development in *Kingship*, 335, focuses on the contrast with England.

[52] Boundary clauses were from the first both consistent in form and different from English ones. Twelfth-century Scottish charters, instead of the usual English *habendum et tenendum*, generally said just *tenendum* (later *tenendum et habendum*). The inclusion of warranty against women occurs in at least one Scottish charter before or at much the same time as I believe it was introduced in England: Stringer, *Earl David*, no. 6. It is also in *A. B. Coll.*, 407-19, on which see below n. 56.

[53] F. W. Maitland, *The Constitutional History of England* (Cambridge, 1908), 142.

it was used in the Great Cause, though that does not mean that it was known yet in Scotland.[54] By the 1380s, however, the bishops of Aberdeen and Moray and the abbot of Lindores all employed lawyers who cited the *Libri Feudorum* and commentaries on it along with texts of Roman law.[55] Even without the citations one might guess a knowledge of academic law from their use of the word vassal.[56] The way that the words *superior* and *recognoscere* were used in Scotland meanwhile suggests that lawyers and administrators here had developed their own community of language and concepts apart from what some of them had learned from the law books that embodied what civil lawyers called *ius commune*.[57] When the bishop of Aberdeen required his tenants to produce their charters or 'show their holdings', his officials could have thought the procedure up for themselves, but they could have been copying, not so much from the law books as from practices developed earlier in France, Germany, and Italy.[58] Fourteenth-century Scotland also produced what seems to be the first hint of the myth, destined to a great future in the historiography of feudalism, that all land had once belonged to the king, and that all later titles were therefore derived from him. Fordun's story about Malcolm Mackenneth, however, in making the king's gift of all his lands absolute, so that the return of dues and casualties that were promised to him constituted a free gift, rather than an obligation incurred by his grant, does not fit the later feudo-vassalic myth very well.[59]

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To conclude: a great deal was going on in Scotland in the twelfth and thirteenth centuries that may account for much of the evidence of what

[54] Duncan, *Kingship*, 313-15.

[55] *Moray Registrum* [*Moray Reg.*], nos. 159, 298, 301-2; *Aberdeen Registrum*, 143-53; *Lindores Chartulary* [*Lind. Cart.*], nos. 149-50. Comments: P. G. Stein, *Roman Law in Scotland* (Milan: Ius Romanum Medii Aevi, v. 13. b, 1968); MacQueen, *Common Law*, 53-4, 78-9.

[56] Reynolds, *Fiefs and Vassals*, 392 and index *sub* vassalage. On English use, above text at n. 5. It was used in one early thirteenth-century Scottish charter (*A. B. Coll.*, 407-19), which otherwise seems to follow English forms. For the vernacular use of the word in Scotland: *DOST*, xi, 461-2

[57] For *superior* as a noun to denote the immediate lord (rather than as an adjective to distinguish the immediate lord's lord from him): *DOST*, x, 171-2, though the definition is made slightly unclear by the use of 'overlord' when the immediate lord is clearly meant. I have happened on only one 14th-century example: *Lindores Cart.*, no. 149 (p. 203). The word does not occur at all in Du Cange, *Glossarium mediae et infimae Latinitatis*, ed. L. Favre (Paris, 1883-7), vi, 444. All examples but one of its use in 'feudal law' in *Oxford English Dictionary* (2nd edn., Oxford, 1989), xvii, 229-30, are from Scotland. *Recognoscere* to mean confiscate occurs in *Moray Reg.*, no. 291; *Lindores Cart.*, no. 149 (p. 202). It may also be peculiar to Scotland: *DOST*, vii, 119-20; *Oxford English Dictionary*, xiii, 343. Du Cange, *Glossarium*, vii, 49-50, does not include this use. On *ius commune*: e.g., M. Bellomo, *The Common Legal Past of Europe, 1000-1800*, trans. L. G. Cochrane (from *L'Europa del diritto comune*, 2nd edn.,1991), (Washington, 1995); Reynolds, 'Medieval law', 497.

[58] *Abdn. Reg.*, 135, 143. Earlier cases cited by R. M. Maxtone-Graham, 'Showing the holding', *Juridical Review*, ii (1957), 251-69, and MacQueen, *Common Law*, 120-2, look different in character.

[59] Reynolds, *Fiefs and Vassals*, 346; Fordun, *Chronica*, i, 186; A. A. M. Duncan, 'The laws of Malcolm Mackenneth', in Grant and Skinner, *Medieval Scotland*, 239-73.

is generally called feudalisation, but that deserves to be seen in a much wider context. The growth of the economy, combined probably, as elsewhere in Europe, with growth of population, and certainly with a striking growth of pragmatic literacy, made possible the transition from Reuter's 'assembly politics' to more continuous government.[60] The extension of royal power to the north and west, the beginning of more structured jurisdiction and more expert law, the raising of taxes and the keeping of royal accounts, all seem to be evidence of these wider economic and social changes. That is not meant to imply that Scotland was the same as everywhere else. Within the same general trends there were variations everywhere. In Scotland there was immigration, though its impact was surely less than in parts of Europe where migrations involved larger numbers than the mostly upper-class lords and knights whose arrival has been so well described and analysed. It was also surely less than the impact of immigration of similar people to England, where they came in a violent conquest that then involved that kingdom in long wars in France.

How important were cultural, as distinct from political differences, between natives and newcomers? That there were political differences, though not so fierce as in England, seems obvious: some of the immigrants, at least, surely came with different loyalties and the more successful must have aroused jealousies. But not all jealousies and hostilities were between natives and newcomers. Those there were need not imply very different cultures – let alone the biological differences that may be misleadingly implied by the words race and racial.[61] There were, after all, already differences of culture between regions and classes in Scotland. But differences of language, for instance, were common within other kingdoms and polities, and not only on the frontiers of Europe (however defined). Apparently they did not always divide regnal communities in the way that nineteenth- and twentieth-century historians thought they should have. Abandoning a simple contrast between feudal culture on the one hand and native or Celtic culture on the other might help to focus attention on the problem of identifying cultural differences and changes.

One change may have taken place around the twelfth century that would be called feudalisation by a different definition from that implied so far in this discussion of Scottish feudalism. May there, in some parts of Scotland, have been peasant societies before 1100 that remained fairly free of any close and coercive control rather like those in other parts of Europe that Chris Wickham has described?[62] If so, the economic and

[60] Above, at n. 50.

[61] On race in the context of medieval Europe: Reynolds, *Kingdoms and Communities*, 255, and 'Our forefathers? Tribes, peoples and nations in the historiography of the Age of Migrations', in A. C. Murray (ed.), *After Rome's Fall: Essays presented to Walter Goffart* (Toronto, 1998), 17-36, at 25, 31-2.

[62] C. Wickham, 'Problems of comparing rural societies', *TRHS*, ser. 6, ii (1992), 221-46, repr. in his *Land and Power* (London, 1994).

political changes of the twelfth century may well have increased the pressure of lordship on some of them so as to make them more like Marx's kind of feudal societies. This is not to postulate either a belated *mutation de l'an mil* of the kind that Guy Bois proposed or the quite different kind that Duby suggested and Poly and Bournazel took up, which seems equally implausible.[63] In any case, however, Marxist feudalism raises quite different problems from those about the kind of feudalism that concerns fiefs and vassals.

That kind of feudalism, the kind that is implied in most discussions of the feudalisation of Scottish society in the twelfth and thirteenth centuries, not only does not explain enough of what was going on then. It also relies too much on models drawn from the historiography of the last two centuries rather than the evidence found in the sources of the period. Maybe the suggestions made here about other processes, explanations, and interpretations of the medieval sources do not explain enough either, or are simply wrong. That is for the historians of Scotland to investigate and decide.

[63] G. Bois, *La Mutation de l'an mil* (Paris, 1989): various authors discussed his arguments in *Médiévales*, xxi (1991); J. P. Poly and E. Bournazel, *La Mutation féodale: x^{e} - xiie siècles* (Paris, 1980); D. Barthélemy, *La mutation de l'an mil a-t-elle eu lieu? Servage et chevalerie dans la France des xe et xie siècles* (Paris, 1997).

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