

Royal Mercy in Later Medieval Scotland

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Towards the end of October 1308, following a campaign that saw Robert Bruce secure his hold over the region of Moray, William earl of Ross found it wise to abandon the support he had to date given to Edward I of England in favour of the new king of Scots. The earl's treason against the latter was notorious and of long standing: he had refused to recognize Bruce's seizure of the throne in the summer of 1306, had carried fire and sword to the king's supporters and the women of his kindred, and had been in correspondence with the enemy English as recently as the previous spring.¹ The singular harshness and "terrible completeness"² that marked Bruce's "herschip" of the province of Buchan after the victory of royalist forces near Inverurie stands in marked contrast to the magnanimity that the king demonstrated towards Earl William himself in a public assembly held at Auldearn Castle. Here, before a large crowd of secular and ecclesiastical magnates the earl of Ross publicly confessed his offences; with joined hands and on bended knee he performed homage to Bruce and swore a solemn oath henceforth "faithfully to give [him] service, aid and counsel."

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1 Barrow, *Robert Bruce*, 207-08, 226, 228-30; see also *CDS*, iv, App. I, no. 14.

2 Barron, *The Scottish War of Independence*, 330.

Bruce's return gesture was an open offer of his "innate goodness, inspired mercy and special grace" and the remission of "all rancour of spirit" towards the traitor.³

The spectacle at Auldearn was not the only one in which Robert Bruce made a public show of his power to forgive. In the introduction to his edition of Bruce's charters, Archibald Duncan aptly remarked that Robert I "had much to pardon."⁴ The precarious nature of Bruce's hold on the throne may have required him to be unusually forgiving of his political enemies, but as king of Scots he also drew on a long tradition that endowed rulers in most of western Europe with the authority to make manifest the gift of mercy by granting clemency to offenders of all stripes. In the years immediately after 1306, Bruce's struggles to seize, and then to maintain, his hold over the Scottish Crown forced his hand in the treatment of more than one rebellious nobleman. It was only in November 1314, after the decisive Scottish victory on the field of Bannockburn, that he felt secure enough to have a meeting of parliament at Cambuskenneth issue a decree that

all who died outside the faith and peace of the said lord king in the war or otherwise, or who had not come to his peace and faith on the said day [. . .] should be disinherited perpetually of lands and tenements and all other title within the kingdom of Scotland. And they should be considered as the king and kingdom's enemies henceforth, perpetually deprived of any further claim of right whatsoever hereafter for themselves or their heirs.⁵

Even then, Bruce found it expedient to temper the severity of this legislation with the offer of a year's grace, and, over the course of the next few years, he proved himself ready to extend his mercy and favour to other former rebels, noble and common.⁶ Intriguingly, extant records suggest that by contrast, Scottish criminals quickly discovered the limits of Robert Bruce's leniency; exchequer accounts, for example, make reference to the lands and movable goods forfeited by condemned felons.⁷

One of the central tenets of medieval political and legal theory held that among the highest expressions of sovereignty was the power to pardon both political enemies and felons. Throughout the medieval and early modern periods, Scottish rulers, like

3 *RPS*, record 1308/1.

4 *RRS*, V, 102.

5 *RPS*, record 1314/1, printed in *RRS*, V, no. 41.

6 For example, Gilbert of Carrick, head of the Kennedy kindred. *RMS*, i, no. 510.

7 *ER*, I, 326.

their English and European counterparts, claimed and exercised the prerogative of mercy, but rather surprisingly, Scottish historians have been slow to examine the subject in detail, and to date there exists no comprehensive history of pardoning in the medieval kingdom. Scholars have been reluctant to undertake such a broad study in part because there survives no single body of source material directly related to the king's powers of mercy and pardon in the period before the sixteenth century: instead, information about these is scattered among a wide variety of materials, including chronicles, parliamentary records, exchequer and treasurers' accounts, records of the Privy Council and the Chancery, the texts of several hundred royal and private deeds and, not least, a large and varied collection of literary sources.

The reluctance of historians to come to grips with the practice of criminal pardon is also, however, a reflection of the distinct nature of the medieval Scottish legal tradition, which saw the king share responsibility for apprehending and punishing felons with his great barons. In a society like that of medieval and early modern Scotland, in which lordship functioned alongside kinship as an avenue for the expression of power and authority, the maintenance of order and stability was as much a privilege associated with magnate power as it was the business of the royal courts. Moreover, throughout the later medieval and early modern periods the exercise of the royal prerogative of mercy was much complicated by the legal customs associated with *kinbot*, later known as assythment, which required the payment of compensation to the families or friends of victims of violence. Competing notions of Gaelic, kin-based justice, on the one hand, and, on the other, of the justice inherent in the European understanding of the king's peace make the study of the law in medieval Scotland at once unique and challenging. This article is part of a large project that examines the subject of royal pardon in Scotland from the later eleventh century, that is, the accession to the throne of the so-called MacMalcolm dynasty, down to the sixteenth century. It explores how letters of remission — as letters of pardon were known in Scots parlance — operated within the legal system of the kingdom in the late Middle Ages.

The Crown exercised the prerogative of mercy in two distinct, but related, contexts; the first in favour of what might loosely be termed 'political' enemies, the second within the legal customs and procedures by which persons found guilty of felonious (criminal) offences were reprieved from the penalties of life, limb, and purse that were the normal consequences of such acts. One strand of the larger research project, then, explores, over the *longue durée*, the circumstances under which Scottish

kings forgave acts of rebellion by those who sought to challenge their authority, much as Robert Bruce found it expedient to do in the years after 1314. A second strand of the project examines the pardon of felonious offences such as homicide, theft, arson, and rape and the ways in which it functioned within the legal system of the kingdom. In Scotland, royal mercy was effected by means of letters of remission, issued (or not) in response to a felon's application to the king or his council for clemency and a concomitant request for readmission to the comfort of the royal peace. The focus of this essay is the early history of the king's peace in Scotland and of notions of royal clemency in the later Middle Ages.

Robert Bruce was certainly not unique in allowing political expediency to dictate his decision to treat some opponents harshly but to exercise the prerogative of mercy in respect of others. In a study of the MacMalcolm rulers of Scotland, Andrew McDonald identified a long list of rebels who challenged the dynasty's hold on the throne between the mid-eleventh and the later thirteenth centuries and enumerated the diverse fates that befell each of the malefactors.⁸ Predictably, several perished in battle, but many others suffered gruesome ends at the hands of the kings they had betrayed: slain in judicial combat,⁹ burned alive in a church,¹⁰ or beheaded.¹¹ Still others endured judicial mutilation of one kind or another,¹² the intent here being to ensure that such wretches spend the rest of their lives constantly reminded of their treachery; a final handful was condemned to long imprisonment — not in acts of royal clemency, but rather to enable the king to keep close watch over them and to pre-empt any possibility of further uprisings.¹³ Only rarely in this early period was the litany of terrifying punishments interrupted, but the circumstances under which the Crown occasionally forgave its enemies are instructive. An example here is the rebel Malcolm

8 McDonald, *Outlaws of Medieval Scotland*, 180.

9 Anderson, ed., *Chronicle of Holyrood*, 126 (s.a. 1154).

10 Anderson, ed., *Early Sources*, II, 311 (s.a. 1186), discussed also in Anderson, ed., *Chronicle of Holyrood*, 170-71 (s.a. 1186, 1187).

11 Anderson, ed., *Chronicle of Holyrood*, 170-71 (s.a. 1186, 1187); Skene, ed., *Chron. Fordun*, I, 278-79 (Annal 27, for 1212); Anderson and Anderson, eds., *Chronicle of Melrose*, 117 (s.a. 1215).

12 Skene, ed., *Chron. Fordun*, I, 276 (Annal 24). For a discussion of these mutilations, see McDonald, *Outlaws of Medieval Scotland*, 138-39, and Gillingham, "Killing and Mutilating Political Enemies," 123-24.

13 Stevenson, ed., *Chron. Lanercost*, 46; Anderson, ed., *Early Sources*, II, 497-98 (s.a. 1235), discussing Thomas of Galloway, who was captured in 1235 and sent to prison in Edinburgh, where he remained until 1296.

MacHeth.¹⁴ According to the *Chronicle of Holyrood*, MacHeth was formally “reconciled” with King Malcolm IV in 1157; before long, moreover, he had been granted the earldom of Ross, no doubt as the price of his release and almost certainly in return for an oath to support the MacMalcolm dynasty in the turbulent northern parts.¹⁵

In the middle years of the thirteenth century, the kings of Scotland had begun to look with new eyes on the normally severe treatment that they meted out to rebels. In 1215, it is true, the most recent representative of the MacWilliam kindred, whose members had long laid claim to the throne, was beheaded, as were, a generation later, the supporters of other troublemakers who in 1234-1235 rose in Galloway.¹⁶ However, the leader of these Galloway rebels, Thomas son of Alan, was not put to death, but rather sent off to lifelong imprisonment. In his examination of the treatment that the post-Conquest kings of England meted out to their political enemies, the historian John Gillingham suggested that following the introduction there of a new European aristocracy, “kings and aristocrats came to place a high value on the merciful treatment of those of their fellows who were at their mercy.”¹⁷ For Gillingham the deliberate abandonment of the inhumane treatment of prisoners (at least those of “high status”) was a defining aspect of the “Europeanization of England,” part and parcel of what he has termed the civilizing influence of European style chivalry on the realm. Gillingham’s suggestion that the “new rules of political conflict” had taken hold in Scotland, too, by the middle years of the thirteenth century, although tentative, is at first sight compelling:¹⁸ certainly, Alexander II, and after him his son, Alexander III, consciously modelled their own royal images on the Christian kingship of their Continental contemporaries and sought, if unsuccessfully, the privilege of unction that would endow them with similar status.¹⁹

The link that Gillingham posits between the growing influence of European ideas of chivalric conduct in Scotland and changing attitudes towards the treatment

14 See here Ross, “The Identity of the ‘Prisoner of Roxburgh,’” 269-80, which summarizes the alternative arguments of several other historians.

15 Anderson, ed., *Chron. Holyrood*, 128-31 (s.a. 1156, 1157). Earl Harald Maddadson was similarly reconciled with the king in 1201-1202. Skene, ed., *Chron. Fordun*, I, 276 (Annal 24).

16 Neville and McDonald, “Knights and Knighthood in Gaelic Scotland,” 57.

17 Gillingham, “1066 and the Introduction of Chivalry,” 32; the issue is more fully explored in Gillingham, “Killing and Mutilating Political Enemies.”

18 Gillingham, “Killing and Mutilating Political Enemies,” 114, 124.

19 *RRS*, IV, 32 and no. 181.

of political prisoners is generally sound. A recent article traces the spread of other aspects of European chivalry in the kingdom and concludes that by the thirteenth century even the Gaelic-speaking magnates of Scotland had begun to incorporate into the governance of their territories many of the concepts that scholars traditionally associate with knighthood and chivalry.²⁰ It is apparent, however, that something other than changes in cultural *mores* may have been at work here and that an equally important explanation for the changes apparent in the treatment of political enemies lies elsewhere. The different ways in which the fundamental notion of the king's peace developed in Scotland go some way towards explaining why, ultimately, the common law here evolved along different lines from the common law of England. More immediately, and perhaps also more importantly, the unique development of the concept lies at the heart of the distinction between the function of pardon in each of the realms. The following section of this article offers a brief review of the early history of the king's peace in England, before exploring the early development of that notion in Scotland.

To historians of early English law, the close relationship between the expansion of the notion of the king's peace and the growth of royal authority is axiomatic. The great legal historian of the nineteenth century, Frederic William Maitland, summed up developments in the years immediately before and after the Norman Conquest when he noted, in typically succinct fashion, that "Gradually this peace — which at one time was conceived as existing only at certain times, in certain places, and in favour of certain privileged persons [...] — was extended to cover all times, the whole realm, all men."²¹ To his contemporary, Sir Frederick Pollock, the triumph of a unifying concept of the king's peace was not merely an achievement of the high medieval rulers of England, but a crucial factor in distinguishing the "modern" from the "medieval" state.²²

Scholars have, of course, long debated the early history of the king's peace in England and, more vigorously still, the implications of the notion for understanding the extent to which the late Anglo-Saxon kings sought, and were able to make real, their authority over their subjects. Chief among the proponents of the so-called maximalist school of interpretation was the late Patrick Wormald, who entertained no doubts about the existence of the "Anglo-Saxon state" in the period between the reign of

20 Neville and McDonald, "Knights and Knighthood in Gaelic Scotland."

21 Maitland, *Equity*, 307.

22 Pollock, *Oxford Lectures*, 66.

Alfred the Great and the Norman Conquest, and one of whose guiding principles as a legal historian was the conviction that the English monarchy of the tenth and eleventh centuries exercised near-exclusive control over courts and over the administration of what would today be called criminal justice.²³ Wormald's work has found a great deal of support among other historians interested in early English law,²⁴ but his thesis has also been the subject of vigorous challenge by scholars who question the centrality and the extent of royal authority in the late Anglo-Saxon period. In the tradition of Milsom, they situate the "making" of English common law in a considerably later period and perceive the development of the law as a process of "incremental change [. . .] driven by argument and stratagem in and out of court."²⁵ Scottish historians have only just begun to engage in a similar kind of historiographical debate. Most agree that "In the twelfth century and for long thereafter, the Scottish judicial system was far more accommodating of lordly justice than post-Angevin England ever was; in Scotland [. . .], kings and magnates shared responsibility for maintaining law and order and for overseeing the business of dispute settlement."²⁶ There is good charter evidence to support the statement, and in a recent book I explored at some length the process by which native Gaelic aristocrats "adopted and adapted" Anglo-Norman concepts of public justice within their lands.²⁷ More generally, charter evidence has led Alexander Grant to posit a "royal" model of the early Scottish state, in which Gaelic officials, notably thanes, *tòsichean*, *breitheamhan*, and *mormaeren*, exercised judicial authority on behalf of the king.²⁸ Archaeologists have also weighed in, offering compelling arguments in favour of a late Pictish-era origin for a recognizable "administrative apparatus" in Scotland north of Forth, which, by the time when written records began to be kept regularly, had long functioned as "effective elements in a larger institutional structure of the state."²⁹ From this perspective, the vocabulary of sake, soke, toll, team, and infangentheof, although new in twelfth-century charters

23 Wormald, *The Making of English Law*, passim.

24 See, for example, O'Brien, *God's Peace and King's Peace*; Campbell, *The Anglo-Saxon State*, 1-30.

25 Hudson, "The Making of English Law," 425.

26 Neville, *Land, Law and People*, 13-14. See also Grant, "Franchises," 155-60, 176-91.

27 Neville, *Land, Law and People*, 5.

28 Grant, "The Construction of the Early Scottish State," 62-63. See also Grant, "Thanes and Thanages," but cf. his revision of his arguments in Grant, "Franchises," 176-80.

29 Driscoll, "The Archaeology of State Formation," 88, 93; see also Driscoll, "Power and Authority," esp. 221, and Foster, *Picts, Gaels and Scots*, 36, 108-109.

that granted baronial jurisdiction in Scotland, did not signify a fundamental alteration to what has been likened to an arrangement in which administrative and judicial responsibilities for the kingdom were “contracted out’ to a number of special lords.”³⁰ Perhaps not surprisingly, Patrick Wormald found this argument alluring, and, in a paper that he presented to the annual conference of the Scottish Medievalists, later published posthumously, he ventured the opinion that the genesis of a broad and all-encompassing notion of the king’s peace in Scotland may “have a very much earlier origin” than historians have hitherto believed and that Scottish royal jurisdiction shared with its Anglo-Saxon counterpart a “notably aggressive profile.”³¹

Wormald’s musings have not gone unnoticed or unchallenged. A competing, ‘minimalist’ view was put forward a few years ago by Alex Woolf, who criticized the tendency of historians and archaeologists to see in pre-twelfth-century Scotland “a more bureaucratic polity than is justified,” much less the origins of “a precocious Scottish ‘state.’”³² More recently still, in her analysis of the complicated manuscript history of the earliest body of Auld Scots law, Alice Taylor has found “little to support the notion of an administratively precocious Scottish state” in the eleventh century and less evidence still that the kings of the early period exercised “widespread public authority and jurisdiction.”³³ In the very late twelfth century, she argues, change was in the air and the legislative efforts of Kings William I and Alexander II made important strides in extending the king’s peace, but in the middle years of the thirteenth century, she holds, royal government was still limited in its reach and the notion of a king’s peace covering the length and breadth of Scotland had yet to be firmly established.³⁴

Although the ‘minimalist’ view represents the more recent contribution to the historiography of pre-feudal Scotland, it has by no means won over all scholars. The completion of an edition of the written acts of Alexander III and the launch of the People of Medieval Scotland database, containing some 8,600 pre-1314 charters from Scotland, make it possible now for scholars to explore changes to the legal system over this long period with a thoroughness that has hitherto proved elusive.³⁵

30 Grant, “Franchises,” 176.

31 Wormald, “Anglo-Saxon Law and Scots Law,” 197, 199.

32 Woolf, *From Pictland to Alba*, 347, 349. See here also Ross, “The Dabhach in Moray”; and Broun, “The Property Records in the *Book of Deer*,” 325.

33 Taylor, “*Leges Scocie*,” 244.

34 Taylor, “*Leges Scocie*,” 244–45.

35 RRS, IV. A useful introduction to the *People of Medieval Scotland* research project and access to its database may be found at <<http://www.poms.ac.uk>>.

In contrast to the period of his father's rule, the reign of Alexander III is singularly devoid of legislative records.³⁶ Quite why this should be the case has long puzzled historians: there is no lack of other written material emanating from the royal council or its administrative offices, much of it of relevance to Scottish legal custom and practice (notably, but not solely, references to fines levied in sheriff courts in fragmentary exchequer audits). There is specific mention, too, in inventories of the royal treasury compiled in 1282 and 1292, of the existence of records of judicial proceedings held in royal and baronial courts.³⁷ The treatise generally known as *The Scottish King's Household*, moreover makes ample reference to a formal hierarchy of courts which, extant sources confirm, was already of considerable age and fully functional by the time the treatise was composed in the early 1290s.³⁸ A good number of written source materials disappeared while in English custody in subsequent years, of course, but the consensus among scholars seems to be that few of these records attest the kind of legislative activity attributable to Alexander III's immediate predecessors.

If, as Taylor suggests, the success of the Scottish Crown's efforts effectively to expand the king's peace over the entire kingdom by means of formal legislation had proven only limited by the mid-thirteenth century, there is nonetheless good reason to argue that the kings of this period devised alternative strategies for achieving similar goals. The work of the jurist Lord Cooper and, more recently, that of Hector MacQueen on the role of the thirteenth-century ecclesiastical courts and the influence of canon law in dispute resolution in a wide variety of cases points the way to one such strategy.³⁹ Another strategy, surely of equal importance, was the bestowal of the king's personal protection on any and all who sought it. The combined research of Scottish legal historians in the last three decades has shown that a generation and more before the reign of Robert I Scottish *brieves* had come to encompass a "full and diverse range of documents" for expressing the king's will to subjects great, small, corporate and individual, and for ensuring the implementation of decisions made in curial or conciliar settings.⁴⁰ So numerous were the types of *brieves* emanating

36 See here MacQueen, "Scots Law under Alexander III," 75-76; Brown and Tanner, "Introduction," 7-8; Duncan, "The Early Parliaments," 36-37.

37 APS, I, 114-15, and the many references scattered through ER, I.

38 Bateson, "The Scottish King's Household."

39 Cooper, *Select Scottish Cases*; MacQueen, "Canon Law."

40 Harding, "The Medieval *Brieves* of Protection," 115-16. See also Duncan, ed., *Scottish Formularies*; Duncan, *Formulary E*; MacQueen, "Pleadable *Brieves*"; Broun, "The Adoption of *Brieves*."

from chancery that, well before the death of Alexander III in 1286, working lawyers had begun to compile formularies in which they sought to distinguish the legal from the administrative, the pleadable from the non-pleadable, the retourable from the non-retourable, brieves *de cursu* from brieves *de gratia*, and brieves *tout court* from more general “judicial letters.”⁴¹ One of the keys to understanding the growth of the concept of the king’s peace in Scotland lies in finding a closer link than historians have hitherto considered between the wording of brieves of protection and other expressions of the royal peace.

The ‘maximalist’ proponents of late Anglo-Saxon legal history interpret the extant law codes of the period as reserving to the king alone the punishment of the most egregious of offences: treason, homicide, arson, and robbery among them. It follows that the remission or mitigation of the sentence of death that was the traditional consequence of such activity belonged to the Crown alone. For these scholars, the Conquest of 1066 signalled no momentous break in the power and authority of the monarch: simply, if crudely put, William I and his Anglo-Norman successors adopted an all-encompassing notion of a royal peace that already stretched the length and breadth of the English kingdom and assumed a concomitant authority to punish all breaches of that peace. Developments in the twelfth century were particularly important, so that, already by 1180, some have argued, the right of a family to seek compensation for a dead man’s worth had become “largely illusory.”⁴² More certainly, half a century later, the legislation of Henry II made it clear that the Crown now possessed the near exclusive right to put to trial, to punish — and, by implication, to pardon — killers and other felons. The restriction of such power marked a bold claim for royal authority, and Henry II’s appropriation of powers of prosecution, punishment, and pardon from the purview of his great barons and in a steadily widening variety of legal contexts was a potent reminder of his ambitious conceptualization of royal authority.⁴³ In the century after Henry II’s reign, the English Crown arrogated to itself much of the responsibility for offering compensation to the injured kindred for losses suffered as a consequence of murder and other felonious activity. In doing so, it replaced the violence of private vengeance and the lawlessness of the feud, which had so deeply troubled late Anglo-Saxon society, by providing an alternative model of

41 RRS, V, 104.

42 Hurnard, *The King’s Pardon*, 213.

43 Brand, “Henry II and the Creation of the English Common Law,” 221-23, 235-40.

compensation, now increasingly expressed in the payment of fines to the central fisc. These fundamental changes proved to be a keystone in the medieval development of a form of law unique to England, and (again simply put) the changes that the second of great law-making English kings, Edward I, effected to English common law were almost all procedural rather than substantive.

The contrast with the Scotland of the period between 1050 and 1300 could not be much more marked. The Scottish judicial system saw kings and magnates continue to “[share] responsibility for maintaining law and order and for overseeing the business of dispute settlement.”⁴⁴ In Scotland, until the reign of Robert Bruce and the disruptions caused by the wars of independence with England in the early fourteenth century, the Gaelic officials noted above remained integral to the operation of the law in the heartland of old Scotia, the vast region north of the River Forth.⁴⁵ The implication of these findings is that, by and large, many scholars have come to understand that the “Europeanization” of twelfth- and thirteenth-century Scotland was a process in which newly established aristocrats from England and the Continent and, a short time later, sheriffs and justiciars joined the ranks of the old-established Gaelic officialdom in administering a justice that only gradually became royal and public. The consolidation on the throne of the MacMalcolm kings of Scotland, who modelled a host of new offices on English exemplars and adopted the vocabulary of Anglo-Norman royal authority, did not, in fact, signify a fundamental alteration to the operation of what was essentially a “public-private partnership,” in which judicial responsibilities for the kingdom were shared by the Crown and the Gaelic magnates of old.⁴⁶

There are, among the extant acts of the thirteenth-century rulers, clear indications that the kings of this period were intrigued by the English understanding of the royal peace and were intent on building on the work of their immediate predecessors in expanding its scope within Scotland. To offer but one example here, both Alexander II and Alexander III occasionally presided in person in judgement over their subjects’ disputes, and the implication in some circumstances at least is that decisions announced in such settings were intended to have the force of law throughout

44 Neville, *Land, Law and People*, 14.

45 Barrow, *The Kingdom of the Scots*, 7-56; Barrow, *Kingship and Unity*, 39; Duncan, *Scotland*, 111, 169-70; Grant, “The Construction of the Early Scottish State,” 62-63; Grant, “Franchises,” 176-79.

46 Grant, “Franchises,” 176.

the realm.⁴⁷ There are other reasons, too, for treating this same century as a crucial period in the development of the fundamental notion of the king's peace.

One avenue for the Scottish Crown to give expression to its ambitions was through the bestowal of the king's personal peace and protection on any and all who sought it. Among the more than 450 written acts that survive in complete or near complete texts from the period of the two Alexanders are several that record grants of the king's specific "peace and protection" to land holders great and small, secular and ecclesiastical, rural and urban. Some of these were simple grants of peace to their subjects and their property, designed, as they had been in tenth- and eleventh-century England, to refresh or renew earlier gifts of the royal peace: such, for example, were the firm peace and protection that Alexander III granted to the prior and monks of Lesmahagow in August 1264 and other gifts of the royal peace and protection in favour of the abbeys of Dunfermline, Lindores, and Balmerino and the men of the bishop of Glasgow.⁴⁸

This last grant raises intriguing questions about the nature of the king's protection. The Glasgow deed noted above applied only to the specific circumstances it described, and it was by means of another act that the young King Alexander III took "under his firm peace and protection William bishop of Glasgow, his men and his lands," strictly prohibited anyone from causing them injury or harm, and threatened with "full forfeiture" any one of his subjects who dared to do so.⁴⁹ More interesting still is a deed of May 1263, by which the king took the nuns of Coldstream, "their lands, their men and all their possessions, movable and immovable, ecclesiastical as well as worldly" under his "firm" peace and protection.⁵⁰ This appears to have constituted the first direct offer of the king's peace to the nunnery: before then, its inhabitants had been protected by the peace of the earls of Dunbar, whose family members were the founders and chief benefactors of the house.⁵¹ There are more of these sorts of grants. By an act of February 1257, Alexander extended to one of his favoured Northumberland subjects as well as his lands in Scotland and his Scottish men the benefits of royal protection within the realm of Scotland (breach of which

47 See, for example, *RRS*, IV, no. 187.

48 *RRS*, IV, nos. 77, 158, 174, 175, 272.

49 *RRS*, IV, no. 8.

50 *RRS*, IV, no. 45.

51 Hamilton, *Mighty Subjects*, 49-50, 69-75, 228-34.

entailed full forfeiture), together with freedom from poinds.⁵² Similarly ‘new’ grants of peace were made in 1277 to the burgesses of Aberdeen⁵³ and, in 1280, to the Scottish lands, men, and possessions of the abbot and convent of Holm Cultram.⁵⁴

The “hand given peace”⁵⁵ of the thirteenth-century Scottish kings, like that of the Anglo-Norman rulers of England, was normally expressed in the form of a written deed that identified the beneficiaries, who might be individuals or corporations such as monastic houses or burghs. But Alexander III also found novel ways of extending his peace and protection to his subjects. In July 1266, at Perth, he set his seal to a treaty with King Magnus Hákonarson of Norway by which the latter ceded to the king of Scots title to the kingdom of Man and all the western isles. It is, predictably, a long and complex document, but among its provisions are several that, unambiguously but comprehensively, offer the peace of the king of Scots in place of that of the king of Norway to all the inhabitants of the highlands and islands who chose to remain under the new regime and all the benefits of the laws and customs of the realm of Scotland.⁵⁶

Thus, at the stroke of a pen, as it were (or, more accurately, by the imprint of the matrix of the Great Seal), Alexander’s hand of peace stretched into the Irish Sea and northwards along the Atlantic Ocean reaches of his realm. Moreover, the peace and protection that he offered and, by implication the jurisdiction that the Scottish Crown was henceforth to exercise over the region, were both more clearly defined and more extensive in the treaty of Perth of 1266 than had been the case back in 1237, when Alexander II acquired by treaty with Henry III control over lands in northern England.⁵⁷ The king, moreover, gave added weight to the new royal peace in Man by raising his son, Prince Alexander, to the position of lord of Man.⁵⁸

Collectively, these acts raise several interesting points. First, they suggest that the thirteenth-century rulers of Scotland, no less than their twelfth-century predecessors, were keen to extend the royal peace in place of the peace of their great

52 RRS, IV, no. 23.

53 RRS, IV, no. 101.

54 RRS, IV, no. 129.

55 The expression is found in Harding, “The Medieval Brieves of Protection,” 137; for earlier references, see Goebel, *Felony and Misdemeanor*, 427-33.

56 RRS, IV, no. 61.

57 Stones, ed., *Anglo-Scottish Relations*, 44.

58 Neville, “Preparing for Kingship.”

lords — or other rulers — when the opportunity arose for them to do so. The grant in favour of the nuns of Coldstream resembles in this respect the replacement of the ‘private’ peace of a magnate family with that of Alexander II which occurred in 1247, when the king brought the abbey of Inchaffray under his firm protection, offering the Austin canons there “the peace of God, the king” and, as an afterthought, that of “the earl.”⁵⁹ Extant charter materials show clearly that before this the canons had depended almost exclusively on the Gaelic earls of Strathearn to look out for them, but after the king’s grant of peace, it was to the justice of the royal courts that they entrusted their litigation.⁶⁰ In similar fashion, the king’s grant of 1263 brought the interests of, and the settlement of disputes involving, the priory of Coldstream firmly within the orbit of the Crown.

In the second place, the acts suggest that in Alexander III’s reign it was now clearly understood that the king’s peace extended over the full extent of the realm, however mutable its boundaries might be at any given time and irrespective of the fact that the recipients of that peace might be subjects of the English Crown. The prior of Rushen Abbey on the Isle of Man grasped the implications of these conditions when, sometime after 1266, he successfully invoked Alexander’s peace in defence of the possessions of his house.⁶¹ The abbot of Holm Cultram, Cumberland, too, understood the concept when, in 1291, he requested of the current sovereign of the kingdom, Edward I (or so he called himself!), confirmation of his monks’ Scottish possessions.⁶² Alexander himself conceived of his peace as a gift that might be given or withheld and, in 1275, confronted with unrest on the part of some disaffected Manxmen, he sought to pre-empt rebellion by offering afresh to the people of the island “the peace of God and of the king of Scotland, provided they desist from their most foolish presumption and submit in future to the king and his chief men.”⁶³ A Banffshire thane forfeited by the king for some undisclosed felony was still seeking recovery of his lands long after Alexander’s death in 1286.⁶⁴ Alexander III’s grant of peace to the men of the bishop of Glasgow, noted above, is dated 30 April 1251, less

59 Lindsay et al., eds., *Charters, Bulls . . . Inchaffray Abbey*, no. 53; Innes, ed., *Liber insule missarum*, no. 17.

60 See, for example, Lindsay et al., eds., *Charters, Bulls . . . Inchaffray Abbey*, no. 1106 (c.1279).

61 RRS, IV, no. 244.

62 Grainger and Collingwood, eds., *The Register and Records of Holm Cultram*, 60-61.

63 Stevenson, ed., *Chron. Lanercost*, 98.

64 Innes, ed., *Registrum episcopatus Moraviensis*, no. 244.

than two years after his accession to the throne and when he was only nine years old: too young to be considered an adult either at ecclesiastical or secular law and too young, surely, to back with real physical force his threat of forfeiture to any who dared to break his peace. The grant of 1251 nonetheless bears witness to the significance that the noblemen who counselled the young king accorded to the idea of an exclusively 'royal' peace in the realm.

Alexander III's written acts are also worthy of note for what they reveal about the early efforts of the Scottish Crown to develop notions of pardon and royal mercy. As noted at the outset, in medieval Scotland the exercise of the royal prerogative of pardon was much complicated by legal customs that remained central features of the law well into the early modern period, chief among which was assythment. The obligation to compensate the families and friends of persons injured or killed in incidents of violence remained a vital feature of the law of felony in Scotland for a very long time. The longevity of assythment had important implications for the substance of a royal pardon at Scots law and, indeed, until the middle of the twentieth century, learned opinion remained divided over precisely what royal letters of remission did and did not remit.⁶⁵ Certainly, long after procedural developments in England had transformed the process by which the family of a slain person might seek compensation,⁶⁶ in Scotland royal remission from criminal prosecution was always conditional on the payment of compensation. It is, in this respect, pertinent to observe that while much of the law of real property in thirteenth-century Scotland was heavily influenced by developments in England, the reception of English procedure and process appears to have been more attenuated in the sphere of criminal law. Here, the enduring vigour of the peace-keeping functions of the kindred influenced the ruler's ability to flex his jurisdictional muscle at will.

There are indications that the advisors of the young Alexander III — and perhaps the king himself — consciously sought to emulate the royal prerogative of

65 Gane, "The Effect of a Pardon."

66 Hurnard, *The King's Pardon*, 213. Hurnard's study of royal pardon for homicide before 1307 and Paul Hyams's very different take on the post-Conquest period discuss the survival, well into the thirteenth century, of the right of a victim's relatives to wreak vengeance on a murderous offender. The former has noted the existence, before 1130, of a form of pardon that was restricted to the king's suit, "leaving the grantee liable to prosecution by the victim's relatives or feudal associates"; Hurnard, *The King's Pardon*, 18 and, more generally, 171-213; Hyams, *Rancor and Reconciliation*, 136, 165. See also van Caenegem, "Public Prosecution of Crime."

mercy that his father-in-law Henry III enjoyed. Thus, over the course of the week-long festivities at Christmas 1251 that celebrated the knighting of the ten-year old king and his marriage to the English princess Margaret, a host of outlaws secured formal pardon of their transgressions when Alexander himself pleaded their cause before his new father-in-law.⁶⁷ The public ceremonies that accompanied the Scottish couple's visit late in 1260 prompted a similar display of royal mercy at the behest of King Alexander.⁶⁸ As a great English lord in his own right, moreover, Alexander regularly discharged the obligation of interceding with the English Crown on behalf of his tenants or, indeed, anyone else fortunate enough to catch his ear. Thus, several miscreants accused of breaching forest law in Inglewood (Cumberland) found in him a willing advocate.⁶⁹ So did a man who sought and obtained respite from having to perform military service when he set off on pilgrimage to Santiago de Compostella,⁷⁰ and so, too, did a couple of fortunate creditors to the English exchequer.⁷¹ The thirteenth-century kings of Scotland fully understood the implications of clemency in the English context and, insofar as they could within the constraints of contemporary Scots law, they found ways in which to deploy it. Thus, the rebel Ewen of Argyll bought his way into the king's peace in 1255 and was made to find sureties thereafter for the ongoing payment of an annual tribute intended to remind him constantly of the oath of fealty that he had taken.⁷² On another occasion, the trial of a suspected killer was suspended, apparently so that an inquest might determine whether the homicide had been committed in self-defence or by misadventure.⁷³ This case is especially intriguing in that it recalls the procedure known in contemporary England, the purpose of which was to ascertain the eligibility of the accused for a royal pardon.⁷⁴ The written acts of the thirteenth-century rulers reveal, more generally, that the Crown was fully cognizant of the link, fiscal as well as jurisdictional,

67 *CPR, 1247-58*, 121, 122; for other examples, see *CPR, 1247-58*, 121, 122, 256, 426, 495-96; *CPR, 1258-66*, 142; *CPR, 1272-81*, 392.

68 *CPR, 1258-66*, 128.

69 *Close Rolls, 1251-53*, 83; *Close Rolls, 1259-61*, 368; TNA, PRO: JUST 1/618 m 23d.

70 *Close Rolls, 1259-61*, 216; see also *Close Rolls, 1259-61*, 238.

71 TNA, PRO: C 60/532, m 3; PRO: C 60/53, m 11; PRO: C 60/58, m 17.

72 APS, I, 115, discussed in Duncan and Brown, "Argyll and the Isles," 212, and McDonald, *The Kingdom of the Isles*, 108-109, 116-18.

73 APS, I, 97-98.

74 Cooper, *Select Scottish Cases*, 58-59. This was abolished, in England, by the Statute of Gloucester, chap. 9 (1278); *Statutes of the Realm*, I, 45-50.

between breach of the king's peace, whatever form and variety this might assume, and the penalty of "full forfeiture."⁷⁵ Under Robert I in the early fourteenth century, breach of the royal peace became the subject of specific legislation, but Alexander III's brieves show that by then the concept was already well developed in Scotland.⁷⁶

The corpus of Auld Laws reveals that, among their other goals, the legislative efforts of the kings of Scotland sought to employ new concepts of the king's peace to counter the challenges to their authority represented by the feud.⁷⁷ It may well be the case that by the mid-thirteenth century these rulers had proved only "moderately successful" in this endeavour. But this was not, as legal historians once believed, a reflection of the Scottish Crown's "failure [. . .] to establish a system of criminal prosecution adequate to meet the lawless state of the country."⁷⁸ The acts of Alexander II and III show that in its thirteenth-century manifestations the combined power of royal protections and the threat of forfeiture of all who challenged them brought the king's peace for the first time into significant portions of the realm and, not least, into the heart of the burgeoning towns.⁷⁹ Moreover, the extension of the king's peace made serious inroads into the exercise of justice by noblemen who held their lands by grants of barony. Thus, not long after he had achieved the age of majority, Alexander III exercised his new authority by exempting four convicted offenders from the obligation to pay a hefty fine after failing to produce an indictment in an Aberdeenshire court.⁸⁰ Even in traditionally independent Galloway, royal authority was well established by the mid-thirteenth century and, despite the survival there of legal customs peculiar to the region, royal justice was no less keenly felt.⁸¹ In the later medieval period, in fact, it was only in the context of kindred-based justice that the Scottish Crown might be said to have experienced a real and meaningful check on the exercise of jurisdiction over violent offences and, by extension, on its ability to exercise exclusive control over the remission of guilty persons. Perhaps

75 For full forfeiture, see *RRS*, IV, nos. 3, 49, 60, 163; for full forfeiture of £10, see *RRS*, IV, nos. 9, 14, 41, 53, 54, 81, 156.

76 *RPS*, record 1314/1; Harding, "The Medieval Brieves of Protection," 130-31, 137; *RRS*, V, 405-406, 412; Duncan, ed., *Formulary E*, 21; Barrow, *Robert Bruce*, 387-88.

77 Taylor, "*Leges Scocie*," 232-34.

78 Smith, "Criminal Law," 299-300.

79 Threats of forfeiture were included in many of the protections issued in favour of towns.

80 *RRS*, IV, no. 239.

81 MacQueen, "The Laws of Galloway"; Duncan, *Scotland*, 531-32.

the best-known example of the enduring claims of such ‘private’ justice were the customs that recognized the authority of heads of kindred and the so-called Law of Clan MacDuff, which reserved to the earls of Fife authority to repledge all cases of homicide to their own courts and to permit offenders to make a fixed payment in compensation for such crimes.⁸² Yet, to view the customary privileges exercised by the heads of kindred as existing in competition with the aims of the Scottish Crown is to do rough justice to the unique nature of Scots law in the period before the reforms of Robert I. Alexander III in particular had plenty of opportunity to study at first hand the judicial authority that his father-in-law, Henry III, and, after him, his brother-in-law, Edward I, exercised within the kingdom of England, and plenty of precedence within Scotland proper to support his ambitions to extend the king’s peace over ever-broadening stretches of the realm. Under the two Alexanders (1214 to 1286), the Scottish Crown did, in effect, make important strides towards implementing the contemporary European maxim that the matter of clemency was the exclusive business of the king and his advisors.

The growth of Scottish royal jurisdiction in the twelfth and thirteenth centuries occurred in some contrast to the English experience. It was at once incremental and opportunistic, yet extant sources reveal that it was also more than merely aspirational. The interpretation offered here argues that in the later thirteenth century the Crown successfully claimed and exercised an increasingly significant share of the patchwork of ‘private’ and ‘public’ kinds of peace that remained essential aspects of the legal landscape of Scotland. Moreover, the substantive development of the law of pardon from the reign of Malcolm IV right down to the modern period runs parallel to the proliferation of remedies for breaches of specific, and general, grants of royal peace and protection. In the midst of the bitter struggle for national survival that began in the fourteenth century, Robert Bruce would declare all wrongdoing an offence against the Crown, very much on the English model; in doing so, he likewise cast notions of royal authority and royal clemency into a whole new framework. But long before then, the concept of the king’s peace was already well developed in Scotland.

The elaboration of the concept of the king’s peace had important implications for the development in Scotland of a common law of pardon distinct from that of England. The differences between the two, however, were notable. In England in

82 MacQueen, “The Kin of Kennedy,” 274-75; MacQueen, “Laws of Galloway,” 131-36; Wormald, “Bloodfeud,” 64-65; Bannerman, “The Scots Language,” 5-6; Sellar, “Celtic Law and Scots Law,” 16.

the century after 1066 the king's powers of clemency developed rapidly; similarly, the same period witnessed the growth of the authority of royal judicial officers and their ability to act on behalf of the Crown. By the mid-thirteenth century, in fact, the process of seeking and securing letters of pardon had already become so routine in England that the personal involvement of the king in grants of clemency had all but disappeared: the common law already recognized a series of circumstances under which royal agents might issue a pardon either as a matter of course (that is, *de cursu*) or as a special act of grace. Depending on the circumstances, suspects presented their letters of pardon at the arraignment stage and thus avoided altogether the onus of answering formal charges before royal justices. Alternatively, and more frequently, English felons might petition the Crown for such letters after a jury had returned a verdict of guilt against them: in such cases the king's pardon offered full remission of conviction.⁸³

In Scotland, the legal process that led to the "remission of rancour of spirit" on the part of the king, and the issue of a pardon, was rather different. Here, too, pardon could be granted either before or after conviction, but in Scotland letters of remission were widely available before a suspect even proceeded to trial.⁸⁴ Some offenders — usually wealthy ones — pre-empted the legal process altogether by making application to the king or his council for such a letter, paying a sum of money, and then waiting for the king to send a warrant to the chancellor directing that a remission be granted under the great or privy seal. Other offenders had (or chose) to await the arrival in the region of the itinerant justice ayre or, if they were in Edinburgh, a

83 Lacey, *The Royal Pardon*, 19; Bellamy, *The Criminal Trial in Later Medieval England*, 139-40. This procedure remained essentially unchanged well into the early modern period; see here Kesselring, *Mercy and Authority*, 93-111.

84 The following two paragraphs owe a great deal to the meticulous discussion of judicial procedure at the ayre and the High Court of Justiciary in Edinburgh by Athol Murray. Dr. Murray's studies revise, clarify, and bring up to date the research presented in several essays collected in the 1958 Stair Society volume *An Introduction to Scottish Legal History* and the even older "Introduction" to vol. I of the *TA*; see Murray, "Notes on the Treasury Administration," *TA*, XIII, xix-xxviii, and Murray, "Introduction," *TA*, XII, xii. See also Grant, *Independence and Nationhood*, 156-59. Dr. Jackson W. Armstrong recently published a detailed examination of the operation of the justice ayre in the late fifteenth century. Several of his findings are similar to my own, though we wish to note that we arrived at our respective conclusions independently of each other; see Armstrong, "The Justice Ayre," 3-34. The procedures used in the late medieval ayres — and no doubt earlier — are described at length in the treatise known as *Modus tenenedi itinere justiciarie*, printed in *APS*, I, 705-708; see esp. 707-708.

sitting of the High Court of Justiciary. The ayre sessions always opened with a public proclamation inviting all the persons who had been summoned to appear (that is, all who had been formally charged by dittay, or indictment) to “given in their desyres for their compositouris,” that is, to seek’ royal mercy. In this way, offenders of all sorts — murderers, thieves, rapists, reseters, and others — could essentially admit their guilt with impunity, by agreeing to “compone for” (that is, purchase) letters of remission. Court clerks stood by to write down the offences which these persons had been summoned to the ayre to answer; once these documents had been drawn up, the “lords compositours” who accompanied every session of the itinerant ayre (one of whom was the treasurer himself) determined the amount of money that each suspect would have to pay for his or her remission. The law required that all accused persons find surety both to pay the sum that the compositours had assessed for breaking the king’s peace (and so drawing upon them his “rancour of spirit”) and to make satisfaction to the injured party. The former they performed on the spot in the presence of the lords compositours and other officers of the court; assythment they arranged by means of what were known as letters of slains. Statutory legislation held that the payment of compensation to Crown and kindred be completed within forty days,⁸⁵ but the process of composing brought a complete halt to all further criminal proceedings and there was no trial. The process was a little different in the High Court of Justiciary in Edinburgh, but here, too, trial might be halted if a suspect chose to petition for the gift of royal mercy by “coming into the will” of the king. Here again, such persons paid for the privilege. They had to offer security that assythment would be made to the injured parties, and they had to pay a penalty for raising the rancour of their king. Once the parchment work was completed, the Crown stayed all criminal proceedings against the offenders, and there was no need for their cases to proceed to trial. Both composing and coming into the king’s will, then, were as promising an avenue for avoiding the courtroom as were letters of remission under the king’s seal. Royal mercy remained available even to persons who, for reasons of poverty or out of hubris, chose to undergo trial by assize (jury) on charges of serious crime and faced sentence after a guilty verdict. The law permitted such wretches to throw themselves on the mercy of the presiding justice and to make a “fine in judgement,” that is, to pay a sum of money in place of the usual punishment for their offences. Thus, convicted felons who might otherwise have

85 *RPS*, record 1458/3/20, discussed in Gane, “The Effect of a Pardon,” 20-21.

suffered execution frequently managed to save their necks by paying a fine, at a level once again set by the lords compositours. During the course of a trial, moreover, suspects had the opportunity to request (and pay for) a formal respite of the charges against them, usually in order to set in motion the process of purchasing letters of remission and arranging assythment.

Procedural practices alone must have set the solemnity, spectacle, and theatre of criminal trials in the medieval English assize courts quite astonishingly apart from the business enacted in the Scottish ayres and the High Court of Justiciary of the same period. In England, once the Crown had initiated prosecution, proceedings could be halted only under unusual circumstances. By the sixteenth century, moreover, efforts by the parties involved in a criminal suit to pre-empt the Crown's judgement by settling out of court was itself tantamount to felony;⁸⁶ in Scotland, by contrast, the judicial process actively encouraged it.⁸⁷ The drama of the common law trial for felony in English courts lay in the central role of the local jury, whose members were ultimate arbiters of the guilt or innocence of the accused parties. Verdicts remained undetermined and often unpredictable until the court itself convened, and the records that describe the business conducted in medieval English criminal trials speak clearly to the nervous tension that attended the reading aloud of indictments, the defendants' utterances of their pleas to the formal charges, the jurors' examination of witnesses and deliberation of evidence, and, finally, the justices' proclamation of verdicts of guilt or innocence. Moreover, the verdicts, in turn, were crucial in determining whether, in the end, the royal prerogative would spare the life of convicted persons or send them to the gallows.

That is not the way things happened in Scotland. Here, much of the royal justice meted out in the criminal process had been completed even before assizes were summoned and asked to consider a suspect's dittay. In fact, felons who had letters of remission in hand did not even need to attend court sessions, because the law permitted them to send pledges who would attest the legitimacy of their pardons. In the day or two before the ayre began hearings, the lodgings in which the lords compositours had set up shop were busy sites, with treasury and court clerks taking notes (for later

86 The offence was known as compounding a felony; see Blackstone, *Commentaries*, Book IV, chap.10, para. 10.

87 Grant, *Independence and Nationhood*, 157-59; Brown, *Bloodfeud in Scotland*, 43-58; Goodare, *The Government of Scotland*, 163.

enrolment) of sums owed and paid and of pledges presented, and arrangements for compositions and assythments carefully recorded. Flurries of letters of remission under the great seal issued in the weeks following the holding of a justice ayre suggest that a very considerable number of people availed themselves of the opportunity to pre-empt the normal operation of the criminal law system by partaking of the king's mercy.⁸⁸ In some contrast to England, then, the main business of the justice ayres and the High Court of Justiciary was not so much the provision of a public forum in which to hear the verdicts of local assizes, but rather (and perhaps more importantly) the enacting of a public drama, designed to remind the assembled crowd that the gift of mercy belonged to the Crown alone, but that all might avail themselves of royal clemency if they so wished. Consequently, the judicial sessions of late medieval Scotland were much briefer than their counterparts in England: the ayre held in Jedburgh in 1493, for example, dealt with a total of 193 cases in a mere six days.⁸⁹

Some examples will help to illustrate the criminal trial process set out above. At the justice ayre convened at Jedburgh in November 1493, William Tayt of Cesford and his cousin Robert Burn "came into the king's will for art and part of the forethought felony done to Thomas Young by way of murder at the ford of Cale," as well as for the reif (theft) of a horse, a saddle, a bow, a satchel, and a purse with 20s belonging to the said Young. Sir Robert Kerr, knight, became his surety to answer to the king and to Young's kindred.⁹⁰ It was only several months later and only after one of the culprits had paid the sum of £7 to the Lord High Treasurer and made restitution to the family that the whole matter was regarded as settled.⁹¹ At another session, also in Jedburgh, this one in 1495, Gilbert Chirdene came to court on a dittay that charged him with housebreaking, reiving, wounding, and treasonably riding with the king's English enemies. He presented to the presiding justice a remission that he had purchased from the Crown forgiving him all these offences (and at least one other incident of reiving), and after producing a pledge for his good behaviour, he walked away.⁹² The remissions of royal rancour sold to small fry such as Tay and Chirdene were relatively inexpensive, but others might cost considerably more: in 1494, David Melville secured letters of remission for the steep but still affordable sum of £50, but

88 MacQueen, *Common Law*, 61.

89 Smith, "Criminal Procedure," 437.

90 NRS, JC 1/1, m 10d.

91 TA, I, 214.

92 NRS, JC 1/1, fol. 27v.

Hugh Ross of Kilravock and his accomplices had to pay a much stiffer £223 6s 8d for their part in a homicide.⁹³ The extant records of the late medieval ayre and the High Court of Justiciary leave no doubt that royal clemency was widely available to Scottish felons, though always and only for a price.⁹⁴

The figure set for Hugh Ross's remission serves as a useful reminder of the extent to which the power to remit held promising fiscal as well as political potential. By the opening decade of the fifteenth century, contemporary criticism of the royal grants of mercy and clemency as expressed in the Scottish Estates had become widespread and vocal. From 1424, when James I assumed personal rule, down to the end of the reign of James V — and, indeed, well beyond — there were bitter denunciations in parliament concerning abuses of royal justice and, from about 1450 on, specifically of the Crown's practice of selling letters of remission to the most violent of Scottish offenders. Critics repeatedly enjoined the king to "close his hands," that is, to refrain from granting pardons, in 1473 merely "for a certane tyme,"⁹⁵ but later for specified periods ranging from three years in 1478 and 1484⁹⁶ to seven years in 1487.⁹⁷ Extant exchequer and treasurers' accounts and the registers of the privy and great seals confirm just how extensively acts of royal clemency contributed to the Crown's income. Such figures help to explain why the fifteenth-century kings repeatedly treated any kind of statutory limitation on their prerogative as a "dead letter,"⁹⁸ and why they were so willing to go on risking the ire of their Estates.

Precisely why the reign of James I should have marked such a significant turning point in royal behaviour is probably explicable in part by the notorious inflationary conditions that characterized most of the fifteenth century in Scotland, conditions that were exacerbated by frequent devaluations of the Scottish pound. But they also bear witness to James's powers of observation. The eighteen years that he spent as a prisoner of war in England between 1406 and 1424 coincided with a period that witnessed the unprecedented manipulation of the royal power to pardon by Henry V, a ruler who, in more masterful fashion than any before him, succeeded in exploiting to

93 TA, I, 210.

94 See now Armstrong, "The Justice Ayre," esp. 27, 29-34; see also Murray, "Notes on the Treasury Administration," xxvi.

95 APS, II, 50, 104.

96 APS, I, 118, 165.

97 APS, II, 176.

98 Macdougall, *James III*, 201; Tanner, *The Late Medieval Scottish Parliament*, 247, 255-56.

the maximum the fiscal resources of his kingdom.⁹⁹ Scottish historians have drawn some parallels between the policies of Henry V and the reforms to the royal administration and Scottish common law that kept James I preoccupied for the decade or so after 1424,¹⁰⁰ but the fiscal dimension attendant on the exercise of royal clemency merits closer scrutiny.

The growing outcry in the Scottish Estates against the sale of letters of remission in favour of felons finds strong echoes also in the literature of the late medieval and early modern periods. Chronicles, poems, and political pamphlets all reveal that while contemporaries still celebrated the notion of clemency as the highest and most praiseworthy ideal of Christian rule, the actual exercise of the royal prerogative of mercy was not necessarily a *sine qua non* of good governance. Intriguingly, chronicle materials from the late medieval period also suggest that the rulers of Scotland used the spectacle of punishment for rebellion and serious crime to send very different messages to their subjects than did their fellow monarchs in contemporary England.

In later medieval and early modern England, the Crown used the prerogative of mercy as a means of coercion in the case of political offences and criminal wrongdoing, when contemporary political theory held that the victim of an offence was the king himself. Ultimately, it fell to the Crown alone to decide who should or should not receive grace. English rulers used pardon in different ways and for different offences, but pardon in England was always a demonstration of the king's authority and sovereignty as expressed through the prerogative to forgive or, conversely, by the power to punish. In the final analysis, in granting pardon either to a political enemy or a criminal, the king bound the malefactor to himself in a relationship of patronage; the subject became a client of the king, to whom he owed his very life. The exercise of royal mercy, then, may be framed as something of a contract, the consequence of which was a written proffer of mercy that promised forgiveness for breach of the king's peace and readmission to the comfort and protection of that same peace.¹⁰¹ In late medieval and early modern Scotland, things were a little different. The texts of countless royal letters of remission — and they survive in their hundreds — reveal that once offenders had compounded with the Crown and made arrangements for the payment of assythment, the king formally “remitted all rancour of spirit” and

⁹⁹ Powell, *Kingship, Law, and Society*, 232-40.

¹⁰⁰ Brown, *James I*, chaps. 1, 9.

¹⁰¹ Lacey, *The Royal Pardon*, 20.

graciously readmitted the offenders to his peace: the act wiped the slate clean, as it were, and defined relations between the king and his subject afresh. In Scotland, that 'reset' button could be pushed any number of times. The Crown's general readiness to grant clemency meant that, in some contrast to England, judicial execution in Scotland was a less frequent consequence of felony at Scots common law; generally speaking, the only persons who went to the hangman's gallows or fell under the headman's axe were those who could find no one to stand surety for them.

It would indeed seem that the Scottish understanding of the notion of the king's peace — and, by extension, the quality of Scottish mercy itself — had something about it that was distinct and different. In England, the legal reforms effected in the course of the so-called Angevin revolution in justice in the twelfth and thirteenth centuries initiated a trend towards royal control over the operation of the common law that had profound implications for the development of the notion of princely mercy and grace. There was no similar common law 'revolution' in Scotland, or at least not until much later. Thus, while an understanding of concepts of royal power, authority, and clemency in England is useful for elucidating the history of the king's pardon in Scotland, there is good reason to suggest that there is much more to the matter than scholars have hitherto uncovered.

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