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## ***Decretum fuit per burgenses: a fresh perspective on law-making in the medieval Scottish burghs***

Until recently, Scottish historians were largely unaware of an early manuscript witness to the development of medieval Scottish legal texts.<sup>1</sup> This is Harvard Law School MS 164, which can be dated to the 1390s.<sup>2</sup> Alice Taylor has labelled this manuscript **CH**, a convention which will be followed here, and she has demonstrated its importance in the context of studying the medieval Scottish treatise *Regiam Majestatem*.<sup>3</sup> Of course, **CH** also has much to reveal about the development of the other texts it contains. Amongst them is the *Leges et consuetudines quatuor burgorum* – the ‘laws and customs of the four burghs’ (hereafter LCQB).<sup>4</sup> LCQB is one of the oldest surviving texts purporting to contain laws applicable in the burghs of medieval Scotland, burghs being towns with trading and jurisdictional privileges.<sup>5</sup> The earliest witness

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<sup>1</sup> See Alice Taylor, ‘Introduction’, in *Regiam Majestatem: The Earliest Known Version*, ed. by John Reuben Davies with Alice Taylor, Stair Society 68 (Edinburgh, 2022), 142–65.

<sup>2</sup> A digitised version of Harvard Law School MS 164 (**CH**) is available online at [https://iif.harvard.edu/manifects/view/drs:466199984\\$7i](https://iif.harvard.edu/manifects/view/drs:466199984$7i) (accessed 17 June 2022). For the date of the manuscript, and for discussion of **CH**, see Taylor, ‘Introduction’, 142–51.

<sup>3</sup> Taylor, ‘Introduction’, 142–65.

<sup>4</sup> **CH** fols 63r–76r. The choice of the acronym ‘LCQB’ is deliberate; it is somewhat conventional to use the acronym ‘LQB’, but, for reasons that will become clear below, it is helpful to remember that the text purports to contain laws and customs of the four burghs.

<sup>5</sup> For earlier work on LCQB, and for related introductions to the history of medieval Scottish burghs, see, for example, *Acts of the Parliaments of Scotland*, ed. by Thomas Thomson and Cosmo Innes, 12 vols (Edinburgh, 1814–1875) (APS), i, 32–6; *Ancient Laws and Customs of the Burghs of Scotland*, 2 vols, vol. 1 ed. by Cosmo Innes, vol. 2 ed. by Robert Renwick, (Edinburgh, 1868–1910), i, xix–l; *Early Records of the Burgh of Aberdeen 1317, 1398–1407*, ed. William Croft Dickinson, Scottish History Society series 3, vol. 49 (Edinburgh, 1957), xvii–cli; A. A. M. Duncan, *Scotland, The Making of the Kingdom* (Edinburgh, 1975), 463–501; Hector L. MacQueen and William J. Windram, ‘Laws and Courts in the Burghs’, in *The Scottish Medieval Town*, ed. by Michael Lynch, Michael Spearman and Geoffrey Stell (Edinburgh, 1988) 208–27; Elizabeth Ewan, *Townlife in Fourteenth-Century Scotland* (Edinburgh, 1990); Joanna Kopaczyk, *The Legal Language of Scottish Burghs: Standardization and Lexical Bundles 1380–1560* (Oxford, 2013); Alice Taylor, *The Shape of the State in Medieval Scotland, 1124–1290* (Oxford, 2016), 259–62; Andrew R. C. Simpson and Jackson W. Armstrong, ‘The Roll of the Burgh Courts of Aberdeen, August–October 1317’, in *Miscellany Eight*, ed. by A. M. Godfrey, Stair Society 67 (Edinburgh, 2020), 57–93; J. D. Ford, ‘Telling Tales: Maritime law in Aberdeen in the early sixteenth century’, in *Cultures of Law in Urban Northern Europe, Scotland and its Neighbours c. 1350 – c. 1650*, ed. by Jackson W. Armstrong and Edda Frankot, (London, 2021), 23–38; Andrew R. C. Simpson, ‘Procedures of the Scottish Common Law in a Medieval Town: A fresh look at the 1317 court roll of Aberdeen’, in *Comparative Perspectives in Scottish and*

to LCQB – which is incomplete – is found in the Berne MS (labelled **A** by Taylor), and it can be dated to 1267x1272.<sup>6</sup> Presumably, then, much of LCQB itself was in existence by the mid-thirteenth century. Of course, historians have long speculated that it is older – often with good reason – but direct manuscript evidence is lacking.<sup>7</sup> The other early witnesses to LCQB are in the Ayr MS (**B**), dated to 1323x1346,<sup>8</sup> and the Bute MS (**C**), dated to the 1390s;<sup>9</sup> both give the text different titles, as will be explained further below. What matters for now is that **CH** is the third or fourth earliest witness to the text, underlining its importance. The great nineteenth-century editors of the LCQB, Thomas Thomson and Cosmo Innes, did not have access to **CH**.<sup>10</sup> This last point in itself shows that a fresh critical edition might be desirable. In addition, the editions produced by Thomson and Innes – whilst useful – represented attempts to produce something approximating the most developed versions of the texts, and in the process they reconstructed texts which are not – in their entirety – vouched by any single manuscript witness.<sup>11</sup> Taylor has also demonstrated how much can be discovered by editing other medieval texts of Scots law according to modern critical standards;<sup>12</sup> but there is no such modern edition of LCQB.

In the course of laying the groundwork for such an edition, I have prepared draft transcriptions of the texts of LCQB in **A**, **B**, **C** and **CH**. Towards the end of the process of transcribing LCQB in **CH** – which is by far the longest version of LCQB to have been composed in the fourteenth century – I noticed that two short, unnumbered paragraphs were

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*Norwegian Legal History, Trade and Seafaring: 1200-1800*, ed. by Andrew R. C. Simpson and Jørn Øyrehagen Sunde (forthcoming).

<sup>6</sup> NRS PA5/1 (**A**) fols 62r–63v; for this manuscript and its date, see *The Laws of Medieval Scotland: Legal compilations from the thirteenth and fourteenth centuries*, ed. Alice Taylor, Stair Society 66 (Edinburgh, 2019), 33–8.

<sup>7</sup> The most comprehensive discussions of the date of the text are to be found in Duncan, *Making of the Kingdom* 463–501 and MacQueen and Windram, ‘Laws and Courts’ 209–11. Duncan argues that sections of LCQB were compiled in the late-twelfth century, but notes that the text developed over this period, and assigns a possible date in late-thirteenth century to one chapter; see Duncan, *Making of the Kingdom*, 481–2, 488. MacQueen and Windram, ‘Laws and Courts’, 210–11, consider two possibilities about the date of the text – ‘one is the suggestion of Professor Duncan that the text was built up gradually over a long period of time, starting perhaps in the late twelfth century; the other is that it represents a gathering together of the laws and customs of the burghs made at some single point of time in the thirteenth century but including material from earlier periods.’ They conclude that it is difficult to be sure which is more likely without further work; the present article will not answer the question, but it is hoped that it will contribute to future discussions on the point.

<sup>8</sup> NRS PA5/2 (**B**) fols 49v–67v; for this manuscript and its date, see *Laws of Medieval Scotland*, ed. Taylor, 39–48.

<sup>9</sup> NLS Adv. MS 21246 (**C**) fols 153v–163r; for this manuscript and its date, see *Laws of Medieval Scotland*, ed. Taylor, 49–60.

<sup>10</sup> See *APS*, i, 180–210.

<sup>11</sup> For discussion, see, for example, *Laws of Medieval Scotland*, ed. Taylor, 15–16.

<sup>12</sup> *Laws of Medieval Scotland*, ed. Taylor.

added after the end of the text.<sup>13</sup> This article is concerned with the first of those two paragraphs, which arguably sheds light on the fourteenth-century development of the text of LCQB, and perhaps on the origins of LCQB itself. The paragraph purports to record decisions of the ‘burgesses of Berwick, Edinburgh, Roxburgh and Stirling’ made in Holyrood Abbey ‘in the year of our Lord 1295 on the Monday next after Epiphany’.<sup>14</sup> According to modern reckoning, it is conceivable that this date should be given as Monday 10<sup>th</sup> January 1295; this would follow if the scribe treated the year of grace as beginning with the Nativity. However, it seems far more likely that the decisions were made on Monday 9<sup>th</sup> January 1296, which would follow if the scribe treated the year of grace as beginning with the Annunciation (25<sup>th</sup> March).<sup>15</sup> Dating the beginning of the new year from the Annunciation was increasingly common in the thirteenth century, and the practice is attested in a contemporary Scottish parliamentary ratification of a treaty dated to ‘7 Kalends March, in the year of our Lord 1295’ – i.e. 23<sup>rd</sup> February 1296.<sup>16</sup> This article will proceed on the basis that the decisions were made in 1296, and not in 1295, and refer to them accordingly; but the point will be mentioned again in connection with any argument that turns on dating the decisions to 1296, rather than 1295.

The decisions were apparently made by the ‘burgesses’ of ‘Berwick, Edinburgh, Roxburgh and Stirling’, which were the four burghs – the ‘*quatuor burgi*’ – referenced in the title of LCQB.<sup>17</sup> They were all major royal burghs in southern Scotland; as ‘royal’ burghs, their trading and jurisdictional privileges had been granted by the crown. The ‘burgesses’ were those

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<sup>13</sup> CH fol. 76r.

<sup>14</sup> CH fol. 76r; a fresh edition and a translation of the text are printed below.

<sup>15</sup> See C. R. Cheney, *A Handbook of Dates For Students of British History*, new edn, rev. Michael Jones, (Cambridge, 2000), 8–14; the specific dates of the Monday following Epiphany in 1295 and 1296 given here are based on the tables found at 155–230.

<sup>16</sup> *The Records of the Parliaments of Scotland to 1707*, ed. by Keith Brown *et al.* (St Andrews, 2007–2022), available online at <https://rps.ac.uk/> (accessed 8 October 2022) [RPS] A1296/2/1. I am also grateful to Professor Dauvit Broun for discussing this point with me, who kindly drew my attention to the fact that dating the new year to Lady Day is common in contemporary chronicles; of course, he bears no responsibility for the views expressed here.

<sup>17</sup> For helpful discussion of the four burghs, see APS, i, 38–42; *Ancient Laws and Customs of the Burghs*, ed. Innes, i, xxxix–xl; *Records of the Convention of the Royal Burghs of Scotland, with Extracts from Other Records Relating to the Affairs of the Burghs of Scotland. 1295-1597*, ed. J. D. Marwick, 2 vols (Edinburgh, 1866-1870), i, v–xii; Duncan, *Making of the Kingdom*, 603; Theodora Keith, ‘The Origin of the Convention of the Royal Burghs of Scotland: With a Note on the Connection of the Chamberlain with the Burghs’, *The Scottish Historical Review* 10 (July 1913) 384–402 at 385–8. Note also the comments in Ranald Nicholson, *Scotland: The Later Middle Ages* (Edinburgh, 1974), 17–18, 264–5; Theodora Pagan, *The Convention of the Royal Burghs of Scotland* (Glasgow, 1926), 2, 9–10; Ewan, *Townlife*, 146–7; and in R. D. Connor and A. D. C. Simpson, *Weights and Measures in Scotland: A European Perspective*, ed. by A. D. Morrison-Low (Edinburgh and East Linton, 2004), 10–11. On the importance of the corporate identity of the four burghs and the burghs of Scotland more generally during the later medieval and early modern periods, see *Records of the Convention of Royal Burghs 1555; 1631-1648*, ed. by Alan R. MacDonald and Mary Verschuur, Scottish History Society series 6, vol. 3, 1–30 (with a brief comment on the thirteenth-century position at 1).

who held the privileges in question; they were communities of merchants and craftsmen.<sup>18</sup> The decisions referenced in **CH** established rules governing succession to moveable property in the future for all burgesses in the four burghs.<sup>19</sup> As will be seen, these are interesting in their own right, both because they seem to reflect the concerns of near-contemporary canon law, and also because – on one reading – they present the burgesses as autonomous law-givers for the four burghs. They seem to have acted without royal or ecclesiastical sanction in reaching their decisions. Of the very few writers who have (briefly) commented on the decisions in the past, J. D. Marwick and W. Croft Dickinson seem to have thought of them as ‘ordinances’ (Marwick’s term) of a ‘court’ (*curia*) of the four burghs.<sup>20</sup> Another – Theodora Keith, writing in the early-twentieth century – was slightly more cautious, suggesting that the ‘assembly’ that made the decisions may have had some link with a *curia* of the four burghs first attested in 1345. It will be suggested below that such caution is wise.<sup>21</sup>

Modern lawyers may also find this article of some interest, because one of the decisions seems to have represented the earliest attempt to articulate the rules that they know as ‘legitim’ – the doctrine whereby children are entitled to a portion of a deceased parent’s moveable estate.<sup>22</sup> This doctrine is controversial today, and the Scottish Law Commission has proposed its replacement.<sup>23</sup> Better understanding of its origins and its initial purpose may inform the discussion. Some critical comments about legitim are based on assumptions about its original aims, and how these are now out of step with contemporary reality; but contemporary

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<sup>18</sup> See (for example) the discussions in *Early Records*, ed. Croft Dickinson, xxiv–xli; see also Duncan, *Making of the Kingdom*, 463–81.

<sup>19</sup> **CH** fol. 76r; the extent to which the decisions were thought to have any effect beyond the four burghs will be considered further below.

<sup>20</sup> *Records of the Convention*, ed. Marwick, I, xi. See also *Early Records*, ed. Croft Dickinson, cxlii–cxliii.

<sup>21</sup> Keith, ‘Origin of the Convention’, 386–7, discussing *Rotuli Scotiae in Turri Londinensi et in Domo Capitulari Westmonasteriensis asservati*, ed. David Macpherson, 2 vols (London, 1814–1819), I, 660. Later, under the name Theodora Pagan, she published an account of the assembly of 1295 which more confidently linked the assembly and the later court of the four burghs. See Pagan, *Convention*, 10–11. For Theodora Pagan, née Keith, see <https://www.universitystory.gla.ac.uk/biography/?id=WH1304&type=P> (accessed 26 November 2022).

<sup>22</sup> Authority for the doctrine is to be found today in the Institutional Writers (see, e.g., Stair, *Institutions*, III.8.43–5; Bell, *Principles*, § 1582). For discussions of the doctrine, and for an introduction to the controversy surrounding it, see J. C. Gardner, ‘The Origin and nature of the legal rights of spouse and children in the Scottish law of succession’, *Juridical Review*, first series 39 (1927), Parts I–III; Part I, 209–16; Part II, 313–44; Part III, 434–45; J. C. Gardner, ‘The Origin and nature of the legal rights of spouse and children in the Scottish law of succession’, *Juridical Review*, first series 40 (1928), Part IV, 72–92; W. David H. Sellar, ‘Succession Law in Scotland – a Historical Perspective’, in *Exploring the Law of Succession: Studies National, Historical and Comparative*, ed. by Kenneth G. C. Reid, Marius J de Waal and Reinhard Zimmermann, (Edinburgh, 2007), 49–66 at 57–61; Dot Reid, ‘From the Cradle to the Grave: Politics, Families and Inheritance Law’, *Edinburgh Law Review* 12 (September 2008), 391–417. See also the ‘Symposium: Reforming Intestate Succession Law’, printed in *Edinburgh Law Review* 24 (January 2020), 110–52, introduced and concluded by Alexandra Braun.

<sup>23</sup> See Scottish Law Commission, *Report on Succession* (Scot Law Com No 215, 2009), Part Three: Protection from Disinheritance.

understanding of those aims is quite limited, and this tends to generate confusion in the argumentation that follows from this. Making sense of the past is one way of demystifying it, allowing modern policy makers to reject its assumptions and purposes with confidence – if they deem it appropriate to do so. A full historical account of the development of legitim, of the sort which could make greater sense of the current law in light of developments between the thirteenth century and the present, must await another study; but this article may lay some of the groundwork necessary to achieve that goal.<sup>24</sup> Yet that is, at best, a subsidiary purpose of the present study, which seeks to understand the decisions dated to 1296 in the context in which they were made, and to use them to shed light on the textual history of LCQB. In the process, the article will aim to show how studying the text of the decisions can provide historians with something more. First, it provides a fresh perspective on the interaction of English borough customs and canonist rules and principles in the formation of the burgh laws of Scotland. Second, it argues that considering the formulation of these decisions, and their transmission through medieval textual traditions to the early modern period, may be instructive for those who wish to reflect further on previous comments about the nature of the Scottish legal tradition itself.

In order to explain the significance of these decisions for attempts to understand the development of LCQB, it is first necessary to consider the decisions themselves. This article will do this by considering the following five questions. First, what is the manuscript evidence for the decisions dated to 1296? Second, what do the decisions say? Third, is the date given for the decisions reliable? Fourth, assuming it is reliable, can we contextualise the decisions so as to make greater sense of them? Fifth, what do the decisions tell us about the development of LCQB?

### **The Decisions of 1296: The Evidence Base and Edited Text**

What is the manuscript evidence for the decisions dated to 1296? In preparing a modern edition of the earliest surviving version of the decisions for the purposes of this article, the starting point has been the oldest known witness to the decisions, which is **CH**. However, it is worth

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<sup>24</sup> Gardner, 'Legal Rights' provides an introduction to the topic, but much of what is said there has been superseded by the work of Scottish legal historians writing in the last century. A fresh history of the topic is required. For some helpful remarks, see Ilya Kotlyar, 'The Evolution of the Scots Law and Practice of Succession: 1300-2000', in *Succession Law, Practice and Society in Europe across the Centuries* (Gewerbestrasse, 2018), 167–206, particularly at 176–7 (for the medieval period). See also the discussion in Kenneth G. C. Reid, 'Legal Rights in Scotland', in *Comparative Succession Law Volume III: Mandatory Family Protection*, ed. by Kenneth G. C. Reid, Marius J. de Waal and Reinhard Zimmermann (Oxford, 2020), 417–49 at 419, 430–2.

mentioning that Thomas Thomson and Cosmo Innes also prepared an edition of the decisions, which was printed in 1844 in the first volume of the monumental *Acts of the Parliaments of Scotland*.<sup>25</sup> Innes printed the decisions again in 1868.<sup>26</sup> It will be recalled that Thomson and Innes did not have access to **CH**, but they did have access to a wide range of (later) manuscript witnesses to the decisions. Thomson and Innes stated that the decisions were sometimes included as integral parts of LCQB, and sometimes they were not. Sometimes they appeared in a completely different text, for reasons that have not yet been established – the text in question came to be labelled as the *Leges Forestarum* during the medieval period.<sup>27</sup> Presumably for this reason, Thomson and Innes did not print the decisions in their edition of LCQB, but rather in a section of the *Acts of the Parliaments of Scotland* that another historian called an editorial ‘cry of despair’; it was named *Fragmenta Collecta*.<sup>28</sup>

Historians generally make very little use of *Fragmenta Collecta*, because on first sight it is very difficult to get any sense of where the texts printed there came from. Shorn of context, they seem almost meaningless. This may explain why almost no-one – except for Innes himself, and Keith, already mentioned above – has commented on the decisions of 1296 in the past.<sup>29</sup> However, Thomson and Innes did print a detailed table explaining the evidence base for the texts printed in *Fragmenta Collecta*.<sup>30</sup> As a result, historians can use *Fragmenta Collecta* as a guide to the texts – so long as the collection is used in conjunction with the table outlining the manuscript evidence on which it rests, and in conjunction with the manuscripts themselves. In preparing the revised edition of the decisions of 1296 for the purposes of this article, the table that Thomson and Innes prepared to help readers make sense of *Fragmenta Collecta* proved extremely useful. That said, the table does not list all witnesses to the text, for two reasons. First, historians are now aware of manuscripts to which Thomson and Innes did not have access (such as **CH**). Second, Thomson and Innes listed only one of the witnesses to this particular text in each manuscript that they consulted, but some of those manuscripts in fact contain two witnesses to the text – one in LCQB, and one in the *Leges Forestarum*.<sup>31</sup>

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<sup>25</sup> *APS*, i, 724.

<sup>26</sup> *Ancient Laws and Customs*, ed. Innes, I, 501.

<sup>27</sup> *APS*, i, 254–5.

<sup>28</sup> *APS*, i, 717–754; for this description of *Fragmenta Collecta*, see A. A. M. Duncan, ‘*Regiam Majestatem*: A Reconsideration’, *Juridical Review*, new series 6 (1961), 199–217 at 206.

<sup>29</sup> See *APS*, i, 42, footnote 1; Keith, ‘Origin of the Convention’, 386–7; Pagan, *Convention*, 10. See too *Records of the Convention*, ed. Marwick, I, xi.

<sup>30</sup> *APS*, i, 254–65.

<sup>31</sup> For example, *APS*, i, 254–5 states that the NLS Adv. MS 25.5.6 (**K**) – also known as the Monynet MS – contains a witness to the text in *Leges Forestarum* c. 40. That is true, as can be seen from **K** fol. 230r-v. However, a variant reading of the text also appears in **K** at fols 133r-134v, as LCQB c. 116.

In considering how to prepare an edition of the earliest version of the text containing the decisions of 1296, primary attention has been given to the one fourteenth-century witness to the text in **CH**, and to those witnesses to the text dated by Taylor to the fifteenth century.<sup>32</sup> The fifteenth-century witnesses are in **D, E, G, I, J, K, L, M** and **N**;<sup>33</sup> they are all in Latin, and no firm evidence has been found to indicate that the text was translated into Scots in its entirety before the sixteenth century.<sup>34</sup> By considering these witnesses, it is possible to offer an account of the textual transmission of the decisions of 1296 over the course of the fifteenth century. This, in turn, makes it possible to identify which manuscripts are likely to represent the earliest (surviving) stages in the transmission of the text. However, readers should be aware of three difficulties that need to be kept in mind. First, and most obviously, the surviving evidence is fragmentary. It is impossible to know with absolute certainty how complete a picture the surviving evidence gives historians of the transmission of the text of the decisions during this period. Second, it is incorrect to think of **CH, D, E, G, I, J, K, L, M** and **N** as constituting a single manuscript tradition, produced by some identifiable school of Scottish legal scribes. Rather, as Alice Taylor has shown so clearly, they are the products of several different – albeit closely related – scribal traditions of enquiry.<sup>35</sup> This will be discussed in more detail below.

#### **a) The textual transmission of the decisions of 1296: the evidence**

How is one to reconstruct the textual transmission of the decisions of 1296 across the fifteenth century? In answering this question, it is helpful to begin by observing that fourteenth-century and fifteenth-century witnesses vary in one sense, this being that the scribes placed the texts of the decisions in different places within their manuscripts. In this regard, one might say that there are three “sets” of witnesses to consider. In the first “set”, two scribes appended the text to the end of LCQB; in the second, another two scribes included the text within LCQB, but in

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<sup>32</sup> See the catalogue of manuscripts in *Laws of Medieval Scotland*, ed. Taylor, 25–218.

<sup>33</sup> The text is to be found in the following witnesses which may be dated to the fourteenth or the fifteenth centuries: **CH** fol. 76r (unnumbered appendage to LCQB); NLS Adv. MS 25.4.13 (**D**) fols 157v-158v (LCQB c. 170); NLS Adv. MS 25.4.10 (**E**) fol. 45r (LCQB c. 119 according to modern numbering); EUL MS 206 (**G**) fol. 73r (unnumbered appendage to LCQB); EUL MS 207 (**I**) fols 98v-99r (LCQB c. 116) and 122v-123r (unnumbered chapter in *Leges Forestarum*); NLS MS 16497 (**J**) fols 92r-v (LCQB c. 115) and 125v-126r (unnumbered chapter in *Leges Forestarum*); **K** fols 133r-134v (LCQB c. 116) and 230r-v (*Leges Forestarum* c. 40); Lambeth Palace Library MS 167 (**L**) fols 59r-v (LCQB c. 114) and 221v (unnumbered chapter in *Leges Forestarum*); St Andrews UL MS Kf51.R4 (**M**) fols 90r-v (LCQB c. 115) and 123r-v (*Leges Forestarum* c. 40); and NRS PA5/3 (**N**) fols 91r-v (LCQB c. 116) and 123r-v (*Leges Forestarum* c. 42). For the dates of these manuscripts, see *Laws of Medieval Scotland*, ed. Taylor, 61–155 and Taylor, ‘Introduction’, 142–51.

<sup>34</sup> Cambridge UL MS Kk.1.5 fols 22v-23r preserves a Scots translation of the text; for the date of this manuscript, see Gero Dolezalek, *Scotland Under Jus Commune*, 3 vols, Stair Society 55–7, (Edinburgh, 2010), III, 46.

<sup>35</sup> See *Laws of Medieval Scotland*, ed. Taylor, 357–91.

different places; and in the third, the text was included in both LCQB and in the *Leges Forestarum* in relatively fixed places. These “sets” of witnesses may be taken in turn.

The first set – or perhaps more accurately, pair – of witnesses is made up of **CH** and **G**.<sup>36</sup> As already explained, **CH** can be dated to the 1390s, and **G** can be dated to the first half or the middle of the fifteenth century;<sup>37</sup> Taylor has noted in the past the close connection between these two manuscripts.<sup>38</sup> The scribes who wrote these manuscripts simply appended the text containing the decisions of 1296 to the end of LCQB, together with another text. Whilst they numbered the chapters of LCQB, they did not number these additional texts appended to LCQB, perhaps indicating that they did not see them as parts of LCQB – or at least as established parts of LCQB. The texts given in **CH** and **G** are very similar.

The second pair of witnesses mentioned above are to be found in **D** and **E**.<sup>39</sup> **D** was completed on 17<sup>th</sup> December 1439, or soon afterwards.<sup>40</sup> The scribe treated the text containing the decisions of 1296 as an integral part of LCQB, including it as LCQB c. 170. He gave LCQB c. 170 the title ‘*Distinctio mobilium inter heredem et alios liberos*’.<sup>41</sup> The scribe of **E** – Alexander Foulis, clerk of St Andrews – also took the step of incorporating the text into LCQB, but in a very different way. He included it in LCQB c. 119, with the title ‘*De hiis que pertinent ad heredem*’.<sup>42</sup> Foulis’ manuscript may have been written in stages, but the relevant part of his manuscript can be dated with reasonable confidence to 1454.<sup>43</sup> While **D** and **E** differ from **CH** and **G** by locating the text *within* LCQB, there are really no major variations in the content of the text itself.

The third set of fifteenth-century manuscript witnesses to the text containing the decisions of 1296 are characterised by their uniformity in placing that text in essentially the same places within the *Leges Forestarum* and in LCQB. This group is made up of **I**, **J**, **K**, **L**, **M** and **N**, all of which can be dated to the later fifteenth century.<sup>44</sup> The witnesses to the text of

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<sup>36</sup> **CH** fol. 76r; **G** fol. 73r.

<sup>37</sup> For the date of **G**, see *Laws of Medieval Scotland*, ed. Taylor, 79.

<sup>38</sup> See Taylor, ‘Introduction’, 157–61.

<sup>39</sup> **D** fols 157v–158v (LCQB c. 170); **E** fol. 45r (LCQB c. 119).

<sup>40</sup> See *Laws of Medieval Scotland*, ed. Taylor, 61.

<sup>41</sup> **D** fols 157v–158v (LCQB c. 170) (‘Division of moveables between the heir and the other children’).

<sup>42</sup> **E** fol. 45r (LCQB c. 119) (‘Concerning those things which pertain to the heir’); on Foulis, see *Laws of Medieval Scotland*, ed. Taylor, 66–7.

<sup>43</sup> For discussion, see *Laws of Medieval Scotland*, ed. Taylor, 66–7.

<sup>44</sup> **I** fols 98v–99r (LCQB c. 116) and 122v–123r (unnumbered chapter in *Leges Forestarum*); **J** fols 92r–v (LCQB c. 115) and 125v–126r (unnumbered chapter in *Leges Forestarum*); **K** fols 133r–134v (LCQB c. 116) and 230r–v (*Leges Forestarum* c. 40); **L** fols 59r–v (LCQB c. 114) and 221v (unnumbered chapter in *Leges Forestarum*); **M** fols 90r–v (LCQB c. 115) and 123r–v (*Leges Forestarum* c. 40); and **N** fols 91r–v (LCQB c. 116) and 123r–v (*Leges Forestarum* c. 42). For the dates of these manuscripts, see *Laws of Medieval Scotland*, ed. Taylor, 100–55.



the decisions of the burgesses as found in the *Leges Forestarum* in **I, J, K, L, M** and **N** are all very similar to one another, and indeed to the witnesses found in **CH, G, D** and **E**. However, there are differences between all of these witnesses to the text, on the one hand, and the witnesses found within LCQB in **I, J, K, L, M** and **N**, on the other. In other words, it sometimes happened that a scribe would copy out two different versions of the text of the decisions in two different places within his manuscript. Something should be said first about the witnesses to the text of the decisions contained within the *Leges Forestarum* in **I, J, K, L, M** and **N**; and second about the witnesses to the same text contained within LCQB in **I, J, K, L, M** and **N**.

First, within the *Leges Forestarum* in **I**, the text of the decisions appears as an unnumbered chapter entitled ‘*Distinctio nobilium [sic] domesticorum inter heredem et alios liberos*’.<sup>45</sup> This title is curiously similar to that in **D**, dated to 1439; there it was given as ‘*Distinctio mobilium inter heredem et alios liberos*’.<sup>46</sup> However, in **D** this title was given to the text as a part of LCQB, not the *Leges Forestarum*. The versions of the *Leges Forestarum* preserved in **L, J, M** and **N** follow **I**’s title, whilst **K** gives the title ‘*Distinctio mobilium inter heredem et alios liberos*’. While the omission of the word ‘*domesticorum*’ may have been a scribal slip in **K**, ‘*mobiliium*’ is surely a better reading than ‘*nobilium*’.<sup>47</sup> It is worth adding that sixteenth-century witnesses – such as **O, Q, R** and **S** – also present the text as part of the chapter ‘*Distinctio mobilium inter heredem et alios liberos*’ within the *Leges Forestarum*.<sup>48</sup> As already stated, save for the title, there are no substantial differences between the witnesses to the text contained in the *Leges Forestarum* in **I, J, K, L, M** and **N**, on the one hand, and the witnesses found in **CH, D, E** and **G**, on the other.

Second, the witnesses to the text of the decisions of 1296 preserved in the versions of LCQB in **I, J, K, L, M** and **N** are different. Rather than presenting the decisions as a distinct unit of text, they incorporate the decisions into a chapter within LCQB, often entitled ‘*De vasis*

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<sup>45</sup> **I** fol. 122v.

<sup>46</sup> **D** fol. 157v.

<sup>47</sup> **J** fol. 125v; **L** fol. 221v; **M** fol. 123r; **N** fol. 123r; **K** fol. 230r. ‘*Domesticorum mobilium*’ would mean ‘of the household moveables’ whilst ‘*domesticorum nobilium*’ does not make much sense, *nobilium* being the genitive plural of the adjective *nobilis*, meaning noble or distinguished or celebrated.

<sup>48</sup> See NLS Adv. MS 25.5.9 (**O**) fols 109v-110r (LCQB c. 116) and 206r-v (*Leges Forestarum* c. 40); Cambridge UL MS Ee.4.21 (**Q**) fols 146v-147r (LCQB c. 116) and 245v (*Leges Forestarum* c. 40); Glasgow UL MS 548 (**R**) fols 113r-v (LCQB c. 116) and 227r-v (*Leges Forestarum* c. 39) and NLS Adv. MS 25.4.12 (**S**) fols 148r-149r (LCQB c. 116) and 248r-v (*Leges Forestarum* c. 40). In BL Add. MS 48033 (**T**) there is no witness to the *Leges Forestarum*, but there is a witness to the text considered here at fol. 55r-v (unnumbered chapter in LCQB). For the dates of these manuscripts, see *Laws of Medieval Scotland*, ed. Taylor, 156–215.

*et utensilibus ad heredem pertinentem*’ (hereafter ‘*De vasis et utensilibus*’).<sup>49</sup> This chapter already had a complex history before a scribe – probably writing during the fifteenth century – decided to interpolate the text of the decisions of 1296 into it. ‘*De vasis et utensilibus*’ is absent from the earliest version of LCQB that contains a definite *incipit* and *explicit* – which is found in **B**, dated to 1323x1346.<sup>50</sup> However, it is found in another text in **B**, known as the Ayr Miscellany.<sup>51</sup> At this point in the history of its development, the chapter ‘*De vasis et utensilibus*’ simply explained that when a burgess died, some of his moveables passed automatically to his heir. The bulk of the chapter then went on to list *which* moveables passed to the heir. It made no direct reference to the decisions of 1296. By the end of the fourteenth century, this version of ‘*De vasis et utensilibus*’ had come to be incorporated into the textual traditions of LCQB represented in **C** and **CH**.<sup>52</sup> It also appeared in the witnesses to LCQB found in **D**, **E** and **H**.<sup>53</sup> These manuscripts all belong to the first six decades of the fifteenth century. However, in the later fifteenth-century witnesses to the Latin text of LCQB – **I**, **J**, **K**, **L**, **M** and **N** – the scribes were working within a tradition whereby the decisions of 1296 had been interpolated into an expanded version of ‘*De vasis et utensilibus*’.<sup>54</sup> The decision to interpolate the decisions into this chapter of LCQB is readily intelligible. Like ‘*De vasis et utensilibus*’, the decisions of 1296 outlined the rule that certain moveables passed automatically to the heir of a deceased burgess; but the decisions articulated the point in much less detail than the text into which they were interpolated.

As regards the manner of interpolation, the decisions were simply inserted towards the end of the established text of ‘*De vasis et utensilibus*’. They were placed between an established list of items that passed to the heir and a short passage at the end of the chapter dealing with the capacity of a burgess to alienate property that would normally pass heritably to the heir. It should be added that in the version of the decisions given in ‘*De vasis et utensilibus*’ in **I**, **J**, **K**,

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<sup>49</sup> **I** fols 98v-99r (LCQB c. 116) (‘Concerning the vessels and utensils pertaining to the heir’; **J** fol. 92r-v (LCQB c. 115); **K** fols 133r-134v (LCQB c. 116); **L** fol. 59r-v (LCQB c. 114); **M** fols 90r-v (LCQB c. 115); and **N** fol. 91r-v (LCQB c. 116).

<sup>50</sup> See **B** fols 49v-67v.

<sup>51</sup> See *Laws of Medieval Scotland*, ed. Taylor, 458-9; **B** fol. 3r.

<sup>52</sup> **C** fol. 162r-v (LCQB c. 109); **CH** fols 71v-72r (LCQB c. 114).

<sup>53</sup> **D** fols 143v-144r (LCQB c. 114); **E** fol. 44v (LCQB c. 116 according to modern numbering); NLS Adv. MS 25.5.10 (**H**) fol. 89v (LCQB c. 113); on **H**, see *Laws of Medieval Scotland*, ed. Taylor, 88-99.

<sup>54</sup> **I** fols 98v-99r (LCQB c. 116); **J** fol. 92r-v (LCQB c. 115); **K** fols 133r-134v (LCQB c. 116); **L** fol. 59r-v (LCQB c. 114); **M** fols 90r-v (LCQB c. 115); and **N** fol. 91r-v (LCQB c. 116).

**L, M** and **N**, the date of the decisions is generally given as 1396, rather than 1296, but otherwise the text remained relatively stable.<sup>55</sup>

Note that this was not the only change that was made to ‘*De vasis et utensilibus*’ in **I, J, K, L, M** and **N**. The passage on the burgess’ power of alienating heritable property was also amended to include a new cross-reference to an earlier chapter in LCQB. To explain, in the version of ‘*De vasis et utensilibus*’ attested in **C, CH, D, E** and **H**, it was stated that a burgess could only alienate heritable property where compelled to do so by poverty or necessity. It was then said that this poverty should be attested by oaths of the burgesses. At this point, a further interpolation was added to the text of ‘*De vasis et utensilibus*’ – as witnessed by **I, J, K, L, M** and **N** – to indicate to the reader that the oaths of *twelve* burgesses were required to establish this poverty. It was then added that this point had already been explained in the eleventh rubric of LCQB together with its gloss: ‘*et hoc testificetur per duodecim legales homines ut supra dicitur Rubrica huius libri xi cum glosa*’.<sup>56</sup> This gloss has not been identified with any confidence.<sup>57</sup> What matters for present purposes is that all of these developments within ‘*De vasis et utensilibus*’ presumably occurred at some point during the fifteenth century.

#### **b) The textual transmission of the decisions of 1296: analysis**

What does this tell historians about the transmission of the text purporting to record decisions made by the burgesses of Berwick, Roxburgh, Edinburgh and Stirling in 1296? First, in the 1390s, the scribe of **CH** chose to append this text to his copy of LCQB, but not (apparently) to incorporate it into LCQB. The scribe of **G** chose to do the same, writing at some point during the first half of the fifteenth century. Second, in 1439, the scribe of **D** chose to incorporate the text into LCQB; in 1454, Alexander Foulis, the scribe of **E**, chose to do the same, but at a different point within LCQB. Third, the scribes of **I, J, K, L, M** and **N**, writing during the last third of the fifteenth century, presented the text quite differently than their predecessors, but quite consistently. They incorporated it into the long-established chapter of LCQB entitled ‘*De vasis et utensilibus*’ and simultaneously included it as a separate chapter of the *Leges Forestarum* entitled ‘*Distinctio mobilium inter heredem et alios liberos*’. The scribal tradition

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<sup>55</sup> See **I** fol. 99r; **J** fol. 92r; **K** fol. 133r; **L** fol. 59r; **M** fol. 90r. It is difficult to be certain of the date given at **N** fol. 91r; it may be 1296 or 1396.

<sup>56</sup> See **I** fol. 99r (from which the witness quoted here is taken; it means ‘and this is witnessed by twelve lawful men as is said above in the eleventh rubric of this book with its gloss’); **J** fol. 92v; **K** fol. 134v; **L** fol. 59v; **M** fol. 90v; and **N** fol. 91v.

<sup>57</sup> For a gloss to one witness to LCQB c. 11, see **K** fol. 113r-v. However, the witness to LCQB c. 11 in **L** is not glossed; see **L** fol. 49r, and it is difficult to be certain as to what was originally meant by the gloss to c. 11 here.

of presenting the text in this way lasted well into the sixteenth century, as attested in **O, Q, R** and **S**.

This pattern – whereby there was scribal agency in the way in which a text was handled in the first half of the fifteenth century, followed by a period of standardisation in the second half of the fifteenth century – is at least consistent with the pattern identified by Taylor in her much broader study of Scottish legal manuscripts from this period.<sup>58</sup> She has noted the existence of what she calls Group One manuscripts (**A, B, C, F<sub>1</sub>**), Group Two manuscripts (**CH, D, E, F<sub>2</sub>, G, H** and **U**), Group Three manuscripts (**I, L, M, N, S** and **Q**) and Group Four manuscripts (**K, O, R, P** and **T**). There is a real risk of oversimplifying Taylor’s sophisticated analysis in what follows, but it is necessary to treat it with some concision here. Taylor treats the Group One manuscripts as a group simply because they are the earliest surviving Scottish legal manuscripts. The Group Two manuscripts are united by the fact that they were produced during the first half of the fifteenth century – or thereabouts – and they represent diverse if creative reworkings of the earlier manuscript traditions. The Group Three manuscripts and the Group Four manuscripts are different. They represent two different – albeit related – attempts to bring order and uniformity to the textual traditions. Of course, both attempts were also creative in their own ways.<sup>59</sup> Taylor tentatively suggests that the Group Three manuscripts may just possibly have resulted from a parliamentary commission to reduce the laws of the Scottish realm to order in 1450; and the Group Four manuscripts may have resulted from another parliamentary commission to achieve the same goal in 1469.<sup>60</sup>

It is intriguing that the first two groups of witnesses to the text considered here – **CH** and **G**, and **D** and **E**, are all witnesses belonging to the period of the diverse yet creative development of the manuscript tradition during the late-fourteenth and early-fifteenth centuries. By contrast, the third group of witnesses – **I, K, L, M** and **N** – are all either Group Three or Four manuscripts in Taylor’s scheme, or – in the case of **J** – associated with the Group Three manuscripts, and the second half of the fifteenth century.<sup>61</sup> This period witnessed greater standardisation in the textual traditions. As has been said, this standardisation was also creative, as can be seen from the evidence of the transmission of the text being considered here. While in **CH** and **G**, the text was presented as an appendage to LCQB, and while in **D** and **E** it was simply slotted into the text of LCQB at different points, in **I, J, K, L, M** and **N** it was decided

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<sup>58</sup> See *Laws of Medieval Scotland*, ed. Taylor, 357–91.

<sup>59</sup> *Laws of Medieval Scotland*, ed. Taylor, 357–91.

<sup>60</sup> *Laws of Medieval Scotland*, ed. Taylor, 378, 390.

<sup>61</sup> For **J**, see *Laws of Medieval Scotland*, ed. Taylor, 378–81.

to incorporate it fully into LCQB within the chapter ‘*De vasis et utensilibus*’. As was explained above, this was logical, given the connection between the subject-matter of the decisions and that of ‘*De vasis et utensilibus*’. At the same time, someone attempted to develop cross-references within the text of ‘*De vasis et utensilibus*’. No evidence has been found to show that any similar development of the text of the decisions given in the chapter of the *Leges Forestarum* entitled ‘*Distinctio mobilium inter heredem et alios liberos*’. However, it is worth noting that in **I**, **J**, **K**, **L**, **M** and **N** this chapter of the *Leges Forestarum* was consistently followed by a short text entitled ‘*De terris non aliendis in lecto egritudinis Rubrica*’ (or a variant of that phrase).<sup>62</sup> This text made a point similar to the extra sentence added to the decisions in ‘*De vasis et utensilibus*’ in **I**, **J**, **K**, **L**, **M** and **N**, stating that a burgess could only alienate heritable lands in cases of necessity. The difference here was that there was no reference to the oaths of the twelve men, but it was clarified that the burgess could alienate heritable lands *on his deathbed* in cases of necessity, because necessity knew no law – a point attested elsewhere in the textual traditions of LCQB.<sup>63</sup> This made some sense, given that the decisions of the burgesses provided that a burgess *could* alienate moveable property on his deathbed. Not all scribes felt the need to reiterate these points in full. In **L**, the scribe gave his version of ‘*Distinctio nobilium [sic] domesticorum inter heredem et alios liberos etc*’, and then copied out the heading ‘*De terris non aliendis*’. However, he then remarked that the law of deathbed had already been fully treated in the final chapter of LCQB – ‘*In lecto egritudinis satis dictum est in In legibus burgorum ultimo capitulo*’.<sup>64</sup> In other words, the text of the decisions found in ‘*Distinctio mobilium domesticorum inter heredem et alios liberos*’ found in the *Leges Forestarum* by the second half of the fifteenth century could form part of a larger scheme of inter-related texts in the minds of the scribes.

### **c) The textual transmission of the decisions of 1296: edition**

<sup>62</sup> **I** fol. 123r (this can be translated, ‘Concerning lands not capable of alienation on deathbed’); **J** fol. 126r; **K** fol. 230v; **L** fol. 221v; **M** fol. 123v; **N** fol. 123v.

<sup>63</sup> See, for example, **B** fol. 67r (LCQB c. 101). The origins of the maxim ‘*necessitas non habet legem*’ go back to Gratian and beyond; see C. 1 q. 1 d.p.c.39, VI pars, as discussed in Franck Roumy, ‘L’origine et la diffusion de l’adage canonique *Necessitas non habet legem* (VIII<sup>e</sup> – XIII<sup>e</sup> s.)’ in *Medieval Church Law and the Origins of the Western Legal Tradition: A Tribute to Kenneth Pennington*, ed. by Wolfgang P Müller and Mary E Sommar, (Washington, D.C., 2006), 301–19. For discussion of the maxim in LCQB, see also Peter Stein, ‘Roman Law in Medieval Scotland’ in *The Character and Influence of the Roman Civil Law: Historical Essays*, ed. by Peter Stein, (London and Ronceverte, 1988), 269–317 at 274–6.

<sup>64</sup> **L** fol. 221v (this can be rendered, ‘regarding deathbed enough was said in the last chapter of the burgh laws’); for a similar comment, see **K** fol. 230v.

The versions of the decisions preserved in **I, J, K, L, M** and **N** – whether in the LCQB chapter ‘*De vasis et utensilibus*’ or in the *Leges Forestarum* chapter ‘*Distinctio mobilium domesticorum inter heredem et alios liberos*’ – seem to represent a distinct stage in the textual transmission of the decisions of 1296. In **I, J, K, L, M** and **N**, the decisions were being assimilated into a broader framework of legal texts. Perhaps this was directly the result of the parliamentary commissions of 1450 and 1469, as Taylor suggests. Regardless, there seems no reason to consider the witnesses to the decisions found in **I, J, K, L, M** and **N** as anything other than the result of a re-working of the texts during the second half of the fifteenth century. By contrast, the witnesses to the decisions found in **CH, G, D** and **E** – which are, of course, older *manuscripts* than **I, J, K, L, M** and **N** – seem to belong to an earlier stage in the history of their textual transmission, when their link with the textual traditions of LCQB was still being established. For these reasons, it is assumed that the best surviving evidence of the original text of the decisions is to be found in the oldest manuscripts – **CH, G, D** and **E**. Consequently, the text of the edition given below has been taken from **CH**, and collated with **G, D** and **E**.<sup>65</sup>

*Decretum*<sup>66</sup> fuit per burgenses de berwic<sup>67</sup> Edynburgh<sup>68</sup> Roxburgh et Stryvelyne<sup>69</sup> Anno domini millesimo cc<sup>70</sup> nonagesimo quinto die lune<sup>71</sup> proxima post epiphaniam<sup>72</sup> [Monday 9<sup>th</sup> January 1296] apud monasterium sancte crucis de edinburgh<sup>73</sup> quod naves navicule batelle nec equi alicuius burgensis defuncti nullo modo<sup>74</sup> hereditarie ad heredem sed tantum melior palefridus<sup>75</sup> quem ipse burgensis habuerit spectat<sup>76</sup> dum tamen non fuerit legatus alicui domui religiose quod si fuerit heres de racione potest petere alium equum meliorem post illum Item decretum fuit per eosdem ibidem quod quilibet burgensis potest legare et conferre arma sua et utenselia<sup>77</sup> sua<sup>78</sup> ubicunque voluerit in lecto egritudinis et

<sup>65</sup> **CH** fol. 76r. In **D** the text is given the title ‘*Distinctio mobilium inter heredes et alios liberos*’. In **E** it is given the title ‘*De hiis que pertinent ad heredem*’. The use of the letters ‘u’ and ‘v’ have been modernised, and contractions have been expanded. Original capitalisation has been preserved.

<sup>66</sup> **D**: *ecretum* rather than *Decretum*, with space left for an initial, and “D” written in a later hand in front of “ecretum”.

<sup>67</sup> **D**: *Berwyk*; **E**: *Berwik*; **G**: *Berwic*.

<sup>68</sup> **E**: *Edinburgh*.

<sup>69</sup> **E**: *Strivelyne*.

<sup>70</sup> **G**: *cc<sup>o</sup>*.

<sup>71</sup> **G**: *luna*.

<sup>72</sup> **D**: *epyphaniam domini*.

<sup>73</sup> **G**: *Edinburgh*.

<sup>74</sup> **E**: *modo* absent.

<sup>75</sup> **D**: *palefridus*; **E**: *palafridus*.

<sup>76</sup> **D**: *ad heredem* after *spectat*.

<sup>77</sup> **E**: *utensilia*.

<sup>78</sup> **E**: *sua* absent.

*extra salvis heredi suo armis et utensilibus principalibus Item si aliquis burgensis liberos de uxore sua procreaverit legitimos<sup>79</sup> sive ipse sive ipsa decedat<sup>80</sup> tertia<sup>81</sup> pars omnium bonorum debetur filiis et filiabus ipsius Et heres ipsius uxoris et viri<sup>82</sup> habebit eandem porcionem<sup>83</sup> quam alii sument nisi ipse fuerit forisfamiliatus.*

Translated, it reads as follows:<sup>84</sup>

It was determined by the burgesses of Berwick, Edinburgh, Roxburgh and Stirling in the year of our Lord 1295 [1296] on the Monday next after Epiphany at the monastery of Holyrood in Edinburgh that ships, small ships, boats [*batelle*] and horses of any deceased burgess shall not in any way [pertain] to the heir by right of heritage, but only the best palfrey which the burgess himself had shall pertain [to the heir]. However, this only applies if the best palfrey was not the subject of a legacy to any religious house. In this situation, the heir is, of reason, able to request another horse, the next best horse. Likewise, it was determined by the same burgesses [*eosdem*] in the same place that any burgess whatsoever is able to make legacies and to transfer his equipment<sup>85</sup> [*arma*] and his utensils to whomsoever he wishes, whether on his deathbed or not, saving to the heir the burgess's principal equipment [*armis*] and utensils. Likewise, if any burgess had legitimate children with his wife, whether he dies or she dies, the third part of all the goods shall be owed [*debetur*] to the sons and the daughter of the same. Furthermore, the

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<sup>79</sup> **D:** *legittimos procreaverit* rather than *procreaverit legitimos*.

<sup>80</sup> **D, E, G:** *decedat*.

<sup>81</sup> **D:** *tertia*.

<sup>82</sup> **D, E:** *virum et uxoris* rather than *uxoris et viri*.

<sup>83</sup> **D:** *portionem*.

<sup>84</sup> Note that there is Scots translation of the decisions dating from the first half of the sixteenth century in Cambridge UL MS Kk.1.5 fols 22v-23r; for the date of this manuscript, see Dolezalek, *Scotland Under Jus Commune*, III, 46. The Scots translation reads as follows: 'It was decreted and ordanit be the worthy and noble burgess of berewyk edinburghe and sterling the yer of gode m<sup>c</sup> CC<sup>to</sup> nyntte ye v day ye Monday of next efter the ephiphanie of our lorde Jehsus cryst at the abbay of the haly cross of Edinburghe that is to say that schippis forcastis or battis na hors of ony burgess dede aw on na way to pertene to the ayr herytably bot never the less the best palfra falt to the ayr and he be nocht gyffin to the kyrke or to suume Religieuse man thane may the ayr ask the next horss best efter And it was decryd be the saide consallye that ilk burgess may gyf and conferme his armour and his wtensely thingis qwhar ever hume thunke in his dede bede safand to the ayr his armoure wyth other utensellys principalt Alswa ony burges haffand children lawchfull gottin betwixt hime and his wyffe qwhether he or scho dee the thred pairt of all the guds sall be to the [fol. 23r] barnis dowchteris or sonnys and the ayr of the samen man and woman sall have the samyn portioun with the tother bot gif /he\ have takin befoyr'. This seems to provided part of the basis of Innes' Scots edition of the text in *APS*, i, 724, but not the whole of his edition – he treated the third decision differently. This will be discussed further below.

<sup>85</sup> This word '*arma*' is difficult to translate, and it may be that it should be translated 'armour' as in the earliest known Scots translation of the whole text, dating from the first half of the sixteenth century (see Cambridge UL MS Kk.1.5 fols 22v-23r).

heir of that wife and husband will have the same portion as the others unless he has been made independent of his father's household [*nisi ipse fuerit forisfamiliatus*].

Before commenting further on this edition of the text, it is worth mentioning that it differs in one very important respect from that of Thomson and Innes. Thomson and Innes do not present the text as one coherent whole in *Fragmenta Collecta*. Rather, they indicate that the first two of the three decisions of the burgesses can be confidently included within the text. These first two decisions they label as *Fragmenta Collecta* c. 20. However, they then proceed to separate the third decision from the rest, and present it as *Fragmenta Collecta* c. 21.<sup>86</sup> This is *prima facie* quite puzzling, because in every single Latin witness considered here – in **CH, D, E, G, I, J, K, L, M, N, O, Q, R** and **S** – the three decisions are all consistently presented as decisions of the burgesses gathered at Holyrood Abbey. Furthermore, the Latin text that Thomson and Innes give for *Fragmenta Collecta* c. 21 is very close to that presented here. However, the Scots text is quite different, and this in fact provides a clue to explain the editorial decision in *APS*, i, to signal that the textual origins of the third decision might have been different from the first two decisions. Evidently this is of some importance for any discussion of the text of the decisions of 1296, and what they might have meant to contemporaries. It raises the possibility that only the first two decisions were actually made in 1296, and that the third was added to the text later – but before the earliest surviving Latin version of the text was committed to writing in **CH**, probably during the 1390s.

To address this problem, it is helpful to begin by trying to understand more fully the editorial decision made by Thomson and Innes. In the course of his discussion of LCQB in the 'Preface' to *APS*, i, Innes noted briefly in a footnote that 'Another of the burgh laws... with regard to the division of the third of moveables, can be plainly traced to a... consultation and reply of the burgh of Newcastle', and he then cited *Fragmenta Collecta* c. 21. He proceeded to note that this 'consultation and reply' could be found in the 'Scotch version' in two manuscripts – 'W. 4. *Ult.*' and '*Colvil*'.<sup>87</sup> Based on the description of these manuscripts found in *APS*, i,<sup>88</sup> it has been possible to identify *W. 4. Ult.* as NLS Adv. MS 25.4.15, dated by Dolezalek to the mid-fifteenth century, and *Colvil* as EUL MS 208, dated by Dolezalek to the sixteenth century.<sup>89</sup> Innes' 'consultation and reply' have been found,<sup>90</sup> and it is clear that the basis of

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<sup>86</sup> *APS*, i, 724.

<sup>87</sup> *APS*, i, 42.

<sup>88</sup> *APS*, i, 188–9; *APS*, i, 198–9.

<sup>89</sup> Dolezalek, *Scotland Under Jus Commune*, II, 318–27; Dolezalek, *Scotland Under Jus Commune*, III, 182–5.

<sup>90</sup> NLS, Adv. MS 25.4.15 fols 163r-164r; EUL, MS 208 fol. 240r-v.



Innes' edition was the version of the text found in NLS Adv. MS 25.4.15.<sup>91</sup> As Innes stated in his 'Preface' to *APS*, i, this text actually formed a section of a short tractate entitled 'her folowys the statutis of the burowys', which was a miscellaneous collection of texts – all in Scots – variants of which are also attested in LCQB.<sup>92</sup> Innes printed an edition of this text as *Fragmenta Collecta* cc. 15–19 and 21 at *APS*, i, 722–4. The first chapter within this text was presented as an 'assisse of the new castell'.<sup>93</sup> The second was presented as a response from the burgh and burgesses of Newcastle to their counterparts in Perth to the question 'quhether yet ony burgess of the king of Scotland in seikness of ewill that he deis of may gif of his conquest or heritagis within burgh or utouth' to his children.<sup>94</sup> The third was presented as a response from the burgesses of Edinburgh to a query from the burgesses of Lanark, and the fourth was presented as a response from the burgesses of Edinburgh to a query from the burgesses of Aberdeen, both of which were also about the law of deathbed.<sup>95</sup> The fifth and final chapter of this curious text – on which Innes based his Scots edition of the third decision of the burgesses – is reproduced in full here:<sup>96</sup>

#### Abirden

Till thar der frendis the burrowgrieffis and burgess of Abirden Patrik dey Mar of the new castall and the burgess of that ilk toun greting knawyn be it to you that sic be the custum in our burgh of the new castall that gif a burgess gettis child with his wif lauchfully and scho dee and that ilk burges spouss ane other wyf and that burgess dee the tother wif sall duell in the principall wonnyng of hir husbandis xl dais efter the deid of her husband discendande of his fader and his eldfader And gif that wonnyng in quhilk he deyt was of his conquest he may gif that wonnis as all his other landis throu him of conquest gottin alswell till his wif as to ony other man Item it is custome in our burgh of the new castall that gif ony burgess lauchfully with his spousyt wif has gottyn ony child and he or scho dee the third part of all thar gudis salbe to the children sonnys or dochteris And the sone first gottyn and lel ayr of that burgess ded and of his wif sal haf that ilk portioun of gudis as ony of the tother children bot gif the ayr war frely feft in landis or in other gudis befor

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<sup>91</sup> Compare NLS, Adv. MS 25.4.15 fol. 164r with *Fragmenta Collecta* c. 21, as printed in *APS*, i, 724.

<sup>92</sup> *APS*, i, 42 (footnote).

<sup>93</sup> NLS, Adv. MS 25.4.15 fol. 163r.

<sup>94</sup> NLS, Adv. MS 25.4.15 fols 163r-v.

<sup>95</sup> NLS, Adv. MS 25.4.15 fols 163v-164r.

<sup>96</sup> NLS, Adv. MS 25.4.15 fol. 164r.

Innes' *Fragmenta Collecta* c. 21 seems to be taken from the final section of this text, beginning 'Item it is custome in our burgh of the new castell'. It is very clear that there is some close link between this Scots text, and the Latin text preserved in the decisions of 1296. Leaving aside what the two texts say about their origins, they are substantively identical in content and structure.

What is one to make of all this? It is helpful to recap what has been said in this section thus far. First, the current section of this article began with an edition of the earliest surviving version of the decisions made by the burgesses in Holyrood Abbey, ostensibly in 1296, based on the witnesses found in **CH, G, D** and **E**. Second, it was then noted that this edition differs in one significant respect from that of Thomson and Innes in *APS*, i. The edition printed here indicates that the burgesses reached three decisions about the law of succession. The last decision established that if a burgess or his wife died, then a third of their moveable property was owed to their children – including, in some circumstances, their heir. However, Innes was conscious that a text witnessed in a fifteenth-century manuscript attributed that third decision to an (undated) letter written by one Patrick Dey, mayor of Newcastle, and the burgesses of that burgh, to the burgesses of Aberdeen. Innes was conscious that the two texts were substantively the same. He then took the view that this letter from Newcastle was in all likelihood the original source of the *rule* encapsulated in the third decision; and he sought to reflect that view in his edition in *Fragmenta Collecta*. On this basis, Innes detached the third decision of 1296 from the first two decisions, numbering the first two decision as *Fragmenta Collecta* c. 20, and the third decision as *Fragmenta Collecta* c. 21. As printed on the page, they look like two distinct *fragmenta*.

However, this was not all that Innes said; and here he demonstrated that guarded, careful and honest scholarship that was so characteristic of his work. Having made the argument that 'Another of the burgh laws... with regard to the division of the third of moveables, can be plainly traced to a... consultation and reply of the burgh of Newcastle',<sup>97</sup> he then acknowledged a counter-argument. He observed, 'A doubt may perhaps be raised as to the age of these laws, by the position of some of the consultations on which they are founded, in connection with another which bears the date of 1295'; and Innes then cited his edition of the decisions of 1296, as found in *Fragmenta Collecta* c. 20.<sup>98</sup> He then referred his readers to the tabular information about the entries in *Fragmenta Collecta*, already cited above, to help

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<sup>97</sup> *APS*, i, 42.

<sup>98</sup> *APS*, i, 42.

them understand the problem; but argued that ‘[n]o very safe conclusion... can be drawn from the order or juxtaposition of chapters in the compilations referred to’.<sup>99</sup>

With respect, this seems too cautious. *None* of the Latin MSS cited above supports the severance of the third decision attributed to the burgesses who gathered in 1296 from the first two. Furthermore, one can question whether Innes’ approach is supported by the evidence of the undated letter addressed by Patrick Dey, mayor of Newcastle, to the burgesses of Aberdeen. Despite some efforts, it has not been possible to trace any Patrick Dey, mayor of Newcastle – that might have helped to date the letter preserved in Adv. MS 25.4.15, which could of course be very much older than the 1450s.<sup>100</sup> Indeed, the only datable evidence of burgesses of Aberdeen consulting the burgesses of other burghs about the resolution of difficult legal questions comes from a dispute in 1467. In that year, they asked their counterparts in Perth, Dundee and Edinburgh about another aspect of the law of succession (which their counterparts in Dundee and Edinburgh resolved with express reference to a chapter in LCQB).<sup>101</sup> However, let it be assumed that the letter preserved in Adv. MS 25.4.15 – perhaps in a Latin original – predates the decisions of 1296. It would not follow from such a conclusion that this letter was the source of the text concerning children succeeding to a third of their parents’ moveables, and that this then somehow made its way into the decisions of 1296. It is true that the two texts are quite similar in content and structure; but all that follows is that there was a close link between them. Perhaps this close link was that *both* were based independently on some statement of customary law observed in Newcastle and articulated in writing. It has long been known that whoever first reduced LCQB to writing drew heavily on a Newcastle custumal dating from the second half of the twelfth century.<sup>102</sup> That process of augmentation and adaptation of that custumal for the four burghs was advanced by 1272 at the latest, the *terminus ante quem* of **A**, which preserves the earliest witness to LCQB – the laws of the four burghs. In other words, those who articulated the laws of Berwick, Roxburgh, Edinburgh and Stirling in the thirteenth century had looked to Newcastle for inspiration; it would not therefore be surprising if their successors had done so too in 1296.

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<sup>99</sup> *APS*, i, 42.

<sup>100</sup> There is no Patrick Dey listed amongst the ‘Mayors, Bailiffs and Sheriffs of Newcastle From 1251 to 1500’ as printed in Richard Welford, *History of Newcastle and Gateshead In the 14<sup>th</sup> and 15<sup>th</sup> Centuries* (London, 1884), 415–32. The surname ‘Deye’ was not unknown in Newcastle in the medieval period; Welford, *History*, 403, 405 and 409, mentions a John Deye, vicar of Newcastle, who was active during the 1490s.

<sup>101</sup> See *Aberdeen Registers Online*, ed. by Edda Frankot, Anna Havinga, Claire Hawes, William Hepburn, Wim Peters, Jackson Armstrong, Phil Astley, Andrew Mackillop, Andrew Simpson, Adam Wyner (University of Aberdeen, 2019), <https://www.abdn.ac.uk/aro> (accessed 5 September 2022) (ARO), ARO-5-0593-08; ARO-5-0602-01; ARO-5-0602-02; ARO-5-0603-01.

<sup>102</sup> This is discussed in more detail below, but see – for example – *APS*, i, 39–40.

For all of these reasons, the edition of the earliest surviving version of the decisions of 1296 presented above departs from that of Innes. His rationale for severing the third decision of the burgesses from the first two decisions in *Fragmenta Collecta* cc. 20–1 is, with respect, dubious, and so that editorial decision is not followed here.<sup>103</sup> Innes does not give modern historians sufficiently good reason to doubt that the earliest version of the text of the decisions quoted above is actually representative of what was decided in 1296.<sup>104</sup>

### **The Decisions of 1296: Date**

Before trying to explain what these decisions might have meant to the burgesses who made them, and why they might have decided to formulate them as they did, it is first necessary to say something more about whether or not the date of 1296 is reliable. Only then will a contextual reading be possible.

It is certain that the text of the decisions was in existence by the time that **CH** was composed in the 1390s. Furthermore, the four earliest witnesses to the text (**CH**, **D**, **E** and **G**) all concur in the date of the Monday next after Epiphany in 1295 – i.e. 1296, assuming the scribe followed the convention of beginning of the new year at the Annunciation.<sup>105</sup> As has been explained, the witnesses to the text within the *Leges Forestarum* in **I**, **J**, **K**, **L**, **M** and **N** also concur in this date. While the witnesses to the text within LCQB in **I**, **J**, **K**, **L** and **M** suggest a date of 1396, this is surely the result of a scribal error. The fact that the text is attested in **CH** – dated to the 1390s – does not completely rule out the possibility of a date of 1396, but it makes it rather unlikely. More relevant is the point that Berwick was in English hands in 1396, and it is therefore implausible to suggest that its burgesses would have participated in making laws for the four burghs by this point in time.<sup>106</sup> Of the two dates suggested by the manuscript tradition, 1296 is by far the more likely.

Also relevant to the question of the date of the decisions is an apparent connection between the decisions, on the one hand, and the text of LCQB as it developed during the

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<sup>103</sup> In fairness to Innes, it should be pointed out that he had no access to **CH**, dated to the 1390s. The other early witnesses to the text of the decisions – **D**, **E** and **G** – were all dateable to the mid-fifteenth century, and so very close in time to Adv. MS 25.4.15, the source of the letter of Patrick Dey, mayor of Newcastle. Indeed, **E** and **G** may have been composed at exactly the *same* time as Adv. MS 25.4.15. I should also point out that I could never have formulated these arguments except through reflecting on the meticulous and rigorous scholarship of Thomson and Innes.

<sup>104</sup> That is not to say that this article has demonstrated that the earliest surviving version of the text *is* reliable evidence of what was actually decided in 1296; more is to be said about that below.

<sup>105</sup> See the collation of the text above.

<sup>106</sup> Alexander Grant, *Independence and Nationhood: Scotland 1306-1469*, (Edinburgh, 1984), 33–57 traces the dates when Berwick (and Roxburgh) were lost and recovered.

fourteenth century, on the other. To explain, the third of the decisions supposedly formulated in 1296 does not only bear a resemblance to the text of the letter sent by Patrick Dey, mayor of Newcastle, to the burgesses of Aberdeen. It also bears a striking resemblance to two further texts that had emerged within manuscript traditions of LCQB by the 1390s. Consider LCQB c. 108 in **C**<sup>107</sup> and c. 113 in **CH**.<sup>108</sup>

**C c. 108 Of thryd pairt a mannys gude**

The custome is in the burows of Scotland and that lang tyme that na man may thynk that qwhen ony man or burges get wyth his lauchful wyf childre And scho or he dey the thryd pairt of al the gudes aw to be done and gyfyn to the dochtrys and the sonnys of thaim And the ayre and the fryst child sal hafe that ilk portion as the tuthir children has evynly wyth thaim bot gyf he be festnyt furth.

**CH c. 113 De legitima parte bonorum ad heredes pertinentes** **v<sup>xx</sup> xiii**

*Consuetudo est in omni burgo Scocie a tempore quo non extat memoria de contrario quod cum aliquis burgensis liberos procreaverit de uxore sua legitima et ipse decedat tercia pars omnium bonorum debetur filiis et filiabus ipsorum legitimus autem filius primogenitus et heres eiusdem viri et uxoris habebit eandem portionem bonorum quam alii videlicet equalem cum aliis liberis nisi ipse primogenitus fuerit forisfamiliatus.*

**C** LCQB c. 108 and **CH** LCQB c. 113 are evidently very similar to the third decision of the burgesses who supposedly gathered together in Holyrood Abbey in January 1296. The only significant change is that **C** LCQB c. 108 and **CH** LCQB c. 113 do not present the rules as resulting from decisions of burgesses, but as expressions of ancient custom. The phrase ‘The custome... in the burrows of Scotland and that lang tyme that na man may thynk’ is simply the Scots rendering in **C** of the passage ‘*Consuetudo... in omni burgo Scocie a tempore quo non extat memoria de contrario*’ in **CH**. The witnesses to LCQB in **D**, **E**, **H**, **I**, **J**, **K**, **L**, **M** and **N** all preserve very similar variants of the text, and all treat it as an expression of ancient custom. In other words, the text was accepted within all living manuscript traditions during the fifteenth

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<sup>107</sup> **C** fol. 162r, LCQB c. 108.

<sup>108</sup> **CH** fol. 71v, LCQB c. 113 (‘It is the custom in every Scottish burgh, time out of mind, that when any burges has children with his lawful wife and he dies, the third part of all of the goods are owed to their sons and daughters. Moreover, the lawful first born son and heir of the same man and wife will have the same portion of the goods as the others, that is to say an equal [portion], unless that firstborn son was forisfamiliated’).

century.<sup>109</sup> By contrast, there had been a time – attested in **B** – when these rules were not included within all scribal traditions of LCQB. It will be recalled that **B** is dated to the period 1323x1346, and the text is absent from it.<sup>110</sup> The rules are not attested either in the version of LCQB found in **F**<sub>1</sub>, which dates from the early-fifteenth century.<sup>111</sup> It is conceivable that this is because **F**<sub>1</sub> preserves an older reading of LCQB, which would be consistent with the fact that it preserves an older reading of another Scottish legal text – *Regiam Majestatem*.<sup>112</sup>

The surviving evidence suggests that the inclusion of the rule about children succeeding to a third of their parents' moveables within LCQB, and the scribal decision to treat it as immemorial burghal custom, can be dated to some time during the fourteenth century. A possible explanation for this development emerges if one takes seriously the putative dating of the decisions of the burgesses under consideration here to 1296. As has already been said, the Latin text of the rule in **CH** LCQB c. 113, and the related texts in **D**, **E**, **H**, **I**, **J**, **K**, **L**, **M** and **N**, are all virtually identical to that preserved in the third decision of the burgesses in **CH**, **G**, **D** and **E**. If the date of 1296 is taken seriously, then the third decision could have been the source – or *a* source – for **CH** LCQB c. 113, and the related texts preserved in the witnesses to LCQB in **D**, **E**, **H**, **I**, **J**, **K**, **L**, **M** and **N**. Of course, it might not have been the *only* source for **CH** LCQB c. 113. It is at least curious that a very similar text was treated as an expression of the custom of Newcastle in the undated letter attributed to Patrick Dey, mayor of that town. That said, the decision of 1296 can much more easily be understood as expressions of the customs of the four burghs than the rules found in Dey's letter. In addition, if the decisions really were made in 1296, then they could easily have contributed to a process whereby the rules they expressed came to be regarded as *immemorial* custom a century later, in the 1390s, when the scribes of **C** and **CH** were compiling their manuscripts. In other words, accepting the date of 1296 for the third decision of the burgesses would help to explain what is known about the historical development of the textually similar chapter of LCQB represented in **CH** LCQB c. 113.

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<sup>109</sup> **D** fol. 143v (LCQB c. 113); **E** fol. 44v (LCQB c. 115 in modern numbering); **H** fol. 89v (LCQB c. 112); **I** fol. 98v (LCQB c. 115); **J** fol. 92r (LCQB c. 114); **K** fol. 133r-v (LCQB c. 115); **L** fol. 59r (LCQB c. 113); **M** fol. 90r (LCQB c. 114); **N** fol. 91r (LCQB c. 115). The absence of the text from **G** is irrelevant, given that **G** is incomplete (see *Laws of Medieval Scotland*, ed. Taylor, 79–87. See also Adv. MS 25.4.15 fol. 145v (LCQCB c. 110 in modern numbering) for a Scots version of the chapter.

<sup>110</sup> Consider **B** fols 49v–67v.

<sup>111</sup> See BL, Add. MS 18111 (**F**), fols 77r-103r. For **F**, see *Laws of Medieval Scotland*, ed. Taylor, 72–8. This point is developed more fully below.

<sup>112</sup> See Taylor, 'Introduction', 36–61.

There is therefore some reason to accept the date of 1296 for the decisions; and there seems to be no good reason to doubt it. Later sections of this article will indicate that the date of 1296 makes considerable sense in light of other known developments in burghal law and custom at this time. For all of these reasons, this article will now proceed on the assumption that the date of 1296 is reliable.

### **The Decisions of 1296: Content**

Having made these remarks, it is worth pausing to comment on the content of the decisions, and to think about two questions in particular. First, who made the decisions, and second, what were the decisions?

#### **a) The decision-makers: the burgesses**

As regards the first question, the reader is told that the burgesses of Berwick, Edinburgh, Roxburgh and Stirling gathered at Holyrood Abbey ‘in the year of our Lord 1295 on the Monday next after Epiphany’. On the assumption that it is correct to give this date in modern reckoning as Monday, 9<sup>th</sup> January 1296 – an assumption already explained above – it is possible to identify some of those who may have constituted the assembly. This is due to the turbulent events which followed as 1296 unfolded. In March 1296, Edward I invaded Scotland. After inflicting devastating defeats on King John Balliol, in August 1296 Edward demanded that the political elites the community of the realm should swear him fealty – including the aldermen (roughly equivalent to mayors) and the burgesses of each burgh.<sup>113</sup> Lists of those who swore him fealty survive, including lists of the aldermen and burgesses of Edinburgh, Stirling and Roxburgh.<sup>114</sup> In all likelihood, aldermen were elected annually, at the Michaelmas assembly of the head court of each burgh – so towards the end of September or at the beginning of October.<sup>115</sup> As a result, there is good reason to think that the aldermen who swore fealty to

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<sup>113</sup> Nicholson, *Later Middle Ages*, 44–51. On the aldermen, see, for example, *Early Records*, ed. Croft Dickinson, lxxvii–cix, particularly at cii–ciii footnote 11.

<sup>114</sup> The lists are printed in *Instrumenta Publica sive processus super et fidelitatibus et homagiis Scotorum domino regi Angliae factis, A. D. 1291-1296*, ed. Thomas Thomson (Edinburgh, 1834); the approach here has been to make reference to the lists as contained in *People of Medieval Scotland 1093-1317 [PoMS]*, ed. by A. Beam, D. Broun, J. Bradley, D. Carpenter, J. R. Davies, K. Dutton, N. Evans, M. Hammond, R. Ó. Maolaláigh, M. Pasin, A. Smith, 1<sup>st</sup> edn (2010); with S. Ambler, A. Giacometti, B. Hartland and K. J. Stringer, 2<sup>nd</sup> edn (2012); with C. Jackson and N. Jakeman, 3<sup>rd</sup> edn (2016); with G. Ferraro, E. Hall and A. Taylor, 4<sup>th</sup> edn (2019), available online at [www.poms.ac.uk](http://www.poms.ac.uk) (accessed 20 June 2022).

<sup>115</sup> See *Early Records*, ed. Croft Dickinson, lxxx–lxxxi; Croft Dickinson states the point very tentatively, but all of the fourteenth-century witnesses to LCQB agree that the ‘*prepositi*’ were elected at the Michaelmas head court (**B** fol. 62r, LCQB c. 72; **C** fol. 160r, LCQB c. 79; and **CH** fols 68v-69r, LCQB c. 74). **C** fol. 160r, LCQB c. 72 translates ‘*prepositi*’ as the ‘aldyrman and the bailes’. There seems little reason to doubt the truth of this,

Edward I in August 1296 had also been aldermen in January that year. As the leading figures within each burgh, they may have been present at the assembly of burgesses that had gathered in Holyrood and made the decisions being discussed here. Their names were William Dederick, burgess and alderman of Edinburgh;<sup>116</sup> Walter the goldsmith, burgess and alderman of Roxburgh;<sup>117</sup> and Richard Bryce, burgess and alderman of Stirling.<sup>118</sup>

Additionally, it may be the case that at least some of the other named burgesses who swore fealty to Edward I in August 1296 had also been present at the assembly in January that year. Exactly twelve burgesses from each of the three burghs just mentioned swore fealty to Edward I.<sup>119</sup> Duncan noticed this, and suggested that the twelve burgesses might be identified with the individuals mentioned in LCQB c. 109 in **CH** and LCQB c. 106 in **C**.<sup>120</sup> These texts provided that in each burgh twelve men were to be appointed (**CH**) or elected (**C**) to uphold the laws and customs of the burgh. Croft Dickinson and Duncan both linked this with the later emergence of the burgh councils, charged with governance of each town.<sup>121</sup> Less evidence survives concerning when precisely this body was to be elected, or otherwise chosen; by the fifteenth century, the council was – like the alderman – elected at the Michaelmas head court.<sup>122</sup> If this was also the case in the late-thirteenth century, and if the twelve men from each burgh who swore fealty to Edward I in August 1296 were indeed burgh councillors, then perhaps

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which – as Croft Dickinson notes – is an attested practice in the council registers of Aberdeen from 1398 onwards.

<sup>116</sup> See <https://www.poms.ac.uk/record/person/17605/> (accessed 20 June 2022).

<sup>117</sup> See <https://www.poms.ac.uk/record/person/10644/> (accessed 20 June 2022).

<sup>118</sup> See <https://www.poms.ac.uk/record/person/17585/> (accessed 20 June 2022).

<sup>119</sup> The burgesses listed for Edinburgh were ‘William Dederick, burgess and alderman of the burgh of Edinburgh, James of Edinburgh, Walter fitz Martin, Walter the Arblastar, Henry Scott, John Hogg, William Taylor, Walter of Ripon, Waldef de la Roche, William of Leicester, Richard fitz Walter of Edinburgh, John Wigmore of Edinburgh’; the burgesses listed for Stirling were ‘Richard Bryce of Stirling, burgess and alderman of the same burgh, Lawrence of Dunblane, William the servant (sergeand?), Reginald Melville, Richard Prestre, Robert Taylor, Maurice Rous, Gilbert Tacket, Adam the son of Richard, Ralph the wright, William the lardner, and John Drylaw, burgesses’; and the burgesses listed for Roxburgh were ‘Walter Goldsmith of Roxburgh, burgess and alderman of Roxburgh, Richard the furber, Richard Vickers, Michael Sealer, William Boswell, Adam Mindrum, Adam Knout, Geoffrey of Berwick, Adam York, Adam Corbrand, Austin Mercer, John Knout of Roxburgh’. For Edinburgh, see: <https://www.poms.ac.uk/record/source/7417/>; for Stirling, see: <https://www.poms.ac.uk/record/factoid/77922/>; for Roxburgh, see <https://www.poms.ac.uk/record/source/7417/> (all accessed 20 June 2022).

<sup>120</sup> Duncan, *Making of the Kingdom*, 487–8; see **C** fol. 162r, LCQB c. 106 (‘In al borowis of Scotland the best men sal chese the xij lauchful burges sufficiand and wyse of the burgh and thai sal afferme thrw atthis that thai sal kepe the lawys and al the oyse of the burgh eftyr thair mycht’); **CH** fol. 71v, LCQB c. 109 (‘*In omni burgo tocius regni Scocie superior illius burgi faciat xii legales burgenses sufficientiores et discrestiores[sic] burgi sacramento suo asserere et in ipso facient observari quod omnes leges et iustas consuetudines pro posse suo conservabunt*’). No parallel text is found in **B**; this point will be discussed further below.

<sup>121</sup> *Early Records*, ed. Croft Dickinson, lxxxiv–lxxxvii; Duncan, *Making of the Kingdom* 487–8.

<sup>122</sup> See *Aberdeen Guild Court Records 1437-1468*, ed. by Elizabeth Gemmill, Scottish History Society series 5, vol. 15 (Edinburgh, 2005) 5–6.



these thirty-six men were the representatives of Edinburgh, Stirling and Roxburgh who gathered in Holyrood Abbey in January that year.

What of Berwick? Another text, known as the *Statuta Gilde* – elements of which go back to the mid-thirteenth century – declared that Berwick was to be governed by twenty-four good men, together with a mayor and four bailies.<sup>123</sup> If so, Berwick’s representatives in January 1296 in Holyrood might have been drawn from this group. However, no community of the burgh of Berwick did homage to Edward I in August 1296. The reason is rather poignant. One of Edward I’s first acts in his invasion of Scotland was to sack Berwick, and to massacre the inhabitants.<sup>124</sup> Only one ‘burgess of Berwick’ is listed as having given fealty to Edward I in August 1296; he was Thomas of Crichton.<sup>125</sup> Most, if not all, of the others were presumably dead, including the burgesses who had met with their counterparts from Edinburgh, Stirling and Roxburgh in Holyrood Abbey seven months earlier.

For present purposes, what matters is that the burgesses who swore oaths to Edward I in August 1296 were leading merchants, or possibly craftsmen. These men, or some of these men, were – in all likelihood – the same men who had gathered in Holyrood Abbey to make decisions about succession to moveable property in January that year. These men were not in any sense lawyers or professional judges. Many would have had experience of running the various burgh courts in their towns, and they would have been familiar with the procedures and customs of their own communities in relation to the performance of certain legal acts, such as transferring lands. All that said, it remains the case that they were essentially successful merchants rather than professional or quasi-professional lawyers.<sup>126</sup>

## **b) The decisions**

What did the burgesses decide? In essence, the burgesses were making decisions about what types of property did, and did not, automatically pass to the heir of a burgess on his death. The

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<sup>123</sup> See **B** fol. 73r–v, *Statuta Gilde* cc. 36–7; cf. *APS*, i, 436 and *Ancient Laws and Customs*, ed. Innes, I, 80–1. For illuminating discussion, see Duncan, *Making of the Kingdom*, 494–6. The date of the text will be discussed further below.

<sup>124</sup> Nicholson, *Later Middle Ages*, 49.

<sup>125</sup> See <https://www.poms.ac.uk/record/person/16962/> (accessed 20 June 2022).

<sup>126</sup> For discussion – admittedly relying on the evidence of a later period – see Andrew R. C. Simpson, ‘Men of Law in the Aberdeen council register? A preliminary study, circa 1450-1460’, *Juridical Review*, new series (2019), 136–59; see also the *erratum* published in connection with this article at the end of the third issue of the *Juridical Review* for 2019 (no page reference); see also Andrew R. C. Simpson, ‘Andrew Alanson: Man of Law in the Aberdeen Council Register, c. 1440-c. 1475?’, in *Cultures of Law in Urban Northern Europe*, ed. by Jackson W. Armstrong and Edda Frankot, (London, 2021), 247–66.

heir was usually the burgess' eldest surviving son.<sup>127</sup> Property that passed automatically to the heir was called 'heritable'. The primary example of heritable property was land inherited from a relative.<sup>128</sup> Property that was not heritable was subject to different rules of succession; and the decisions with which this article is concerned dealt with two related questions.<sup>129</sup> First, leaving aside land inherited from a relative, what types of property were heritable? Second, how much freedom did a burgess have to make a will bequeathing property that was not heritable to legatees of his choice?

In response to these questions, the burgesses gathered in Holyrood reached three decisions. First, ships and horses were *not* heritable. The only caveat to that proposition was that the heir was entitled to the deceased burgess' best horse, unless the deceased burgess had made a legacy of that horse in favour of some religious house. In that case, the legacy was to stand, but the heir was to be entitled to the deceased's second best horse. Second, the burgesses decided that certain items should pass automatically to the heir – specifically, the best equipment and utensils found in the deceased's house. However, leaving such items aside, every burgess could bequeath the rest of his property to whomsoever he pleased, whether he was on his deathbed or not. This caveat is interesting, given that alienations of heritable property on deathbed were in general prohibited by LCQB, save in cases of necessity – the rationale given in LCQB being that the canonist argument that '*necessitas non habet legem*', as was noted briefly above.<sup>130</sup> In other words, the second decision clarified that burgesses enjoyed significant freedom of testation in respect of property that was *not* heritable. Third, the burgesses assembled in Holyrood decided that if a burgess had legitimate children with his wife, then if either the burgess or his wife died, a third part of all of their goods would be owed ('*debetur*') to the sons and the daughters of the deceased. The burgesses also clarified that the heir would have the same portion as the other children. Suppose there were three children, one of whom was the heir; in that case, the third allocated to the children would be split three ways

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<sup>127</sup> See Sellar, 'Succession Law in Scotland', 52–3. LCQB does not give a fixed order of succession, but the third decision of 1296 (for example) makes it clear that there was an expectation that one child would be heir, and the others would not. On customs governing succession in the burghs at this time more generally, see David Baird Smith, 'The "Retrait Lignager" in Scotland', *The Scottish Historical Review* 21 (April 1924), 193–206.

<sup>128</sup> Not all land was held heritably, but land acquired during a man's lifetime was 'conquest'; for discussion, see Sellar, 'Succession Law in Scotland', 54. See also LCQB, which provided that if a burgess had acquired lands during his lifetime, and he had not assigned them ('*eas non assignaverit*') prior to his death, then '*post mortem suam filius eius vel filia eius heres cedit in hereditatem totius terre sue quam pater suus [habuerit] die quo fuit vivus et mortuus*' (A fol. 62v, LCQB c. 17; the word '*habuerit*' in square brackets is supplied from B fol. 53r, LCQB c. 23; see also C fol. 155v, LCQB c. 12 and CH fol. 64v, LCQB c. 25).

<sup>129</sup> See Sellar, 'Succession Law in Scotland'.

<sup>130</sup> See footnote 63 above.

between them. However, this would not apply if the heir was forisfamiliated, that is to say if the heir had not been made independent of the father's household.<sup>131</sup>

### **The Decisions of 1296: Purpose**

Why did the burgesses make these decisions in January 1296? One way of approaching this question is to think about who would have benefited from the decisions. Another is to think about whether or not the burgesses might have drawn inspiration from contemporary thinking on the subject of succession to property. Each of these approaches to the question will be considered in turn.

#### **a) Who might have benefited from the decisions?**

First, the decision-makers wanted to articulate the proposition that burgesses had extensive freedom of testation in respect of non-heritable property. In other words, the burgesses stood to benefit. Whether or not burgesses' heirs actually benefited from the decisions is unclear. Establishing that ships did *not* pass to them automatically may have removed an ambiguity that could otherwise have been resolved in their favour. Second, the decision-makers wanted to ensure that burgesses could not exercise that freedom in order to wholly exclude their children from their wills – hence the provision the children were owed a third of the moveable goods of the deceased. In other words, burgesses' children generally stood to benefit from the rules, at least to some extent. Third, the rules did not only give protection to the burgesses and their children; they also gave protection to religious houses. Readers will recall the rather odd provision, to the effect that the heir was entitled to the burgess' best horse *unless* that horse was the subject of a legacy to a religious house, like an abbey or a priory. In that case, the legacy would trump the heir's claim. In other words, the decision in question conferred what looked like a rather limited express privilege on abbeys and priories.

This limited privilege does not, in itself, reveal just how much monastic houses stood to gain from the clarity given in these decisions. The decisions evidently had in contemplation the possibility that burgesses might leave moveable property to abbeys and priories. Of course, if burgesses did not leave property to their immediate heirs or children, then one of the most obvious beneficiaries of testamentary legacies at the time would have been the church, in one guise or another. There is a reasonable body of evidence to show that burgesses were already

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<sup>131</sup> The meaning of forisfamiliation is discussed further below.

endowing monastic houses in their burghs in a range of ways.<sup>132</sup> The evidence is often concerned with *inter vivos* gifts of burghal land, or claims in respect of burghal land. However, the reason that more is known about *inter vivos* dispositions of heritable property to the church than testamentary grants of non-heritable property relates to the nature of the surviving evidence; grants of land needed to be preserved for the future in a way that gifts of money and non-heritable items did not. Burgesses would also have left extensive amounts of such property to the church, and records of such bequests can easily be traced in later periods.<sup>133</sup> By clarifying that a burghess had extensive freedom of testation in respect of non-heritable property, the decision-makers in January 1296 cleared the way for their brethren to make extensive gifts to the church with impunity. Of course, if the church was interested in this, then so were the burgesses; they would be able to secure prayers and intercessions for their souls and the souls of their families as a consequence of endowing religious houses and altars.<sup>134</sup>

Another potential beneficiary of the burgesses' newly articulate freedom of testation was the merchant guild in each burgh.<sup>135</sup> This can be traced in another text, which laid down statutes to govern the burgh of Berwick. It came to be known as the *Statuta Gilde*, and its first chapters were composed when Robert de Bernham was mayor of Berwick, probably during the 1230s or the 1240s.<sup>136</sup> Duncan notes that Robert de Bernham was the brother of Master David de Bernham, who became bishop of St Andrews and promulgated provincial statutes for the Scottish church during the 1240s; more will be said about one of these shortly. During the 1230s, he had served as chamberlain, the officer responsible for overseeing the administration of the burghs,<sup>137</sup> and Duncan speculated that there was a link between the emergence of the

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<sup>132</sup> For discussion, see, for example, Wendy B. Stevenson, 'The Monastic Presence in Scottish Burghs in the Twelfth and Thirteenth Centuries', *The Scottish Historical Review* 60 (October 1981) 97–118. Stevenson showed that the monasteries acquired some of their urban properties through genuine gifts, but many transfers were the result of commercial transactions. See also Wendy B. Stevenson, 'The Monastic Presence: Berwick in the Twelfth and Thirteenth Centuries', in *The Scottish Medieval Town*, ed. by Michael Lynch, Michael Spearman and Geoffrey Stell, (Edinburgh, 1988), 99–115.

<sup>133</sup> Consider, for example, *Cartularium Ecclesiae Sancti Nicholai Aberdonensis*, ed. J. Cooper, 2 vols, (Aberdeen, 1888–1892), New Spalding Club 2, 7, ii, 184; see also, on bequests to the church more generally, A. E. Anton, 'Medieval Scots executors and the courts spiritual', *Juridical Review*, first series 67 (1955) 145–9.

<sup>134</sup> See, for example, the discussion (drawing on late-medieval records) in Iain Fraser, 'The Late-Medieval Burgh Kirk of St Nicholas, Aberdeen', unpublished PhD thesis, University of Edinburgh (1989), particularly at 2–13. See also Anton, 'Medieval Scots Executors', 145–9.

<sup>135</sup> For discussion of the merchant guild and its development at this time, see Duncan, *Making of the Kingdom*, 488–501; *Early Records*, ed. Croft Dickinson, xc–cix. For discussion of the development of the guild at a later period, see *Aberdeen Guild Court Records*, ed. Gemmill, 1–40.

<sup>136</sup> For Robert de Bernham, see <https://www.poms.ac.uk/record/person/5393/> (accessed 20 June 2022); for Master David de Bernham, see <https://www.poms.ac.uk/record/person/432/> (accessed 20 June 2022). Robert 'de Bornhame' is named as the mayor responsible for the *Statuta Gilde* in the earliest surviving witness to the text (**B**); see **B** fol. 68r, *Statuta Gilde* pr..

<sup>137</sup> On the chamberlain, see Taylor, *Shape of the State*, 244–62.

*Statuta Gilde* and David de Bernham's tenure of office as chamberlain.<sup>138</sup> Regardless, the version of *Statuta Gilde* preserved in **B** and in **C** shows that there was an expectation that guild brothers – burgesses who were members of the merchant guilds – should leave something to the merchant guild in their wills.<sup>139</sup> The guild did a range of things with its money, linked with the financial administration of the burgh generally. It also endowed altars in the burgh churches, and provided charitable financial support to guild brethren and their families who were in financial distress.<sup>140</sup> Precisely how much the guild brother should bequeath was left up to him; but the statute in question made a rather opaque reference to the notion that a burgess was expected to leave property from 'the part' pertaining to him.<sup>141</sup> All this may have meant was that the burgess could not leave heritable property to the guild by will. Alternatively, it may have meant that there was already some notion that a burgess did *not* enjoy complete freedom of testation in respect of non-heritable property, and that others – like heirs and children – had some sort of specific claim on a deceased burgess' non-heritable property before 1296. For present purposes, what matters is that the guild might have been another beneficiary of the largesse of a rich merchant burgess contemplating his mortality.

#### **b) Were the burgesses inspired by contemporary thinking about succession on death?**

Thus far, it has been argued that some of those who stood to benefit from the decisions of January 1296 were the burgesses themselves, the burgesses' children, the church and merchant guilds. Of these groups, perhaps the church had most to gain. Perhaps unsurprisingly, then, there are parallels between contemporary canonist assumptions about the regulation of testamentary legacies and bequests, on the one hand, and the decisions of 1296, on the other. These may make it easier to explain some possible motivations behind the decisions. To explain, Franck Roumy has recently drawn attention to the ways in which a coherent law of inheritance was gradually developed by canonist jurists until it was incorporated into the

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<sup>138</sup> Duncan, *Making of the Kingdom*, 495.

<sup>139</sup> **B** fol. 69r, *Statuta Gilde* c. 3; **C** fol. 165v, *Statuta Gilde* c. 3.

<sup>140</sup> See, for example, *Aberdeen Guild Court Records*, ed. Gemmill, 8–40.

<sup>141</sup> **B** fol. 69r, *Statuta Gilde* c. 3; **C** fol. 165v, *Statuta Gilde* c. 3; the reading given in *APS*, i, 432 and in *Ancient Laws and Customs*, ed. Innes, I, 66, is not vouched by the earliest manuscript witnesses. While the points made here are relatively clear, the text as a whole is difficult to interpret; in **B** it is as follows: '*Quod fratres Gilde legant aliquid ad Gildam. Statuimus etiam ut fratres huius Gilde in dispoicionem testamentorum certo loco secundum quod eis libuerit de parte eis tangente huic Gilde deligerint nisi ex negligencia fuerit commissa ita quod aliquid legant.*' In **C** the text reads as follows: '*De testamentis gylde. Statuimus ut omnes fratres huius gylde in dispoicione testamenti sui ~~tercio~~ certo loco secundum quod eis libuerit de parte [e]is contingente huic gylde delegant nisi ex negligencia si fuerit omissum Ita quod aliquid legent.*' For a comment on this text, see Duncan, *Making of the Kingdom*, 498.

*Decretales* of Pope Gregory IX in 1234, under the titles *De testamentis et ultimis voluntatibus* and *De successione ab intestate* (*Liber Extra* 3.26-3.27).<sup>142</sup> The basic principle of the canon law was that of freedom of testation – particularly in favour of the church. Popes of the twelfth and thirteenth centuries had eroded Roman testamentary formalities to make this more straightforward. By the thirteenth century, a system had developed whereby parish priests would discover the last wishes of the deceased, and then have them written up and ‘certified by an oath of the witnesses, and transcribed in a register of the episcopal court’.<sup>143</sup> Thirteenth-century statutes of the *ecclesia Scoticana* reveal that it was no different. There is an undated statute in the Lambeth MS (L), which is generally thought to be thirteenth-century in origin, and perhaps dateable to the 1230s; it is included within a collection also containing statutes of David de Bernham.<sup>144</sup> The statute in question focused on the payment of mortuary dues to the church, but it also dealt with the administration of the estates of those who died testate and intestate. In the course of outlining how the estates of those who died testate were to be administered, it provided that the temporal debts of the deceased should be paid first, and the remaining ‘*peculium*’ – as it was described – pertaining to the deceased was to be divided into three parts (*tres partes*). Immediately afterwards, it was said that if the ‘*pars defuncti*’, or the ‘part of the deceased’ – exceeded a certain amount, then a cow had to be given to the church.<sup>145</sup> Whether or not this ‘*pars defuncti*’ was connected with the ‘part’ pertaining to the deceased which was mentioned in the near-contemporary *Statuta Gilde* is unclear; but it seems very likely.

This division of an estate into thirds is intriguing, particularly in light of the rule articulated by the burgesses gathered in Holyrood in 1296, that the children of a deceased burgess could claim a third of his goods. Both this provision, and also the Scottish provincial statute of the 1240s which reflected an assumption that the ‘*peculium*’ of a deceased individual should be divided into thirds, may have been indebted to another rule of canon law developed

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<sup>142</sup> See the discussion in Franck Roumy, ‘Family Law’, in *The Cambridge History of Medieval Canon Law*, ed. by Anders Winroth and John C. Wei, (Cambridge, 2022), 475–91, at 485–90.

<sup>143</sup> Roumy, ‘Family Law’, 486–7.

<sup>144</sup> See *Ecclesiae Scoticanae Statuta tam Provincialia quam Synodalia quae Supersunt MCXXV-MDLIX*, ed. by David Patrick, 2 vols, Bannatyne Club No. 116, (Edinburgh, 1866), II, 44 [c. 88] (note too II, 18 [c. 25]); see also *Statutes of the Scottish Church, 1225-1559: being a translation of Concilia Scotiae: ecclesiae Scoticanae statuta tam provincialia quam synodalia quae supersunt*, ed. by David Patrick, Scottish History Society series 1, vol. 54 (Edinburgh, 1907), 46–7 [c. 88] (note too 17 [c. 25]); and for the date of the statutes, see the discussion in D. E. R. Watt, *Medieval Church Councils in Scotland*, (London, 2000), 64–5, and in general the discussion at 55–78. On the Lambeth MS (L), see *Laws of Medieval Scotland*, ed. Taylor, 130–7.

<sup>145</sup> *Ecclesiae Scoticanae Statuta*, ed. Patrick, II, 44 [c. 88]; *Statutes of the Scottish Church*, ed. Patrick, 46–7 [c. 88]. For discussion, see also Anton, ‘Medieval Scots Executors’, 145–9.

in decretals of Pope Innocent III (r. 1198-1216) and Pope Gregory IX (r. 1227-1241). While both popes upheld the basic ideal of testamentary freedom, they also developed protections for the testator's family. In what became *Liber Extra* 3.26.16, *Rayntius*, Innocent III had developed rules of Roman law to the effect that one could not completely 'disinherit one's closest relatives by will'.<sup>146</sup> Innocent III had spoken of the claim of the closest relatives as being '*debitum iuris naturae*'. In *Liber Extra* 3.26.18, *Raynaldus*, Gregory IX had confirmed that this was the case in respect of the property owed to descendants of a deceased individual; and the amount of the debt owed to the descendants was set at one third.<sup>147</sup>

It was perhaps within the context of these canonist assumptions – of the need to protect broad freedom of testation, particularly in favour of the church, and the need to ensure that that freedom did not leave testators' families destitute – that the Scottish ideas about testate succession developed. The provincial ecclesiastical statutes of the 1240s reflected an idea that the '*peculium*' of an individual who died testate should be divided into three '*partes*' after the payment of ordinary debts; and immediately afterwards, the statute in question referred to a '*pars defuncti*' (the part of the deceased).<sup>148</sup> The near-contemporary *Statuta Gilde* c. 3 maintained that a merchant burgher who was a guild brother should leave something of 'the part pertaining to him' to the guild in his will. While the first and second decisions made by the burghers in Holyrood in 1296 emphasised a burgher's freedom of testation in respect of non-heritable property, they also limited this by crystallising the content of 'heritable' property, and by providing that a third of the goods of a deceased burgher was owed to his children. There seems to be a way of tracing the emergence of these ideas from the *Liber Extra*, through the provincial statutes of the Scottish church and the *Statuta Gilde*, and on into the decisions of the burghers.

However, while it is plausible to suggest a canonist origin for these rules, there is more to be said on the subject. While past generations of scholars have not really explored the decisions of 1296 in detail, they did take notice of the related rules found in the manuscript tradition of LCQB from – as we now know – the 1390s. They linked the rule that the children of a deceased burgher could claim a third of his moveable goods, on the one hand, with a rule

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<sup>146</sup> Roumy, 'Family Law', 489; for an introduction to the complex development of the Roman rules, see, W. W. Buckland, *A Text-Book of Roman Law from Augustus to Justinian*, 3<sup>rd</sup> edn, rev. Peter Stein, (Cambridge, 1963), 327–32.

<sup>147</sup> Roumy, 'Family Law', 489.

<sup>148</sup> The term '*peculium*' is difficult to translate, but it is probably more precise in meaning here than 'property', because presumably it only refers to the pool of assets from which the *pars defuncti* might be drawn – and presumably this excluded heritable property.

found in another Scottish treatise, *Regiam Majestatem*.<sup>149</sup> John Davies and Alice Taylor have recently published a ground-breaking edition of the earliest surviving version of this text.<sup>150</sup> Taylor has shown that it was probably originally composed in the second decade of the fourteenth century by a clergyman with knowledge of Romano-canonical law.<sup>151</sup> In the Davies and Taylor edition, *Regiam Majestatem* II.63–64 stated that when any man – not specifically a burgess – wanted to make a will, his moveable goods were to be divided into three parts. One part was to go to his widow, one part to his heir, and one part was his to dispose of as he wished.<sup>152</sup> It has long been known that this rule was lifted almost word-for-word from an English text known as *Glanvill*, which was written in the late-twelfth century.<sup>153</sup> There are obvious parallels between this scheme and the rules of testate succession in thirteenth-century Scotland as reconstructed above. Both schemes envisage the existence of the division of a deceased’s property into thirds; and both schemes seem to contemplate the existence of a ‘*pars defuncti*’. However, that is where the direct parallels stop. In the *Regiam* scheme it was the *heir* – and not the children of the deceased generally, as in the burgesses’ decisions of 1296 – who was entitled to one third of his moveable property. The significance of this can be overstated; it seems that in practice ‘heir’ was read to mean ‘children’ from an early date.<sup>154</sup> Perhaps more obviously, the *Regiam* scheme also made direct reference to the claims of the widow; but the decisions of 1296 did not – they were focused exclusively on the children.

One possible explanation for this oddity is that *Regiam* reflected practice generally in the landward areas of the kingdom, whilst the decisions of 1296 were concerned exclusively with the law as practised in the burghs of Edinburgh, Roxburgh, Berwick and Stirling. Just such a distinction was observed in another English text, known as *Bracton*, which seems to have originally been written in the 1220s or the 1230s and then partially edited in the mid-thirteenth century.<sup>155</sup> *Bracton* followed *Glanvill* in explaining the ways in which the goods of

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<sup>149</sup> See Gardner, ‘Legal Rights’; for a characteristically careful reading of the evidence, see Sellar, ‘Succession Law in Scotland’, 59–60.

<sup>150</sup> See *Regiam Majestatem*, ed. by Davies and Taylor.

<sup>151</sup> Alice Taylor, ‘What does *Regiam majestatem* Actually Say (and What Does it Mean)?’, in *Common Law, Civil Law and Colonial Law: Essays in Comparative Legal History from the Twelfth to the Thirteenth Centuries*, ed. by William Eves, John Hudson, Ingrid Ivarsen and Sarah B. White, 47–85.

<sup>152</sup> *Regiam Majestatem*, ed. by Davies and Taylor, II.63–4.

<sup>153</sup> See, for example, *APS*, i, 154. On *Glanvill*, see, for example, Sir John Baker, *An Introduction to English Legal History*, (5<sup>th</sup> edn, Oxford, 2019), 185–7.

<sup>154</sup> Sir Frederick Pollock and Frederic W. Maitland, *The History of English Law before the Time of Edward I*, 2 vols, 2<sup>nd</sup> edn, reissue with an introduction and select bibliography by S. F. C. Milson, (Cambridge, 1968), II, 350; Sellar, ‘Succession Law in Scotland’, 60.

<sup>155</sup> Baker, *Introduction*, 186; see also Paul Brand, ‘The Age of Bracton’, in *The History of English Law: centenary essays on ‘Pollock and Maitland’*, ed. John Hudson, *Proceedings of the British Academy* 89 (1996), 65–89 at 66–78. I am grateful to the anonymous reviewer for this reference.



a deceased person were to be divided; but *Bracton* then observed that this did not necessarily apply in the English boroughs, where there were sometimes different customs.<sup>156</sup> The example given was that of London, where it is said that if a ‘specified dower’ was ‘settled on the wife, whether in money or other chattels’ then she might ‘rightfully claim nothing more, except by her husband’s grace and favour... depending on whether or not she deserved well of him in his lifetime’.<sup>157</sup> The rationale given for the rule was that the widow could claim her dower before debts were paid; presumably this meant that her position was suitably privileged. *Bracton* also indicated that children were not necessarily protected in all of the English boroughs by a fixed share of inheritance; they were expected to earn parental favour.<sup>158</sup>

Therefore, while *Bracton* indicated that a deceased person’s goods should be divided into thirds, with one third passing to his widow and another third passing to his children, *Bracton* also indicated that this general rule gave way to customary practices in some of the boroughs. It is conceivable that a fourteenth-century Scot might likewise have read the decisions of 1296 as articulations of customary departures from a general rule expressed in *Regiam* II.63–64; but this is wholly speculative. What matters for present purposes is that thirteenth-century English boroughs evidently *were* articulating their own distinctive customary rules regarding succession to the goods of a deceased burgess. Perhaps the representatives of the Scottish burghs of Berwick, Roxburgh, Edinburgh and Stirling who assembled in Holyrood in January 1296 were following their lead, albeit in their own way.

Other evidence strengthens this line of argument. As has been explained, the origins of the rule that a deceased burgess’ children had a claim to his moveables was attributed in one source to the customs of Newcastle, as expressed in an undated letter from Patrick Dey to the burgesses of Aberdeen.<sup>159</sup> The idea that there were certain items beyond inherited land that passed to the heir as of right – which was articulated in 1296 – was also being articulated in near-contemporary English borough customs, and in similar ways. Mary Bateson’s edition of the borough customs of England reveals that a similar custom was recognised in Dunstable, possibly as early as 1220, and in Leicester in 1293. In Leicester, it was said that the heir should have the ‘best boiler, the best brass pot, the best basin with the laver, the best mazer, the silver

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<sup>156</sup> The diversity of the customs is captured to some extent in *Borough Customs*, ed. Mary Bateson, 2 vols, Selden Society 18, 21 (London, 1904–1906), II, 121, 125, 136–8, 154.

<sup>157</sup> *Bracton on the Laws and Customs of England*, ed. Samuel E. Thorne, 4 vols, (Cambridge, Massachusetts, 1968), II, 180. Reference has been made to Bracton Online, available at <https://amesfoundation.law.harvard.edu/Bracton/index.html>, accessed 21 June 2022.

<sup>158</sup> *Bracton*, ed. Thorne, II, 180–1.

<sup>159</sup> NLS, Adv. MS 25.4.15 fol. 164r.

spoon, the best table, with the best table-cloth'.<sup>160</sup> The list of items that passed to the heir was longer in a statute of Godmanchester dated to 1312/3, and in a custom of Torksey dated to ca.1345.<sup>161</sup>

The link with developments in England becomes clearer when one appreciates that many of these items overlap with those found in the Scottish lists of items that passed automatically to the heir, as attested in the LCQB text '*De vasis et utensilibus*'. The origins of '*De vasis et utensilibus*' can also be traced to the turn of the thirteenth into the fourteenth century. While the chapter is not known to have formed part of the textual traditions of LCQB prior to the 1390s – when it appeared as **C** LCQB c. 109 and **CH** LCQB c. 114<sup>162</sup> – a version of the text was included in another collection of Scottish legal materials preserved in **B**, which can be dated to 1323x1346.<sup>163</sup> Taylor labels the collection in question the Ayr Miscellany, following Duncan.<sup>164</sup> While the date of the Ayr Miscellany is not certain, Taylor shows that it preserves good readings of late-thirteenth century materials, and argues that it was probably composed before an important series of legislative acts were promulgated in 1318.<sup>165</sup> In other words, the text that came to be known as '*De vasis et utensilibus*' seemed relevant to burghal law and practice in the eyes of at least one Scottish legal scribe working around about the turn of the thirteenth into the fourteenth century. What seems clear from this is that the process of articulating which items did, and did not, pass to the heir automatically was happening at about the same time in Scotland and England.

What is one to make of all this? Two broad points follow from the discussion thus far. First, there was evidently some link between the development of the English borough customs, on the hand, and the decisions of 1296, on the other. The decisions of 1296 reflected the assumption – also found in at least some near-contemporary English boroughs – that some of the 'best' utensils in the household of a deceased burgess should pass automatically to his heir. In addition, in England – as in Scotland – there were attempts to articulate precisely which items were to pass to the heir. The possibility that the customs of burghs in Scotland were informed by developments in borough customs in England during this period has long been mooted; Innes in particular cited some (undated) evidence to the effect that Scottish burghs

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<sup>160</sup> *Borough Customs*, ed. Bateson, II, 138 (Dunstable) and 140–1 (Leicester).

<sup>161</sup> *Borough Customs*, ed. Bateson, II, 141–2 (Godmanchester) and 142–3 (Torksey).

<sup>162</sup> **C** fol. 162r–v, LCQB c. 109; **CH** fols 71v–72r, LCQB c. 114.

<sup>163</sup> *Laws of Medieval Scotland*, ed. Taylor, 458–9 (Ayr Miscellany c. 3).

<sup>164</sup> On the Ayr Miscellany, see *Laws of Medieval Scotland*, ed. Taylor, 265–80.

<sup>165</sup> *Laws of Medieval Scotland*, ed. Taylor, 265–80.

sometimes consulted their English counterparts in resolving disputed questions.<sup>166</sup> There was logic to this; as Innes pointed out, several texts in LCQB were lifted – almost word-for-word – from a late-twelfth century customal of Newcastle.<sup>167</sup> There is also a tantalising reference in LCQB as attested in **B** to the effect that there was an ‘*Assisa* [blank] *Anglie et Scocie*’ concerned with restitution for those who were unjustly dispossessed of lands within burgh. The space in the manuscript between ‘*Assisa*’ and ‘*Anglie*’ seems to have been scraped clean – in other words, it was probably not blank originally – and there is room for the word ‘*burgorum*’. It is dangerous to speculate too much as to what this ‘*Assisa*’ was, or when it might have happened; but what does seem clear is that LCQB consciously incorporated reference to practice in contemporary England – at least in **B**.<sup>168</sup> For present purposes, what matters is that there was some sort of link between the decisions of the burgesses in 1296, on the one hand, and contemporary developments in individual borough customs in England, on the other.

Second, while the burgesses of Berwick, Roxburgh, Edinburgh and Stirling made decisions about succession that resembled choices attested in individual borough customals in England, their rulings were distinctively their own. They did not simply follow the general rule found in *Glanvill*, or in *Bracton*; and the variety of customary succession practices observed in the English boroughs in the thirteenth century meant that they could draw inspiration from a number of different customals – assuming they chose to do so at all. Indeed, while they evidently did draw inspiration from England, and in particular Newcastle – for example in articulating the distinction between heritable and non-heritable property, and possibly also in articulating the rule that a deceased burgess’ child could claim a third of his moveables – in other regards, their approach was perhaps more indebted to canonist ideas. The emphasis on a burgess’ freedom of testation – expressly including freedom of testation in favour of the church – coupled with the attempt to articulate the limits of that freedom to protect the burgess’ family, perhaps suggests that canonist ideas were influential in the decisions the burgesses made in 1296. Incidentally, the Scottish customs continued to be shaped by canon law, and in particular by provincial statutes of the church until, in 1420, another such statute finally clarified the law. Thereafter, the estate of a deceased individual was to be divided into thirds, with a third going

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<sup>166</sup> *APS*, i, 38–42 (particularly at 42 footnote 1).

<sup>167</sup> *APS*, i, 38–42; see also Charles Johnson, ‘The Oldest Version of the Customs of Newcastle Upon Tyne’, *Archaeologia Aeliana*, 4<sup>th</sup> series 1 (1925), 168–78, and the cautionary note in MacQueen and Windram, ‘Laws and Courts’, 209–10.

<sup>168</sup> **B** fol. 66v, LCQB c. 99. For a comment, see *Ancient Laws and Customs*, ed. Innes, I, 48, and the single footnote to the text printed there.

to his *children*, a third going to his widow, and a third being left for his funeral expenses and for legacies.<sup>169</sup>

It has been argued here that the burgesses' decisions in 1296 were potentially beneficial to the church, amongst others; and they were informed both by English borough customs and by canonist assumptions about both the freedom of testators to leave legacies, and also the limits on that freedom. As already explained, one detail within the decisions underlines the point that they were written to give *some* sort of benefit to the church. The burgesses decided that the best horse was to go to the heir unless it had been the subject of a specific legacy to a religious house. Why horses should have been singled out for special treatment is unclear; and one might speculate that the burgesses had been asked to resolve a dispute concerned – at least in part – with this particular matter. If so, it would have been prudent – and possibly necessary – for the burgesses to answer the questions put to them in a manner consistent with canon law, given the prominent role the *ecclesia Scoticana* enjoyed in the administration of the estates of deceased individuals.<sup>170</sup> This last point is speculative; but what might make it more credible is any evidence suggesting that the burgesses of Berwick, Roxburgh, Edinburgh and Stirling decided contentious matters, perhaps sitting in some sort of assembly, or even as a court. It has been argued in the past that the decisions the burgesses made in 1296 were, in fact, decisions of a court known as the *curia quatuor burgorum*.<sup>171</sup> Only one writer – Theodora Keith – has expressed caution on this point; and it will be argued next that she was correct to do so.<sup>172</sup> A fresh attempt to survey the evidence surrounding the operation of the *curia quatuor burgorum* indicates that there was significant institutional development in the operation and functions of an assembly – or assemblies – of the four burghs between the 1290s and the 1360s. Surveying this evidence facilitates further contextualisation of the decisions, and this – in turn – makes it possible to speculate how those decisions shaped the textual tradition of LCQB itself. Indeed, it may also help historians to understand how the decisions not only made their way into LCQB, but also came to be taken to represent not just the law of the four burghs, but also the law applicable in all of the burghs of Scotland. These points will be considered next.

### **The Decisions of 1296 and the so-called ‘*Curia Quatuor Burgorum*’**

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<sup>169</sup> See Sellar, ‘Succession Law in Scotland’, 58; Anton, ‘Medieval Scots executors’, 144–5; *Ecclesiae Scoticanae Statuta*, ed. Patrick, II, 77–8 [c. 166]; *Statutes of the Scottish Church*, ed. Patrick, 80–3 [c. 166].

<sup>170</sup> See Sellar, ‘Succession Law in Scotland’, 58; Anton, ‘Medieval Scots executors’, in particular at 130–4.

<sup>171</sup> See the next section of this article below.

<sup>172</sup> Keith, ‘Origin of the Convention’, 386–7.

Innes, Marwick, Keith, Croft Dickinson and Duncan drew attention to several pieces of evidence dating from the thirteenth and fourteenth centuries concerning the operation of the so-called *curia quatuor burgorum*; and they tended to assume a broad continuity in the operation and development of the institution.<sup>173</sup> The first is the title of LCQB itself in **A**;<sup>174</sup> the second is a decision of the *quatuor burgi* dated to 1291;<sup>175</sup> the third is the collection of decisions from 1296, discussed above; the fourth is a reference to a fine paid to the *quatuor burgi* in 1331;<sup>176</sup> the fifth is a request from the burgesses of Berwick to Edward III, and dated to 1345;<sup>177</sup> the sixth is a statute of a parliament of David II (r. 1329-1371), dated to 1369;<sup>178</sup> the seventh is a statute of Robert III (r. 1390-1406), of uncertain date.<sup>179</sup> Each of these pieces of evidence will be considered here in turn.

First, the earliest witness to LCQB in **A** is entitled '*Leges et consuetudines quatuor burgorum scilicet Edinburg Rokisburg Berewic Striveling constitute per dominum David regem Scocie*'.<sup>180</sup> Dated to 1267x1272, **A** is the first surviving reference to the concept that these '*quatuor burgorum*' had something in common; and what they allegedly had in common were '*leges et consuetudines*' – laws and customs. If it is asked who was behind the composition of **A**, then a possible answer is a scribe operating in Kelso Abbey. Duncan noted that accounts for grazings owned by Kelso were added to **A** in 1306, and suggested that it may therefore have belonged to that monastery; Taylor accepts this argument.<sup>181</sup> However, while it is possible to argue that a scribe in Kelso Abbey writing between 1267 and 1272 was familiar with the idea that the '*quatuor burgi*' shared '*leges et consuetudines*', it is difficult to know where that idea came from originally. The scribe was evidently prepared to attribute the creation of laws and customs for the four burghs – and so presumably the association of the four burghs themselves – to David I (r. 1124-1153). This will be discussed further below, but the claim must be treated with the same scepticism normally according to claims of Davidian

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<sup>173</sup> *APS*, i, 41–2; *Ancient Laws and Customs*, ed. Innes, i, xxxix–xl; *Records of the Convention*, ed. Marwick, i, xi; Keith, 'Origins of the Convention', 385–8; *Early Records*, ed. Croft Dickinson, cxlii–cxlv; Duncan, *Making of the Kingdom*, 603. See also Pagan, *Convention*, 9–15.

<sup>174</sup> **A** fol. 62r, LCQB pr..

<sup>175</sup> *Rotuli Parliamentorum, ut et petitiones, et placita in Parlamento tempore Edwardi R. I. [ad finem Henrici R. VII.]*, ed. by Richard Blyke and John Strachey, 7 vols, (London, 1767-1777), i, 107–8.

<sup>176</sup> *Rotuli Scaccarii Regum Scotorum: The Exchequer Rolls of Scotland*, ed. by John Stuart, George Burnett, J. G. Mackay and George Powell McNeill, 23 vols, (Edinburgh, 1878-1908), i, 336.

<sup>177</sup> *Rotuli Scotiae*, ed. Macpherson, i, 660.

<sup>178</sup> *APS*, i, 507; *RPS*, 1369/3/11.

<sup>179</sup> *APS*, i, 742.

<sup>180</sup> **A** fol. 62r, LCQB pr. ('The laws and customs of the four burghs, that is to say Edinburgh, Roxburgh, Berwick and Stirling, made by the lord David, king of Scotland').

<sup>181</sup> *Scottish Formularies*, ed. A. A. M. Duncan, Stair Society 58 (Edinburgh, 2011), xii–xiii; *Laws of Medieval Scotland*, ed. Taylor, 34.

authorship for Scottish medieval legal texts.<sup>182</sup> What the scribe's claim in **A** does perhaps tell us is that it was possible, by the 1270s, to regard the notion that the '*quatuor burghi*' shared laws and customs in common as an idea of some antiquity.

The next reference to the phrase '*quatuor burgorum*' comes in the course of a court case initially heard in 1291 by the Guardians of Scotland.<sup>183</sup> One Marjory Moyne, who lived in Berwick, had brought an action together with her third husband, against Master Roger Bartholomew, burgess of Berwick, and executor of her second husband. The litigation turned on the fact that Marjory's second husband had been insolvent at the time of his death, and the question was essentially which of his creditors were to be preferred in the distribution of what was left of his estate. Marjory argued that her claim to *dos* – in this case, a gift given to her by her husband at the church door on their marriage – should rank ahead of all other debts on the estate. Roger, as executor, disagreed,<sup>184</sup> and both sought the judgement of the four burghs on the matter. Roger '*petit quod Justiciarii certificentur super legem et consuetudinem Burgorum per quatuor Burgos*' and Marjory '*petit hoc similiter secundum dictum quatuor Burgorum*'; and it was noted '*Ideo consulendum est cum quatuor Burgorum*'.<sup>185</sup> At the next meeting of the court, it was noted that the '*quatuor burghi*' had been asked about the custom of the burghs – '*requisiti fuerunt de consuetudine burgorum*'. Their reply was *not* a judgement in favour of Marjory; rather, they said '*quod lex et consuetudo Burgorum Scocie talis est, quod petitio dotis est principale, et quod pre aliis debitis solvi*'.<sup>186</sup> As a result of this finding, the Guardians then found in favour of Marjory. The decision was reviewed by a parliament of Edward I at Newcastle in 1292, where the matter was finally settled by agreement between the parties.<sup>187</sup> It is worth emphasising that historians only know about this dispute from the records of this parliament; in other words, one is seeing the Scottish dispute through English eyes.

These records demonstrates four things about the functions of the '*quatuor burghi*' in 1291 and 1292. First, by 1291, where there was a dispute about the law and custom applicable within one of the '*quatuor burghi*', it was possible for the litigants to request that the court hearing the dispute should refer the matter to the '*quatuor burghi*' – whatever that meant.

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<sup>182</sup> See, for example, Taylor, *Shape of the State*, 260, citing MacQueen and Windram, 'Laws and Courts', 209–10.

<sup>183</sup> *Rotuli Parliamentorum*, ed. by Blyke and Strachey, I, 107–8.

<sup>184</sup> *Rotuli Parliamentorum*, ed. by Blyke and Strachey, I, 107.

<sup>185</sup> I.e., Roger 'asked that the justiciars should be made certain concerning the law and custom of the burghs by the four burghs' and Marjory 'asked this likewise according to the said four burghs' and 'therefore, there must be consultation with the four burghs'.

<sup>186</sup> This can be rendered, 'that the law and custom of the burghs of Scotland is such, that the claim of *dos* ranks first, and ought to be paid ahead of the other debts'.

<sup>187</sup> *Rotuli Parliamentorum*, ed. by Blyke and Strachey, I, 108.

Whether or not a court faced with such a request was obliged to submit to it is unclear; in this case, it clearly did, but it is worth noting that the parties were in agreement as to the correct course of action to be adopted. What would have happened if one party had refused to refer the matter to the *'quatuor burgi'* is unclear. Second, the Scottish government was evidently conscious that it was a meaningful request to ask the *'quatuor burgi'* to rule on a disputed matter of burgh law and custom; and it is certain that the *English* government was also conscious of this from 1292 onwards. Third, the *'quatuor burgi'* – again, whatever that meant – were also quite willing to answer questions put to them about the *'lex et consuetudo burgorum'*; indeed, if the record is to be believed, the *'quatuor burgi'* were quite prepared to rule on the content of the *'lex et consuetudo burgorum Scocie'*. This is the first instance of a direct link being made between the *'lex et consuetudo quatuor burgorum'*, on the one hand, and the *'lex et consuetudo burgorum Scocie'*, on the other; and it seems to have been made by the *'quatuor burgi'* themselves. What other major burghs of Scotland – like Perth or Aberdeen – might have made of this apparent capacity of Berwick, Roxburgh, Edinburgh and Stirling to rule upon the *'lex et consuetudo burgorum Scocie'* is, once again, unclear. However, it is worth mentioning that the record does not need to be read to indicate that the *'quatuor burgi'* enjoyed *exclusive* privileges in this regard; the evidence will not bear that assumption either. Fourth, it is intriguing that the *'lex et consuetudo burgorum'* articulated by the *'quatuor burgi'* in 1291 is very similar to that stated in *Bracton*. *Bracton* too said that a claim to *dos* ranked ahead of ordinary debts on a man's estate. The English text then used this as a basis for maintaining that a widow should have no further claim to her husband's estate after death – such a claim to a third of his goods – unless her husband freely chose to leave those goods to her.<sup>188</sup> Is it possible that this helps to explain why the burgesses who gathered in Holyrood in 1296 did not limit a burgess' freedom of testation by giving his widow – as well as his children – a claim to one third of all of his goods on his death?<sup>189</sup> Is it possible that they – like the author of *Bracton* – thought that ranking a claim to *dos* ahead of ordinary debts, as they had done in 1291, constituted sufficient protection for burgesses' widows in matters of succession? If so, then they evidently did not accept the other proposition in *Bracton*, to the effect that children within boroughs should not enjoy any fixed share of inheritance either. It is impossible to be sure of the burgesses' thinking here; but the evidence is tantalising.

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<sup>188</sup> *Bracton*, ed. Thorne, II, 180–1.

<sup>189</sup> This reading of the rules is obviously inconsistent with that offered in Gardner, 'Legal Rights', II, 321–2.

The next surviving reference to the phrase '*quatuor burgorum*' comes in the decisions of 1296, with which this article has been concerned thus far. In light of the dispute of 1291-1292 discussed above, it is now possible to offer reasoned speculation about precisely what these decisions were. A dispute had arisen in a court, and the court had decided to refer a question concerning the relevant law and customs of the burghs to the '*quatuor burgi*'. The '*quatuor burgi*' – specifically, the '*burgenses quatuor burgorum*' – had then assembled in Holyrood Abbey to answer whatever questions had been put to them. Based on the decisions that resulted, those questions were probably about whether or not ships and horses were heritable, and about the extent of a burges's freedom of testation. This may explain why the decisions were framed as rules to govern future disputes; the '*burgenses quatuor burgorum*' were consciously attempting to articulate the '*lex et consuetudo burgorum*' – perhaps meaning the '*lex et consuetudo burgorum Scocie*'. However, this may also explain why one of the decisions was concerned with such a specific question – the question of whether or not a legacy of the best horse to a religious house would stand in the face of the heir's claim to the best items in the deceased burges's household. Presumably, the burgesses had been asked precisely that question, and they answered it in a manner that was favourable to religious houses generally.

The evidence is, admittedly, limited; but what it seems to suggest is that, by the 1290s, there was a recognised procedure available to deal with disputed questions in court concerning the '*lex et consuetudo burgorum Scocie*'. Where such disputes arose, litigants could petition the court to consult the '*burgenses quatuor burgorum*', who would be asked a specific question of law – which seems, on the evidence of the dispute of 1291, to have been one formulated through forensic pleading. The '*burgenses quatuor burgorum*' – perhaps meaning individuals like the aldermen and the members of the town councils who submitted to Edward I in August 1296 – would then assemble and rule on the matter of law, and return their response to the court. The court could then decide the dispute accordingly; there is no evidence to establish whether or not courts were *bound* to decide the dispute accordingly, although if the parties had jointly submitted the matter to the judgement of the '*quatuor burgi*' – as they did in the dispute of 1291 – then perhaps they were bound by the result.

Note that there is no sense here that the assemblies of the '*burgenses quatuor burgorum*' in the 1290s constituted some sort of permanent institution, like the courts of the sheriffs, the justiciars or the chamberlains.<sup>190</sup> The limited evidence that survives suggests that

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<sup>190</sup> For these, see now Taylor, *Shape of the State*, 191–265.



it was an *ad hoc* assembly, which could be called upon to answer specific questions that arose from forensic disputation about the nature of the ‘*lex et consuetudo burgorum Scocie*’; and for their part, the ‘*burgenses quatuor burgorum*’ were willing to give answers when asked. It is possible that one witnesses here something akin to the *enquête* procedures used in near-contemporary France to establish the content of customary law where there was doubt on the subject; but the lack of surviving Scottish evidence makes it difficult to be certain.<sup>191</sup>

The next surviving reference to the phrase ‘*quatuor burgi*’ or equivalent comes in the course of the *Exchequer Rolls*. In 1331, there is a reference to ‘*l. s., receptis de quodam amerciamento, in quo Simon Gelchauch cecidit ad quatuor burgos*’.<sup>192</sup> This is the only surviving reference to the ‘*quatuor burgi*’ as a recipient of money; and there is certainly no sense that the *ad hoc* assembly of the 1290s had any sort of fiscal functions. The next two surviving pieces of evidence may explain this, and reveal that the meaning of the phrase ‘*quatuor burgi*’ had changed by 1331. In 1345, the burgesses of Berwick – by then in English hands – approached Edward III of England with a request.<sup>193</sup> They narrated that in the kingdom of Scotland, it had been the usage ‘of old’ that ‘if a party pursuing an action or defending alleged an error or falsehood in judgements [given] in the courts of the burghs of the said realm’ then the whole process in the matter would be heard ‘at Haddington, in the same kingdom, in the presence of the chamberlain of Scotland and sixteen of the best and most law-worthy men of the four burghs, that is to say of Edinburgh, of Roxburgh, of Stirling and of Berwick’. Such disputes would be finally determined by these seventeen men.<sup>194</sup> However, the burgesses of Berwick could no longer bring their disputes before this court, because Edinburgh, Roxburgh and Stirling were in Scottish hands; and so they asked Edward III to rule as to how their disputes should be settled. Edward III said that the matters should be decided before twelve of the most discreet and law-worthy men of Berwick.<sup>195</sup>

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<sup>191</sup> See, for example, L. Waelkens, ‘L’Origine de l’Enquête par Turbe’, *Tijdschrift voor Rechtsgeschiedenis* 53 (1985) 336–46; Mari Dejoux, *Les Enquêtes de Saint Louis: Gouverner et Sauver Son Âme* (Paris, 2014).

<sup>192</sup> *Exchequer Rolls*, I, 336 (i.e. ‘50 s, received in connection with a certain fine, in which Simon Gelchauch fell at the four burghs’).

<sup>193</sup> *Rotuli Scotiae*, ed. Macpherson, I, 660.

<sup>194</sup> *Rotuli Scotiae*, ed. Macpherson, I, 660: ‘*quod cum in regno Scocie usitatus sit ab antiquo quod si partem querelantem vel defendentem pretensum fuisset errorem vel falsitatem in judiciis in curiis burgorum dicti regni redditus intervenisse eadem judicia et totus processus in hac parte habitus apud Hadyngton in eodem regno coram camerarii Scocie et sexdecim de prioribus et legalioribus hominibus quatuor burgorum videlicet Berewici, Rokesburgh, Stryvelyn et Edenburgh mitti et ibidem rectari examinari et terminari deberent & executiones judiciorum illorum remanerent in suspenso*’.

<sup>195</sup> *Rotuli Scotiae*, ed. Macpherson, I, 660.

The process described by the burgesses of Berwick in 1345 is very different from that described in 1291. In 1291, two litigants in dispute before a court of the Guardians asked to suspend proceedings to consult the ‘*quatuor burgi*’ on a point of law, so as to enable the court of the Guardians to dispose of the dispute properly. The consultees from the ‘*quatuor burgi*’ were not part of the court, and they did not, as such, give a ruling on the dispute. By contrast, in 1345 the burgesses of Berwick spoke of a procedure whereby judgements of burgh courts might be challenged at Haddington, in the presence of the chamberlain of Scotland and sixteen men chosen from the ‘*quatuor burgi*’. Here the representatives of the ‘*quatuor burgi*’ were definitely members of a *court* (precisely which court will become clear shortly); and they were acting, together with the chamberlain, to decide disputes, and not simply to make pronouncements about the law and customs of the burghs.

The next reference to the ‘*quatuor burgi*’ is also a reference to this court. In 1369, a parliament of David II (r. 1329-1371) lamented the loss of Berwick, and now also Roxburgh, to the English. The same parliament noted that this presented difficulties for the administration of justice in Scotland. It was explained that Berwick and Roxburgh had been two of the four burghs which ‘had of old to make the court of the chamberlain once in the year at Haddington concerning judgements, if there may have been any, contradicted anywhere before him in his ayre’.<sup>196</sup> This reveals that the ‘court’ mentioned in 1345 was in fact a special sitting of the court of the chamberlain. The chamberlain was a royal official with various duties, including travelling around the burghs of Scotland on ‘ayre’, supervising their governance and their administration of justice.<sup>197</sup> There survives in **B** a text entitled ‘*De articulis inquirendis in burgo in Itinere Camerarii secundum usum Scocie*’<sup>198</sup> which outlines the questions that the chamberlain was supposed to consider in each burgh whilst on his ayre. The text – which seems to have reached its current form after 1318, and was presumably composed before 1346, given that **B** can be dated to 1323x1346<sup>199</sup> – states that one of the questions that the chamberlain was supposed to ask was ‘*si aliqua iudicia sint reddita contradicta et non presentata*’ – that is to say, ‘if any judgements had been given, challenged and not presented’.<sup>200</sup> In light of the petition of the burgesses of Berwick in 1345, and in light of the statute promulgated by David II in 1369, it seems that the forum in which such ‘*iudicia*’ might have been challenged was the *curia*

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<sup>196</sup> *APS*, i, 507; *RPS*, 1369/3/11 – ‘*qui habent ex antiquo curiam facere camerarii semel in anno apud Hadyngton super iudiciis, si que forent, coram ipso in itineribus suis ubicunque contradicta*’.

<sup>197</sup> See Taylor, *Shape of the State*, 259–262; see also Keith, ‘Origin of the Convention’, 397–9.

<sup>198</sup> **B** fols 15v–18v.

<sup>199</sup> See *Laws of Medieval Scotland*, ed. Taylor, 44–5.

<sup>200</sup> **B** fol. 15v.

of the chamberlain acting alongside the sixteen representatives of the *quatuor burgi*. Consequently, the question the chamberlain was supposed to ask in each burgh was whether or not any judgements had been ‘challenged’ and not yet ‘presented’ in that *curia* – presumably so that the business of the next meeting of the *curia* at Haddington could then be organised accordingly.

All this raises the question of when this ‘*curia*’ at Haddington actually operated. One piece of evidence considered thus far is perhaps helpful here – it will be recalled that in 1331, there is a reference in the *Exchequer Rolls* to a payment of ‘*l. s., receptis de quodam amerciamento, in quo Simon Gelchauch cecidit ad quatuor burgos*’.<sup>201</sup> Given that this was a payment of a fine, the most plausible explanation is that the phrase ‘*quatuor burgi*’ was shorthand for the special sitting of the chamberlain’s court that the sixteen men of the *quatuor burgi* ‘made’ – to use the language of the 1369 act – together with the chamberlain himself.<sup>202</sup> If so, this would provide some evidence to show that this special sitting of the chamberlain’s court with the sixteen men of the ‘*quatuor burgi*’ was operational in 1331. It presumably ceased to operate – or to operate fully – after the loss of Berwick to England in 1333;<sup>203</sup> perhaps it continued to function with only Edinburgh, Roxburgh and Stirling represented. Taken together, this might indicate that this ‘*curia*’ of the ‘*quatuor burgi*’ was functional towards the end of the reign of Robert I (r. 1306-1329) and during the first years of the reign of his son, David II (r. 1329-1371). Towards the end of the reign of David II, in 1369, an attempt was made to breathe new life into the court, and it was provided that whilst Roxburgh and Berwick remained in English hands, representatives of the burghs of Linlithgow and Lanark would take their places in the *curia*. This *curia* does seem to have functioned, at least to some extent; an undated statute of Robert III (r. 1391-1406) outlined the procedure for falsing dooms in the court.<sup>204</sup> At about the same time, in 1405, there seems to have been a meeting of what was called – for the first time – the ‘*curia quatuor burgorum*’. No mention was made of the presence of the chamberlain; and the ‘*curia*’ required that ‘two or three sufficient burgesses of each burgh of the lord king on the south side of the River Spey’ should come each year ‘to the said parliament of the four burghs wherever it should be held’.<sup>205</sup> The point of the assembly was to agree upon what was to the common profit of all of the burghs of Scotland. This ‘*curia*’ looks once again

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<sup>201</sup> *Exchequer Rolls*, I, 336.

<sup>202</sup> *APS*, i, 507; *RPS*, 1369/3/11.

<sup>203</sup> See Nicholson, *Later Middle Ages*, 128–9.

<sup>204</sup> *APS*, i, 742. See also the erudite discussion in Keith, ‘Origin of the Convention’, 387–91.

<sup>205</sup> *APS*, i, 703; *Ancient Laws and Customs*, ed. Innes, I, 156.

quite different from the *ad hoc* assemblies of the 1290s, and the ‘*curia*’ that the sixteen representatives of the four burghs made with the chamberlain during the 1320s and 1330s.

### The Decisions of 1296 and the Textual Development of LCQB

This demonstrates that it is not possible to maintain – as some earlier writers have done<sup>206</sup> – that the decisions of 1296 were decisions of the ‘*curia quatuor burgorum*’, as if there was a single ‘court’ of the four burghs that was operational during the thirteenth and fourteenth centuries. The evidence will not support that view. Indeed, it is legitimate to question the extent to which there existed links between the *ad hoc* assemblies of the ‘*burgenses quatuor burgorum*’ in the 1290s, and the ‘*curia*’ of the chamberlain that the sixteen representatives of the four burghs ‘made’ in the early-1330s, and indeed the ‘*curia quatuor burgorum*’ referenced in 1405. It is possible that members of Robert I’s government in the 1310s and 1320s were conscious that the representatives of the ‘*quatuor burgi*’ had periodically ruled on disputed matters of law during the 1290s. Perhaps they sought to formalise this by incorporating something like the old *ad hoc* assemblies into a special sitting of the chamberlain’s court, thereby creating what may have been a new mechanism to deal with challenges to judgements in the burgh courts.<sup>207</sup> It is also possible that the existence of this court reinforced a sense that the ‘*quatuor burgi*’ had a special function in declaring and indeed protecting the laws and customs of the burghs of Scotland. Perhaps this, in turn, fuelled their sense that they were a ‘*curia*’ in their own right, capable of summoning representatives from other Scottish burghs to meet with them in 1405. It is difficult to be certain.<sup>208</sup>

What does seem clear is that the decisions of 1296 were decisions of an *ad hoc* assembly of the ‘*burgenses quatuor burgorum*’. The assembly probably made its decisions in response

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<sup>206</sup> *APS*, i, 41–2; *Ancient Laws and Customs*, ed. Innes, i, xxxix–xl; *Records of the Convention*, ed. Marwick, i, xi; *Early Records*, ed. Croft Dickinson, cxlii–cxlv; Duncan, *Making of the Kingdom*, 603 (although Duncan is slightly guarded in his brief comments here).

<sup>207</sup> It is likely that the chamberlain had enjoyed a power to review decisions of the burgh courts for some time before the 1320s (see Taylor, *Shape of the State*, 260–1), but it is not clear that this involved any formal input from sixteen representatives of the *quatuor burgi* before that date. The evidence cited by Taylor relates to a chapter in **B**, which provides that each burgh was to elect four liners in order to establish boundaries within burghs, so that complaints about such matters would not come before the chamberlain in the future. It is conceivable that there was some connection between this and other reforms of the chamberlain’s court during the reign of Robert I, but it is difficult to be certain. Perhaps there was an expectation that boundary disputes – which could, presumably, only be resolved locally – would *not* come to the *curia* in Haddington, and perhaps the point was to ensure that there was a local procedure to determine such disputes in each burgh without any prospect of further review. Yet this is speculative. For the text discussed by Taylor, see **B** fol. 67v, LCQB c. 105. The text is not attested in **C** or in **CH**; no conclusions can be drawn from its absence from **A** because, as Taylor notes, if it was in **A**, it would presumably have been in the section of the manuscript which has been lost.

<sup>208</sup> For a similar argument, see Keith, ‘Origin of the Convention’, 390.

to specific legal questions formulated in the course of forensic disputation. Like the decision given by the ‘*quatuor burghi*’ in 1291, it seems that they were pronouncements on the ‘*lex et consuetudo burgorum*’, and indeed perhaps on the ‘*lex et consuetudo burgorum Scocie*’. Judging from the evidence of the decision of 1291, their authority to pronounce on the law and custom of the burghs may have been twofold. First, the parties to the dispute submitted the question about the law and custom of the burghs to their judgement; and second, the court hearing the dispute permitted this to happen. It may be that this procedure was of some antiquity; it is difficult to be sure. If it was, that might explain how the text of LCQB came into being in the first place. It was suggested earlier in this article that the decisions of 1296 influenced the fourteenth-century development of the text of LCQB, as attested in **C** and in **CH**. Perhaps some of the other sections in LCQB emerged as *ad hoc* assemblies of the *quatuor burghi* met to address questions about law and custom put to them by individual Scottish courts.<sup>209</sup> One might hazard a guess that at first the assemblies addressed questions coming only from the individual courts of Berwick, Roxburgh, Edinburgh and Stirling, and only gradually received – and answered – questions coming from burgh courts, and indeed other courts elsewhere in the kingdom. The authority of the ‘*quatuor burghi*’ as arbiters of the ‘*lex et consuetudo burgorum Scocie*’ may simply have developed organically, and it may have been facilitated by the simple fact that they possessed a set of customs reduced to writing in the form of LCQB. This is highly speculative, but it is worth noting that the version of LCQB attested in **A** represents a significantly expanded version of customs of Newcastle dating from the late-twelfth century.<sup>210</sup> This indicates that the core text of the Newcastle customs underwent dramatic expansion during the thirteenth century, presumably in the hands of the ‘*quatuor burghi*’; and this may have been the result of questions being put to assemblies like that which gathered in Holyrood in 1296.

The ‘*quatuor burghi*’ were asserting the ability to articulate the ‘*lex et consuetudo burgorum Scocie*’ as early as 1291; and it is therefore conceivable that the rolls inventoried in Edinburgh Castle in 1292 ‘*de legibus et consuetudinibus burgorum Scocie*’ may simply have

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<sup>209</sup> Innes comes close to making such an argument in *Ancient Laws and Customs*, ed. Innes, I, xxxix, where he mentions the ‘combination’ of burghs ‘in the south, consisting originally of the four burghs of Berwick, Roxburgh, Edinburgh and Stirling, but filling up the number of four by adopting other burghs when Berwick or one of the border burghs fell into English hands’. Of this ‘combination’, Innes says ‘These were the Four Burghs from whose deliberations emanated the code of laws that still bears their name. Such was the origin of these laws, which in due time received the sanction of the King’s Court or Parliament, but which, even independent of that sanction, were received as authoritative by all the burghs of Scotland.’

<sup>210</sup> The text of the Newcastle customs printed in Johnson, ‘Customs of Newcastle’, 170, is about 400 words in length; the incomplete witness to LCQB preserved in **A** is, in my draft transcript, approximately 2,500 words in length.

something like LCQB.<sup>211</sup> In **B**, dated to 1323x1346, LCQB is in fact entitled the ‘*Capitula legis burgorum Scocie*’;<sup>212</sup> and in **C**, dated to the 1390s, LCQB is entitled ‘*leges burgorum Scocie facte apud novum castrum super Tynam per David regem Scotorum illustrimum*’.<sup>213</sup> These manuscripts seem to attest a process whereby LCQB was gradually associated with the *leges burgorum Scocie*. That process may have been accelerated by the existence of the *curia* of the chamberlain that was ‘made’ by the sixteen representatives of the four burghs. It has been argued elsewhere that in so far as there was, in fact, a common law of the burghs of Scotland, it must have been largely the work of the chamberlain, who was responsible for overseeing the administration of justice within the burghs.<sup>214</sup> The fact that the sitting of his *curia* that reviewed decisions in individual burgh courts was made up of burgesses of Berwick, Roxburgh, Edinburgh and Stirling must have cemented the notion that the laws and customs of *their* burghs were, in fact, the *leges burgorum Scocie*.

Of course, the extent to which this *idea* of a common law of the burghs of Scotland became a reality in practice during the fourteenth century awaits further study. Yet what is clear is that, by the time that the burgesses gathered in Holyrood in January 1296, the *idea* that there was such a thing as the *lex et consuetudo burgorum Scocie* had taken root. What is more, there was an established process whereby courts and litigants could identify that *lex et consuetudo*; they could submit their questions about law and custom to *ad hoc* assemblies of the *burgenses quatuor burgorum*.

## Conclusions

This article has dealt with the decisions of 1296 at length. However, it has demonstrated just how much can be learnt from the study of such texts in the context of the manuscript traditions of medieval Scotland. It is useful to draw out here certain conclusions that emerge from the study. First, what has been said about the origins, purpose and subsequent history of the decisions themselves will be summarised. Second, it will be suggested that the study has broader ramifications for what it means to think about the development of the Scottish legal

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<sup>211</sup> See *APS*, i, 114. For discussion of the inventory of 1292, and other inventories of records in the king’s ‘treasury’ in Edinburgh Castle at this period, see Taylor, *Shape of the State*, 399–417.

<sup>212</sup> **B** fol. 52r, LCQB pr..

<sup>213</sup> **C** fol. 155r, LCQB pr. (‘the laws of the burghs of Scotland made at Newcastle-upon-Tyne by David, illustrious king of the Scots’).

<sup>214</sup> Andrew R. C. Simpson, ‘Procedures of the Scottish Common Law in a Medieval Town: A fresh look at the 1317 court roll of Aberdeen’, in *Comparative Perspectives in Scottish and Norwegian Legal History, Trade and Seafaring: 1200-1800*, ed. by Andrew R. C. Simpson and Jørn Øyrehagen Sunde (forthcoming, Edinburgh, 2023). See also Keith, ‘Origin of the Convention’, 402.

tradition – or rather, Scottish legal traditions – during the medieval period. More work is needed to consider possible points of interaction between the manuscript traditions of enquiry represented by texts such as LCQB, on the one hand, and the articulation of traditional customary practices in courts such as that of the chamberlain and individual burghs, on the other. This article provides an opportunity to reflect further on that. Third, it will be suggested that the work undertaken here could help to lay the foundations for a better understanding of the origins of legitim.

#### **a) The Story of the Decisions of 1296**

In January 1296, burgesses of Berwick, Roxburgh, Edinburgh and Stirling gathered in Holyrood Abbey.<sup>215</sup> It is possible that these were the same burgesses who made up the nascent town councils of each burgh, who were charged with upholding the laws and customs of their towns. The limited surviving evidence suggests that the gathering was an *ad hoc* assembly of burgesses tasked with answering particular legal questions that had arisen in the course of forensic argumentation. Just such a process had previously been observed in 1291, and probably also on other occasions as the need arose.

The burgesses gathered at Holyrood made three decisions about rules governing succession to the property of a deceased burgher. They were conscious of a rule or a customary expectation that certain utensils and equipment belonging to a deceased burgher would pass automatically to his heir, and their first two decisions clarified the parameters of that rule. First, they said that certain classes of goods did *not* pass automatically to the heir – including a list of different types of ships. They said that the heir was entitled to the best horse owned by the deceased burgher *unless* that deceased burgher had made a testamentary legacy of that horse to a religious house. In that case, the heir would be entitled to the second best horse instead. Second, they said that a burgher had complete freedom to leave his utensils and equipment to whomsoever he wished, excepting the principal utensils and equipment in his household, which had to pass to the heir. Third, they stated that if a burgher or his wife died, then their male and female children would be entitled to claim one third of their moveables. The heir would be able to take an equal share of this third, but only if he had not been forisfamiliated. Exactly what ‘forisfamiliated’ meant in this context is unclear. The Scots translations of the text indicate that it meant that the heir had been set up independently in business, or that he had received some

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<sup>215</sup> This section of this article will only be footnoted in so far as any novel points are made.

sort of patrimonial settlement that allowed him to enjoy a life independent of his parents' household.<sup>216</sup>

The burgesses were probably answering a specific question – or questions – which are now lost to history. However, the curious detail in the rule stating that a burgess could make a legacy of his best horse to a religious house, trumping the rule that the heir should automatically be entitled to that property, may suggest that the question had something to do with a disputed legacy made by a burgess to an abbey or a priory. In making their decisions, the burgesses were possibly influenced by contemporary canonist principles, to the effect that freedom of testation should be respected, subject to certain protections being in place that would ensure the family members of a testator were protected from destitution. It is also clear that the decisions they articulated were strongly influenced by contemporary English borough customs, and perhaps by the customs of Newcastle in particular.

It is not clear if this sort of ad hoc assembly of the burgesses of the four burghs continued to operate after the Wars of Independence. There may have been a link between this assembly and the rather distinctive special sitting of the chamberlain's court that was staffed by the chamberlain and sixteen representatives of the four burghs, which seems to have operated towards the end of the reign of Robert I and in the opening years of the reign of David II. What is certain is that the text of the decisions of 1296 was preserved by scribes working on collections of laws of the Scottish realm.

Exactly how the text made its way from whatever records were kept of the burgesses' decisions in 1296 into the scribal traditions of enquiry regarding the laws of the kingdom is unknown. The decisions had entered at least one of those traditions by the 1390s, and as a result, they appeared as an appendage to the witness to **CH** in LCQB. By then, essentially the same text used to articulate one of the decisions of the burgesses – the third decision, concerned with children's claims to the moveables of a deceased burgess – had entered the manuscript tradition of LCQB itself. Here, however, it was presented not as a decision of the burgesses gathered at Holryood, but rather as an expression of the ancient custom of *all* the Scottish burghs.

It is difficult to know how true this was in legal practice. However, it is not inconceivable that there was some connection between the developing manuscript tradition of LCQB during the fourteenth century, on the one hand, and the work of the chamberlain's court

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<sup>216</sup> See NLS, Adv. MS 25.4.15 fol. 164r – no share of the third is available 'gyf the ayr war frely feft in landis or in other gudis befor'; see also CUL, MS Kk.1.5 fol. 23r: the heir can claim his share of the third of the moveables 'bot gif /he\ have takin befoyr'.



augmented by representatives of the four burghs, on the other. Exploring the possibility of that connection might prove fruitful. Historians interested in this question might want to consider the development of the text known as ‘*Iter Camerarii*’. This purports to outline the functions of the chamberlain’s court as it proceeded around the burghs of Scotland on ayre; and it has received even less attention than LCQB.<sup>217</sup> At the same time, when thinking about legal practice in this period, historians should follow the leads of Anton in giving greater attention to the work of the consistorial courts, which dealt with executry business.<sup>218</sup> It will be recalled that something closely resembling the later law on legal rights was first fully articulated in 1420, by a provincial council of the Scottish church.

In the fifteenth century, the scribal tradition of appending the decisions of the burgesses to the end of the text of LCQB continued to be represented in **G**. However, the direction of travel within virtually all known scribal traditions – even in the first half of the fifteenth century – was to assimilate the decisions directly into LCQB. In **D** and **E**, the decisions appeared as separate chapters within LCQB. The process of assimilation seems to have received fresh impetus from the mid-fifteenth century, possibly as a result of parliamentary intervention in 1450 to encourage the reduction of the scribal traditions of law to order. All fifteenth-century manuscripts later in date than **E** – including **I**, **J**, **K**, **L**, **M** and **N** – assimilated a slightly corrupted version of the text of the decisions into the LCQB text ‘*De vasis et utensilibus*’; and they also incorporated a slightly better reading of the text into the *Leges Forestarum*. This trend continued into the sixteenth century, as witnessed by **O**, **Q**, **R** and **S**. The extent to which this scribal tradition influenced the parameters of a very different discourse – that of the learned judges and men of law who made up the sixteenth-century College of Justice – awaits further research. The sixteenth-century judges David Chalmers of Ormond and Sir James Balfour of Pittendreich were certainly conscious of the decisions of the burgesses dating from 1296, because they made reference to them in their respective works on the laws of the Scottish realm.<sup>219</sup> However, what precisely the texts meant to them and to their colleagues is, as yet, unknown.

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<sup>217</sup> There is an edition of *Iter Camerarii* in *APS*, i, 693–702. For comments on the manuscript tradition of *Iter Camerarii*, see *Laws of Medieval Scotland*, ed. Taylor, 44 (discussing an older text that informed *Iter Camerarii*, which is preserved in **B**); 59–60 (discussing what may be the earliest witness, in **C**); 64 (discussing the witness in **D**); 71 (**E**); 77–8 (**F**<sub>2</sub>); 84–5 (**G**); 96 (**H**); 105 (**I**); 110 (**J**); 123–4 (**K**); 133 (**L**); 142–3 (**M**) and 151 (**N**).

<sup>218</sup> See Anton, ‘Medieval Scots executors’.

<sup>219</sup> For Chalmers, see *Compendium of the Laws of Scotland by David Chalmers of Ormond*, ed. by Winifred Coutts, Julian Goodare and Andrew R. C. Simpson, (forthcoming, Edinburgh, 2023), *Stair Society* 69, c. 119; for Balfour, see *The Practicks of Sir James Balfour of Pittendreich*, ed. by Peter G. B. McNeill, 2 vols, (Edinburgh, 1962–1963), *Stair Society* 21–22, i, 217, 234.

## b) The decisions of 1296 in Scottish legal traditions

One of the points that follows from this analysis is that it is perhaps better to speak of Scottish legal traditions, rather than a single, monolithic, Scottish legal tradition stretching back to the medieval period. While the late Lord Cooper famously described the Scottish legal tradition as a series of ‘false starts and rejected experiments’,<sup>220</sup> he still perceived something of a methodological golden thread running through it. In the twelfth and thirteenth centuries, he drew attention to borrowing from English law, but maintained that there was no ‘wholesale and indiscriminate borrowing’; rather, there was ‘critical picking and choosing, simplifying, adapting and rationalising’.<sup>221</sup> Even in the fourteenth and fifteenth centuries – which Cooper thought of as a period of in which legal development was seriously interrupted by political strife – ‘the lawyers had never laid their work aside’.<sup>222</sup> Now there was borrowing from Roman law; but ‘[o]nce again the appropriation was not indiscriminate but carefully selective, the choice being confined to broad principles and praetorian equity’.<sup>223</sup> Cooper believed these attitudes persisted into the nineteenth century.<sup>224</sup> The implication of all of these comments is that there was *one* single community of Scottish lawyers – or men of law, or law-makers – who participated in what can be called a single discourse or tradition of enquiry between the twelfth and nineteenth centuries. This tradition was marked by certain methodological attitudes about legal development and law-making. These attitudes might well be described in terms of a strong predisposition towards intellectual cosmopolitanism, duly tempered by sharp critical thought that was both logical and also practical.

Many views that Lord Cooper expressed about Scottish legal history are no longer tenable. The late David Sellar and others have drawn attention to continuities in legal development of institutions and procedures during the medieval period.<sup>225</sup> Even if there is now – once again – an increasing emphasis on the importance of the Wars of Independence as a moment when significant change occurred, the change was rather to fortify a tradition of royal law-making and to consolidate royal jurisdictional authority, perhaps ultimately at the expense

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<sup>220</sup> T M Cooper, ‘The Scottish Legal Tradition’, in Scott Crichton Styles, ed., *The Scottish Legal Tradition*, (Edinburgh, 1991), 65–89 at 70.

<sup>221</sup> Cooper, ‘Scottish Legal Tradition’, 68.

<sup>222</sup> Cooper, ‘Scottish Legal Tradition’, 68.

<sup>223</sup> Cooper, ‘Scottish Legal Tradition’, 68.

<sup>224</sup> Cooper, ‘Scottish Legal Tradition’, 68–71.

<sup>225</sup> See, for example, Hector L. MacQueen, ed., *Continuity, Influences and Integration in Scottish History: Select Essays of David Sellar*, (Edinburgh, 2022); Hector L. MacQueen, *Common Law and Feudal Society in Medieval Scotland*, classic edn, (Edinburgh, 2016); John W. Cairns, ‘Historical Introduction’, in *A History of Private Law in Scotland*, ed. by Kenneth G. C. Reid and Reinhard Zimmermann, 2 vols, (Oxford, 2000), i, 14–184 at 14–74.

of the aristocracy.<sup>226</sup> In addition, there is now an increasing emphasis on the importance of 1532 and the institution of the College of Justice as a significant development in the history of Scots law.<sup>227</sup> Cooper too saw this as an important fresh start, although he placed rather more weight on the advent on those jurists who came to be known as the Institutional Writers.<sup>228</sup> However, the framework of actions and remedies administered by that court were developed in light of the medieval heritage – at least, as it was perceived by the mid-fifteenth century – and in light of the late-medieval practice(s) of the session, the judicial sitting of the king’s council which was reconstituted as a College of Justice in 1532.<sup>229</sup>

The idea that one can trace continuous causes and effects in legal change in Scotland from the medieval period to the early modern and beyond is not, of course, quite the same thing as re-articulating an account of the Scottish legal tradition. In engaging critically with Cooper’s views of the legal *tradition*, one needs to be conscious of just how many distinct, discordant and disjointed voices, scribal enquiries, customary practices and legal discourses lie behind those words, ‘the Scottish legal tradition’ – if it is assumed that they are describing some single phenomenon stretching from the twelfth century to the nineteenth. Cooper’s idea that there was one single community of lawyers refining the law in light of shared methodological attitudes throughout the medieval period is problematic. In fact, what the evidence presented here suggests is that there were several different forms of traditional enquiry or practice in operation by the end of the thirteenth century, all of which might be described as concerned with laws of the burghs of Scotland, and all of which might be described as Scottish legal traditions. To focus on examples considered here, first, there were the customary, procedural practices of individual burgh communities and their courts. Second, there were the collective views of the *ad hoc* assemblies of representatives of the four burghs. Third, there were probably already *traditions* – plural – of scribal enquiry attempting to articulate the laws of the Scottish realm, as there would be in the fourteenth and fifteenth centuries. Fourteenth-century and fifteenth-century royal governments made different attempts, of course, to gain control of these Scottish

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<sup>226</sup> See the general direction of the argument in Alice Taylor, ‘Law and Administrative Change in Scotland, Twelfth-Fourteenth Centuries’, in *Comparative Perspectives in Scottish and Norwegian Legal History, Trade and Seafaring: 1200-1800*, ed. by Andrew R. C. Simpson and Jørn Øyrehagen Sunde (forthcoming, Edinburgh, 2023).

<sup>227</sup> Compare Mark Godfrey, *Civil Justice in Renaissance Scotland*, (Leiden, 2009), and also John W. Cairns, ‘Revisiting the foundation of the College of Justice’, in *Stair Society Miscellany V*, ed. by Hector L. MacQueen, (Edinburgh, 2006), *Stair Society* 52, 27–50 with the older view of the institution of the court represented in *The College of Justice. Essays by R. K. Hannay with an Introduction by Hector L. MacQueen*, ed. by Hector L. MacQueen, (Edinburgh, 1990), *Stair Society Supplementary* 1.

<sup>228</sup> Cooper, ‘Scottish Legal Tradition’, 68–9.

<sup>229</sup> See in particular Godfrey, *Civil Justice*, 161–354.

legal traditions, and to unify them. Examples of such attempts might include the institution of the special sitting of the chamberlain's court staffed by representatives of the four burghs to oversee the other towns in the kingdom, or the parliamentary attempts to gain control of the scribal traditions, possibly witnessed in **I, J, K, L, M** and **N**. Indeed, historians might find it illuminating to explore possible links between these traditions and the legislative tradition itself during the fifteenth century.<sup>230</sup> Yet all these traditions remained distinctive. The extent to which they informed the *institutionalised* practices of the College of Justice from 1532 requires further study. Those practices finally did result in the emergence of a learned discourse – conducted according to shared methodological assumptions – that had supreme control of the development of Scots law in civil matters, and thereafter lay at the heart of the Scottish legal tradition. The extent to which the medieval Scottish legal traditions informed the learned disputations in the College of Justice can only become clear once those *traditions* have come fully into focus. This article is intended to make a small contribution towards that process, and to show just how much can be done in this regard.<sup>231</sup>

### **c) A history of legitim?**

Finally, this article has endeavoured to lay some of the groundwork necessary for a modern history of legitim, which is a *desideratum*. Writing a history of legitim might seem a simple prospect, because at its core is a very ancient rule; and at the heart of that rule is an idea that children should be entitled to one third of their parent's moveables on the parent's death. Such a rule still exists today; so writing its history should surely be straightforward. Of course, it is not. For one thing, the formulation of the rule just given obviously oversimplifies it. In the decisions of 1296, it was applicable only within the burghs – and possibly originally only within the four burghs of Berwick, Roxburgh, Edinburgh and Stirling. Furthermore, there were caveats to the rule. Notably, it only operated in favour of an heir if he had not been 'forisfamiliar'. It is not clear what that word meant in the late-thirteenth century; and early Scots translations gave subtly different takes on the term in the fifteenth and sixteenth centuries.

As has been explained, these and other substantive points should be considered alongside the fact that the rule was given meaning in different traditions, which may, or may

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<sup>230</sup> Consider, for example, *RPS*, A1474/5/8, which extended the rules governing heirship moveables to the 'aieres of barons, gentilmen ande frehaldaris... efter the statute of the burow lawis and is contenyt in the sammyn'.

<sup>231</sup> It is difficult to overstate the importance of *Laws of Medieval Scotland*, ed. Taylor, and *Regiam Majestatem*, ed. by Taylor with Davies for anyone remotely interested in these aspects of the history of Scots law, and in the development of Scottish legal traditions.

not, have interacted with each other. Amongst them were scribal traditions, customary practices, the work of the consistorial courts of the church, and – ultimately – the learned discourses of the College of Justice. Whatever happened in the process, the result was not any simplistic continuity, but rather interesting change, which must be explained. One example of this change will suffice to underline the point. By the seventeenth century, Stair could remark on the great antiquity of the rule of legitim as forming part of ancient custom in Scotland,<sup>232</sup> and simultaneously point to the fact that elements of the rule were not fully settled in his own time. In particular, he believed that the decisions of the College of Justice had not wholly established the meaning of forisfiliation.<sup>233</sup> Yet one thing *was* clear about this for Stair, indicating how different his rule of legitim was when compared with the third decision of the burgesses in 1296. Stair considered the extent to which forisfiliation could take away the rights of *any* child to legitim, rather than singling out the heir for special attention. Additionally, when he came to the heir's entitlement to legitim – or rather, his *lack* of entitlement – he did not say this was anything to do with his being forisfiliated, as the burgesses had done in 1296. In general, he said that '[H]eirs are excluded from the bairn's part, though in the family, because of their provision by the heritage', and then he noted two exceptions to this rule which had nothing to do with forisfiliation.<sup>234</sup>

In other words, legitim was in one sense ancient, as Stair said; but the rule of legitim of which Stair spoke was really quite different from the rule articulated in the third decision that the assembled burgesses made in Holyrood in 1296. As one might expect, the ancient customary rule was not reified, but in fact very much alive, in the hands of a sophisticated judicial discourse within the College of Justice; and this was evidently informed by the older traditions. Any history of legitim would have to be committed to the rigorous reconstruction of those traditions for their own sakes. That would require understanding of what contemporary scribes, law-makers and jurists wanted to communicate to contemporary audiences when discussing and debating the content of the rule. It would be a significant task, involving the reconstruction of their intellectual worlds, and the assumptions and conventions that they shared with their readers.<sup>235</sup> However, engaging with the traditions of Scots law in this way

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<sup>232</sup> Stair, *Institutions*, I.1.16. For Stair's understanding of the development of customary law in Scotland, see J. D. Ford, *Law and Opinion in Scotland during the Seventeenth Century* (Oxford and Portland, 2007), 306–7, 414–7, 534–9, 548–50.

<sup>233</sup> Stair, *Institutions*, III.8.44–6.

<sup>234</sup> Stair, *Institutions*, III.8.48–9.

<sup>235</sup> For the sort of methodological approach that is envisaged here, see the contributions to *Meaning and Context: Quentin Skinner and his Critics*, ed. James Tully, (Princeton, 1988); for the approach as applied to

would present the opportunity to learn a great deal. Indeed, it would present the opportunity to learn much more than would be possible if the *only* legitimate focus of legal scholarship were to become the immediate practical utility of ideas – however critically important that concern must remain for legal academics.

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Scottish legal history, see Ford, *Law and Opinion*, x; *Alexander King's Treatise on Maritime Law*, ed. J. D. Ford, (Edinburgh, 2018), *Stair Society* 65, cxvii and cxvii footnote 713.