VAN'S DUNLOP SCHOLARSHIP
IN
SCOTS LAW AND CONVEYANCING.

ESSAY
ON
BARONY TITLES.
In 1285 the Scottish Parliament at Scone put an end to the 30-year old controversy as to the Earldom of Menteith by deciding that the earldom should remain with Walter Stewart and that half of the lands should be erected into a "Barony" in favour of William Comyn.¹ So old, and indeed older, is that peculiar and privileged grant which has been a feature of the land rights of Scotland from almost the beginning of its authentic history to the present day. In order to comprehend the meaning and significance of grants of "barony", it will be instructive in the first place to consider shortly the legal and social institutions which existed in Scotland prior to the introduction of Norman feudalism; in the second place, to examine the sources from which barony was introduced into our country; and in the third place, to consider what were its salient features at the period when it was in its prime in the fourteenth, fifteenth and sixteenth centuries.

When David I ascended the throne of Scotland in 1124, he began to address his charters "baronibus, vicecomitibus ministris et omnibus fidelibus suis"² instead of "omnibus suis fidelibus Tegnis et Drengis"³ as they were addressed in the reign of his predecessor. In the earlier history of Scotland the nobility consisted largely of Thanes, the representatives either of the Celtic Moors or Toschachs and Earls who were the ancient Mormaors or greater Thanes. These early titles did not originally connote any property in land but represented the King's Officials, members of his blood for the most part, among whom the country had been partitioned with powers and duties of administering it on the King's /

². Charter for Dunfermline c.1130 Lawrie's "Early Scottish Charters".
³. Charter for Coldingham c.1117 ibid.
King's behalf and collecting the Royal Revenue from the neyfs who tilled the soil. In remitting the rents and dues which were paid mainly in cattle, corn and hens according to the wealth and status of the tenants, the Thanes were entitled to retain their share, the tertius denarius, by virtue of their office; and while the office was probably neither hereditary at first nor inclusive of the proprietorship of the lands over which it was exercised, by the era of the introduction of the Feudal System into Scotland it had in most cases become vested in a particular family by the operation of the law of the three descents.1

The importance of these early Thanages is that they represented the pre-feudal system of land tenure which was not ousted by the introduction of feudalism but subsisted for several centuries after the feudal military tenure had been introduced, and grew up alongside it into the tenure of feu-farm as opposed to the strict feudal tenure by ward. As Robertson says - "It is "evident that there were two distinct tenures very generally "prevalent about the middle of the thirteenth century in Scotland, "the tenants in capite holding either by the feudal tie of knight-"service or by the older tenure of thanage."2

It is with David I that the age of charters in Scotland properly begins. Before his accession he had spent many years in the South, and, as a feudal baron in Cumbria, had gathered round him a body of Norman knights and barons; and he brought to Scotland many of the feudal ideas which had gained a firm footing in England, among them the charter and the tenure by military service. The earlier grants to Thanes, Earls, and the Church had been made with studied ceremonial according to the "ancient custom" /

1. Appendix I.
2. Scotland under her Early Kings App. N.
and it is clear that no written evidence or title was required. From David's time onwards it became common to grant Charters to all those holding of the Crown and indeed the holding of such a Charter became the mark of gentle birth. It is not to be thought that David attempted to displace the earlier nobility and to replace it by Norman barons holding by military service; nor was this necessary as there must have been plenty of the King's demesne lands available for his royal grants. The tenure of the Thanes continued although the name "barons" was applied to them collectively from then onwards, the older name being retained only for the lands, which were still called thanages and continued to be held by the Scottish service. Thus there were the two systems growing up side by side. On the one hand, there was the tenure of the former thanes who paid a fixed rent for their lands and were liable only for service in the King's "hosting", the servitium Scotticanum or forinsecum of later times which was apparently rendered on foot and without defensive armour; and on the other hand that of the Barons who held their lands in free benefice on condition of fealty, making suit in the King's Court, and rendering so many mail-clad men-at-arms to serve in his army for forty days without pay. It is this latter tenure which Craig at the end of the sixteenth century calls the "true feu", characterising the other as a "feudastrum" or "bastard feu" and attributing its introduction to a later and more lax age. The idea of a "feudal Baron" having found its way into Scotland /

1. e.g. Grant of the Cursus Apri or "the Boar's Raik" to the Priory of St. Andrews by Alexander I.
2. Appendix II.
3. Appendix III.
4. Cf. Anglo-Saxon "inwer" and "utwer".
5. Jus Feodale.
Scotland before the middle of the twelfth century, it must be considered probable that grants of land in baroniam followed not long after, particularly as barony was a distinctive feature of the Feudal System in England at the time. But no such early barony charters have survived and it is not until the end of the following century that grants of land in liberam baroniam become common. Cosmo Innes says that in the charters of David's time "the word barony does not occur ....... and it would seem that a "grant of forest was the most extensive and most privileged then "in use". But by the early part of the fourteenth century at least grants of lands by the Crown to be held in free barony had become frequent and well defined in meaning. In the district north of the Forth there was little tenure by barony in the early feudal period and the course of the fourteenth century witnessed the wholesale conversion of thanages into baronies. For the origin of the peculiar rights and privileges of barony (or at least such of them as are not peculiar to the Scottish genus) regard must be had to the systems of Normandy and England whence their introduction into Scotland was derived.

In Normandy the word "baro" passed through successive stages of meaning from that of "man" to "tenant in chief" and by the middle of the eleventh century it was the technical name for a tenant in chief who had certain rights of public justice, called by later French lawyers "la haute justice". These consisted in right to hold the duel in civil causes and to inflict death or mutilation on thieves taken within the barony either in the act or with the booty on them and were "pleas of the sword" belonging by/1

1. Appendix IV.
2. q.v. Register Magni Sigilli vol. 1.
4. Appendix V.
by right to the Dukes themselves. The Norman baron was thus a ducal officer as well as a tenant in chief and his barony an administrative unit as well as a "fief de hauberc". There were other peculiarities inherent in a barony in Normandy such as that while other heritages were equally divisible among male heirs a barony descended entire to the eldest son, and that there was attached to every barony a *mansio capitalis* where the Baron held his "pleas of the sword" and to which all the men in his barony must repair.¹

Turning to England in the era immediately succeeding the Norman occupation a difficulty is encountered at the outset in the controversy which has been waged by constitutional writers and lawyers as to what constituted a barony in that country and particularly whether it was a separate form of tenure or merely a modification of knight-service. Maitland, looking at the question from a constitutional point of view, contents himself with positing the question "What is a Barony?" and quoting Stubbs' conclusion that "as we do not possess anything like an early enfeoffment of a barony, it is safer to confine ourselves to the assertion that in whatever form the lands were acquired or bestowed the special summons (to Parliament) recognised the baronial character of the tenure."² But this conclusion takes no notice of the earlier distinction between a holder of a barony and an ordinary knight holding no matter how many knights fees, and Maitland, while he admits by implication that there was such a distinction in public law at least, pursues the matter no further.

In England, as in Normandy, the distinction originally lay in the public jurisdiction which a barony title conferred and not on the privilege of a separate summons to Parliament which was merely a later /

---

¹ See English Historical Review vol. 35 "Barony and Thanage" by Professor Rachel Reid, D.Litt., pp. 167-8.

² Constitutional History of England p. 81.
later development. In other words baronies and the persons who exercised the rights inherent in them were an earlier feature than Parliaments to which greater and lesser barons were summoned so that a difference existed which cannot be explained by applying the test of a special summons.

The special rights and privileges of a Barony in England were similar to those found in Norman law. The barons holding per baroniam in England in the late eleventh and in the twelfth centuries were probably as in Scotland the successors of the "King's Thegns" of Saxon England and like the Thegns had a certain quasi-royal jurisdiction over their vassals and villeins.  

Bracton says - "There are certain barons and others who have a "liberty, that is to say soc, sac, toll, team, infangthef, utfangthef. These may judge in their court if anyone has been "found within their liberty seized for some open theft as hand- "having and back-bearing," and he has been accused by sacborh ..... "Likewise they may take cognisance of affrays and of men beaten or "wounded, if felony and the King's peace be not offended."

From the same authority we learn that barons were to be distinguished from knights and vassors as being "potentes sub rege" while the latter had no such power and were called "magnae" or "viri magnae dignitatis". A barony had a principal manor, "caput baroniae", which could not be partitioned among co-heirs as were other fiefs which had no "caput baroniae". The essence of barony as a parcel of land was in England as in Normandy the possession of a "caput baroniae", and the "raison d'être" of the distinction was the same in both cases, namely that this was the place /

1. See Article in English Hist. Review by Professor Rachel Reid on "Barony and Thanage."
2. Observe the similarity to the Norman rule in theft.
4. Appendix VI.
place for holding court and administering the "pleas of the sword" or as they were called in England "the pleas of the Crown". It is also clear that the nature of the jurisdiction of the English holder by barony was similar to that of his Norman counterpart although the nomenclature of his rights was Anglo-Saxon.

The decline of baronies in England was concurrent with that of feudalism. The Barons' heritable jurisdictions were encroached upon by the institution under Henry II of itinerant Royal Justices who abrogated the justiciary rights of the Barons' Courts under the pretext that any use of force was a breach of the King's Peace and claimed for the King all actions for the possession of land as opposed to its ownership. In Magna Charta the Barons attempted to save their crumbling privileges but without success and Maitland says that "before the end of the thirteenth century it was a very rare thing for an action concerning freehold to be begun, tried, and ended in a manor court". Only the greater Barons' Courts survived to become later the "Courts Leet" and barony as a kind of holding became a dead letter. But what the Baronies lost in power the Barons themselves gained in dignity, their rights of jurisdiction being commuted with the growth of constitutional government into the later legislative and judicial powers of the House of Lords.

The barony holding which existed in England and exhibited such striking similarities to its Norman prototype was introduced in much the same form into Scotland probably by David I in the twelfth century, and there it suffered a very different fate. Feudalism spread fairly rapidly, new Crown grants being made in ward, the form which military tenure took in Scotland, and the old holdings being converted either into feu or blench farm or into ward whenever they fell into the King's hands either by reason /

1. Constitutional History p. 133.
reason of resignation for regnant or by forfeiture or by failure of heirs. The lack of a strong central government and the internal strife of the fourteenth, fifteenth and sixteenth centuries tended to increase the power of the greater barons. Grants of pit and gallows and of regalities to the Church formed an example for similar grants to powerful lords, and our Scottish baron of these times cannot have been so very unlike the "feudal tyrants" who eventually caused the Revolution in France.

The jurisdiction which a grant of barony carried was the crux of the matter in the centuries between the introduction of feudalism and the Union of 1707. Skene defines a Baron as he "quha holdis his landes immediatlie in chiefe of the King and hes "power of pit and gallows". The grant of a Barony usually contained in the tenendas clause the words "cum furca et fossa, "sak et sok tholl et theme et infanghandtheif." Occasionally offanghandtheif too was added, and in the Charter of Erection of Dunblane in the hands of the Bishop in 1142 there is the added "et hamosukkin". Furca et fossa is the "pit and gallows" which have been regarded by the later institutional writers as the true mark of a baron of these times which gave him power of life and death over malefactors. Lord Darling in the Gordon Peerage Case observed that there were degrees of Barons in England and France some having only one post and a transverse while others had three or four uprights and could hang several criminals at once, but no such distinction seems to have obtained in Scotland. The criminal jurisdiction of the baron extended to all crimes except treason and the four pleas of the Crown (robbery, rape, murder and wilful fire-raising), which were sometimes specially excluded; but even these could be included. The baron could execute judgment upon the/

1. De verborum Significatione s.v. Baron.
2. e.g. Charter by Robert Bruce to his nephew of Earldom of Moray. Registrum Magni Sigilli No. 294. Vol I.
the thief taken within the barony with the "fang", that is in the act, or "hand-haveand or back-bearand", before he could convey the booty to a place of hiding. If he had "outfanghandthief" as well he could have the thief pursued outwith the bounds of the barony and brought back to justice. An Assise of David I enacted that Barons who had pit and gallows for theft should have pit for homicide, and when it is considered that such capital crimes as "hamesukkin" - that is, seeking the victim out in his home and killing him - were specially mentioned in grants, it must be thought probable that in early times at least the jurisdiction of the baron extended to every crime except treason. Unfortunately no very early Baron Court Books have survived, the earliest being that of the Carnwath Barony and the majority being of the seventeenth century, but the law administered in them was the general law of the land. The Sheriff's jurisdiction within the barony was excluded though he or his officer was directed to be present in Court to see that justice was done and in a capital offence after _appelatio and responsio_ the baron might not make _concordiam_ without leave of the King, given, it would appear, by the Sheriff present in Court.

The jurisdiction of the holder of a barony was peculiar to him and was inferior only to a grant of regality which included the powers of the Sheriff in civil causes and those of the King's Justiciars in criminal offences. A grant of _comitatus_, of earldom, while it included that of barony, carried no higher rights of justice but only the added dignity or nobility of an earl. A baron could _infeft_ his tenants _cum curiis_ which gave them right to take cognisance of ordinary breaches of the peace

---

1. Appendix VII.
2. Appendix VIII.

---
and actions between their sub-tenants; and if it were cum curiis et bludavit it carried right to the fines payable for offences causing the effusion of blood. But he could not depute his office of judge in capital crimes; and any jurisdiction delegated by him was, on the ordinary feudal principle, held as cumulative with his own and not privative. All his tenants were bound in the feudal service of doing suit at his Court, as he was himself at the Court of the King. The barons' suits at Court were very often specified in his grant - "faciendo tres sectas ad curias nostras" etc. - and these he was bound to fulfil under penalty of a certain customary fine or unlaw from which he could be relieved only by sending a procurator or attorney and pleading a proper essonyie or excuse; but those of his tenants were dependent on the custom of the barony or on the summons of the baron. The officers of his Court were the bailie who must preside when the lord himself was one of the disputants, and the "deempster" who administered the oath to the pares curiae and "fenced the Court". This latter office gradually fell into desuetude. There was, too, a clerk of court who must be a notary and the proceedings and decrees of the court were liable to be reduced if he were not. All the free tenants of the "voisinage" or visnet must attend and from them the baron bailie chose fifteen to bear witness to the guilt or innocence of the accused. In this can be observed the first traces of the modern trial by jury.

The Courts of the barons were a source of great revenue to them and lent themselves to great abuses. In the twelfth and thirteenth centuries Acts of Parliament were passed visiting the penalty of loss of his jurisdiction upon a lord who showed undue leniency towards malefactors either through friendship or for a money consideration, and if a thief escaped from his prison the baron /

1. Appendix IX.
2. Appendix X.
baron must clear himself by the oath of three of his peers and twenty seven leal men. Both barons and lords of regality had the right to "repledge" actions in the Sheriff's Court, but, as the judicial powers of barons became more and more limited, particularly by the growing power of the King's Courts, this right of the barons fell into desuetude, until in the sixteenth century it was one of the main distinctions between the jurisdictions of a baron and of a lord of regality that the latter alone could claim actions such as spuilzie and ejection and have them removed from the Sheriff's Court to his own. 1

So slow was the evolution of a proper judicial system in Scotland that it was not until 1747 that the heritable jurisdictions of pit and gallows were abolished by Act of Parliament. But the act of the Legislature merely evidenced what was already a "fait accompli" for in the seventeenth century by reason of the power of advocation of the Court of Session "the Barons had ceased "to exercise their right of pit and gallows". 2 By this time they dealt only with minor civil actions and petty breaches of the peace. 3 The most important of these were bloodwits with a penalty not exceeding £50 Scots; and in these cases while the injured party might get some small recompense the greater part of the fine went to the baron, the penalty being expressed as "for fylin my "lordis grund with violent blude." 4 The Act of 1747 provided for payment of compensation to the lords for the loss of revenue from their Courts and left them with a minor jurisdiction for enforcing the feudal obligations of their tenants and for trying assaults with a maximum fine of twenty shillings or penalty of three hours in the stocks. But even this limited jurisdiction was hardly exercised /

1. Robertson: Scotland under her Early Kings p. 265.
5. Carnwath Record.
excercised and the Baron Courts soon fell completely into desuetude, leaving only an occasional moothill or remains of a thieves' pit as a reminder of their former importance.

Barony was a nomen universitatis et dignitatis and contained besides right to hold a court of pit and gallows many other special rights and privileges which an ordinary crown tenant did not possess. The baron was an important member of the community, a privileged person and the object of special legislation. The ordinary man might not wear gold, silver, velvet etc. nor even woollen goods imported from foreign countries but the baron was exempted from this restriction. Only barons and earls might retain their horses in the King's army on the march although all might ride their horses to the meet. What is called the first Education Act directed the sons of barons to attend school and be taught Latin until they were fluent. But most of the baron's rights, privileges and obligations were connected with his lands. At this period feudalism was a social as well as a legal system, and every man's position in the law and in the community depended on his place in the structure of land rights.

The whole country was divided into small settlements under a feudal overlord, a baron, who was in relation to all the inhabitants of the barony their judge, their military commander and the source from which their lands flowed. In the Highlands the associations took the form of clans which were noted for their more vagabond and plundering propensities. There were, too, the towns, but at least until the seventeenth century they were small in number and size and of little immediate importance in the life of the nation. The main social unit was the barony with the baron.

1. Scots Act 1581.
2. do. 1540.
3. do. 1496.
The importance of the barony in the social system is evident in the rights which were included in the grant, and which the caution of conveyancers caused them to set out at greater and greater length in their deeds. The earliest charters are simple, but with the development of the art of conveyancing they become more and more verbose. One of the oldest pertinents of barony was the right to mills (molendini), which were characterised by Ross as being along with pigeon-houses "the very marks of nobility".

Ordinarily they did not pass with lands as they belonged to the jurisdiction, but they passed with a barony for that very reason. In modern times the mill does not seem to us to be of such strategical importance; but in a simpler state of society the baron's monopoly of mills and of grinding his tenants' corn evidences his control over their very livelihood. The French called this monopoly "banalité du seigneur" and in England it was called the "socome" or "socna", from which our word "sukken" is derived. In Scotland the tenants could be thirled to their lord's mill either at their investiture or by proclamation of the baron bailie and if they were caught going secretly to another mill their horse and corn was forfeited. The power of thirlage to the mill was open to great abuse in the hands of avaricious lords, and multures which were at first a reasonable charge for grinding the corn came in some cases to be a burden on the tenants out of all proportion to the services rendered. And a further charge was sometimes made in name of "dry multures", which was an oppressive tax on corn whether ground at the mill or not.

The French "banalité du seigneur" extended to wine-presses /

2. A corruption of the word "thrall-enthrall".
3. Appendix XI.
4. Craig: Jus Feodale.
wine-presses and ovens too, and in Balfour's Decisions we find cases in Scotland of thirlage to the Baron's oven. Smiddies, brewing and ale-selling were all at one time or other the subject of similar rights, and life on some estates where all these rights were exercised by the lord according to "the custom of the manor" must have been very restricted.

It is interesting to note in connection with the sociological eminence of the baron the construction which some sixteenth and seventeenth century lawyers put upon the words *merchetis mulierum* which occur frequently as one of the pertinents in barony titles. Craig resisted with vigour as a base slander on the morals of our ancestors the imputation that this was the *jus primae noctis* or "droit de seigneur" which the continental jurisprudence harboured, and thought the words themselves were introduced through imitation of the French. And Lord Hailes in a very learned appendix to his Annals proved not only that the *jus primae noctis* had a very different derivation from that usually imputed to it, but that the "merchets of women" in Scotland were the ordinary fines of marriage inherent in every military holding.

Towers and battlements were included among the pertinents in a barony title as part of the jurisdiction and originally only such a title could carry them, as by the ancient feudal law all battlemented fortalices belonged to the King. They were handed over to the baron, however, for the safe keeping of criminals condemned in his Courts. Roads and paths were carried to a limited extent by all grants but in a barony the power of exclusion as well as use was included. By virtue of his right of "thol" the baron could impose a customs tax upon all goods and merchandise passing through his lands. Forests were *inter regalia* but it was common to include a grant in free forest with a barony, and in later

1. Craig: *Jus Feodale*.
2. Appendix XII.
later times when forests ceased to be a royal monopoly a barony title was habile to establish a right to them on long possession. A barony was, then, a universal title to lands incorporating high and diverse legal rights all indicative of the elevated position in society of the holder of a barony. A question which has sprung into prominence in modern times in peerage cases, and regarding which theories have been largely canvassed in the Courts in this and the preceding century is whether a grant of barony ever carried a title of nobility and if so at what period.

Titles of nobility were certainly territorial until near the end of the sixteenth century, in spite of Lord Mansfield's oft-repeated dictum in the House of Lords that "titles ceased to be territorial certainly by 1214." But a title in the modern sense is a modern phenomenon. In the formative period of feudalism in this country rank was intimately connected with the possession of land, and while the erection of lands into an earldom or a viscounty carried no more jurisdiction than an ordinary barony, such a grant was only made to the greatest landowners and carried per se the rank of earl or viscount. If the owner sold the lands the title passed with them, though the alienation could only be made with the King's consent or out of great necessity - "mykle mystyr" is the expression used in one old deed of sale. The same rules applied in a lesser degree to baronies. Originally a grant of a barony, or the inheritance or acquisition of one conferred the title of baron or lord upon the owner, and so closely was the title connected with the lands that the dignity of baron, as indeed of earl, did not enure until feudal investiture. The title of lord may only have been one which was "spontaneously bestowed by the people" as Wallace says, but then nothing more was needed to make a baron.

1. Appendix XIII.
2. Feudal Tenures and Peerages; George Wallace.
a man an earl than to bestow on him a "comitatus"; and a barony was of the same genus as earldom but smaller or less ennobled. In each case it was the lands upon which the dignity was conferred, and not the owner, and the mere holding of the lands invested the owner with the dignity inherent in them.

During the course of the fourteenth century a great many estates were erected and thanages converted into baronies which varied greatly in extent and in the importance of their owners. It is estimated that by the beginning of the fifteenth century there were some three hundred baronies in Scotland,¹ and in 1425 there is the first indication of a recognised distinction in the status of the different barons. Every crown tenant as such was under the duty of attending the King's Court or Parliament² whether his lands had been erected into a barony or not. But in fact, as the records of the early parliaments show, only the greater landowners did attend, the expense and the danger of travel in these unruly times being a strong deterrent on the smaller tenants in capite. James I when he ascended the throne in 1424 imbued with ideas of a representative parliament such as he had observed in England passed an Act of Parliament enforcing the presence of those absentee lesser barons and crown tenants, probably in order to show the futility of the then existing theory. This was followed by an Act of 1427 introducing for the first time a distinction between lesser barons and greater barons, and allowing the former along with the free tenants to be represented by two of their number from each shire, while the latter were to be summoned in person as before. From this time dates the beginning of the change in the basis of nobility from the ownership of land to lordship of parliament, although rank continued to be inseparably connected with /

2. Appendix XIV.
with the lands themselves and it was not until the beginning of the seventeenth century that conferment of the dignity of a lord of parliament as a thing by itself first appeared. Similarly the year 1427 marks the beginning of the split between the greater barons who became the peers of the realm entitled to a hereditary seat in parliament, and the lesser barons who became the lords or "lairds" of their estates. The gap was not then such a wide one as it is to-day but it grew wider with the evolution of parliament and with the emergence of "lords of parliament" unconnected with any rights in land.

The Act of 1427 was largely disregarded and it was not until 1587 that the distinction between greater and lesser barons was constitutionally confirmed. In that year an Act was passed excluding the lesser barons from a hereditary seat in parliament, and "the words 'title, honour and rank of a free baron' independent of the baronial fief were applied technically ex tunc to a great Baron or Peer". But the territorial principle in part remained and "instances occur even then of charters of a comitatus simply 'carrying the dignity'."

It remains to cite one instance of the strong connection which still existed between the titles of peers and the baronies from which the titles of all of them arose. The Barony of Torphichen and other possessions belonged to the Knights of St. John who had a regality and chancery and many extraordinary immunities and privileges. Their Preceptor was an ambiguous personage who was called Lord of St. John of Torphichen and sat in Parliament alternately amongst the abbots and priors and at the head of the higher barons. In 1563 after the Reformation Queen Mary /

1. Appendix XV.
2. Appendix XVI.
3. Riddell: Earldom of Moray 1611.
Mary granted a charter of the Barony of Torphichen and other possessions of the erstwhile Knights of St. John to Sir James Sandilands who had been their Preceptor. When Charles I resumed the superiorities of Church lands in 1633 John, then Lord Torphichen, petitioned His Majesty that the Barony of Torphichen was "ane temporal estate", and dutifully offered to surrender the superiorities of the lordship excepting "that mean portione thairof lyand within the baronie of Torphichen and Shireffdome of Linlithgow quairin does subsist the title and dignitie of Lord "of Parliament". And the King was pleased to grant his request and by an Act of his Privy Council to except "that meane remaner" of the Barony of Torphichen from the operation of the Acts of forfeiture. Even at this time, it seems, the dignity of a peer was attributed to the lands in which the title had its origin. It was not long, however, before titles of honour were completely divorced from land, and after the Union of 1707 when the peerage was determined, it was firmly established as a hereditary and personal honour belonging to certain families and entitling the holders of the titles to return representatives to the House of Lords. The territorial principle ceased to be an active factor and became merely historical.

The only conclusions which can with safety be drawn are that every modern peerage has its origin in a grant of lands - in a barony or an earldom. Until some time previous to 1427 every grant of barony involved the historical equivalent of a modern title. And with the evolution of parliamentary government and the decline of land as the basis of the legal and sociological structure of society Barons came to be divided into Lords, or Peers, having no connection with their benefices, and Lairds and large landowners possessing no "title" in the modern sense but still deriving their designation from the lands which they held.

From the nature of a grant of barony as a nomen universitatis, the jurisdiction which it carried per se, and its probable /
probable origin in the earlier office of King's Thane, it is natural to expect that it was a prerogative of the Sovereign only to confer such a title to lands. And this is the rule of law stated by the institutional writers. Bell says "the right of barony can be "conferred only by the Crown and cannot be transmitted by the "baron to be held base of himself". It is all the more surpris-
ing therefore to find that this rule was not in fact invariable either in Scotland or elsewhere. Craig says that in the French system there were certain feuda loricae which carried nobility and could only be granted by the King, such as dukedoms, marquisates and earldoms; while others which did not confer nobility, such as baronies, viscounties, baronetcies and constabularies, could be granted by dukes, marquesses and earls also. And in another place, after stating that in this country all barons hold in chief of the King he remarks that earls create barons in Germany and Lombardy but in these cases usage stands for law. In England, too, Lord Darling says that the principal tenants of the Bishop of Durham who was Earl Palatinate of Durham were always called Barons. In Lancashire there were barons who held of Roger of Poitou with the privilege of free courts for all pleas but those of the earl's sword; and a charter of the Earl of Richmond confirms a fief to Torfin "cum soco et saco, et tol et tem, et infangthef et cum "omnibus libertatibus et liberis consuetudinibus sicut aliquis alius "ex meis baronibus feudum suum melius et honoratius de me tenet".

All these are instances of grants carrying a jurisdiction similar to that of a Scottish baron infeft with pit and gallows and yet not issuing from the Sovereign. Inspection reveals the same feature in /

2. Jus Feodale.
4. Barony & Thanes: Professor Rachel Reid.
5. Facs. of Charters, British Museum i. 30 cited by Professor Rachel Reid.
in Scotland.

It was a common practice for the kings in Scotland before the Reformation to give large grants of land to the Church, to erect their lands into lordships and baronies, and to include in them notable immunities from the usual obligations of subjects. Some of these grants carried, besides the jurisdiction which was implied in a barony or regality, immunity from taxes and from all extraneous jurisdictions whatsoever excepting only submission to the Sovereign and the Privy Council. The religious houses in their turn granted out some of their lands either by military tenure for protection or by feodofirma, feu-farm, for agricultural purposes; and they seem in some cases at least to have granted subaltern rights of barony. In this way the Barony of Kilconquhar in Fife was held of the Archbishop of St. Andrews by the Dunbars, Earls of March, on which account it was saved from the attainder of the last earl. On 5th February 1568 there is a grant in the Privy Seal Record to Andrew Wood of Largo of the non-entries of one-fourth of the Barony of Kilconquhar belonging to Elizabeth Dunbar and lying within the Regality of St. Andrews but now in the hands of the Crown by the forfeiture of the Archbishop of St. Andrews "superiore of ye saidis landis and barony".

There is another instance on record of a barony held of an Archbishop. In the Act and Decree Register of the Supreme Civil Court occurs an entry on 25th November 1586 concerning Sir James Stirling of Keir heritor of "ye baronie of Caulder wyth tower "fortalice and manor-place etc. lyand wytin ye baronie of Glasgow" which formerly belonged to the Archbishop of Glasgow; which Barony of Calder Sir James Stirling and his predecessors held of the Archbishop by service of ward and relief and giving suit at the prelate's /

1. e.g. Grant of Barony & Regality of Torphichen to the Knights of St. John.

2. Riddell's Peerage.
But it was not only the Church which made grants of
baronies. The chief men in the country were the great landed
nobility to whom also grants of regality were often made. The
Earl of Sutherland was one of the most powerful of the great barons
owing partly to the magnitude of his landed possessions and partly
to their distance from the seat of the central government. By a
charter of David II dated 10th October 1345 the earldom of Suther-
land was erected into a free regality in the hands of William,
fifth Earl of Sutherland, and Margaret Bruce, his Countess, and
their heirs. As a result of this erection of his earldom into
what was in effect a miniature principality William seems to have
arrogated to himself powers and privileges which in strict theory
the Sovereign alone could wield. In 1360 he is to be found
granting to his brother Nicolas Sutherland for his faithful homage
and service past and future, sixtan davatae of land in Torboll to
be held in libera baronia "cum sok et sak, tol et them, furca et
"fossa, infanghandtheif" and that for "the service of ane knight a
"year for every service, exaction or demand whatsoever". In fact
Nicolas Sutherland thereafter held a barony of a subject superior
with all the peculiar rights of jurisdiction inherent in such a
title; and from the enumeration of pertinents in the tenendas
clause it is clear that he also got all the special privileges
which a barony as a nomen universitatis carried such as the privi-
lege of hunting and hawking and the right to mills. Whether
Nicolas thought that his barony right was open to objection, or
whether he felt that as it was a noble feu, although of the second
rank, it should have the Sovereign's imprimatur, is not clear, but in
1362 /

1. Riddell's Peerage.
2. The Sutherland Charters ed. by Sir Wm. Frazer No. 13.
3. The Sutherland Charters No. 19.
4. Appendix XVII.
1362 he obtained from David II a Charter confirming the grant from his kinsman, and narrating that, having examined the Charter and found that no parts of it were erased or suspect in any way, the King approved, ratified and confirmed it in all its conditions and circumstances, in its form and effect "salvo servicio nostro". 1, 2 It is clear when the King specifically approves of a grant of barony by one of his subjects that such grants were not merely effected sub rosa. They were constitutionally valid, even if theoretically incorrect. Nor was this an isolated instance in the Earldom of Sutherland. In 1562 John, Earl of Sutherland, with consent of his spouse granted to Alexander Sutherland of Duffus the lands and fishings of Skelbo and others with the Castle of Skelbo; which lands formerly belonged to the said Alexander but were resigned per justum et baculum in the hands of the said Earl pure et simpliciter to be united in one barony; wherefor the Earl united them in the one Barony of Skelbo and regranted them to Alexander with the privilege of a single sasine at the Castle of Skelbo. 3

It must be considered probable that such grants of baronies by the great landed nobility and by the Church before the Reformation were more frequent than is supposed. As the granters in all the instances cited above were in right of a regality, the grant of barony did not take from them all the jurisdiction which they held but left them with the superior power of a sheriff in civil causes and of a King's Justiciar in crime. The lord of a regality was a high judicial personage executing justice on behalf of the King and to his jurisdiction the baron's was subordinate. But however one tries to justify grants of barony by subject superiors the fact remains that a grant of barony carried high rights /

1 & 2. Appendices XVIII and XIX.

3. Appendix XX.
rights of property and a justiciary right proper to the Crown, and that grants of jurisdiction by the Crown could not be delegated, so that such grants should theoretically have been validly made only by the Sovereign as the fountain of justice as well as of honour. To reconcile theory with fact it must be supposed that such grants by subjects occurred only in the case of the most eminent of the nobility or the most powerful of the religious houses; and that this is an instance of the prime importance of the custom of the land to which, as Craig says, strict feudal theory must give way. The holders of barony titles no longer command the general respect and fear which they did when feudalism was at its height in this country. The feudal system receded gradually from its position as an all-pervasive social principle regulating the rights between man and man and between man and lord, and became merely a framework for our system of land rights. Even this aspect of feudalism has well-nigh disappeared in the last hundred years, during which legal reforms have abolished the outworn usages of feudal conveyancing and replaced them with forms and procedures more fitted to an age of widespread commerce and dealings in land. Little is left but the nomenclature and the historical foundation of conveyancing principle without a clear understanding of which our land law is quite unintelligible to the layman and none too clear to the lawyer. With the decline of feudalism marched that of the barony which followed the same course as a particular manifestation of the general principle. But the relics of its pristine eminence are more considerable in this case, and the barony, although it has lost all meaning in the jurisdictional administrative and social aspects, is still an important feature of heritable conveyancing. The modern privileges of a barony title are too well known to require /
require enumeration and they were summarised by Lord President Inglis in Lord Advocate v Cathcart. Every privilege which a barony title possesses to-day has its root in the period when the barony was the most important social and administrative unit. That period is, unfortunately, not the clearest or best documented in our history, when a learned writer of the last century could say that all legal and historical research had achieved was merely "a torch which served to make the darkness more visible". If it were possible to disclose fully and clearly the nature and implications of a barony at this the most flourishing period of its evolution a great service would be done not only to legal science but also to the history of our civilisation.
BOOKS of REFERENCE

Craig's Jus Feodale ed. Lord President Clyde.
Skene's De Verborum Significatione.
Ross's Lectures (1792)
Hailes' Annals (1779)
Feudal Tenures and Peerages: George Wallace.
Gordon Peerage: 1928.
Riddell's Peerage and Consistorial Law (1642)
Lawrie's Early Scottish Charters.
Scotch Legal Antiquities: Cosmo Innes.
Registrum Magni Sigilli.
Register of the Privy Seal.
Taxes upon Land in Scotland: Thomas Thomson.
Sutherland Book: ed. Sir Wm. Frazer, K.C.B.
Scotland under her Early Kings: Robertson.
The Parliaments of Scotland: R. S. Rait.
English Historical Review Vol 35: Article by Professor Rachel Reid, D.Litt.
Bell's Dictionary and Digest.
Stair's Institutes.
Duff's Feudal Conveyancing.
Green's Encyclopedia s.v. Barony, Baron.
Constitutional History of Scotland: James MacKinnon.
History of Civilisation in England: Buckle.
Robertson: Scotland under her Early Kings Vol. I, p. 290 note
"The invariable 'three descents' appear to have conferred "hereditary right". And Appendix N. p. 147 "the Thane.... "as a royal official responsible for the rents and revenues "of a Thanage, or portion of crown-land placed under his "charge which if possessed uninterruptedly for three genera-
tions in early times or confirmed by charter in a later age "was held of the King in hereditary fee-farm or payment of "rent, and by 'Scottish' instead of knight-service".

APPENDIX II.

In foundation charter of Dunfermline David confirms the grants made by his father Malcolm and his brothers which must have been made according to the "ancient custom" or the charters would have been forthcoming in the Dunfermline Registry. q.v. Robertson Vol. I p. 286 n.

APPENDIX III.

A Statute of Alexander II enacts that only a knight or a knight's son or one holding his feu by charter and free service is noble. Acts of Scottish Parliament: 1400-1.

APPENDIX IV.

Scottish Legal Antiquities p. 33. But Bailie McWheeble in Sir Walter Scott's "Waverley" boasts that his master the Baron of Bradwardine holds his barony by charter granted by David I with rights of "sac and soc, furca et fossa, outfangtheif and infang-
"theif". Scott obviously was of the opinion that barony grants dated back to that time.

APPENDIX /
APPENDIX V

"Nulli licuit ....... de membris suis hominem dampnare ......... "nisi per judicium curie domini Normannie de hoc quod ad eum vel "pertinet ad judicio curie baronum de hoc quod ad barones."

Consuetudines et Justicie c. 8.

APPENDIX VI

Bracton op.cit. II: 39: 6. "Quod dicitur de baronia non est "observandum in vavassoria vel aliis minoribus feodis quam "baronia, quia caput non habent sicut baronia; et quod dicitur "de baronia et barone servari debet in comitatu et comite."

APPENDIX VII

c 1523. It is at present in course of publication. Some idea of the proceedings of the Barons' Courts can be gathered from indirect sources. In the Acts of the Lords of Council in Civil Causes there is an entry under date 1st February 1499 recording an action by Marion MakKiddrow and Margaret MakKiddrow against Richard Heres and Robert Neilson for spoliation of five kye worth 26/8d. each and an ox worth 30/- and other goods. The Lords find the defenders did wrong in taking the said goods because the pursuers "schaw a rolment of the barone court of Terreglis and "Kirkgunzeone under the curatour sele and the clerk subscripions "mannuale makand mencione that the sadis gudis war decernit til "pertane to the sadis Marion and Margaret as thair barnis part of "gude on the deceis of umquhile Thomas MacKiddrow thair fader "schawin and producit before the Lordis." Divisions of heirship moveables seem therefore to have been made in these Courts.

APPENDIX VIII

of the realm to be administered "tam in curiis prelatorum comitum et baronum et omnium aliorum qui curias habent quam in curiis nostris".

APPENDIX IX

Craig says that they are fines inflicted on one who wounds another in anger. If a limb is severed or rendered useless the case becomes one of mutilation and must be tried by a higher court, i.e. a curia vitae et membrorum such as a Baron's Court: Jus Feodale.

APPENDIX X

Assize of William: Statutes of King William ed. John Skene c 7. "And that they (barons etc.) sall nocht receave nor take silver or "anie budde for doing of justice be water irn or be battell or for "anie maner of judgement quhereby the effect of justice may be "stayed ...... And the King tuke and receaved their courts in "wadde. Swa that he quha salbe convict of the breakin of this "Law sall tyne his court perpetuallie".

APPENDIX XI

Multures were called "insukken" and "outsukken" according to whether the tenant was thirled to the mill or not. Cf. English "bond-soccome" and "love-soccome".

APPENDIX XII

q.v. Charter by David II to Sir John Heris of the lands of Trauereglys in free barony. Registrum Magni Sigilli I. In this extraordinary deed specific privileges of regulating the passage of the King's officers even if conducting a robber or with a robber's head etc. are set forth in the grant; as also the privilege that the King's officer must present his warrant at the "chymis" (the chief dwelling place) before execution of it.
e.g. In 1371 Thomas Fleming, Earl of Wigtown sold the earldom to a member of the Douglas family who was thereafter called Archibald, Earl of Wigtown, while Thomas Fleming became a commoner and was described in a charter of 1374 as "dudum comes de Wytoun".

Rait: Parliaments of Scotland p. 177.

This duty was sometimes expressed in the grant, e.g. Charter by Robert I dated 20th December 1324 in favour of Thomas Randolph, Earl of Moray, of the Isle of Man for a return of six ships of twenty six oars and oarsmen annually and six weeks victuals on reasonable warning "et faciendo personalem appresentationem ad "Parliamenta nostra et heredum nostrorum per rationables "quadraginta dierum summitiones". Riddell's Peerage.

"Item the King with consent of his haill Parliament generale has "ordanyt that the small baronys and fretenendis neidis nocht to "cum to Parliamentis".

Riddell's Peerage: He cites erection of lands and Bishoprie of Moray into the free Barony of Spynie in 1590 in the charter of which these words occur.
"omnibus aliis comoditatibus curiis placitis querelis et cum
"nativis eiusdem terre ac cum omnibus libertatibus, comoditibus
"et aysiamentis ad dictam baroniam de Thorbol spectantibus seu
"spectare valentibus, tam non nominatiss quam nominatiss, tam sub
"terra quam sursum quomodolibet in futurum". At this time the

tenendas clause seems to have been the place for setting forth
the pertinents: and it would appear that the rule of law whereby
mention of a right must be made in the dispositive clause in order
to make the transference of it effective was of later emergence;
and that it was the formulation of this rule which accounted for
the transfer of the enumeration of parts and pertinents from the
tenendas clause to the dispositive.

APPENDIX XVIII

"David Dei gratia rex Scottorum, omnibus probis hominibus tocius
"terre sue clericis et laicis salutem. Sciatis nos inspexisse
"ac veraciter intellexisse quandam cartam Willelmi comitis de
"Sothirland, non rasam, non abolitam, non cancellatam, nec in
"alia su parte viciatam aut suspectam tenorem qui sequitur in
"omnibus continentem (here follows Charter by the Earl of Suther-
"land): quam quidem cartam donacionemque et concessionem in
"eadem contentas, in omnibus suis punctis, articulis, condicionibus
"modis ac circumstanciis suis quibuscunque, forma pariter et
"effectu, in omnibus et per omnia, approbamus, ratificamus et pro
"nobis et heredibus nostris in perpetuum confirmamus; salvo
"servicio nostro. In cuius rei testimonium etc." Sutherland
Charters No. 21.

APPENDIX XIX

The servitium nostrum was the service in the King's army for
forty days without pay to which every man in the realm was subject.
q.v. Scottish Historical Review XXIV: "Barony" by James Ferguson,
K.C.
A single sasine for all the diverse rights included in it was one of the privileges of a grant of barony when sasine by the appropriate symbols became fixed and regular (about the fifteenth century); but the place of taking it was usually set forth in the grant. If it was not, sasine was taken at the principal manor or castle. The same result could be effected by a clause of Union in a grant lesser than a barony and the advantage of it lay in the fact that the vassal had only to pay one ox to the Superior's bailie. This was the "sasine ox" which was the fee for giving sasine, and the rule was one sasine ox for each sasine. The ceremony of sasine was abolished in 1845 but Innes testifies that the practice had not quite died out in his day when the Sheriff as bailie of Her Majesty still took the "sasine ox" for "investing some earl in his hereditary domain". Legal Antiquities p. 91.