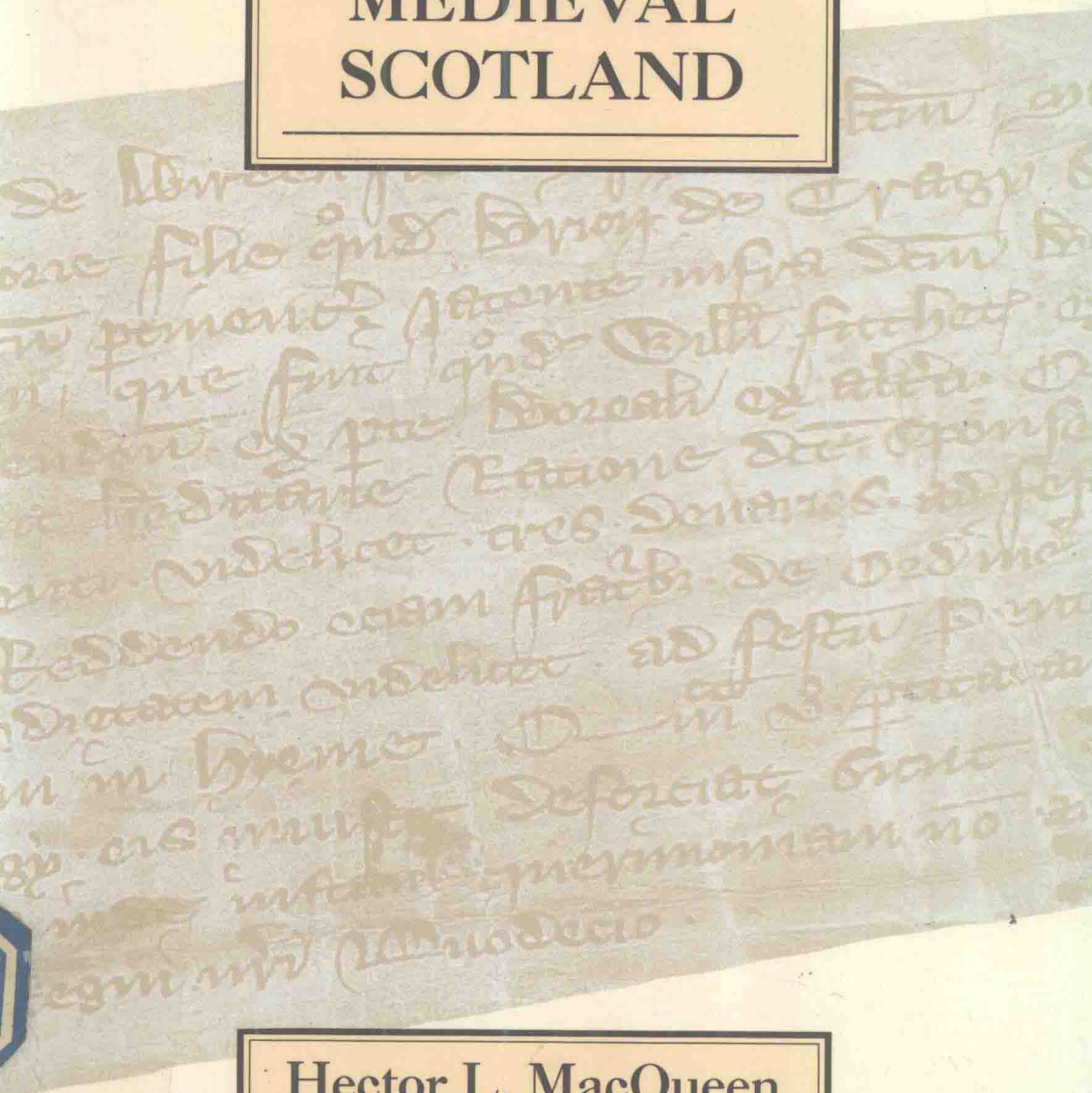
COMMON LAW & FEUDAL SOCIETY IN MEDIEVAL SCOTLAND



Hector L. MacQueen

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Some of the material published here has appeared previously elsewhere, although all of it has been carefully reconsidered and much rewritten. I am pleased to acknowledge these previous publications as follows:

'Dissasine and Mortancestor in Scots Law', *Journal of Legal History*, iv (1983), p. 21.

'The Brieve of Right Revisited', in *The Political Context of Law: Proceedings of the Seventh British Legal History Conference Canterbury 1985*, ed. R. Eales and D. Sullivan (Hambledon Press, London, 1987).

(with W. J. Windram), 'Laws and Courts in the Burghs', in *The Scottish Medieval Town*, ed. M. Lynch, G. Stell and M. Spearman (Edinburgh, 1988).

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Hector L. MacQueen
Old College, Edinburgh

Note on Editions of Texts

It is necessary to say a few words about the editions of the main medieval treatises of Scots law which have been used in this book. The two principal works are *Regiam Majestatem* and *Quoniam Attachiamenta*. Until recently, there was no satisfactory critical edition of either text. Sir John Skene published versions in Latin and Scots in 1609, both of which have been subjected to severe criticism (some of it perhaps a little unfair) ever since. In the nineteenth century, Cosmo Innes and Thomas Thomson published another edition of the Latin texts in the first volume of the *Acts of the Parliaments of Scotland*. Subsequent scholarship has shown these editions also to be defective in various ways. In 1947, the Stair Society published further texts under the editorship of Lord Cooper. Unfortunately, these were based on the work of Skene, although Lord Cooper provided cross-references to the *APS* edition along with translations. Very recently, an authoritative critical edition of *Quoniam* was at last produced, by Dr David Fergus of Glasgow University in his doctoral thesis, but this has not yet been published (it is hoped, however, that the work will become a Stair Society publication in due course).

Accordingly, in citing and discussing *Quoniam*, Dr Fergus' text has been used; it is cited as *QA (Fergus)*. Because it is not yet published, I have decided to give references also to the *APS* and Cooper editions, citing them as *QA (APS)* and *QA (Cooper)* respectively. In the absence of an authoritative version of *Regiam*, I have chosen again to use and cite both the *APS* and Cooper texts, citing them as *RM (APS)* and *RM (Cooper)* respectively. As a result, the interested reader who consults the relevant footnote references will quickly perceive some of the basic problems which have bedevilled the use of the texts of medieval Scots law. *Regiam* is cited by book and chapter numbers, *Quoniam* by chapter numbers alone.

It is at present generally accepted that the English works known as *Glanvill* and *Bracton* were not written by their eponyms, but I have nonetheless continued to speak as though they had been, indicating that this is not the case by italicising the names. It may also be worth

mentioning that *Bracton* is now thought to be mainly a work of the 1220s. *Glanvill* is cited by book and chapter number in the most recent edition by G. D. G. Hall, and *Bracton* by foliation, although references to the volume and page numbers of the most recent (four volume) edition by S. E. Thorne have been added for convenience.

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1

Introduction

In or just after 1254, the English chronicler Matthew Paris inserted in his *Chronica Majora* the supposed text of a papal bull issued by Innocent IV which referred to Scotland as a land where, like France, England, Wales, Spain and Hungary, the causes of the laity were decided by lay customs and those of the church by the canons of the holy fathers. Accordingly, unless the kings of those realms would have it otherwise, the imperial laws, i.e. the Roman law, should not be taught there.[1] The bull has been dubbed a forgery, concocted by Matthew or others as part of a propaganda war against instruction in, and use of, Roman law.[2] Nonetheless, Matthew's text reflects something of what was thought to be the law of the kingdom of the Scots in the middle of the thirteenth century. Its statements may at first surprise those accustomed to thinking of Scots law as a system which, unlike that of England, was built on Roman or civilian foundations. Contact with the learned laws in Scotland is, according to Matthew, through the canon law of the church rather than Roman law. The law used by the laity in Scotland is, however, customary in nature, comparable in this not only with English but also with Welsh law and the northern French '*droit du pays coutumier*'. Finally, given that the highly-developed English law is also referred to as a law of customs, it seems that a customary system is not necessarily to be seen as a primitive and backward one.

The passage in Matthew's chronicle is yet further evidence of a thirteenth-century perception of Scotland as a kingdom which enjoyed its own native system of laws and customs. It is a perception which emerges through treaties between Scotland and other nations, such as those of Perth in 1266 and Birgham in 1290, both of which refer to the 'laws and customs of the realm of Scotland',[3] and through comments like those made in 1277 by Llywelwyn ap Gruffydd, prince of Wales, to justify the continued survival of the Welsh laws in a land conquered by the English, that every province under the dominion of the English crown – England, Gascony, Ireland and Scotland – had its own laws and customs without prejudice to English suzerainty.[4] Even when in the 1290s Scotland was

indeed brought under the dominion of Llywelwyn's conqueror, Edward I, the English king continued to recognise its laws and customs, even where he did not especially like them.[5] The Scots themselves referred to the 'laws and customs of the realm' frequently in the thirteenth century, as well as to the 'common law' of the realm.[6] Although this latter phrase is more readily associated with the law of England, it was used first by medieval canon lawyers seeking 'to distinguish the general and ordinary law of the universal church both from any rules peculiar to this or that provincial church, and from those papal *privilegia* which were always giving rise to ecclesiastical litigation'.[7] The *jus commune* was the law of all Christendom, the law of the Holy Roman Empire, distinct from local specialities or the *jus proprium*. Thirteenth-century English lawyers spoke not so much of the *jus commune* as of *communis lex*, translating the French *commune lei*, but they nonetheless appropriated the idea of common law in this sense of the general as opposed to the particular to describe the law of their royal courts, and to distinguish it from the several rules and customs which might be applied locally within the kingdom.[8] This meaning also appears to have been used in Scotland, for example in a brieve of King Alexander III (1249–86) in 1264, which refers to 'the usage throughout our kingdom of Scotland according to ancient approved custom and by the common law [*jus commune*]'. Again a statute of King Robert I (1306–29) in 1318 speaks of the king's desire that 'common law [*communis lex*] and common justice should be done to both rich and poor according to the old laws and liberties used before this time'.[9]

It was once thought that this thirteenth-century common law of Scotland dissolved in the later Middle Ages. According to the late Lord Cooper of Culross and William Croft Dickinson, the period after the reign of Robert I was one of retrogression in law and its administration, brought about by the failure to develop a centralised court structure and, instead, the deployment of a multiplicity of courts based in the localities and administered by resident landowners rather than lawyers.[10] This 'Cooper/Dickinson view' has come under increasing challenge. Social and political historians have argued that the structure of Scottish central government, revolving round the figure of the king, was much more powerful than would have been acknowledged when Cooper and Dickinson were writing. They have also argued that one source of this power was the effective partnership which existed between central and local administration, and that, at least in the Scottish context, local peacekeeping was likely to be more effective than any centrally-directed effort with the same goal.[11] For their part, legal historians have been challenging the thesis that the common law of the thirteenth century gradually disappeared in the fourteenth and fifteenth centuries, stressing instead the considerable degree of continuity of earlier institutions, forms

and rules into the later period.[12] There is plenty of evidence that contemporaries still believed in the existence of a common law of Scotland, and that they associated this with the existing decentralised court structure. Where there was 'default of the kepyng of the common law', it was the responsibility of the king and his officers in the localities.[13] The common law was the king's law, and it was to prevail over 'particulare lawis ... speciale privilegis ... [and the] lawis of uther cuntries and realmis'.[14] Rather than dissolving in the face of divisive elements, the common law was increasingly used in the fifteenth century and later to challenge 'particular' laws such as the laws of Galloway and the laws of the Lordship of the Isles. Thus, for example, in 1490 the local custom of 'cawp taking' in Galloway and Carrick was abolished by parliament,[15] and in 1504 it was asserted that Scotland was to be 'reulit be our soverane lordis ane lawis and commone lawis of the realme and be nain other lawis', a provision seemingly directed at the laws of the Lordship.[16]

This book is a study of some aspects of the medieval Scottish common law. Its principal focus is the use of certain pleadable brieves – those of right, mortancestry and novel dissasine. Brieves were documents in which one person, typically the king, commanded another (a court-holder in the case of pleadable brieves) to do something. With our three brieves, the command was to determine through the court process certain types of dispute concerning land. The study of these brieves shows the validity of the criticism of the Cooper/Dickinson view of later medieval legal development. All three had appeared on the Scottish legal scene before 1300, and all three continued in use until well into the fifteenth century or later. Although the brieves were issued by central government – that is, in the king's name and from the king's chapel (chancery or writing office) – the litigations which they initiated took place in local courts held by local royal officers. The law which underlay each form of action was complex and significant. Land was the most important single source of wealth and economic activity in medieval Scotland, and the law which developed in this period relating to its ownership, transfer, exploitation and recovery from intruders needed to be sophisticated to deal adequately with the requirements placed upon it. It can be seen, therefore, that complex rules of law could develop and be administered through the decentralised court structure of the period: a central court staffed by professional lawyers was not a prerequisite of a Scottish common law.

At this level, of course, the study of these brieves is mainly technical and even antiquarian in character. However, a number of other, more general, issues are also raised. From the point of view of the social historian, for example, there arises the question of the significance of law and courts in medieval Scottish society. Partly as a result of the Cooper/Dickinson view that the courts were either unused or ineffective, there has

been a tendency to stress instead the importance of extralegal and extracurial techniques for settling disputes and guiding social conduct. Thus there have been invaluable studies of the interacting factors of lordship, kinship and community as the principal means whereby peace was achieved and maintained, feuds settled and social dislocation avoided.[17] Yet it does not follow from the existence and undoubted importance of these peacekeeping devices that law and the courts either were no longer involved in the maintenance of good order or had never really been involved at all. Powell's studies of arbitration in fifteenth-century England have shown that, while such methods of dispute-resolution were indeed an alternative to legal procedures, there was also a complex interaction between them. As he puts it, 'the two went hand-in-hand, and far from precluding negotiation, the bringing of legal action, with its formalised court encounters and protracted procedure, allowed ample opportunity for it'.[18] This view makes good sense to the modern court lawyer, much of whose activity is directed not towards advocacy and pressing home points of law before a judge but towards the achievement of agreement and settlement between the parties and towards the avoidance of a court appearance. In this process of negotiation, the law is merely a bargaining counter, albeit a very important one. The lawyer who appears to have the law on his side can drive a harder bargain for his client, while making some discount in recognition of the fact that the open-textured nature of many legal rules makes few things wholly certain once a case is before a judge or, even worse, a jury. Actual court cases represent only a very small percentage of the disputes with which the modern lawyer will deal in the course of his profession, although he may get to the point of formally raising the action or even starting in court before settlement is reached. The unpredictability inherent in litigation was clearly recognised early in the twelfth century by the author of the English *Leges Henrici Primi* of c. 1118 when he wrote of the 'utterly uncertain dice of pleas' while also commenting on how it was better to settle by agreement and love than to press for adjudication by law.[19] Many of the cases which will be examined in this book were settled rather than being pressed to the point of decision by the court, and, as Powell argues, it seems likely that, as in modern practice, the threat of law and litigation was part of the background to the resolution of disputes where possible by agreement rather than judgment.

The legal historian will also want to know the answers to questions about change in the law and about the forces which generate that change in a phenomenon, the basic concept of which is a set of rules that are constant unless acted upon by external forces, ranging from legislation to revolution. Why did the brieves of right, mortancestry and novel dissasine enter Scottish legal history, and why, some three centuries later, did they

disappear? The questions become even more sharply focused by the observation that each brieve is clearly modelled on an equivalent writ of medieval English law, respectively the writ of right, the writ of *mort d'ancestor* and the writ of novel disseisin, each of which was established in England before 1200. The development of the brieves was therefore linked in some way with the early development of English law. Further, it was a rule of Scots law (henceforth the brieve rule) that no man could be made to answer for his free holding in a court unless he was impleaded by one of the king's pleadable brieves. This rule was also part of the early English common law (herein called the writ rule). The earliest account of all these matters in Scots law, found in the treatise *Regiam Majestatem*, was derived from *Glanvill*, the late twelfth-century work which is one of the prime pieces of evidence for the early history of English law. It seems clear from all this that we have here an example of what Alan Watson has called a legal transplant[20] – that is, where one legal system develops by imitating institutions and rules found in another.

That there was a close relationship between the laws of medieval Scotland and England has long been widely accepted.[21] This is usually explained on the basis of the similarity between the two societies, at least at the level of the landowning classes, the protection of whose legitimate interests was the main concern of each kingdom's legal system. This similarity arose from the penetration of the British Isles by the Normans, who first arrived in 1066 with William the Conqueror and whose descendants spread not only through England but also through Scotland, Ireland and Wales, often holding land in two or more of these territories as well perhaps as in Normandy itself. The idea of a twelfth-century 'Norman Empire' has recently come under challenge, but it still seems that a common core of institutions and customs relating to justice and landholding is identifiable among the aristocracy of the British Isles and Normandy.[22] However, even though writs of right, *mort d'ancestor* and novel disseisin are found not only in England but also in Normandy, Ireland and Wales, they were not products of purely Norman custom. We will turn to precisely what did produce them in a moment. Their appearance in all the countries just mentioned is explicable as a result not merely of common custom but also of subjugation to a single sovereign power, the king of England. Scotland was different. However much it might be claimed that the king of Scots held his kingdom of the king of England, however much it was the case that individuals held lands in both kingdoms and owed allegiance to both kings, the practical reality (with the possible exception of the period 1174–89) was that Scotland was a sovereign state with control over the shape of its own laws. The brieves of right, mortancestry and novel dissasine ran in the name of the king of Scots, not of the king of England in any of his guises as, for example, duke

of Normandy or lord of Ireland. The development of the Scottish brieves in imitation of the English writs was therefore not absolutely inevitable. An element of choice was involved; part of the problem is to explain that choice.

We can nevertheless begin to understand some of the factors which may have underlain the decisions of Scottish government in these matters by examining the history of the English writs for the recovery of land and the rule requiring their use. This has been the subject of much investigation lately, the outcome of which has been to illuminate the nature of the society in which the English writs took shape and effect in the twelfth century, as well as the forces driving legal and social change thereafter. If, as has just been argued, Scotland and England had strong political links at this period, and landed society in both kingdoms held its property by broadly similar customs, then it seems clear that the detailed studies which have been carried out in England must be considered in an investigation of the Scottish situation, if only to help us to identify some of the questions which may be asked of the Scottish sources. Unfortunately, the English discussion has been complex and contentious, and it is necessary to set out the elements of the debate in some detail. The starting point is the work of F. W. Maitland, mainly published at the end of the nineteenth century; then we will turn to the powerful critique and revision of Maitland proposed by S. F. C. Milsom; and finally a summary of the main points of debate provoked by Milsom's work will be offered.

In Maitland's interpretation, writs and rule were developed during the reign of Henry II (1154–89), in more or less deliberate opposition to the local feudal courts in which lords held sway and actions relating to land held of them were begun.[23] While the writ of right was merely a command to the lord to do right in cases of competing claims to land, it also enabled a transfer to the king's courts if the lord failed to do justice. Further, in 1179, trial by the grand assize or jury was made available, an option much more attractive to litigants than trial by the duel which was otherwise the mode of proof of right in land.[24] In the 1160s, the assize of novel disseisin was enacted. This was a possessory rather than a proprietary remedy, unlike the writ of right – that is to say, it allowed a former seisin or possession to be recovered, but did not preclude the possibility of the defendant later claiming ownership in another action. The writ commanded the immediate restoration of one ejected, or disseised, by another unjustly and without a judgment, with the issue always to be tried by a petty assize in the king's court. As a speedy remedy using rational modes of trial, it was immediately taken up by great numbers of litigants. The assize of *mort d'ancestor* was the result of the Assize of Northampton in 1176. It enabled a claim to possession of land to be made by one within certain close degrees of relationship to a deceased holder who had not

been a mere life-tenant. Again, the issue was to be determined by an assize in a royal court. Since both novel disseisin and *mort d'ancestor* actions would succeed if the relevant facts were established, even if there was a party who could show a better right than the claimant, each was a blow at the proprietary jurisdiction exercised in the lord's court. The same was true of the rule requiring writs in freehold cases, also the result of legislation by Henry II in Maitland's view even though it was stated to be a custom of the realm by *Glanvill*.[25] The writ rule meant that the lord's court was allowed to use its jurisdiction in such matters only at the king's command. The whole edifice of writs and writ rule was thus part of a grand design by which the king's more rational justice, founded on possessory remedies, began to supplant that of the feudal lords.

Milsom opposed Maitland's view with a new model for the origins of the English common law in *The Legal Framework of English Feudalism*, published in 1976.[26] Where Maitland saw royal initiatives in deliberate opposition to the world of feudal courts, Milsom proposed royal acceptance of the feudal world and a series of attempts to make it function according to its own norms but which had the wholly unintended and accidental effect of destroying it. Basing his argument on close consideration of *Glanvill* and the earliest plea rolls, Milsom gave a different emphasis to the significance of the feudal context in which writs and rule took shape. Lordship and its exercise through the courts of private lords lay at the heart of rights to land. A tenant held land only if he was seised of it by its lord, and, within the lord's own court, that seisin was the only right to the land which could exist. The tenant held the land in return for payment of relief on entry and the rendering of service and rightful aids; for failure of service or his other obligations, duly adjudged by the lord's court, the tenant could be put out or disseised of the land. A customary process of seizing first the tenant's chattels and then the land by means of distraint preceded final forfeiture. The intimate relation between the holding of land and the rendering of feudal services meant that the tenant could not transfer his land outright to another (substitution) without the lord's consent, but it was legitimate for the tenant to grant at least part of it to be held of him by a subtenant (subinfeudation) so long as it enabled the tenant to continue the performance of the services due to the lord. When land fell vacant, typically as the result of the sitting tenant's death, the lord had a choice as to who should next have seisin; until that choice was made, no-one other than the lord had any right to the land. The only right of inheritance, therefore, was the one recognised by the lord and his court. However, the lord's exercise of his discretion was hedged around with customary expectations – for example, that the tenant's eldest son would inherit. Although regularly followed, these customs were not absolutely binding: 'a custom is something that happens before it

becomes a rule'.[27] Instead, they provided the lord and his court with criteria for selecting a successor to a dead tenant; once that choice was made, there was no mechanism for undoing it on the grounds that the custom had been broken.[28]

The customs started to become laws with an existence independent of the lord and his court when the king's courts began to intervene regularly in their affairs. A significant degree of intervention came in the aftermath of the 'Anarchy' of King Stephen's reign (1135–53), when settlements had to be made between the descendants of those who had held 'in the time of peace' before the Anarchy – that is, in the reign of Henry I (1100–35) – and those who now held in their place having gained title, or simply intruded themselves, during Stephen's reign. The restoration of the descendants of the dispossessed – the disinherited – was the job for which the writ of right was initially designed, as shown by the fact that claimants had to trace their titles back to the time of Henry I. On this view, the writ was not so much an abstract protection of rights of inheritance in general. Its link with inheritance arose because a generation had passed since the dispossessions of the Anarchy had begun, meaning very often that it was necessary for claimants to start from the seisin of a now-deceased ancestor who had been holding the land when Henry I died.

The classical writ of right addressed to the lord commanding him to do right to a named demandant in respect of lands held by another obviously reflected a feudal world in Milsom's sense, in that the action was begun in the lord's court, and the claim was to hold lands of the lord – in Milsom's phrase, it was upward-looking. However, the writ also provided that if the lord did not act, the sheriff would. It was, argued Milsom, an order to act in which disobedience was expected. The lord's court had already taken its decision in the matter by permitting the enfeoffment of the tenant, and, bound by the homage which he had performed to the lord and the lord's obligation of warranty, it could do none other than refuse the demandant's claim. Accordingly, the case would be transferred to the king's court; unburdened by any obligation to the tenant, the royal court could decide the issue of whether the demandant had a better right to the land.

The lord's commitment to the tenant whose homage he had received and whom he had enfeoffed also explained the rule that no man need answer for his free tenement without the king's writ. The lord could not question the holding of his accepted tenant so long as the tenant performed his services. Only the king's writ – the writ of right – could even succeed in having the matter raised in the lord's court, whence it would have to proceed elsewhere. Thus the writ rule was in origin not a rule but a statement of fact – that is to say, in Milsom's own terms, a custom – about the steps needed to obtain a hearing for a claim against a sitting

tenant. Milsom further argued that, to begin with, both novel disseisin and *mort d'ancestor* actions were conceived as means to curtail abuse by lords of their powers of control over their tenants and the lands which those tenants held of them. Thus a tenant was enabled to sue the lord who put him out without cause or due process of distraint – unjustly and without a judgment – by bringing novel disseisin in the king's court. The lord whose tenant died had to put in that tenant's heir or else be liable to an action of *mort d'ancestor*. While therefore the assize protected freeholders, they were not necessarily among the greater magnates of the realm. If anything, the purpose of the assizes was to curb the power of such magnates over their tenants, and to compel compliance with certain norms: if tenants were to be disseised, it had to be for just reasons and by judgment of the lord's court, while a tenant's heir had a right to be enfeoffed.

The effect of all this upon the feudal world embodied in the lord's court was drastic. The lord's disciplinary powers ceased to be operable in his court, squeezed partly by novel disseisin and partly by the rule about writs. If the lord and his court erred in following the due process of distraint, the tenant could bring the assize. When the tenant denied that he owed the service claimed by the lord, the writ rule hampered the lord's ability to take action in his own court against the tenant's lands. So, instead of taking risks in his own court, the lord turned to royal justice, which provided the writ of customs and services; actions of replevin in the county court, under which the tenant reclaimed distrained chattels from the lord (chattels were not protected by the writ rule and were indeed distrainable without any prior judicial authorisation), also became a vehicle for litigation about services. Similarly, the lord's power to choose the successor to a dead tenant was removed by the compulsitor to enfeoff particular heirs imposed by *mort d'ancestor*. The tenant, and the tenant's heirs, were coming to have rights that were stronger than those found under the old feudal customs, and which were coming to approximate to ownership burdened by the claims of the lord.

Even the lord's power to control the tenant's alienations was affected by the new controls of royal justice: substitutions became rare because the lord would not give his consent for fear that the former tenant's heir would later seek recovery by means of the royal protection of inheritance. The lord was indeed forced to seek the protection of royal justice against alienation, where in the past he might have been able to take action under his own authority. This explained the writs of entry, which were in origin the means by which lords challenged the rights of their tenant's alienees to hold. Because the typical alienation was by subinfeudation, the lord's court had no jurisdiction over the subtenant, and the classical writ of right addressed to him of whom the lord claimed to hold was inappropriate and