

What Does *Regiam maiestatem* Actually Say (and What Does it Mean)?

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In 1609, the Scottish lawyer and Lord Advocate Sir John Skene published an edition of Scotland's ancient laws in two versions, one containing the texts in Latin, the other in Scots.¹ Both were entitled *Regiam maiestatem and the Auld Lawes and Constitutions of Scotland*. Skene's book was the first to print any Scottish legal material which pre-dated the 1424 parliament of James I, king of Scots, and contained 'ancient law' from the early eleventh century to the early fifteenth.² Yet instead of announcing this major contribution to the history of Scots law with a great triumphal fanfare, Skene's 'note to the reader' in his Latin edition spoke of a rather more traumatic personal history of his work on these legal texts.³ He wrote:

¹ J. Skene, ed., *Regiam majestatem Scotiae veteres leges et constitutiones . . . opera et studio Joannis Skenaei* (Edinburgh, 1609); J. Skene, ed., *Regiam majestatem. The Auld Lawes and Constitutions of Scotland . . . Be Sir John Skene of Curriehill, Clerk of our Sovereigne Lordis Register, Counsell and Rollis* (Edinburgh, 1609).

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² *The Actis and Constitiounis of the Realme of Scotland . . . Anno. Do. 1566* (Edinburgh, 1566). A facsimile is available in K. Luig, ed., *The Acts and Constitutions of the Realm of Scotland, Edinburgh 1566: 'Black Acts': Faksimiledruck mit einer Einleitung von Klaus Luig* (Mittelalterliche Gesetzbücher Europäischer Länder in Faksimiledrucken; Glashütten (Taunus), 1971).

³ Skene, ed., *Regiam majestatem*, note 'candido lectori'. The Scots version was rather less dramatic about the labour involved, but more dramatic about the role that Latin had played in supporting the dominance of the pope and his bishops; Skene, ed., *Regiam majestatem* (Scots), vi, ix.

While after only a short time looking into these early and ancient laws, I fell into an Augean stable which not even the labours of Hercules could ever cleanse or purge. Many books were thrown before me, some of ancient authority – now feasts for moths and worms. In these books, there is much that the passage of time has made unknown to us . . . all of which is easier to admire than to interpret. In these books, there is unwise and careless writing, much of which is corrupt, contrary, abbreviated and confusingly rendered, which falsifies the meaning and renders it as nothing.

These despairing words have been quoted many times, so much so that the manuscript corpus of early Scottish law has become almost a totemic lacuna in the history of early Scots law.⁴ Yet, although these books as a whole are not, perhaps, as unyielding and forbidding as Skene has had us imagining, their contents still need a great deal of illumination. Chief among their contents is Skene's headline piece, *Regiam maiestatem*, a work which survives in multiple manuscript copies in various forms from the late fourteenth to the early seventeenth century. It was probably *Regiam* which caused the most difficulty for Skene, and it would continue to do so for generations of lawyers and legal scholars down to the present day. For, although Skene's edition of *Regiam maiestatem* became the one most widely circulated and, indeed, was the 'standard' text used by lawyers and scholars well into the twentieth century, it did not illuminate what *Regiam* was, and how it had come into being, as much as one might have hoped.⁵ This was, in part, because Skene had what might loosely be

⁴ See, for discussion, A. Taylor, *The Shape of the State in Medieval Scotland, 1124–1290* (Oxford, 2016), 457–9; for a reassessment, see *The Laws of Medieval Scotland: Legal Compilations from the Thirteenth and Fourteenth Centuries*, ed. A. Taylor (Stair Society, 66; Edinburgh, 2019).

⁵ See the brief discussion by Lord Cooper in *Regiam Majestatem and Quoniam Attachamenta Based on the Text of Sir John Skene*, ed. T. M. [Lord] Cooper (Stair Society, 11; Edinburgh, 1947), 3–8, 16–18. This was despite Thomas Thomson preparing an edition based primarily but not exclusively on the Cromertie manuscript (Edinburgh, National Library of Scotland (NLS), Advocates MS 25.5.10), which was published under the editorship of Cosmo Innes in 1844: *Acts of the Parliaments of Scotland, Volume 1: 1124–1423*, ed. C. N. Innes and T. Thomson (Edinburgh, 1844), 597–641 (all page references are to the red foliation; henceforth, citations of the various volumes of *Acts of the Parliaments of Scotland* will be referred to as *APS*). During the first half of the 1940s, Lord Cooper was preparing another edition of *Regiam* for the Stair Society (he had drafted the introduction by early 1944), which was published in 1947. Cooper decided to use Skene's edition as the basis for his own, despite the known issues with Skene's editorial techniques. Cooper not only believed that 'the practice of "Skene-baiting" has been carried much too far' but also thought that, given that his edition would be used by 'lawyers and students of legal history', Skene's was anyway the most valuable because to edit a text

called a flexible attitude towards the authority of his texts, making clear emendations, deletions of entire chapters and chunks of text, and often preferring the readings of the latest manuscripts instead of the earliest ones. Almost three hundred years *after* Skene's edition had been published, George Neilson (1858–1923), the Scottish historian and antiquary, wrote in 1891 that 'thick Cimmerian darkness girds the *Regiam* round: its date, its object, its history, lie in primeval doubt. The cobwebs have closed over it once more'.⁶ Nearly 130 years after Neilson's plaint, this essay offers a reconsideration, not only of how *Regiam* survives but also of its original state and, crucially, its intended purpose. In so doing, it will be argued that not only would *Regiam*'s content have mattered very much indeed, but, moreover, the example of *Regiam* adds something to how we understand late thirteenth- and early fourteenth-century political and legal thought in Western Europe.

The Later History of *Regiam maiestatem*

That *Regiam* should be subject to so much doubt is, at first glance, odd. From the beginning of the second quarter of the fifteenth century onwards, *Regiam* was first understood as the kingdom's 'auld law', and was later used as an authoritative source of law. The tractate is first mentioned in 1426, under James I, with the well-known provision that six wise and discreet men should examine the two books of law of Scotland – *Regiam* and *Quoniam attachiamenta* – to discover what they had to say about exceptions.⁷ Parliamentary attempts were made to

based on the earliest manuscripts would be redundant as 'it would not be the text of the *Regiam Majestatem* of professional tradition familiar to Scottish lawyers for 350 years' (Cooper, ed., *Regiam Majestatem*, 18). The major difference between Skene's and Cooper's editions was Cooper's inclusion as a supplement of chapters from book 4 excluded by Skene but present in Thomson's and in some form in all the manuscripts of *Regiam maiestatem* (Cooper, ed., *Regiam Majestatem*, 18–20, with the Supplement at 280–304).

⁶ G. Neilson, 'The Study of Early Law', *Juridical Review*, 3 (1891), 12–20, at 17; also G. Neilson, *Trial by Combat* (Glasgow, 1890), 103. For an earlier comment on this passage, see A. Harding, 'Regiam Majestatem amongst Medieval Law-Books', *Juridical Review*, new ser., 19 (1984), 97–111, at 98.

⁷ It has long been thought that the object of consulting *Regiam* and *Quoniam* in 1426 was to reform them. This is due to the words 'and mend the lawis that nedis mendment' after the injunction to consult both books in the edition of the 1426 statutes printed by Thomson in *APS, Volume 2: 1424–1557*, ed. T. Thomson (Edinburgh, 1814), Acta Parliamentorum Jacobi I, 10 (black foliation). However, Andrew Simpson and Adelyn Wilson have noted that these words are not, in fact, in the earliest manuscripts of this legislation nor those which seem to preserve copies distributed to the localities. Instead, they are in

reform and codify the kingdom's ancient law in 1469 and 1473;⁸ *Regiam's* chapters were cited (correctly) in parliamentary legislation of 1471 and 1475;⁹ another was reformed in parliament in 1481–2.¹⁰ Hector MacQueen has shown that *Regiam* is also cited chapter and verse in notarial instruments (sometimes correctly) and in lawyers' notes to pleading.¹¹ In short, the fifteenth-century status of the lawbook known as *Regiam maiestatem* is not in doubt: it was the ancient law of the kingdom of the Scots, had received parliamentary sanction and was the subject of law reform.¹²

Regiam continued to be influential well into the early modern and modern periods. Over the sixteenth century, the authority of *Regiam* was discussed in the context of wider conversations about which kind of legal authority should take precedence in the judicial decisions of the Court of Session: Roman or Scottish Common.¹³ The discussion was to change emphasis in the seventeenth century: by 1604, it had been discovered that *Regiam* was not an 'original' compilation (in the modern sense) of Scots law but, instead, derived mostly from the twelfth-century English tractate on jurisdiction, law and procedure known as *Glanvill*, itself written between 1187 and 1189.¹⁴

the 'semi-official' copies which may well preserve edits inserted after a legal reform made in 1450: see A. R. C. Simpson and A. L. N. Wilson, *Scottish Legal History, Volume 1: 1000–1700* (Edinburgh, 2017), 59–60. As a result, Simpson and Wilson argue that the remit of the original clause in the 1426 legislation was to consult *Regiam* and *Quoniam* to discover which exceptions could be admitted and which not, as the courts were facing delays.

⁸ RPS, 1469/34; RPS, 1473/7/17. RPS here and henceforth refers to the online resource *The Records of the Parliaments of Scotland to 1707*, eds. K. M. Brown et al. (St Andrews, 2007–20), available at <https://rps.ac.uk> (accessed 28 February 2020).

⁹ RPS, 1471/5/9; RPS, 1475/34.

¹⁰ RPS, 1481/4/13; RPS 1482/3/22 See the broader commentary and analysis in H. L. MacQueen, *Common Law and Feudal Society in Medieval Scotland*, 2nd edn (Edinburgh, 2016), 91–4.

¹¹ MacQueen, *Common Law*, 94–8.

¹² *Ibid.*, 91–8; H. L. MacQueen, 'Regiam Majestatem, Scots Law, and National Identity', *Scottish Historical Review*, 74 (1995), 1–25.

¹³ For a starting point, see A. R. C. Simpson, 'Legislation and Authority in Early-Modern Scotland', in M. Godfrey (ed.), *Law and Authority in British Legal History, 1200–1900* (Cambridge, 2016), 85–119.

¹⁴ *Tractatus de legibus et consuetudinibus regni Anglie qui Glanvilla vocatur: The Treatise on the Laws and Customs of the Realm of England Commonly Called Glanvill*, ed. G. D. G. Hall, with a guide to further reading by M. T. Clanchy (Oxford, repr. 2002); H. L. MacQueen, 'Glanvill Resarcinate: Sir John Skene and Regiam Majestatem', in A. A. MacDonald, M. Lynch and I. B. Cowan (eds.), *The Renaissance in Scotland: Studies in Literature, Religion, History and Culture Offered to John Durkan* (Leiden, 1994), 385–403.

The implications of the suddenly discovered link between the English *Glanvill* and the Scottish *Regiam* were explosive. Hector MacQueen has emphasised that the issue was not simply the immediate one of how far *Regiam* was derived from *Glanvill*, but the potential consequence of that question: how far medieval Scots law was ‘simply a version of the English common law’.¹⁵ This was no small question: in the context of the Union of Crowns (1603), a union of law between England and Scotland was a real possibility; if Scots law was derived from English law, could it, indeed should it, be subsumed by it? Quite understandably, many thought *Regiam* was not part of Scots law. But, although the political implications of *Regiam*’s origins had grown gradually less significant by the end of the eighteenth century – particularly after the 1707 parliamentary union between England and Scotland and the quashing of the 1745/6 Jacobite rising against the Hanoverian dynasty – nothing like consensus as to where, when, how and why *Regiam* had been composed emerged.¹⁶ Theories ranged from *Regiam* being compiled on the orders of Edward I of England to its belonging to the last few years of Alexander II’s reign in 1240s, and the sheer range of opinion makes Neilson’s complaint of ‘Cimmerian darkness’ surrounding *Regiam* understandable, particularly as the debate was no longer raging quite so fiercely by the end of the nineteenth century.¹⁷

It is thus worth recapping what is, currently, known – or thought to be known – about the composition of *Regiam maiestatem*. It is known that it is the earliest surviving jurisprudential tractate to have survived from Scotland. It must have been compiled before 1424/5, because its earliest surviving manuscript was in existence by that point as it was sold on 20 January 1424 (it is unclear whether the year started on Lady Day or not).¹⁸ The manuscript in question – known as ‘the Bute manuscript’ – may have been produced as early as the very late 1380s or 1390s, as, in its current form, the codex is composite, with the first two gatherings being

¹⁵ MacQueen, ‘*Regiam Majestatem*’, 16; MacQueen, ‘*Glanvill Resarcinate*’, 385–7.

¹⁶ MacQueen, ‘*Regiam Majestatem*’, 19–23, disputing and developing C. Kidd, *Subverting Scotland’s Past: Scottish Whig Historians and the Creation of an Anglo-British Identity, 1689–c. 1830* (Cambridge, 1993), 148–50.

¹⁷ MacQueen, ‘*Regiam Majestatem*’, 23–4. In his reissue of Skene’s edition of *Regiam* for the Stair Society in 1947, Lord Cooper argued that *Regiam* was ‘compiled in the later years of Alexander II and was intended to describe the law as it then prevailed’: Cooper, ed., *Regiam Majestatem*, 45.

¹⁸ This is the Bute manuscript, now NLS, MS 21246 (henceforth, C), fos. 27r–62r. The note of sale is on what looks like the original outer leaf of the original manuscript on fo. 178v.

added on to what palaeographically looks like a volume of the late fourteenth century, and, indeed, the latest date in it (1389) seems to be near-contemporary, with Robert Stewart (II) being described as ‘reigning’ (he died in 1390).¹⁹ But if the later fourteenth century is the terminus ante quem of *Regiam maiestatem*, what is its terminus post quem? Internally, *Regiam* states that it was compiled on the command of King David I (1124–53).²⁰ Yet, despite the attribution, it cannot have been compiled during David I’s reign because much of it is derived or taken verbatim from *Glanvill* (1187×9).²¹ In addition, there is a substantial section at the end of its books 1 and 2, taken from the Canon law *Summa super titulis decretalium*, compiled by Goffredus Tranensis – or Goffredo di Trani – between 1241 and 1244.²²

Any twelfth-century origin for *Regiam* should therefore be discounted, and indeed, although there were attempts in the mid-twentieth century to date the tractate to the mid-thirteenth century, research undertaken

¹⁹ Taylor, ed., *Laws of Medieval Scotland*, 49–54; C, fo. 119v.

²⁰ *Regiam*, prologue: ‘set ad iuuandam domini regis Dauid cum sano consilio tocius regni sui’. All references to *Regiam* are to the forthcoming edition being prepared by John Reuben Davies, with editorial and historical commentary from me. This edition will be based on the earliest-known text of *Regiam* as it survives in London, British Library (BL), Additional MS 18111 (elsewhere denoted as F) and the Bute manuscript (NLS, MS 21246, known as C). This will be published by the Stair Society and is part of the research being conducted on the AHRC-funded project ‘The Community of the Realm in Scotland, 1249–1424: History, Law and Charters in a Recreated Kingdom’ (AH/P013759/1).

²¹ What kind of *Glanvill*-text lies behind *Regiam* is rather difficult to ascertain, although this will be developed in the forthcoming Stair edition of *Regiam* (ed. Davies with Taylor). One key diagnostic is the inclusion in the earliest manuscripts of *Regiam* of the cross-references contained in some beta-manuscripts of *Glanvill* to the recognitions on the assize *utrum* (referred to but not inserted in the main edited text of *Glanvill*, XIII, 31). No currently available edition of *Regiam* includes these references, so their inclusion has not been remarked upon. They are present in the earliest beta-manuscripts of *Glanvill*, such as BL, Additional MS 24066 (*Glanvill* manuscript B), which dates from the early thirteenth century. Sarah Tullis suggested that, based on ‘more systematic study’, *Regiam* might have been derived from a manuscript like E (BL, Additional MS 35179) or ‘one that is now lost’: S. Tullis, ‘*Glanvill* after *Glanvill*’, unpublished DPhil thesis, University of Oxford (2007), 165. BL, Additional MS 35179, fo. 71r, does have these cross-references.

²² P. Stein, ‘The Source of the Romano-Canonical Part of *Regiam Maiestatem*’, *Scottish Historical Review*, 48 (1969), 107–23. There is no modern critical edition of Goffredo’s *Summa*, so all references are to Goffredus Tranensis, *Summa super titulis Decretalium* (Lyon, 1519; repr. 1968). Aberdeen Cathedral’s library is known to have had two copies: *Scottish Libraries*, ed. J. Higgitt, with J. Durkan (London, 2005), 17 (S1). I am grateful to Richard Sharpe for his help with Goffredo.

since the 1960s has located the treatise in the early fourteenth century, during the reign of Robert I (1306–29).²³ In particular, A. A. M. Duncan reexamined a passage in book 1 of *Regiam* which was also found, near-verbatim, in a chapter of a well-circulated piece of legislation enacted by Robert I in his parliament held at Scone on 3–5 December 1318.²⁴ Duncan concluded that, *pace* Lord Cooper, this passage could not be an interpolation but was instead so fundamentally integrated into and expanded in *Regiam* that *Regiam* had to have been compiled after the issue of the legislation in December 1318, not before.²⁵ Yet the post-1318 date is, in fact, debatable, as new material has recently been discovered and edited which has questioned whether the passage in *Regiam* was directly derived from the 1318 legislation and whether *Regiam* was, in fact, developing provisions first laid down in that legislation.²⁶ Instead of *Regiam* directly developing the 1318 legislation, it is more probable that *Regiam* and the 1318 legislation share a common source or, even, that the 1318 legislation was derived from the work which came to be known as *Regiam maiestatem*, rather than the other way around.²⁷

It will be outlined below that *Regiam*'s content and emphasis echo other changes to royal charter diplomatic occurring in the 1310s, thus creating a wider context for its compilation in the 1310s. As a result, the cumulative effect of the new evidence destabilising the post-1318 date is, happily, to locate the text more precisely in the reign of Robert I (1306–29). Indeed, in 1984, Alan Harding drew attention to how well *Regiam* broadly fitted Robert's reign, seeing in it (although without any probative evidence) a desire to concoct ancient law which was probably located in Robert I's own political insecurity.²⁸ Despite his later mythologised role as national hero 'The Bruce', Robert's reign was extremely tumultuous, controversial and thus necessarily full of new ideas about Scottish kingship and government.²⁹ It began in a period when Scotland

²³ Cooper, ed., *Regiam Majestatem*, 43–45.

²⁴ A. A. M. Duncan, 'Regiam Majestatem: A Reconsideration', *Juridical Review*, new ser., 6 (1961), 199–217.

²⁵ *Ibid.*, 210–16.

²⁶ The passage in question is the 'brieve of right in the burgh', which is a short procedural tract for how to plead and propone exceptions to a brieve of right in the burgh court in the form of a brieve of right of Alexander III: Ayr Miscellany, c. 2, in Taylor, ed., *Laws of Medieval Scotland*, 448–53.

²⁷ Taylor, ed., *Laws of Medieval Scotland*, 274–80.

²⁸ Harding, 'Regiam Majestatem'.

²⁹ The two major biographies of Robert Bruce take a rather different view of his post-1314 kingship, with Michael Penman preferring to stress the insecurity of Robert's position,

had been conquered by the English king, Edward I, in 1304–5. Robert was inaugurated king of Scotland in late March 1306, not as an obvious successor to the previous king John Balliol, but in an attempt to resurrect the very idea of an autonomous kingship of the Scots. This move was an even more audacious one since it was done less than two months after he had murdered his main political rival, John Comyn, in a church in Dumfries in February 1306. The early years of his reign were marked by warfare, exile and severe internal political divisions, and, although a famous military victory at Bannockburn in 1314 granted him some time and space to stabilise his rule, his government was extremely uncompromising and could be experienced as ambitious, radical and divisive. Chief among Robert's innovative ideas was the formation of a joint-Bruce-kingship in Scotland and Ireland through his brother Edward Bruce's invasion of Ireland and Edward's proclamation as king of Ireland in 1314. In 1314, Robert's government effectively made cross-border landholding illegal, enacting in a parliament held that year that anyone who refused to swear fealty to him for their lands against all others would be disinherited and treated as his enemy. The unrest around him continued to bubble until his kingship was finally recognised in 1328 (the year before he died). Until that point, he was repeatedly excommunicated; his kingship was not recognised by either the English kings or popes Clement V or John XXII; and, indeed, he had a rival for the Scottish kingship in the figure of Edward Balliol, son of the earlier king of Scots John (1292–1314, deposed 1296 but still recognised), with whom members of the Scottish nobility aimed to replace Robert in an assassination attempt now known as the Soules Conspiracy of 1320. Contextualising these undoubtedly tumultuous political circumstances, the power of Harding's piece lay in its emphasis on law's capacity to offer a salve to ease and cover much more profound political divisions. By attributing *Regiam* to David I, Robert's own kingship was confirming the

particularly in the years 1318–20 following the death of his brother, while Geoffrey Barrow stresses unity and the perseverance of the Bruce government to the challenges of 1319–20: M. Penman, *Robert the Bruce: King of the Scots* (New Haven, 2014), 177–234; G. W. S. Barrow, *Robert Bruce and the Community of the Realm of Scotland*, 4th edn (Edinburgh, 2005), 393–404. A new interpretation of Robert and his reign is being developed as part of the research on the AHRC-funded project, 'The Community of the Realm in Scotland, 1249–1424: History, Law and Charters in a Recreated Kingdom' (<https://cotr.ac.uk>), which this paragraph represents in simplified form.

work of *the* great law-giving and, crucially, undisputed king of Scots.³⁰ Harding thus stressed that it was *Regiam's* symbolic value which mattered far more than its procedural and legal content.

This was an important position because it at least directly confronted one of the, perhaps-surprising, problems which has long bedevilled *Regiam*: its content does not make very much sense, despite its later medieval parliamentary sanction.³¹ As stated above, much of it is derived from *Glanvill*. In fact, from about a third of the way through, the text is essentially *Glanvill* verbatim, minus its writ formulae, until the last book, when *Regiam* becomes a miscellany of Scottish legal chapters, mostly witnessed in other sources.³² *Regiam's* reliance on *Glanvill* has caused historians many headaches because *Regiam* imports long sections on

³⁰ The position of David I as *the* lawmaking king had a long history within and outwith Scotland. In his posthumous *Life of David*, written shortly after the king's death in May 1153, Aelred of Rievaulx had extolled David's delivery of justice and his protection of the poor and vulnerable (Oxford, Bodleian Library, MS Digby 19, fos. 7v–8v, 10r–v). When David's grandson, Mael Coluim, succeeded him in 1153, David's relationship to law was retained and indeed promoted by the king's *capella*. The most famous example is the illuminated majuscule 'M' in a royal charter to Kelso Abbey, printed in *Regesta Regum Scotorum Volume 1: The Acts of Malcolm IV, 1153–1165*, ed. G. W. S. Barrow (Edinburgh, 1960), no. 131. The laws of Mael Coluim's brother and successor, William, were sometimes even portrayed as mere *confirmations* of David's law, despite the institutional structures to which these laws referred not existing in David's reign (for an example, see *Regesta Regum Scotorum Volume 2: The Acts of William I, 1165–1214*, ed. G. W. S. Barrow with W. W. Scott (Edinburgh, 1971), no. 281, discussed in Taylor, *Shape of the State*, 63–4, 180–6. When, in 1305, following his successful – but temporary – conquest of Scotland, Edward I had an ordinance drawn up to lay down how the conquered kingdom would be governed under the new regime, he asked the good men of the land to gather together and literally 'recherche' the laws which King David had made, as well as any amendments and additions made by any of his (unnamed) predecessors. The laws of Scotland were, in some senses, understood by outsiders to be a corpus made by David. For the 1305 ordinance, see *Anglo-Scottish Relations 1174–1328: Some Selected Documents*, ed. and trans. E. L. G. Stones (Oxford, repr. 1970), no. 33 (240–59, at 250–1).
³¹ Harding, 'Regiam Majestatem', 108–10.

³² As we shall see, book 4 actually begins with edited material from *Glanvill*, XIV ('de criminalibus'), before moving on to legal chapters first attested in *Leges Scocie* (*Regiam*, cc. 142–8), then to those later attested in *Statuta Regis Alexandri* (*Regiam*, c. 149), and then material first attested in the Ayr Miscellany (*Regiam*, cc. 150–68), in one case extending what was originally in the Ayr Miscellany (*Regiam*, c. 158*). Further chapters attested in the Ayr Miscellany can be found at cc. 170–9, 181–5. The only chapters not attested in the Ayr Miscellany are *Regiam*, cc. 168–9, 172, 180, 186; however, since the Ayr Miscellany survives only in an incomplete form, it is possible that these chapters too might have been included in it. *Regiam* finishes with four chapters first attested as *Leges Scocie*, c. 21. For the relationship between *Regiam* and the Ayr Miscellany, see Taylor, ed., *Laws of Medieval Scotland*, 265–8, 274–80.

rules, jurisdictions and procedures, some of which were never part of Scots law or its judicial system. For example, *Regiam* contains *Glanvill*'s passage on the assize *utrum*, which determined whether land was alms or lay fee, despite *utrum* never having been adopted as Scots legal procedure.³³ *Regiam* preserves a reference to the King's Bench – never a Scottish institution.³⁴ *Regiam* also contains long sections taken entirely verbatim from *Glanvill* on the writs of novel disseisin, mort d'ancestor and right, and it is unclear how far these were intended to mirror the procedure of their Scottish equivalents (dissasine, mortancestor, and right).³⁵ Susan Marshall has shown how misleading *Regiam*'s testimony banning inheritance by children born before their parents' marriage was as a statement of Scots law. *Regiam* had adopted *Glanvill*'s view (which said pre-nuptial children could not inherit) despite Canon law later stipulating the opposite. *Regiam*'s testimony has been the basis for subsequent historical work which has argued that pre-nuptial children could not inherit in fourteenth-century Scotland, even though, as Marshall points out, there is no evidence save *Regiam* that they could not and, indeed, more evidence to show that the Canon law doctrine of legitimation *per subsequens matrimonium* did apply.³⁶ The authority of *Regiam* as an authority on fourteenth-century Scots law is therefore ambiguous because of the seemingly automatic dependence on *Glanvill* in its middle section. Indeed, the change in quality of work by the compiler of *Regiam* has led historians to argue that its compiler either lost interest in the task about a third of the way through (after the first thirteen chapters in book 2), and thereafter completed his job at a shoddy standard, or that a skilled compiler was 'interrupted' at his task and replaced by someone else who did not have the skill or knowledge to continue the work at the level of his predecessor.³⁷

³³ *Regiam*, cc. 124–5, 130; *Glanvill*, XIII, cc. 2, 23–5.

³⁴ *Regiam*, c. 120.

³⁵ *Ibid.*, cc. 125–33; *Glanvill*, XIII. Some information here is attested in other pieces of Scots law (for example, that there be no essoins for novel dissasine and mortancestor), but other detail is not (for example, socage).

³⁶ S. Marshall, *Illegitimacy in Medieval Scotland* (Woodbridge, forthcoming, 2020), ch. 2. I am grateful to Dr Marshall for sharing her chapter with me before its publication.

³⁷ The change in the use of *Glanvill* around thirteen chapters into book 2 was first noted by Lord Cooper and then developed by A. A. M. Duncan (in the edition based on the two earliest manuscripts, 'book II, c. 13' is *Regiam*, c. 47): Cooper, ed., *Regiam Majestatem*, 22; Duncan, 'Regiam Majestatem', 205. For a different view of the compiler's editorial methods, see below, 62–67.

There are thus many reasons why historians have been wary about tackling the content of *Regiam*. Combined with a complicated and changing manuscript tradition, and three editions which do not in any way represent this tradition effectively, *Regiam*'s position within Scottish legal and medieval history remains ambivalent and its content viewed as a minefield abandoned after generations of Anglo-Scottish political and legal conflict.³⁸ This essay reconsiders the original form, intended content and purpose of *Regiam* based not on any published edition of the work, but on the evidence offered by its two earliest surviving manuscripts which, unless other manuscripts are rediscovered, contain the only two witnesses to its earliest surviving form.

The Survival Context of *Regiam maiestatem*

Regiam survives in over thirty manuscripts as either a Latin or a Scots text.³⁹ The earliest manuscript dates from the later fourteenth century (c. 1389); manuscripts were still being produced in the last third of the sixteenth.⁴⁰ The Scots translations represent, on the whole, a later tradition that is first derived from and then responds to changes in the Latin text.⁴¹ The earliest Scots manuscripts containing *Regiam* date from the third quarter of the fifteenth century at the earliest.⁴² Not all Scots manuscripts are the same, suggesting that there was not a single 'official'

³⁸ There are currently four editions of *Regiam* in print, but, as two derived directly from Skene's edition, only the two remaining differ substantively from one another. Those two are that of Skene, published in 1609, and that by Thomas Thomson for the Record Commission, published under the overall editorship of Cosmo Innes in 1844 as an Appendix to *APS*, volume 1. Lord Cooper based his edition on Skene's text, as did David Hoüard (1725–1802), a French advocate and member of *parlement*, who published Skene's text together with a French commentary in 1776 (*Traité sur les coutumes anglo-normandes*, ed. D. Hoüard, 4 vols. (Rouen, 1776), vol. II, 36–267).

³⁹ This list is roughly coterminous with the manuscripts of *Quoniam attachiamenta*, provided in *Quoniam Attachiamta*, ed. T. D. Fergus (Stair Society, 44; Edinburgh, 1996), 5–6. The list also includes NLS, Acc. MS 11218/5 and St Andrews University Library, MS 39000.

⁴⁰ See, for example, BL, Additional MS 48032 and BL, Additional MS 48033.

⁴¹ Later fifteenth-century Scots manuscripts preserve the earlier version (of c. 190 chapters, divided into four books; see, for example, NLS, Advocates MS 25.4.15) when it was far more common for Latin *Regiam* texts to contain either a three-book *Regiam* (which had already been revised) or a four-book *Regiam* derived from this three-book *Regiam*, or, even, a four-book *Regiam* which had been wholly revised and extended. For a brief survey of these differences, see Taylor, ed., *Laws of Medieval Scotland*, 376–7.

⁴² NLS, Advocates MS 25.4.15.

translation made, but rather continually evolving ones which were responding to changes made to the Latin text over the fifteenth century.⁴³

Two points have to be made about the manuscript corpus as a whole. First, all the known surviving books containing texts of *Regiam* are consciously archaicising in their form and content. That is, they all contain texts of *veteres leges* – of old law. Even the earliest manuscript to survive, the so-called Bute manuscript, is a book containing works of law mostly attributed to a king, David I, who ruled almost three hundred years before the production of that particular codex.⁴⁴ But the Bute manuscript also contains works attributed to kings Mael Coluim mac Cinaeda (1005–34), William the Lion (1165–1214) and Alexander II (1214–49).⁴⁵ By the end of the fifteenth century, the self-consciously archaic nature of these books was proclaimed in a contents' list which appears to have been understood as the 'official' order in which the works should appear.⁴⁶ Thus, throughout its later medieval life, *Regiam* was not only understood by external sources as ancient law, but also survives wholly within a manuscript tradition which explicitly identifies it as such. There is thus no firm evidence to suggest that, even when *Regiam* was originally circulated, it did so as anything other than as part of a broadly based tradition of 'auld law'.⁴⁷

Second, despite the consistently archaic presentation of these books, the texts within them do change. As the fifteenth century progressed, the books become more ordered, and more likely to contain the same corpus

⁴³ Indeed, the Scots texts are generally more fluid than the Latin ones, and require further study. For example, the Marchmont *Regiam* is a three-book text, but only because it does not include the 'fourth' book, supposedly devoted to crime (St Andrews University Library, MS 39000). One manuscript, written in 1470, contains a four-book *Regiam*, but only around 177–80 chapters, missing out ones found in the Latin tradition (e.g. the chapter on *cró*, at the end of the fourth book): NLS, Advocates MS 25.5.7.

⁴⁴ NLS, MS 21246. The first two items in the original codex are *Regiam maiestatem* and an 'Assise Regis David', a witness to the alpha-version of *Capitula Assisarum et Statutorum Domini David Regis Scotie*. The first sixty-seven folios, therefore, of the Bute manuscript are taken up entirely with items attributed to David I; see Taylor, ed., *Laws of Medieval Scotland*, 53–5. There is, however, good evidence that the codex had a practical use, or at least was intended to inform practice.

⁴⁵ Taylor, ed., *Laws of Medieval Scotland*, 55–60.

⁴⁶ Commented on in Taylor, ed., *Laws of Medieval Scotland*, 129, 387–8.

⁴⁷ Although there is not space to develop the implications of this point here, the fact that *Regiam* – as it survives – exists only within a self-conscious tradition of 'auld law' raises questions about its immediate circulation. Was *Regiam* publicly circulated immediately after its compilation (even in its unfinished state)? The paucity of fourteenth-century legal manuscripts means that this question is impossible to answer in its own right.

of texts. More works were added, and all works within them, including *Regiam*, become longer; but not all these 'additions' were of new work, as certain texts which first appear as autonomous legal 'works' become incorporated into other, large tractates, *within the same book*, with the result that some texts appear two or three times, leading to several desperate declarations from scribes.⁴⁸ The increasing tendency to standardise the order of these 'books of law' seems to have been a response to central directives of the parliaments of James II and III which were concerned at certain points with the precise content of ancient law and aimed to create an authoritative 'book of law'.⁴⁹

Consequently, it is not possible to examine these later fifteenth-century manuscript-texts of *Regiam* and treat them as though they represent *Regiam* as it was first compiled and, possibly, circulated. *Regiam* as it appears in these later manuscripts is connected with its contemporary context, first within a burgeoning interest in old law in the first half of the fifteenth century – particularly within the institutional Church, religious houses and the burghs, and also among *magistri* – then in centralised efforts to control the circulation of that ancient law and what authority certain texts had.⁵⁰ This is a particularly important point to grasp for *Regiam*, given that even the best of the four editions currently available (that by Thomas Thomson, published in 1844) is based predominantly on a mid-fifteenth-century manuscript of *Regiam* whose text of *Regiam* contains material resulting from an extension and revision which had already occurred.⁵¹ Thus, in order to understand what *Regiam* originally intended to say, we have to look at its text only as preserved in its earliest surviving version, which is in only two manuscript witnesses, one from the last quarter of the fourteenth century, the other from the early fifteenth. One is the Bute manuscript (NLS, MS 21246); the other is known by its modern repository and shelfmark, BL Additional MS 18111.⁵²

⁴⁸ Taylor, ed., *Laws of Medieval Scotland*, 366–90.

⁴⁹ *Ibid.*, 387–90.

⁵⁰ *Ibid.*, 61–218, 363–90.

⁵¹ This is the Cromertie manuscript (NLS, Advocates MS 25.5.10).

⁵² BL, Additional MS 18111, fos. 1r–76r. This manuscript had not been studied until its existence was rediscovered by A. A. M. Duncan in, presumably, the late 1950s/early 1960s, who used it as the basis of his reassessment of *Regiam*. Since then, T. D. Fergus has used it as one of two early witnesses of *Quoniam* (the other being the Bute manuscript): Fergus, ed., *Quoniam*, 19–23.

The State of the Earliest Surviving Version and the Work of the Compiler

Full manuscript descriptions of both these manuscripts can be found elsewhere.⁵³ It suffices to say here that the Bute manuscript's text of *Regiam* is dated palaeographically to the last quarter of the fourteenth century, and the manuscript itself probably does not long post-date 1389; the Additional manuscript's text dates to the first quarter of the fifteenth century, and that manuscript may well have been produced at or commissioned by Dunfermline Abbey.⁵⁴ Despite the Additional manuscript being the later, it has been postulated by A. A. M. Duncan that it preserves a slightly earlier text, and, indeed, further work has only strengthened this conclusion.⁵⁵ The work by John Reuben Davies on the two manuscripts preserving the earliest-known version of *Regiam maiestatem* is demonstrating that both manuscripts preserve predominantly the same text, divided into four books. This quadripartite structure was, most probably, the work of the original compiler.⁵⁶ On occasion,

⁵³ Taylor, ed., *Laws of Medieval Scotland*, 49–60, 72–78.

⁵⁴ *Ibid.*, 50–51, 73; R. J. Lyall, 'Books and Book-Owners in Fifteenth-Century Scotland', in J. Griffiths and D. Pearsall (eds.), *Book Production and Publishing in Britain, 1375–1475* (Cambridge, 1989), 239–56, at 244.

⁵⁵ Duncan, 'Regiam Majestatem', 202–4; *Regiam*, ed. Davies with Taylor (forthcoming).

⁵⁶ Both manuscripts number *Regiam*'s chapters in continuous sequence, not restarting as new books begin. Although both state that they have c. 190 chapters, the Bute MS text is actually numbered in six score hundreds, making a total of 213 chapters. Both manuscripts have a contents list prefacing the text, although a folio is missing from the Additional manuscript so we cannot see how it would originally have been introduced. The Bute MS contents list makes a clear division between chapters 44 and 45, indicating the start of the second book with the words 'in secundo libro' (fo. 22v). The same division is indicated between chapters '100' (*recte* 120) and '101' (*recte* 121) with the words 'in tercia parte' (fo. 23r). By contrast, there is no division indicated in the contents list between books 3 and 4, which should have occurred between chapters '131' (*recte* 151) and '132' (*recte* 152), at fo. 23v. Subsequently two later hands added this division. When it comes to the main text in the Bute MS, there are clear divisions between parts 1 and 2 (fo. 34r, with the sections called *partes*); parts 2 and 3 (fo. 46v); and parts 3 and 4 (although here the 'fourth' part is mistakenly called *tercia pars*). The Additional manuscript has, in its contents list, a division between parts 1 and 2 between chapters 33 and 34 (BL, Additional MS 18111, fo. 1r); between 2 and 3 between chapters 107 and 108 (fo. 3r); and between 3 and 4 (cc. 133–4: fo. 3v). These are also reflected in the text (divisions noted at fos. 19r, 46r and 62v at the correct chapters). The Additional manuscript divisions are less intrusive than the Bute ones (there is a tendency in the Bute manuscript to suggest that the first rubric of each book is the 'title' of the book, something which later manuscripts absolutely do represent): the Additional manuscript divisions are called only *partes*, with no titles. Thus, although the Bute manuscript contains some ambiguity about the divisions in *Regiam*, the Additional manuscript, which preserves an earlier structure,

there are notes or citations in the main text in *Regiam* which are expanded in notes and commentary in the margin in the Bute manuscript, but not the Additional manuscript.⁵⁷ Equally, there are some occasions when Bute highlights in the margin a *Questio/Solucio* structure to the text where it is not explicitly made in the main text, and it also makes marginal cross-references where none appear in the Additional manuscript.⁵⁸ Bute also contains two extra chapters on the end which are not present in the Additional manuscript's text, and, of the two, only the Additional manuscript includes a clear *explicit*, stating that the work (called here the *Constitutiones regie regni Scocie*) has ended, saving the *Constitutiones burgorum*, suggesting that *Regiam* was conceived as *part* of the kingdom's constitutions, rather than constituting their entirety.⁵⁹ The Additional manuscript also has a more fluid structure, with some chapters containing multiple rubricated sub-sections, many of which have hardened into separate chapters in the Bute manuscript. As a result, Duncan's position is borne out by further work on the texts: although preserving in general the same version of the text, the Additional manuscript should be preferred over the Bute manuscript as representing the earliest-known text of *Regiam*, even if, on occasion, the Bute manuscript preserves better readings.

What, then, is the status of the text contained in both manuscripts? Do they confirm the consensus of current scholarship, that *Regiam* is divided into a polished first third and an unfinished and unpolished second two-

does not, suggesting, at most, that *Regiam* was originally intended to be divided into four books and, at least, that its earliest-known version was divided into four books. For the note that later manuscripts sometimes preserve a three-book text, see MacQueen, *Common Law*, 93, and, for a brief explanation, see Taylor, ed., *Laws of Medieval Scotland*, 375–7. John Reuben Davies and I will comment on the 'three-book'-*Regiam* in our introduction to the forthcoming edition of *Regiam*.

⁵⁷ See the margins in NLS, MS 21246, fos. 30r, 34r, 35v, 43r, 45r, and so on.

⁵⁸ See, for example, the *Questio/Solucio* imposed onto regulations about warrantors in theft accusations in the Bute manuscript (*Regiam*, c. 23, in the Bute manuscript, fo. 31v). The text says that if a far-away warrantor refused to answer or if the accused man could not produce him, then the king's sergeants would go to the lord of the warrantor and make him come. The situation is, in the margin, described as a *questio*, and the procedure (what the king's sergeants would then do) is described as a *solucio*: NLS, MS 21246, fo. 31v.

⁵⁹ The additional chapters in Bute are c. '192' (*recte* c. 212) 'de illis qui sunt conuicti de periurio' and c. '193' (*recte* c. 213), 'nullus serianus potest esse prolocutor nec attornatus'; NLS, MS 21246, fo. 62r. The *explicit* in the Additional manuscript is found after its chapter 190 ('de effusione sanguinis') and reads: 'explicunt constitutiones Regie [*sic*; possibly a scribal error for *Regis*] Regni Scocie preter constitutiones burgorum edite per Dauid Regem Scocie'.

thirds? What follows summarises extensive research into what can be discerned about the original compiler's editorial techniques, to be set out fully in the introduction to the forthcoming edition of *Regiam*. Two points here are most relevant. First, these two manuscripts show that *Regiam* was originally conceived as a single work: it calls itself a 'book' and contains internal cross-references.⁶⁰ Second, it has been possible to identify five editorial techniques that appear throughout the book, to greater and lesser degrees.⁶¹ All concern the compiler's treatment of his sources, whether *Glanvill*, Goffredo's *Summa* or the Scottish legal material. The techniques range from simple interventions in the compiler's source material (removing almost all the writ formulae from *Glanvill*, for example), to slightly altering technical words or phrases to make them better fit the Scottish situation, to wholesale rewrites of passages within *Glanvill*.⁶² These editorial interventions, particularly

⁶⁰ *Regiam*, cc. 2, 9, 19 (following and summarising *Glanvill*, III, 4 (40), although *Glanvill* does not contain the cross-reference), c. 21; see also c. 45.

⁶¹ These will be developed in the forthcoming Stair edition of *Regiam* (ed. Davies with Taylor). For now, they will just be listed. (1) The simplest phase of editing was the removal of almost all writ formulae from *Glanvill* and any mention of them. (2) Passages where *Glanvill*'s content has, broadly, been maintained, but slightly abridged and/or summarised. The most obvious example is actually present throughout *Regiam*: the compiler never included *Glanvill*'s rather tedious description of what happened on each of the three days of essoining but instead just jumped straight to the fourth day, when all lawful essoins have been used, and stipulates what should happen then (for example, *Regiam*, c. 47). (3) Small editorial changes, without any real substantive change to the procedure or rule. For example, the English royal *iusticie* – justices – in *Glanvill* are consistently rendered as *iusticiarii* in *Regiam* to denote the regional justiciar. (4) Small editorial changes to a source which nonetheless result in substantive change. For example, the compiler changed Goffredo's statement that arbiters must be over the age of twenty-five to over the age of twenty-one, the age of majority in Scotland. In a passage on essoins based on *Glanvill*, the compiler of *Regiam* added the words 'de Forth' to the words 'de ultra mare', thereby effectively changing the location of the sea in question from the English Channel to the Firth of Forth. (5) The most substantial changes, elaborated below, in which the material from the source – normally *Glanvill*, as it is the *Glanvillian* sections in book 1 which have been the most heavily edited – provides the bare bones of the structure of a particular chapter and section, but the material has either been completely written for Scotland or 'Scottish' material has been inserted.

⁶² All save seven of the writ-formulae in *Glanvill* are absent in *Regiam*. Five occur in *Regiam*, c. 47, in book 2, under the title 'de donacionibus inter uirum et uxorem et de dote', which Duncan described as '*Glanville totally unrevised*, and includes even the *Glanvillian* writs' (Duncan, '*Regiam Majestatem*', 205). These writs are: the writ of right for dower land (*Glanvill*, VI, 5); the writ for transferring a case from the county to the king's *curia* (*Glanvill*, VI, 7); the writ for summoning the heir to warrant the dower (*Glanvill*, VI, 9); the writ for making a summons for dower when the woman does not have the land (*Glanvill*, VI, 15); and the writ for measuring dower if it is claimed the widow has more

the smallest ones, appear consistently throughout *Regiam*: this suggests that *Regiam* does not contain, as is currently thought, a 'finished' section and an 'unfinished' section, nor does it constitute the work of two compilers, one diligent, the other lackadaisical; instead, it is unfinished all the way through, albeit to greater and lesser degrees. *Regiam* is most finished in the prologue and in book 1, as has long been acknowledged, but there are also relatively finished passages in book 2 and also, most interestingly, at the start of book 4, normally castigated as just a mish-mash of Scottish legal chapters. In addition, there are passages in book 1 whose text has been subjected to minimal editorial intervention, and, conversely, even the long-ignored book 3 displays a degree of editorial intervention which is wholly consistent with the basic techniques identified in more heavily edited sections.⁶³ Thus the earliest manuscripts of *Regiam* reveal it to be originally unfinished all the way through: there was no replacement of one compiler by another. The interesting question is how and why this clearly unfinished work was then recopied and circulated *as though* it was a finished authority. This point will be returned to briefly at the end of this article.

But what is the significance of this conclusion? Two points about both his editorial work and his knowledge of the law are key to appreciating what the original compiler of *Regiam* was trying to do with his work. First, what he would have done with the figure of David I, the king to whom *Regiam* is attributed, had he finished his work, and second, why and how he relied so heavily on *Glanvill*. It is well known that he attributed the tractate to an unknown compiler working on the command of King David, who, as shown above, had a long-standing

than her reasonable share (*Glanvill*, VI, 18), only here there has been a haplographic error between the two *sine dilacione* so the injunction to the sheriff to measure the dower land is not preserved in *Regiam*, both in the earliest manuscripts and in later ones (*Regiam*, c. 47; and, further, the 'Cromertie' manuscript, NLS, Advocates MS 25.5.10, fo. 48v; the Monynet manuscript, NLS, Advocates MS 25.5.6, fo. 17v). However, it is not the case, first, that this is the only place where the writ formulae have not been retained nor, second, that this chapter is *Glanvill* 'totally unrevised'. Two more writ formulae appear, both later in book 2 (*Regiam*, c. 54, on withholding chattels of a testate dead man (*Glanvill*, VII, 7); *Regiam*, c. 81, on the illegitimacy of children born before their parents' marriage (*Glanvill*, VII, 14)). This lengthy chapter 47 of *Regiam* is indeed revised, albeit lightly.

⁶³ *Regiam*, cc. 19–27 (based on *Glanvill*, III, 4–8); *Regiam*, c. 127 contains some rather interesting abridgements of *Glanvill*, XIII, 13–15; *Regiam*, c. 133 says that the pursuer in a case of dissasine will be compensated up to the value of ten marks from the chattels and fruits of the land; cf. *Glanvill*, XIII, 38.

reputation as a law-maker and law-giver. Indeed, when Edward I set out the plans for governing his newly conquered kingdom in 1305, he equated the entire law of Scotland with the figure of King David, relegating all David's successors to having simply provided additions and emendations.⁶⁴ Yet the position of David throughout *Regiam* is rather ambiguous because, perhaps surprisingly for a work which attributes its existence to his command, David rarely appears. This would not be so problematic had David *only* appeared in *Regiam* in the prologue: the laws of Hywel Dda, for example, do not refer explicitly to Hywel himself as a legislator; some manuscripts of *Glanvill* attribute the work to Henry II without Henry appearing in a similar role.⁶⁵ Yet, other than in the prologue, David appears in *Regiam* as a named legal actor twice, and there are further references to an unnamed 'lord king' enacting (*statuit*) various provisions.⁶⁶ This choice, therefore, marks a departure in *Regiam* from its main source, *Glanvill*.

In the context of a work containing over 32,000 words, these few references to David do not stand out; yet it is possible that David's role as law-giver might have been more prominent had the compiler finished his work. As John Reuben Davies has pointed out, the two earliest surviving manuscripts of *Regiam* not only contain references to Roman and Canon law, but also to their major commentaries and glosses.⁶⁷ These cross-references are quite accurate, although not always perfectly preserved in the two manuscripts. Whoever made them was demonstrably learned in the most up-to-date thought on Canon and Civil law in the early fourteenth century: most of the references are to the *Digest*, the *Institutes* and the Canon law collections the *Liber extra* (1234), the *Liber*

⁶⁴ *Anglo-Scottish Relations*, ed. and trans. Stones, no. 33, 240–59, at 250–1: 'et des gentz qui y seront assemblez soient rehercez les leis que le roy David fist, et ausint les amendementz et les addicions qui unt esté puis faites par les roys'.

⁶⁵ *Glanvill*, incipit, 1. Like *Glanvill*, some scribes of manuscripts of the *Laws of Hywel Dda* refer explicitly to Hywel making this law, but not as a legislator; the prologue to the *Ior*. recension makes it clear that Hywel called wise men and clerics to him to examine the old law, and to make new law where appropriate, and on occasion, later changes to the law are referred to: *The Law of Hywel Dda: Law Texts from Medieval Wales Translated and Edited*, ed. and trans. D. Jenkins (Llandysul, 1986), xxiii–xiv.

⁶⁶ *Regiam*, cc. 6, 14. Both references are in book 1. For the references to *dominus rex statuit* (or variant), see *Regiam*, cc. 6, 15, 21 (again, in book 1) and 171, 187 (in book 4).

⁶⁷ These references are discussed in J. R. Davies, 'References to Roman and Canon Law in Regiam Maiestatem', *The Community of the Realm in Scotland, 1249–1424: History, Law and Charters in a Recreated Kingdom*, www.cotr.ac.uk/blog/regiam1. All these references – and how they develop in later manuscripts – will be discussed in detail in the forthcoming Stair edition of *Regiam* (ed. Davies with Taylor).

sextus (compiled on the command of Boniface VIII in 1298) and the ordinary gloss of the *Liber extra* by Bernardus Parmensis (d.1266).⁶⁸ No later manuscript contains these references in this form: they are edited out or expanded in the margins, or readmitted to the main text and discussed further.⁶⁹ What is particularly interesting is that *all* these references to Roman and Canon law in any manuscript of *Regiam*, early or late, have been removed from all print editions. This was, perhaps, not a particularly surprising action for post-Reformation editors to have taken. Yet, as a result, these editions of *Regiam* have confined the Roman and Canon law material in *Regiam* to the unattributed material from Goffredus's *Summa*.⁷⁰ Examining this extra material across the manuscript tradition of *Regiam* is not the subject of this article; what is pertinent here is that not only were these citations probably part of the original work of the compiler himself but that, as will be shown below, they might also have been more elegantly incorporated into *Regiam*'s text, had the compiler finished his work.

There are two places in the main text of *Regiam* where David I's name is explicitly invoked. The first is in book 1, where a lengthy text on warranty, originating, probably, after 1184 in the reign of William the Lion, has been edited slightly and ascribed wholly to the actions of David I.⁷¹ The second is slightly more complex and more revealing of

⁶⁸ References to the *Digest* can be found in *Regiam*, cc. 11, 39, 40, 114; references to the *Institutes* at *Regiam*, cc. 9, 32, 109, 114, 150; and to the *Liber extra*, at cc. 39, 42, 47–8, 119, 127–8. For the *Liber sextus*, see *Regiam*, cc. 28, 127; for the Gloss of Bernardus Parmensis, see *Regiam*, c. 158. Some of these are also found in one of *Regiam*'s sources, Goffredus, but by no means all, and not all of Goffredus's internal references are to be found in *Regiam*: see J. R. Davies, 'The Reception and Identification of Roman and Canon Law in *Regiam Maiestatem*', forthcoming.

⁶⁹ The presence of Roman and Canon law material in later manuscripts of *Regiam* will be developed in more detail in the introduction of the forthcoming Stair edition of *Regiam* (ed. Davies with Taylor). Lord Cooper was aware of this material in the early manuscripts but thought it a work of a later scribe and judged Skene correct to have removed all references. Needless to say, neither Skene's nor Thomson's editions acknowledged the full extent of Roman and Canon law throughout the manuscript tradition of *Regiam*; Cooper, ed., *Regiam Majestatem*, 16–17, 27–32.

⁷⁰ Stein, 'Source of the Romano-Canonical Part', 107.

⁷¹ This is the law long known by the name *Clarmathan* or *Claremathan*, a word which had become attached to the law by the time it had been incorporated into the compilation *Statuta Regis Alexandri*, attributed to Alexander II and probably drawn up in the late 1350s or 1360s (*Statuta Regis Alexandri*, c. 12; Taylor, ed., *Laws of Medieval Scotland*, 231–3, 341–2, 590–5). However, it first appears as the first chapter of *Leges Scocie*, a compilation dated to 1210X72, but whose chapters mostly date from the reign of William the Lion (*ibid.*, 231–3).

how the compiler might have treated the direct citations of Roman and Canon law texts had he finished. It also occurs in book 1, in a relatively heavily edited section on essoins (lawful excuses for non-appearance in court), based on *Glanvill*.⁷² The passage starts with *Glanvill*, taking the problem outlined there of when plaintiffs or pursuers come into a vill, initiate their plea, but suddenly essoin themselves owing to illness.⁷³ The passage in *Regiam* is, however, concerned with a different problem to the one in *Glanvill*: *Regiam* was not, as *Glanvill* was, outlining what should happen if this occurred (essentially a procedural matter), it was questioning the legality of this happening in the first place.⁷⁴ It asks: ‘should such an essoin ever by law be received?’ *Regiam* then states that the problem was solved by a statute enacted by King David, which answered, yes, they were to be received, if such essoins were lawful in the first place.⁷⁵ The reason David gave was as follows: ‘since law is made for the common profit (*communis utilitas*) of both parties – both the pursuer and the tenant – it would indeed be a wickedness if the remedy of benefit was taken away, because the actor and the *reus* ought not to be judged unequally or for the detriment of one over the other’.⁷⁶ This last sentence, beginning *quia actor*, is first found as part of what became the ordinary gloss to the *Liber sextus*, a collection of papal decretals compiled by Pope Boniface VIII in 1298; the ordinary gloss was compiled by Giovanni d’Andrea in 1306.⁷⁷ Thus, if the ordinary gloss to the *Liber sextus* was being used here, it was not only incorporated into the compiler’s prose, its authority was also transposed from its canonical context and placed into the mouth of King David. What this might conceivably suggest is that the original compiler had intended to write these citations of Roman and Canon law into the prose of his text and, on occasion, even transform their authority into statutory pronouncements – one might even

⁷² *Regiam*, c. 6, ‘de essoniis’, with seven rubricated sections, based on *Glanvill*, I, 12, 18, 25, 27–9, 33. There is a lawful essoin in *Regiam* which is not in *Glanvill* that is about going to a fair (*Regiam*, c. 6.5).

⁷³ *Glanvill*, I, 28.

⁷⁴ *Regiam*, c. 6.5. The chapter is widening the remit of *Glanvill* as well, as it includes an essoin for ‘any other reason’ than illness for which the defendant has found a pledge.

⁷⁵ *Regiam* then returns to *Glanvill*, and states that the tenant would have at least a further fifteen days until he must appear in court again: *Glanvill*, I, 28.

⁷⁶ *Regiam*, c. 6.5.

⁷⁷ Johannes Andreae *ad VI.2.13.3, Liber sextus Decretalium d. Bonifacii papae VIII*, in UCLA Digital Library Program, *Corpus Juris Canonici (1582)*, available at <http://digital.library.ucla.edu/canonlaw> (accessed 28 February 2020).

say, legislation – of King David I.⁷⁸ Had the compiler of *Regiam* finished his work, the figure of David I might have appeared much more frequently as a *Gesetzgeber* than he currently does in any known version of *Regiam*.⁷⁹

The Choice of *Glanvill* as Textual Authority

In this context, why was *Glanvill* chosen as the textual authority through which these aims could be communicated? Although there are long passages taken from Goffredo di Trani's *Summa*, the structure of *Regiam* follows *Glanvill*: its prologue is based on *Glanvill*; it starts, like *Glanvill*, with a description of jurisdictions and pleas; and then, like *Glanvill*, it takes the reader through the process of making a plea – from summons and essoins, to the pleading of the case itself, to visnet and judgment, and so on. In this way, the underpinning structure, the literary model and, thus, the authority of *Regiam* is taken from *Glanvill*, not from any other legal work. This is important, as the compiler's choice of *Glanvill* seems even more deliberate given his expertise in *four* kinds of law: Canon, Civil, English Common and Scottish Common. Why *Glanvill* was used is often the question which is first asked about *Regiam* before its content is ever analysed. The underlying issue, of course, is: surely Scottish law was not so similar to late twelfth-century English procedures on writ that *Glanvill* was the most appropriate choice of text?

The very formulation of this question reveals the basic assumption behind any treatment of *Regiam*: it is approached as a 'legal transplant', a borrowing from one legal system and implanting it into another, thus stimulating legal development in the recipient system.⁸⁰ While *Regiam* eventually had this effect, it is suggested here that the compiler of *Regiam*

⁷⁸ Not all internal citations answer questions posed in the text, although some do. For example, in book 3, *Regiam* includes and abridges *Glanvill*'s chapter on loans for use (*comodata*; *Glanvill*, X, 13).

⁷⁹ This is despite the figure of David being invoked more in later manuscripts than he is in the earliest ones. See the transformation of the phrase 'ergo contra eorum personas dominus rex distinguit in hunc modum' (*Regiam*, c. 6.3) into 'ergo circa [sic] eorum personas dominus Rex David precepit distinguere in hunc modum'; NLS, Advocates MS, 25.4.13 (D), fo. 16v.

⁸⁰ A. Watson, *Legal Transplants: An Approach to Comparative Law* (Edinburgh, 1974); see, for an analytical response, J. W. Cairns, 'Watson, Walton, and the History of Legal Transplants', *Georgia Journal of International and Comparative Law*, 41 (2013), 637–96; for a critique, see P. Legrand, 'The Impossibility of "Legal Transplants"',

wanted to takeover and transform the *authority* of *Glanvill*, not its legal content per se. Although in the least finished sections, *Glanvill*'s prose is reproduced almost verbatim in *Regiam* (leading, as was noted above, to the inclusion of procedures and judicial fora which were never part of the Scottish legal system), the same is *not* true in what look like the most finished sections, mainly in books 1, the start of book 2 and book 4. Here, we can see that *Glanvill*'s prose often provided the skeletal structure of each chapter – its first sentence, or first few sentences, its last sentence, its area of concern – but, to follow through with the image, not the muscle, ligaments, tendons or organs.⁸¹ As a result, it is helpful to see *Regiam* not as transplant but as translation, thus serving the same appropriative functions which Rita Copeland has identified for medieval interlingual translations of literary works from Latin into the vernacular.

On this subject, Copeland has written of medieval translation that 'translation reinvents its source and appropriates it'.⁸² She expands:

The aim of translation is to reinvent the source, so that . . . attention is focused on the active production of a new text . . . translation seeks to erase the cultural gap from which it emerges by contesting and displacing the source and substituting itself: it forges no synthetic links with its source.⁸³

To translate is therefore to appropriate and, potentially, to displace and to challenge. To forge 'no synthetic link' with its source raises the possibility that *Regiam*'s reliance on *Glanvill* might not be an obviously imitative act; it might instead have served a more disruptive function. How, then, might *Regiam* be functioning as a translation of *Glanvill*? As a Latin text, *Regiam* is not an interlingual translation. Rather, it should be viewed as an intercontextual translation, that is, the 'making legible' of

Maastricht Journal of European and Comparative Law, 4 (1997), 111–24, and, in this context, MacQueen, *Common Law*, 264–5.

⁸¹ Most obviously in book 1, the section on pleading; *Regiam*, c. 8; cf. *Glanvill*, II, 3, 13, 17–18. For example, the beginning of book 4 starts with *Glanvill* with a few changes, and then slowly its content gets replaced, with *Glanvill*'s dismissal of robbery being rewritten, as is the whole procedure on rape; *Regiam*, cc. 139–40; cf. *Glanvill*, XIV, 5–6. *Regiam* also has a chapter on theft (first attested as *Leges Scocie*, c. 4 and *Ayr Miscellany*, c. 9) where *Glanvill* states that it is not appropriate to mention theft, which belongs in the county court, not the king's court (*Glanvill*, XIV, 8).

⁸² R. Copeland, *Rhetoric, Hermeneutics and Translation in the Middle Ages: Academic Traditions and Vernacular Texts* (Cambridge, 1995), 35.

⁸³ *Ibid.*, 30.

one text in another social, political or legal context.⁸⁴ Instead of ‘matching form and substance [of the original] in a different language’, as Copeland has written about interlingual translation, an inter-contextual translation matches the ‘form and substance’ of the source in a different context, here, a legal context.⁸⁵ This explains the compiler’s ultimate approach to *Glanvill*: to replace much of its precise procedure but retain the verbatim shell of the work as a whole. A ‘new text’, to use Copeland’s phrase, would have been produced, but one which retained the outward form of its source.⁸⁶ This method of working suggests that the aim of *Regiam* was not to transplant rule and procedure; it was to translate – and thus appropriate – *Glanvill*’s authority in a different context. It reinvented *Glanvill* while still constituting it.

But what authority did *Glanvill* have to offer? This question has baffled historians, who have thought that, by the early fourteenth century, *Glanvill* is the last work one would use: there were many other more up-to-date legal tractates written within the English judicial system, not only *Bracton*, but also *Hengham Magna*, which survives in multiple manuscript copies by the early fourteenth century.⁸⁷ However, this ignores the manuscript evidence of *Glanvill* and, of course, its very antiquity. *Glanvill* was old and it was outdated, but it was still known. Of the forty-one surviving manuscripts of *Glanvill* which survive from (perhaps) the late twelfth century to the first quarter of the fourteenth, over half (twenty-one) were put together in the last quarter of the

⁸⁴ ‘Intercontextual’ translations have received little attention as a practice, although translation as a ‘method’ of conceptual history has been discussed since the 1970s, albeit within an interlingual context. See, for example, K. Palonen, *Politics and Conceptual Histories: Rhetorical and Temporal Perspectives* (London, 2016), 145–60.

⁸⁵ Copeland, *Rhetoric, Hermeneutics and Translation*, 30. The phrase intercontextual translation is not used in Copeland; her points about interlingual translation are being used here to illuminate the compilation methods in *Regiam*.

⁸⁶ This is particularly important given the clear attribution to David I in the early manuscripts of *Regiam*, while *Glanvill* was not always known as *Glanvill*, even by the early fourteenth century. It was known by a variety of titles in the surviving manuscripts: ‘Regia Potestas’ (MSS O and W); ‘Leges Henrici Secundi’ (MSS Co, G, Or); ‘Liber Curialis’ (*Ab*). All *sigla* are those used in the modern editions of *Glanvill* (see *Glanvill*, ed. Hall, ix; Tullis, ‘*Glanvill* after *Glanvill*’, 5–7). Others call it *Suma que uocatur Glaunuile*, or similar (*J, P* and also *Co*).

⁸⁷ P. Brand, ‘Hengham Magna: A Thirteenth Century English Common Law Treatise and its Composition’, *Irish Jurist*, new ser., 11 (1976), 147–69; T. J. McSweeney, ‘Creating a Literature for the King’s Courts in the Later Thirteenth Century: Hengham Magna, Fet Asaver, and Bracton’, *The Journal of Legal History*, 37 (2016), 41–71.

thirteenth and beginning of the fourteenth. *Glanvill* was still popular.⁸⁸ Most of these manuscripts were in England, but we can surmise that *Glanvill* was circulating in Scotland too from as early as 1230, if not before, and influenced other legal compilations dating from the late thirteenth and early fourteenth centuries.⁸⁹ By ‘translating’ *Glanvill*, the compiler of *Regiam* was appropriating its status as a crucially old but still-foundational text of the English Common law to reinvent its authority to serve the law and legal procedure of the Scottish kingdom.

This reinvention was simple but would have been extremely effective, particularly had the compiler finished his work. It could also have unsettled *Glanvill*'s reputation. By invoking David I, the compiler of *Regiam* was not only invoking the authority of the king whose law was, by a conquering government, held to be equivalent in 1305 to the law of the entire kingdom, but a king of more ancient authority than the king whose name was associated with *Glanvill*, Henry II.⁹⁰ *Regiam*, if taken at face value, was the earlier work; *Glanvill* derived from it, not the other way around. It may have been in the compiler's mind for someone to look at *Glanvill* and look at *Regiam* and ask which text was the legal authority? Which one was the foundational text of both legal systems? The fact that these were the very questions asked when the link between *Glanvill* and *Regiam* was rediscovered in the early seventeenth century might have amused the original compiler as much as irritated him that it took so long for anyone to ask the question that the compilation of *Regiam* may well have been originally designed to prompt. The choice of *Glanvill* as the structuring source for *Regiam* was probably far more strictly political than legal. In the context of early fourteenth-century Anglo-Scottish relations, the audacious aim of using *Glanvill* – as

⁸⁸ Tullis, ‘*Glanvill* after *Glanvill*’, ch. 1 and appendix 1.

⁸⁹ It is clear that a copy of *Glanvill* had influenced the drafters of Scottish statutes as it influenced the style and content of the statute introducing novel dissasine in Scotland, enacted in October 1230. This survives as *Statuta Regis Alexandri*, c. 7, in Taylor, ed., *Laws of Medieval Scotland*, 586–7; discussed in MacQueen, *Common Law*, 136–7; Taylor, *Shape of the State*, 285–93. *Glanvill* was also used in *Capitula assisarum et statutorum domini David regis Scocie* (henceforth *CD*), cc. 32 and 36, and influenced a passage in the Ayr Miscellany, cc. 1, 34 (Taylor, ed., *Laws of Medieval Scotland*, 446–7, 480–1, 518–19, 522–3).

⁹⁰ Sarah Tullis has shown that the *incipit* which refers to Henry II is preserved in twenty-seven of the surviving manuscripts of *Glanvill*. MSS *G* and *Or* (originally the same volume) contain a miniature of Henry II with an archbishop and four knights (Tullis, ‘*Glanvill* after *Glanvill*’, 19). The French translation (mid-thirteenth century) calls him ‘del second roy Henry de Engleterre’; Tullis, ‘*Glanvill* after *Glanvill*’, 40 and n. 130.

opposed to any other legal text – was to displace that text’s authority and relocate it in a Scottish context as a Davidian invention, a statement of the Scottish king’s legislative power and his position as the inventor of law. This proposition receives further evidential support from an analysis of the surviving content of *Regiam*, as witnessed by its two earliest manuscripts.

Maiestas in Regiam maiestatem

Can any theoretical ideas about authority be identified in *Regiam*? Concerns about its content as well as the absence of an authoritative edition have prevented this question from being asked of *Regiam*, and, in consequence, it is best to start from the beginning, which, in the case of *Regiam*, is its opening prologue. As is well known, both *Regiam* and *Glanvill* use the opening lines of Justinian’s *Institutes* for the opening of their prologue. In the *Institutes*, this is: ‘imperial majesty must not only be decorated with arms but also be armed with laws’.⁹¹ In *Glanvill*, however, the text opens with the words *regia potestas* – royal power – and continues with the more verbose injunction that ‘royal power must not only be decorated with arms against the rebels and peoples who rise up against it and the kingdom but it is also fitting that it is decorated with laws to rule its subjects and peoples peacefully’.⁹² The compiler of *Regiam*, however, changed *Glanvill*’s *regia potestas* half-back to the reading of the *Institutes*. Its opening words are, of course, *regiam maiestatem*, royal majesty. The injunction then follows *Glanvill*, sometimes returning tellingly to the prose of the *Institutes*: royal majesty must not only be ‘decorated with arms against the rebels who rise up against it and the kingdom but it is also fitting to be armed with laws for subject and peaceful peoples’.⁹³

⁹¹ *Institutes*, prologue: ‘Imperatoriam maiestatem non solum armis decoratam sed etiam legibus oportet esse armatam ut utrumque tempus et bellorum et pacis recte possit gubernari et princeps Romanus victor existat non solum in hostibus proeliis sed etiam per legitimos tramites calumniantium iniquitates expellens et fiat tam iuris religiosissimus quam victis hostibus triumphator.’

⁹² *Glanvill*, prologue: ‘Regiam potestatem non solum armis contra rebelles et gentes sibi regnoque insurgentes oportet esse decoratam sed et legibus ad subditos et populos pacificos regendos decet esse ornatam.’

⁹³ *Regiam*, prologue: ‘Regiam maiestatem non solum armis contra rebelles sibi regnoque insurgentes oportet esse decoratam set eciam legibus ad subditos et populos pacificos oportet esse armatam.’

Despite *Regiam*'s unfinished state, it is clear that the compiler intended for the *maiestas* of the Scottish king to be advanced throughout the work. It was not only in the prologue that the compiler substituted *Glanvill*'s words to emphasise royal *maiestas*. For example, in *Glanvill*, no one accused of homicide could be released on bail save 'ex regie dispensationis beneficio'; this stipulation is repeated in *Regiam* but the exception is 'nisi ex regie maiestatis beneficio' – 'save with the benefit of royal majesty'.⁹⁴ The king in *Regiam* was thus a king who exercised *maiestas*.

Maiestas is an odd word. Although transposed into English as 'majesty', its direct translation is 'greatness'. Its legal origins lie in Roman law, in the first-century BC *Lex Julia* on *maiestas*, where it was defined as any action which acted against the Roman people or their security.⁹⁵ Recorded in the *Digest*, Ulpian's opinion was that the crime of offended or harmed *maiestas* was the crime closest to sacrilege, *sacrilegium*, because it so endangered authority and public order. By the early fourteenth century, *maiestas* was a key concept in political and juristic thought, and it was invoked to represent the authority of a ruler who had no temporal superior. It is sometimes asserted (if not interrogated) that, for most of the twelfth century, if anyone thought much about the issue at all, the emperor was the only secular ruler who exercised *maiestas* (then in Staufer hands).⁹⁶ This is, however, questionable, particularly if one looks *outside* juristic sources and towards visual, diplomatic and literary ones. Yet, as the thirteenth century progressed, the possession of *maiestas* became increasingly discussed, contested and politicised. Whom it could be applied to and with what justification needed to be made more explicit.⁹⁷ Did all kings have *maiestas* or was it only the

⁹⁴ *Glanvill*, XIV, 3; *Regiam*, c. 137.

⁹⁵ *Digests* 48.4.1: 'proximum sacrilegio crimen est'. The literature is vast. See W. Ullmann, 'The Development of the Medieval Idea of Sovereignty', *English Historical Review*, 64 (1949), 1–33; K. Pennington, *The Prince and the Law, 1200–1600: Sovereignty and Rights in the Western Legal Tradition* (Berkeley, CA and Los Angeles, CA, 1993), 90–106; A. Bryen, 'Labeo's iniuria: Violence and Politics in the Age of Augustus', *Chiron: Mitteilungen der Kommission für alte Geschichte und Epigraphik des deutschen Archäologischen Instituts*, 48 (2018), 17–52, at 26–32, 42–3.

⁹⁶ A rather famous bull of Paschal II addressed to Emperor Henry V in 1111 referred to the *divina maiestas* flowing through priests and the *regalis maiestas* which should prevent dissension and conflict over episcopal elections; *Constitutiones et Acta Publica Imperatorum et Regum inde ab A.DCCCXI usque ad A.MCXCVII*, ed. L. Weiland (Monumenta Germaniae Historica; Hanover, 1893), no. 96.

⁹⁷ See the summary in K. Pennington, 'Law, Legislative Authority and Theories of Government, 1150–1300', in J. H. Burns (ed.), *The Cambridge History of Medieval Political Thought*, c. 350–c. 1450 (Cambridge, 1988), 424–53.

Roman emperor? What constituted an offense against that *maiestas*, once demonstrated?⁹⁸ Could treason only be committed against a ruler who held *maiestas*?⁹⁹

Most of these discussions focused on the relationship between the kings of Sicily, the pope and the emperor because of their peculiar political relationships, or between the emperor and the king of France. In the 1280s, the preface and gloss to Frederick II's *Liber Augustalis* by Marinus de Caramanico focused on the very right of kings – and particularly the kings of Sicily, the role in which Frederick had legislated – to make law.¹⁰⁰ Since Francesco Calasso published an edition of the preface, Marinus's arguments have been given much attention, so it is unnecessary to repeat them here.¹⁰¹ His basic point, however, was that there was no difference between the authority of a king and the authority of an emperor: even a king who was a vassal of the pope had the authority to make law as superior lord over the *singula* of his kingdom. For Marinus, kings, as much as emperors, deserved the name prince, exercised *maiestas* and thus could punish the crime of *lesa maiestas* for offences against their own *maiestas*.¹⁰²

Maiestas was used alongside a few other highly contestable and politically volatile legal terms, in particular *princeps* and *superior*.¹⁰³

⁹⁸ Thus, in 1313, in *Pastoralis Cura*, Pope Clement V explained that Henry VII had engaged in an offence of his *maiestas* by creating *confederationes* and *conspirationes*; *Clem. II.11*, accessed from *Clementis papae V. Constitutiones*, in UCLA Digital Library Program, *Corpus Juris Canonici* (1582), available at <http://digital.library.ucla.edu/canonlaw> (accessed: 28 February 2020).

⁹⁹ Pennington, *Prince and the Law*, 95–7; S. H. Cuttler, *The Law of Treason and Treason Trials in Later Medieval France* (Cambridge, 2003), 8–15.

¹⁰⁰ See F. Calasso, *I glossatori et la teoria della sovranità: studio di diritto comune pubblico*, 3rd edn (Milan, 1957), 177–205.

¹⁰¹ See, among many, Pennington, *Prince and the Law*, 102–5; M. Ryan, 'Political Thought', in D. Johnston (ed.), *The Cambridge Companion to Roman Law* (Cambridge, 2015), 423–51, at 438–9; Daniel Lee, *Popular Sovereignty in Early Modern Constitutional Thought* (Oxford, 2016), 60–1.

¹⁰² The question of what constituted the royal *dignitas* in Scotland was raised explicitly in the Great Cause in 1292; see, more broadly, the still important discussion in B. C. Keeney, 'The Medieval Idea of the State: The Great Cause, 1291–2', *The University of Toronto Law Journal*, 8 (1949), 48–71.

¹⁰³ Calasso, *I glossatori*, 106–23; cf. Pennington, *Prince and the Law*, 97–98, 102–5. In the twelfth century, the word *princeps* could be used in a narrower sense by single authorities. The *Kanzlei* of the German king-emperors, for example, used it not only to denote the king-emperor, but also high-ranking nobles and *ministeriales*: see H. Koller, 'Die Bedeutung des Titels "princeps" in der Reichskanzlei unter den Saliern und Staufern', *Mitteilungen des Instituts für österreichische Geschichtsforschung*, 68 (1960), 63–80.

Some jurists (particularly in France) argued that a ruler who exercised *maiestas* was a prince who ruled without any superior (although, as Kenneth Pennington has shown, even this was debated, even within France).¹⁰⁴ Others disagreed, like Marinus, and thought that some kings could be princes and exercise *maiestas* even though they had superior and direct lords according to feudal law. In a lovely parallel to the opening words of *Regiam*, Marinus even argued against those who made the rather facile point that it could only be the emperor who exercised *maiestas* because the opening words of the *Institutes* were ‘imperial majesty’ and not ‘royal majesty’.¹⁰⁵

These words – *maiestas*, *superior*, *princeps* – were thus part of a live juristic discussion that was erupting in the later thirteenth and early fourteenth centuries, even though this discussion is often written about as though it was only occurring in Italy, France and the Empire.¹⁰⁶ Yet the compiler of *Regiam* situated his work within this much broader conversation. This is obvious from its first few chapters. We already know that the king in *Regiam* exercised ‘royal *maiestas*’. In the prologue we learn that the ‘king’ in *Regiam* governs, his ‘rule committed to him by God’, and ‘has no *superior* save the Creator of heaven and earth himself, who governs all things, and the most holy mother, the Roman Church’.¹⁰⁷ In the prologue again, the compiler of *Regiam* emphasised the sceptre of the king as the rod of equity which crushed the ungovernable and overmighty and provided justice for the meek and humble – the sceptre being one of the six items of regalia which Marinus had argued signified the *maiestas* of a sacred ruler.¹⁰⁸ Moreover, the compiler made even more effort to present its king as a *princeps*, a prince. In a section

¹⁰⁴ Pennington, *Prince and the Law*, 95–103.

¹⁰⁵ Marinus, ‘Prooemium’, in Calasso, *I glossatori*, 199–200.

¹⁰⁶ J. P. Canning, ‘Law, Sovereignty and Corporation Theory, 1300–1450’, in Burns, ed., *Cambridge History of Medieval Political Thought*, 454–76, at 464–9; G. Jostkleigrewe, ‘“Rex imperator in regno suo” – An Ideology of Frenchness? Late Medieval France, its Political Elite, and Juridical Discourse’, in A. Pleszczyński, J. Sobiesiak, M. Tomaszek and P. Tyszka (eds.), *Imagined Communities: Constructing Collective Identities in Medieval Europe* (Leiden, 2018), 46–84.

¹⁰⁷ *Regiam*, prologue.

¹⁰⁸ *Ibid.*, prologue: ‘ut effrenatorum et indomitorum detera fortitudinis elidendo superbiam et humilium ac mansuetorum uirga equitatis que sceptrum dicitur moderando iusticiam’. The link between the sceptre and the ‘staff of equity’ was made explicitly by the compiler of *Regiam*; it is not present in *Glanvill*, prologue. For the reference in Marinus, see Marinus, ‘Prooemium’, in Calasso, *I glossatori*, 185. Marinus wrote of the sceptre: ‘Licet ista duo ultima, scilicet sceptrum et malum, possint etiam in alia representatione accipi, videlicet quod rex in una manu portat iustitiam et in alia gratiam sive

based on Goffredus's *Summa*, the compiler substituted Goffredus's *praetor* for *princeps uel balliuus suus*.¹⁰⁹ The overall view of the compiler of *Regiam* on the status of the Scottish kingship is clear: the king was a prince, exercised *maiestas* and had no superior save God and the Church.

But would the participation of *Regiam* in this juristic discussion have been legible or understandable at all within an Anglo-Scottish political context? The letters exchanged between Alexander III and Edward I offer a rich avenue of enquiry for how the authority of the king of Scots was perceived by the English chancery and vice-versa, and how far the two perceptions matched up to one another.¹¹⁰ The potential of letters to be a mine for political thinking is often dismissed by both political historians and legal historians: by the former because letters often explicitly say that the *real* message they were conveying would be delivered orally, and by the latter because the ideas expressed within them are often referred to in passing rather than developed. Only when dossiers of letters were explicitly composed as part of legal struggles are letters given real attention.¹¹¹ Yet letter writing was an 'art': manuals of dictamen survive which tried to educate individuals in the *ars dictaminis* to avoid causing offence to the other party and increasing the chances of a good outcome on behalf of the sender.¹¹² The most important part of a letter to get right was the order of a letter's address, its *salutatio*, because that was the place where relative status was asserted. If an individual was writing to a person of higher status, the recipient's name and title was put first; if the sender was of higher status, then his or her *intitulatio* was placed first.¹¹³ If there was any doubt, then it was safer to put the recipient first: better to be humble

misericordiam ... Vigor quidem iustitiae representatus per sceptrum idest virgam, ut XLV. dist., c. Disciplina' (Marinus, 'Prooemium', in Calasso, *I glossatori*, 186).

¹⁰⁹ *Regiam*, II, c. 39; noted also in Stein, 'Source of Romano-Canonical Part', 110.

¹¹⁰ What follows has learnt much from the approach and insights of Anaïs Waag in her doctoral thesis, 'Forms and Formalities in Thirteenth-Century Queenship: A Comparative Approach', unpublished PhD thesis, King's College London (2020); see, more generally, B. Grévin, 'Les mystères rhétoriques de l'état médiéval. L'écriture du pouvoir en Europe occidentale (XIIIe-XVe siècle)', *Annales*, 63 (2008), 271–300.

¹¹¹ B. Grévin, *Rhétorique du pouvoir médiéval: les lettres de Pierre de la Vigne et la formation du langage politique européen (XIIIe-XVe siècle)* (Rome, 2008).

¹¹² M. Carmago, *Ars Dictaminis, Ars Dictandi* (Turnhout, 1991); M. Carmago, 'What's the Brief? The Ars Dictaminis and Reading/Writing Between the Lines', *Disputatio*, 1 (1996), 1–18; and, most recently, F. Hartmann and B. Grévin, *Ars Dictaminis: Handbuch der mittelalterlichen Briefstillehre* (Stuttgart, 2019).

¹¹³ Waag, 'Forms and Formalities', chs. 1, 3.

than to immediately offend someone you were hoping to persuade by making an ill-advised claim of higher status.

The letters exchanged between Alexander III and Edward I leave no doubt as to relative status. Edward's always put Alexander second, addressing him from first position in the letter, and calling him his *dilectus frater* and his *fidelis*, the language of family and service (*dilectus et fidelis* was the standard address to royal officials). By contrast, Alexander III's *capella regis* did not assert the king's status in his replies: they always addressed Edward as Alexander's *frater* (the two were related by marriage) but, crucially, as his *serenissimus princeps*, his most serene prince, or *magnificus princeps*, magnificent prince.¹¹⁴ *Princeps* was not a title used in any of Edward's surviving letters to Alexander. This does not mean they were devoid of affection: Edward addressed Alexander as his *karissimus frater*, his dearest brother, in his letter of condolence sent on hearing of the death of Alexander III's eldest son, Alexander, in 1284 (all three of Alexander's children – as well as his own mother – had died within three years of each other).¹¹⁵ Yet Edward's letters were still soaked through with a language expressing juristic hierarchy. Indeed, it was not uncommon for Alexander's letters in their *conclusio* to refer to Edward's *maiestas*, and reassure him (often because the two kings were in conflict) that he and his men would do nothing that would harm Edward's *maiestas* or, once, his *regia maiestas*.¹¹⁶ *Serenissimus princeps* was also the formal title adopted by Edward during the Great Cause of 1291–2.¹¹⁷ While contemporary political and legal thought thus provided the immediate contemporary context for the implications of a theory of Scottish royal *maiestas* to be understood, the correspondence between Edward I and Alexander III provided more local contextual power: these were concepts and ranks which the king of Scots had long been excluded from

¹¹⁴ London, The National Archives (henceforth, TNA), C47/22/9/15 (abbreviated copy of exchange between Edward I and Alexander III in 1277 over the border). Alexander III's letter is abbreviated, not containing the protocol or the eschatocol.

¹¹⁵ N. Reid, *Alexander III, First Among Equals* (Edinburgh, 2019), 246–68. The address reads: 'karissimo fratri suo Alexandro eadem gratia Regi Scot fideli suo salutem et sincere dilectionis semper augmentum'.

¹¹⁶ 'Nor is it our intention, nor will it be, by God's grace, in the future, to do anything which might or should offend (*ledere*) the extent (*culmen*) of your majesty'; TNA, SC1/20/150; body transcribed in TNA, C47/22/9/15; printed *Regesta Regum Scotorum Volume 4, Part 1: The Acts of Alexander III (1249–86)*, eds. C. J. Neville and G. G. Simpson (Edinburgh, 2013) (henceforth RRS, IV.1), no. 106.

¹¹⁷ *Edward I and the Throne of Scotland, 1290–1296: An Edition of Sources for the Great Cause*, eds. E. L. G. Stones and G. G. Simpson, 2 vols. (Oxford, 1978), vol. II, *passim*.

in his immediate dealings with the English king, and which *Regiam* was explicitly claiming.¹¹⁸

Regiam was intended to be a treatise setting out the Scottish king's *maiestas*, thus situating itself within the major political discussions of the day and resonating deeply with, but challenging, a longer-held hierarchy between the English and Scottish rulers. The aim was obviously to present the Scottish kingship as one without any superior, thus creating a legal argument for jurisdictional autonomy. It is probable that one of the intended audiences was the pope, then John XXII: Robert was a king without papal recognition and *Regiam* did, after all, stress in the prologue that the king had no superior 'save God and the sacrosanct mother, the Roman Church', an emphasis which Sir John Skene, writing in the generations after the Scottish Reformation, removed from his edition. In the summer of 1320, John XXII would be the recipient of the Declaration of Arbroath, an appeal by the Scottish *communitas regni* which used (partly) history to try to persuade the pope of the legitimacy and antiquity of the Scottish kingship and, more particularly, the right of Robert Bruce to hold it. Expecting the pope to issue a written confirmation of kingship was not unusual: in September 1319, John XXII was to use apostolic authority to 'promote' (literally) Duke Władysław as king of Poland, granting him a royal diadem.¹¹⁹ But that *Regiam* was written with one eye on the papal curia did not mean it was originally intended only for an exterior purpose. Even in its unfinished form, *Regiam*'s aim of emphasising Scottish royal *maiestas* not only affected its presentation of the Scottish legal system but also highlights that there was an additional political discourse circulating in Scotland to the 'community of the realm' traditionally focused upon by historians.¹²⁰

¹¹⁸ The only reference I have found to the Scottish king's *regia maiestas* is in a letter of the deans of Carrick and Cunningham, and the 'master of the schools at Ayr' to Alexander II in the early 1230s (before 25 April 1235) which refer to his *regia maiestas*; *Registrum Monasterii de Passelet: Cartas, Privilegias, Conventiones*, ed. C. N. Innes (Edinburgh, 1832), 169–70, commented on in Taylor, *Shape of the State*, 338. Clement III wrote to Henry II in January 1188, asking him to command King William the Lion to accept the election of John the Scot as bishop of St Andrews, stating that John was prepared to be 'obedient and faithful to the royal majesty'; the bull was copied into Roger of Howden's *Gesta*, for which see *Gesta Regis Henrici Secundi Benedicti Abbatis*, ed. W. Stubbs, 2 vols. (London, 1866–7), vol. II, 57.

¹¹⁹ *Vetera Monumenta Poloniae et Lithuaniae Gentiumque Finitimarum Historiam illustrantia*, vol. I: 1217–1409, ed. A. Theiner (Rome, 1860), no. CCXXVI, 146–8, at 147.

¹²⁰ It is of interest that, in his still-thought-provoking *Principles of Politics and Government* (intended for a popular audience), published in 1961, Walter Ullmann distinguished two

Maiestas and *Communitas*: Parallel Legal Discourses

How did *Regiam*'s aims affect its content? First, *Regiam* contains the first formal reference to treason – lese-majesty – in Scotland. While the *crimen lese maiestatis* was referred to in the 1266 Treaty of Perth between Alexander III and Magnus VI of Norway, we have no explicit reference to treason legislation or law within Scotland before its appearance in *Regiam*, where it is listed at the beginning as the first plea belonging only to the Crown: the ‘crime of lese-majesty’ or ‘of harmed or offended *maiestas*’, that is, for the death of or *sedicio* against the king, kingdom or army.¹²¹ Indeed, the opening sentence of *Regiam* highlights an underlying concern for internal order upheld by legitimate royal authority: whereas *Glanvill* follows the *Institutes* by saying that royal power must be decorated with arms against the ‘rebels and peoples’ (*rebelles et gentes*) who rise up against it, *Regiam* says that ‘royal majesty must be decorated with arms to act against *rebels*’, consciously avoiding the diluting effect of the *gentes*.¹²²

The stress on royal *maiestas* was not confined to *Regiam*. In the 1310s, the clerks of Robert I's ‘chapel’, or chancery, were developing the position that the Scottish king exercised *maiestas*, offending which constituted a crime risking life, limb or disinheritance, and made reference to the king's *maiestas* in his charters for the first time. Formulae mentioning the crime of offending the king's *maiestas* started to appear in royal

‘types’ of kingship which prevailed in the central/late Middle Ages: ‘feudal kingship’, as typologised in the example of England, and ‘theocratic kingship’, typologised through the example of France. Ullmann presented these two types as, essentially, incompatible; the example of Scotland provides an interesting example of competing discourses within the same polity (at 211: ‘the constitutional development depended, in short, on whether the theocratic or the feudal functions of kingship predominated’).

¹²¹ RRS, IV.1, no. 61; *Regiam*, cc. 1, 134, 141. The only pre-1310 reference seems to be the news reported to the English king on 20 August 1299 and surviving in an enrolled chancery copy, which referred to William Wallace leaving Scotland ‘without the leave or approval of the guardians’ (translation in Barrow, *Robert Bruce*, 140–1, referring to TNA, C47/22/8 (the words are in fact ‘qe treson ov maeste fu purparle’). The Scottish King's Household mentions treason, but this might well date to the 1310s as well. See David Carpenter, ‘“The Scottish King's Household” and English Ideas of Constitutional Reform’, *The Breaking of Britain: Cross Border Society and Scottish Independence, 1216–1314*, Feature of the Month, October 2011, available at www.breakingofbritain.ac.uk/blogs/feature-of-the-month/october-2011-the-scottish-kings-household/index.html. Even Robert I's 1314 legislation refers to *inimici regis et regni* rather than referring to the crime of offending the king's *maiestas* (RPS, 1314/1, editing Edinburgh, National Records of Scotland, SP13/6).

¹²² *Regiam*, prologue; *Glanvill*, prologue, transcribed above, notes 92–93.

charters from 1310 onwards.¹²³ Some royal charters even set out a conception of princely authority mirroring that which is found in *Regiam*. An intriguing letter – which now only survives as an inspection of James I made in 1424, but which was originally drawn up in 1315 and confirms the possessions of Kinloss Abbey – unusually calls all Scottish kings *princes*: in this document, Robert was following in the footsteps of those ‘most serene princes’ (*serenissimi principes*), his predecessors, the kings of Scotland.¹²⁴ The charter then ends with the injunction that Kinloss Abbey should hold all their lands peacefully, on pain of the king’s full forfeiture and ‘offence of our royal majesty’. This is particularly interesting as it suggests an extremely wide and flexible definition of treason which included harming the property of a monastery under the king-prince’s protection. ‘Lese-majesty’ is also included in another legal compilation compiled in Robert’s reign, known as the Assizes of David I (not to be confused with *Regiam*).¹²⁵

Indeed, that Robert and his government were actually following through on their own idea of *maiestas* is shown not only in the parliament held at Scone in early December 1318 but also by the way they treated the so-called Soules Conspiracy in 1320, a plot to assassinate Robert himself.¹²⁶ The parliament held at Scone not only issued a series of rather influential legislation, but also recognised Robert’s nephew Robert Stewart as his heir (his brother and heir, Edward, had been killed earlier in the year, after having been proclaimed king of Ireland). In addition, Thomas Randolph was named guardian of the kingdom if Robert Stewart succeeded as a minor (in the event he succeeded over

¹²³ *Regesta Regum Scotorum Volume 5: The Acts of Robert I, 1306–29*, ed. A. A. M. Duncan (Edinburgh, 1988) (henceforth *RRS*, V), no. 13: ‘quia Johannes de Polloc contra fidem et fidelitatem nostram extitit et existit inimicis nostris adherendo et in lesione nostre regie magestatis totis viribus notorie machinando’; *ibid.*, no. 140, remits the royal rancour against Henry, bishop of Aberdeen, and regrants him the temporalities of his episcopacy ‘sub pena nostre plenarie forisfacture et offensionis nostre regis magestatis’. This was probably issued at the parliament held at Scone 3–5 December 1318, which issued an important piece of legislation that in part dealt with questions of political loyalty and unity, yet *in that legislation* did not invoke the concept of *maiestas* (*RPS*, 1318; also *RRS*, V, no. 139), even though they mentioned royal majesty in the 1318 entail. See also *RRS*, V, nos. 416, 559; see *Scottish Formularies*, ed. A. A. M. Duncan (Stair Society, 58; Edinburgh, 2011), E55 (78) B37 (135).

¹²⁴ *RRS*, V, no. 66 (NRS, Great Seal Register C2/2, no. 9, inspection by James I, 12 October 1424, also copied in a notarial instrument in 1413 in Kinloss’s archive). For the dating, see *RRS*, V, 351.

¹²⁵ *CD*, c. 32, in Taylor, ed., *Laws of Medieval Scotland*, 518–19.

¹²⁶ See the most recent treatment in Penman, *Robert the Bruce*, 219–27.

half a century later). Crucially, anyone who went against these provisions would be treated as ‘a traitor to the kingdom and guilty of the crime of *lesa maiestas* in perpetuity’ – a reference to *maiestas* otherwise absent in the 1318 legislation itself.¹²⁷

The so-called ‘Soules Conspiracy’ of 1320 showed that Robert and his government would be true to their legislative word. Although later chroniclers have the rather odd story that the coup was to raise to the kingship the relatively minor political actor, William de Soules, it has been convincingly argued that this conspiracy aimed at replacing Robert with Edward Balliol.¹²⁸ Edward was the son of the king of Scots, John Balliol (1292–6), who had substantial English backing and who indeed would be consecrated as a rival king of Scots to Robert’s young son, David, following Robert’s death and as externally sponsored civil war broke out again.¹²⁹ The charge against these conspirators was *lesa maiestas*, according to *Gesta annalia* II and Walter Bower.¹³⁰ Horrific executions are an accepted part of the political narrative of this period: a decade and a half earlier the body parts of William Wallace had been displayed in four towns (three Scottish, one English) following his conviction for treason and sacrilege, while Robert I’s younger brother, Niall, had been hanged, drawn and quartered at Berwick in 1306, to name but two high-profile mutilations.¹³¹ Yet it is still worth pointing out that not only was the fate of the conspirators in the Soules Conspiracy unprecedented in a Scottish judicial forum (one unfortunate even sentenced to being hanged, drawn and quartered despite already being dead, and two others to be pulled apart by horses), so too was the very idea of a formal treason trial.¹³² The formal legal category of treason, of lese-majesty, against the Scottish king should perhaps be seen as a picking up of the

¹²⁷ RPS, 1318/30

¹²⁸ Penman, *Robert the Bruce*, 221–7.

¹²⁹ A. Beam, *The Balliol Dynasty, 1210–1364* (Edinburgh, 2008), 223–34; M. Hammond, ‘Scotland’s Forgotten King’, *The Community of the Realm in Scotland, 1249–1424: History, Law and Charters in a Recreated Kingdom*, available at <https://cotr.ac.uk/blog/scotlands-forgotten-king/>.

¹³⁰ *Gesta annalia* II, in *Joannis de Fordun Chronica Gentis Scotorum*, ed. W. F. Skene (Edinburgh, 1871), 348–9; *Scotichronicon* by Walter Bower, gen. ed. D. E. R. Watt, 9 vols. (Aberdeen and Edinburgh, 1989–98), vol. VII, 2–3.

¹³¹ Barrow, *Robert Bruce*, 177–9, 209–10.

¹³² *Gesta annalia* II, in *Fordun*, ed. Skene, 348–9; Penman, *Robert the Bruce*, 221–6. This is not to say that horrific killings had not been part of the political landscape in Scotland, but the framing of them as formal punishments for treason was new.

pace of Robert's reign, with *Regiam* being an early manifestation of its more prominent conceptualisation.

A further way in which *Regiam*'s aim of stressing royal *maiestas* is developed is in its presentation of jurisdiction and courts. *Regiam* depicts jurisdiction, substantive law and procedure as being clearly hierarchical, bounded, co-dependent and, more importantly, completely royal. *Regiam* only describes procedure in royal courts, those of the justiciar and the sheriff. We see this hierarchical element clearly in *Regiam*'s presentation of the procedure to be followed in a case of rape, which is to be found in book 4: the victim has to show injuries first to the leading men of the vill, then to the sheriff, then to the justiciar.¹³³ In addition, *Regiam* also minimises non-royal secular jurisdiction. This is important because Scottish royal justice explicitly incorporated non-royal temporal jurisdiction to a much greater extent than its English counterpart, with certain individuals and institutions able to hear pleas of the Crown.¹³⁴ Not only does *Regiam* explicitly deny this jurisdictional *fact*, its compiler also describes such courts as *curie private* – private courts – to be contrasted with the *res publica* over which the law of the king ran.¹³⁵

What this suggests, therefore, is that the emphasis on the *maiestas* of the Scottish king may have quite significantly affected the presentation of Scottish law and its legal system within *Regiam* itself, had the compiler finished his work. The emphasis on royal *maiestas* could well have resulted in a presentation of the relationship between the king and the law in which the king was the sole source of law and the conduit by which other sources of law – particularly Roman and Canon – were upheld within his kingdom. All this suggests a rather different idea of kingship than is normally emphasised in scholarship of this period, where the political dominant idea examined has been that of the community of the realm.¹³⁶ This is a powerful narrative: after the death of Alexander III, the elite of the kingdom bound together as the *communitas regni* to guard it, first until its minor heiress came of age and,

¹³³ *Regiam*, cc. 1–3 and, for rape, 140; cf. *Glanvill*, XIV, 6.

¹³⁴ See, in general, Taylor, *Shape of the State*, 157–64, 334–43, 445–55.

¹³⁵ *Regiam*, c. 18. This also affects how we understand the conceptualisation of major jurisdictions as regalities; see A. Grant, 'Franchises North of the Border: Baronies and Regalities in Medieval Scotland', in *Liberties and Identities in Medieval Britain and Ireland*, ed. M. Prestwich (Woodbridge, 2008), 155–99.

¹³⁶ Most powerfully in Barrow, *Robert Bruce*, although in a more ambiguous way than is often stressed.

then, against English aggression. The new and controversial king, Robert, had then to align himself with this notion, for, in addition to being a member of the aristocracy himself, the *communitas regni* was the basis of his own legitimate authority.¹³⁷ In this way, the *communitas regni* became a historical witness to the idea of a Scottish political nation.¹³⁸ But *Regiam* allows us to identify an alternative and not-necessarily-conflicting strain of thought around royal *maiestas*: a conception of singular legal authority residing in the king alone which could have been just as influential as *communitas* in our understanding of political thought during this period, had *Regiam* been finished and circulated. Indeed, the compiler of *Regiam* himself seems to have shied away from developing the idea that legal authority resided in the *communitas* as opposed to the *maiestas* of the prince, for he removed the sections of *Glanvill's* prologue which mentioned counsel and consent from its counterpart in *Regiam*.¹³⁹ The word *communitas* appears only once in *Regiam*, in one of its least-edited sections.¹⁴⁰

¹³⁷ Barrow, *Robert Bruce*; see also M. Penman, “The King Wishes and Commands?” Reassessing Political Assembly in Scotland, c. 1286–1329”, in M. Damen, J. Haemers and A. Mann (eds.), *Political Representation: Communities, Ideas and Institutions in Europe, c. 1200–c. 1690* (Leiden, 2018), 123–41.

¹³⁸ Traditionally, this is thought to have manifested most clearly in the Declaration of Arbroath of 1320 (NRS, SP13/7), described as ‘the most eloquent statement of regnal solidarity to come out of the middle ages’; S. Reynolds, *Kingdoms and Communities in Western Europe, 900–1300* (Oxford, 1987), ch. 8 (250–331, at 274–6 for the Declaration).

¹³⁹ *Regiam*, prologue; cf. *Glanvill*, prologue. *Regiam* does, however, miss out *Glanvill's* injunctions that the king be guided by the laws and customs which are reasonable and long-standing, by those in his kingdom most learned in law, and *Glanvill's* reference to what pleases the prince has the force of law (*Digests* 1.4.1; *Institutes*, 1.2.6). It is interesting that *Regiam* did not include the maxim *quod principi placuit legis habet vigorem*, but this might be because it was so embedded in a passage in *Glanvill* stressing the opposite (that princely authority was constrained by council). It may be that, had *Regiam* been completed, a stronger sense of the relationship between the Scottish prince to its law might have come through.

¹⁴⁰ *Regiam*, c. 148. This was originally an oath sworn in 1197 to keep the peace. It first survives as *Leges Scocie*, c. 15, and was then incorporated and updated in *CD*, c. 27 (which may well post-date *Regiam*). The emphasis on *communitas regni* does not appear in this version of this chapter, although *CD* stresses its enactment ‘de consensu magnatum’. The version in *Regiam* preserves (bar the reference to the community) more of the readings of the *Leges Scocie*-version than the *CD*-version. For the *Lege Scocie*, *CD*, and *Leges Willelmi* versions, see Taylor, ed., *Laws of Medieval Scotland*, 418–19, 512–15, 554–7.

Conclusion

Notwithstanding the moths and worms of Skene's 'old books', there is merit in trying to understand what *Regiam maiestatem* actually says, and what that might mean. *Regiam* is unfinished in its earliest surviving manuscripts and was probably originally an unfinished work. Questions must now be asked of how, why and when this unfinished work was transformed (probably by making a fair copy) and circulated as though it was finished. It will be argued elsewhere that, although it is impossible to prove, *Regiam* was resurrected during the second rule of David II, who issued quite extensive and wide-ranging pieces of legislation in the 1360s, and whose reign seems to have witnessed the 'rewriting' of the kingdom's 'auld law', through the composition of works such as *Leges Malcolmi Mackenneth*, *Ordo justiciarie* and, probably, the legal compilations attributed to William the Lion (1165–1214) and Alexander II (1214–49).¹⁴¹ Regardless of immediate origin, however, *Regiam* had obtained the status of an authoritative source of law by 1426 and, in the fifteenth century, was circulated and revised as the kingdom's 'auld law', thus ushering in centuries of confusion about why a lawbook which did not make much sense as a guide to the early Scottish Common law could have achieved such authoritative status.

Yet, moving aside centuries of textual accretion, we can still see the original conception of *Regiam* as a work of political legal theory by a well-ordered, knowledgeable and intellectually creative mind of the early fourteenth century. Much like the reason why *Regiam* was circulated in its unfinished state, the identity of the compiler of *Regiam* will never be known definitively. Whoever he was, he was closely connected with promoting the legitimacy of Robert's kingship, knew Canon, Civil and Common law, was informed of the latest commentaries, and was probably acquainted with the major controversies over legal authority and jurisdictional boundaries which were coursing through France, the Empire and Sicily in this very period. Given that context, it is tempting

¹⁴¹ For the laws of Malcolm Mackenneth and *Ordo justiciarie*, see A. A. M. Duncan, 'The "Laws of Malcolm MacKenneth"', in A. Grant and K. J. Stringer (eds.), *Medieval Scotland: Crown, Lordship and Community – Essays Presented to G. W. S. Barrow* (Edinburgh, 1993), 239–73; for the compilations attributed to William and Alexander, see Taylor, ed., *Laws of Medieval Scotland*, 351–6; see further A. Taylor, 'The Laws of the Realm in Fourteenth-Century Scotland', in S. Boardman (ed.), *The Community of the Realm in Scotland, 1249–1424: History, Law and Charters in a Recreated Kingdom* (forthcoming).

to see the compiler as the university-educated Robert Wishart, bishop of Glasgow (1273–1316), auditor and defender of the Bruce claim in the Great Cause, stalwart supporter of Robert's incipient and controversial kingship in 1306, and captive of the English from 1308 to 1315, when he was released, blind (although this is according to John Barbour in his vernacular epic, *The Brus*, produced in the 1370s) but still politically active, and returned to Scotland.¹⁴² The possibility that Robert was the compiler of *Regiam* is suggested by his university education, the presence of Roman law terminology in some charters closely associated with his episcopate and the fact that he spent some of his captivity at the papal curia (and seemingly witnessed at least the early stages of the conflict between Robert of Naples and Henry VII play out, a conflict which in part raised the question of each ruler's *maiestas*).¹⁴³ Wishart's death on 26 November 1316 might also provide an explanation of why *Regiam* was left unfinished: if Robert were the compiler, he might have been mid-way through his work when he died.

Robert Wishart's authorship will never be proven and remains only a likelihood or a possibility. What can be said is that the aim of *Regiam*'s compiler was to show, through a variety of techniques – hidden intertextual citation, intercontextual translation and explicit statement – and a variety of legal authorities that the king in his kingdom had no superior other than God and the Church, and certainly not, by implication, the king of England. This intention behind *Regiam* reveals not only that a polity on the 'periphery' of Europe was as engaged in debates about authority as any jurist in Paris or Naples, but also highlights how far our understanding of political thinking during the thirteenth and fourteenth

¹⁴² For Robert Wishart, see A. A. M. Duncan, 'Wishart, Robert (c. 1240–1316)', in *Oxford Dictionary of National Biography* (Oxford, 2004), available at www.oxforddnb.com/view/10.1093/ref:odnb/9780198614128.001.0001/odnb-9780198614128-e-29797?rskey=1Ig5WE&result=13; D. E. R. Watt, *A Biographical Dictionary of Scottish Graduates to A.D. 1410* (Oxford, 1977), 585–90. Robert Wishart, who had also attended the Second Council of Lyon in 1274, was the first of Robert Bruce the Competitor's auditors in 1291 (Stones and Simpson (eds.), *Great Cause*, vol. II, 82). For some early documents drawn up for the Abbey of Paisley, which are soaked in Roman law, but with the figure of the newly elected bishop looming large in the background, see *Registrum monasterii de Passelet*, ed. Innes, 180–3, 183–9, 192–5, 195–7 (note repeated pagination in this volume). Bishop Robert still witnessed two of Robert I's charters on 1 May 1315 after his release (*RRS*, V, nos. 64–5); for more of his activity, see Watt, *Graduates*, 590.

¹⁴³ Watt, *Graduates*, 589–90 (where it is recorded that he was back in London by 24 March 1312 or 1313). Robert was present at the 1314 parliament at Cambuskenneth, where the 'enemies of the king and kingdom' were deprived of their lands; *RPS*, 1314/1.

centuries is still framed by the big political crises and intellectual centres of the 'core' areas of Europe. *Regiam* instead reveals how widely embedded this legal language was, both geographically and, also through letters and more ephemeral sources, in political communication.

Finally, *Regiam* reveals an alternative conceptualisation of the Scottish king's political authority which centred around his *regia maiestas*, and only a long-standing but perhaps uncritical focus on the idea of 'the community of the realm of Scotland' has prevented the identification of this strain of thought in Robert's kingship, as much as the fact that *Regiam* was unfinished. Indeed, that *Regiam* may have intended to create a new – or at least different – legal underpinning for Scottish kingship is suggested not only by its innovative content but also by its presentation of royal jurisdiction as the only legitimate temporal forum. But *Regiam* was *not* finished, the aims and ambitions of its compiler were abandoned and what survives of it retains only the foundations of its original design, buried beneath a mass of *Glanvill* unadapted to its intended field of application. In 1681, Viscount Stair wrote in his *Institutions of the Law of Scotland* that *Regiam*, because of its heavy dependence on *Glanvill*, was 'no part' of Scots law.¹⁴⁴ Stair might have been surprised to learn that a historian writing nearly three-hundred-and-fifty years later now suspects that, could the original compiler of *Regiam* have seen what is now recognised as *Regiam maiestatem*, he might well have agreed with the Viscount's damning judgment.

¹⁴⁴ Lord Stair, *Institutions of the Laws of Scotland*, ed. D. M. Walker, 2 vols. (Edinburgh and Glasgow, 1981), vol. I, book I, 16 (pp. 88–89).