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Brus *versus* Balliol, 1291-1292: the Model for Edward I.'s Tribunal

IT is no small pity that the great lawsuit for the Crown of Scotland still waits a competent and full report of its many aspects not only as a great national episode but also as a brilliant example of exact juridical record, and a leading case in the law of feudal succession. Sir Francis Palgrave edited in 1837, in his *Documents and Records illustrating the history of Scotland*, a great number of till then almost wholly overlooked pleadings and minutes in the elaborate litigation of the would-be kings. For these legal muniments he wrote an important and in many respects fascinating introduction, which brought back for the first time into light and life the varied and often thrilling phases of claims and counterclaims, precedents, answers and arguments, minutes, procurations and notarial notes of the sundry sessions and adjournments of the cause, including the nominations of the Auditors for the various parties and for the postulant Lord Paramount himself in the great debate for a throne.

Much subtle and skilful interpretation was put forward in the introduction, the substance of which has stood little affected by the course of historical or legal criticism during the eighty years which have passed since then. It was a famous and worthy adventure in historical disquisition in which Sir Francis touched with a master-hand many of the constitutional issues at stake. But on one important theme he was silent, and upon that the curiosity of his critics seems to have been no livelier than his own.

The question indeed seems somehow never to have occurred to the Scottish historians or historical critics, ancient or modern. It is the question of a numerical peculiarity about the body of Auditors whom King Edward I. in setting up his tribunal ordered to be 'nominated and elected' to assist him in the judicial task committed to him of determining the right to the realm of Scotland claimed by a dozen aspirants. At a very early stage of the cause, on 3rd June 1291, the great roll of the plea, incorporated in Rymer's *Foedera* (ed. 1816-1869, vol. i. pp. 762-784), that is to say the *Magnus Rotulus Scotiae*,[1] records that King Edward, by unanimous agreement among the various vindicators of their right to the realm, arranged and ordained (p. 766) that for the hearing and discussion of the cause Sir John Balliol and John Comyn for themselves and other petitioners should choose forty fit and faithful men and that Sir Robert Brus for himself and the other petitioners should elect other forty, while the King himself was to nominate four-and-twenty more. The date appointed for these nominations and elections was the third day succeeding, viz. 5th June 1291. That day, at the adjourned sitting of the court, those nominations and elections were duly made, and it is specifically minuted in the great roll (Rymer, i. 766) as well as in the separate notarial protocol of the day (Palgrave, Illustrations, No. ii.) that forty named persons were chosen by Balliol, forty by Brus, and twenty-four by Edward himself. Edward I. therefore in setting up the tribunal that was to determine the great issue of right and succession to the vacant seat of Scottish royalty began by ordering the election of 104 Auditors to be in the closest sense associated with himself in deciding the historic cause. Why this number of the Court?

A return recently for other purposes to this old field of legal interest has made visible the fact that many of the Edwardian annalists and most of the Scots chroniclers were in error not only about the number but also about the precise character of the court. Pierre de Langtoft (*R.S.* ii. 192) does not state the number of the 'tryours' who examined the case. Walter of Hemingburgh persistently styles it an 'arbitration' in which there were 80 arbiters 50 of them Scots and 30 English. Nicholas

[1]This great instrument bears successive dates, beginning with the minute of proceedings at the 'first convention' or opening meeting at Norham on 10th May 1291, and ending with the notarial attestation of Balliol's letter to Edward I. at Newcastle-on-Tyne on 2nd January 1293, some days after Balliol had done homage for the kingdom awarded to him.

Trivet (ed. Hog, p. 324), the anonymous author of the *Lanercost Chronicle* (p. 142) and Sir Thomas Gray in the *Scalacronica* (p.119) unite in saying that the total number of associates was 40, of whom twenty were chosen from each realm. Fordun (ed. Skene, i. 312, 313) declares that Edward was called in 'not as overlord nor as judge of right, but as a friendly arbiter' (*amicabilis arbiter*), and that he invoked to his assistance eminent persons to the number of 80 according to some, 40 according to others, or according to yet other opinions 24, of whom 12 were English and 12 Scots.

Andrew of Wyntoun, of all the chroniclers by far the most elaborately and argumentatively juridical in his long discussion of this vital episode (ed. Amours, volume v. pp. 165-224), calls the case a 'compromyssion' or 'arbitry' (*ib.* pp. 165, 167 and 175), in which the English King was trusted

> 'as gud nychtbure
> And as freyndful composytoure,' (*ib.* p. 167)

assisted by certain 'wise men' of each realm:

> 'Foure score sum said or fewar
> Bot four and twenty thai said thai ware.' (*ib.* p. 215)

Evidently Wyntoun followed the same authorities as Fordun: in both chronicles it is clear that the conception of the English King's position was that of *amicabilis compositor*. This name, which throughout the middle ages had probably the widest currency as the technical term for an arbiter, nowhere appears in the petitions, pleadings or official protocols of the cause. The competitors themselves ('compromising' themselves it may be truly enough) owned by minuted writing under seal that to Edward I. belonged the jurisdiction *de oir, trier et terminer* the question of right. The entire form of the record in all its scattered parts is foreign to the conception of arbitration. At each stage Edward claims and is recognized to be not arbiter but judge.

Walter Bower, continuator of Fordun's *Scotichronicon*, states at one place (lib. xi. cap. 2) that the auditors were '104 in number, 24 of them English, 80 of them Scots,' but further on (lib. xi. cap. 10) he lapses into mingled error and uncertainty, declaring himself as not knowing whether they were 24 or 40 or 80 (just as Wyntoun had the figures), although mentioning that he had found that the majority of the manuscripts (*plures codices*) favoured the first number. This no doubt explains why the *Liber Pluscardensis* (lib. viii. cap. 2) states that they were 24, of whom 12 were Scots and 12 English. Long afterwards the same

statement was made by Bishop Lesley in his History (ed. 1675, p. 221) where King Edward is styled 'arbiter.'

Clearly there were confusions, and as we have seen, the English chroniclers had their share of them. Henry of Knighton (ed. *R.S.* i. 286) fell into more errors than one when he said that there were 30 Scottish and 30 English 'arbitrators,' that they 'chose' (*elegerunt*) John of Balliol, and that Edward accepted him (*acceptavit eum*). By far the most important record of the trial in the archives of English history, however, with the possible exception of the great roll itself, its component and complementary protocols and some stray pleadings, is an early fourteenth century manuscript, the *Annales Regni Scotiae*, ascribed on apparently quite inadequate grounds to William Rishanger, and therefore edited as part of his diversified important but somewhat scattered historical work in his *Chronica et Annales* (ed. *R.S.* pp. 231-368). There are better reasons [1] perhaps than the editor gave (pp. xxv-xxxi) for believing that this invaluable appendix to the great roll, with its very numerous touches of authentic detail on the course of the trial, came from a first-class contemporary hand, professionally engaged in noting the *res gestae* of the litigation. The acute informant, whoever he was, declares that the 80 of Scotland and the 24 of England were chosen as in the manner of compromission—*quasi per viam compromissi* (p. 238), which was a mode of election familiarly resorted to in contests for ecclesiastical appointments. The analogy is shrewd, especially in so far as a process of election was involved, but the *Annales Regni Scotiae* gives no more countenance than the great roll to the proposition that the law plea for the Crown was an arbitration. Whatever may have been in the mind of the Scots in their approach to the English King it is fair to point out, not merely that no document of process extant bears out the supposed arbitration, but also that Robert de Brus, the apparent original mover of the cause, appealed from the outset to Edward as King and overlord and even addressed him as 'Empereur' (Palgrave, p. 29). That there were nevertheless elective and other elements

[1] The editor, Mr. H. T. Riley, seems to have missed noticing John of Caen's own significant statement (Palgrave, p. 299) to Edward I., dating from about 1306, that he had 'about him' notes and remembrances of the weighty matters touching Scotland—*il eit vers lui notes et remembraunces des chariantes busoignes que touchent Escoce*. These notes, he said, he had not been able to work up in due form because he had been worried and 'rioted' by Archbishop Winchelsea. [*Chariantes* from *charger* (which recurs below) is more readily intelligible in the spelling *charjantes*].

about the cause to which a Lord Paramount's notary was not called upon particularly to attend, and which it was not always convenient to record, need hardly be denied.

It is at least faintly possible that the conflicting misstatements of the number of jurors or assessors in the trial may come in part from contemporary rumours or proposals about the coming trial, *i.e.* that there may have been conflicting methods discussed before the final victorious proposal was actually adopted. A natural precedent might have been the border assizes or commissions of knights. A principle of March law was to have an equal number of representatives of the confronting nationalities, for example, six knights of England and six of Scotland in 1248; twelve knights on either side (together twenty-four) in 1246, 1249, and 1285. In 1245 an enquiry relative to the frontier line was made by 24 knights of Northumberland.[1] There is therefore a little to go upon, admittedly not much, by way of precedent for that number 24 which the chronicler Bower found most prevalent in the manuscripts.

No chronicler, historian, or critic hitherto, however, has offered any hint to account for the actual historical number of 104 auditors, plus the Lord Paramount himself, as certiorated by the great roll, which is not only final regarding the auditors, their number and their character, but is equally definite in registering the fact that the suit was in its authoritative form, as actually conducted, no arbitration dependent for its sanction upon the consent of the litigants, but was projected and carried through by King Edward as a regular legal process of a feudal court, a plenary parliamentary court.

There is, in spite of the many prudential and cautious concurrent acceptances of jurisdiction, no real foundation for reckoning the cause as either in the modern or the contemporary sense an arbitration or 'compromission' of arbitral reference (*compromissum ad arbitrium*),[2] or to style the tribunal, as for instance one distinguished recent historian does, a 'Court of Arbitrators.'[3] The 104

[1] As to these border commissions see Bain's *Calendar*, i. appx. No. 5, i. 1676, 1699; ii. 275; *Acts Parl. Scot.* i. p. 413.

[2] Compare the Scottish proceedings with the *Compromissio ad Arbitrium* made to Edward I. by the Count of Holland and the Duke of Brabant in 1297 (Rymer, 8th Jan., 1297). The complete difference is obvious.

[3] Sir J. H. Ramsay, *The Dawn of the Constitution*, 1216-1307, p. 386. It is an occasion of regret to have to contradict an authority to whom on every count, alike personal and historical, so much deference is due.

were not arbiters, they were auditors; and it was through auditors in the thirteenth and fourteenth century parliaments alike of France, England and Scotland, that the Kings of these countries administered justice in their respective courts of parliament.[1] It was the normal method of parliamentary law; arbitration was a quite different thing. It will be difficult to find in the great roll a single word to countenance the interpretation that Edward I. was only a magnified arbiter, or that the auditors any more than Edward himself were 'amicable compositors' in the technical sense. Certainly they were appointed *ad jus dictorum petentium deffiniendum*, as the *Annales Regni Scotiae* (Rishanger, p. 238) has it, but these annals, equally with the great roll, emphatically state and shew that the function of the auditors was to discuss the case and report to the King who meant, he himself said, *jure proprio* to decide it at law (*definiendum de jure*); to him, he claimed, the decision belonged (*ad quem pertinet negotium diffinire*) and his right to decide was therefore expressly reserved (Rymer, i. 763, 764, 765, and 766; Palgrave, Ill. No. iii.). In fact, if we accept, as most probably we must, the *Annales* as a truthful record on that head, preferable to the great roll itself, the judgment rejecting the claim of Brus was drawn up (*ordinata*) by the King's 'whole council,' along with or inclusive of the 24, after which it was submitted to and approved of by the 80; but it was not the judgment of the 104, it was the King's judgment, and when the time came it was delivered as the King's judgment (*judicium*), not a decree arbitral, by his chief justice, Roger de Brabazon (Rishanger, pp. 261, 262, 358).

If the great roll had risen to the height of its lofty opportunity, each step of pleading and process should, with all attendant circumstance of date and detail, have been notarially recorded, fully, frankly and faithfully. But the notary, although his roll was a notable performance, fell somewhat short of even his own ideal. He confesses one bad oversight, which may well have mortified a medieval formalist: the place where the judgment was pronounced—*le lieu du jugement rendu*—an essential in the right 'rolment of Courts,' had been left out (Palgrave, 298). This was an omission of a most important character, an *article mout durement chariant*, in the chief point of the whole process (*en le plus fort poynt de tot le proces*), which only the hand of the

[1] The great constitutional, legal and historical interest of this for Scotland is dealt with in the introduction to the *Acta Dominorum Concilii*, vol. ii. A.D. 1496-1501; 1917, not yet issued by the Stationery Office.

notary himself John, son of Arthur of Caen (*Johannes filius Erturi de Cadomo*, *Johan de Caam*) who wrote it, could competently amend (Palgrave, 298, 299). Some Scotsmen may prefer to hold that the flaw in the judgment was far too deep to be cured. Apart from the question of validity, however, the great notarial roll, able and comprehensive document though it was, had graver deficiencies than a failure to register the place of judgment. Important stages of the trial, incidental findings which formed the base of the final decision, diets of the Court, *e.g.* on October 24, 29 and 31, November 3 and 5, 1292, and other matters of pith and moment, whether for fact or form have unfortunately been dropped. It was no doubt a sufficient register of the trial, but vital elements in the process and in the judgment are recorded elsewhere and are wanting from the roll. In fact the roll edited in Rymer is in the main an imperfect incorporation by Master John of Caen of the admirable protocols of Master Andrew of Tange recording from day to day the separate stages of the process. The roll in Rymer is thus not definitive on the entire course of the cause.

But we return from discussion of John of Caen's great roll to raise the enquiry whether it was not by something more than a coincidence that the persons of the court whereof the deliberations and decision it magistrally set down were precisely of the number of the ancient Roman court of the *Centumviri* consisting throughout large part of the republican period of one hundred and five men? It is well known by the evidence of Festus that from at least the middle of the third century before Christ until after Cicero's time the court was representative, each of the 35 Roman tribes having three constituents upon it. Gaius (iv. 16. 31. 95) tells that at its sittings a spear was set up, the historic emblem of quiritarian authority. Its jurisdiction clearly favours the suggestion of its direct adoption as a precedent by Edward I., for the peculiar province of centumviral authority lay in the decision of questions of right of property and specially concerned hereditary succession. The vouchers of the centumviral court and its activities embrace many great names, not only of Roman literature and law, but also of the long line of glossators and commentators who recovered the sense and majesty of Roman jurisprudence. Cicero, Pomponius, Julius Paulus (v. 16), Quintilian, Pliny, Phaedrus, Lucan, Martial, Gellius, Suetonius, Valerius Maximus and Dion Cassius are among the original authorities for the legal function and popular position of the

court. Although its 'ambitious sentences' had to be pruned by Domitian the Emperor, Justinian recognised the amplitude of reputation of the tribunal, and his approbation found emphatic expression in both Digest and Code.[1]

Among the commentators[2] of the civilian renaissance Cujas was followed by Raevardus, Nicolas Boer, Heineccius and Kahl in chapters of exposition of this court which have been classified and expanded by the moderns[3] Mommsen, Sohm, Greenidge, Muirhead and Fowler. Nor may we omit the quaintness of its appearance in the whimsical jurisprudence of Pantagruel (Rabelais, iii. ch. 39). But chiefly it is important to note as the common verdict of legal commentary that this court was noted for the magnitude and authority of its decisions: that one of Justinian's references to it has been styled a eulogium,[4] that in its procedure the old *legio actio sacramento* was long in prevalent use and that its province specially consisted of the vindication (*vindicias dicere*) of rights of property and succession, and indeed that all its actions were *vendicationes*, primarily of quiritarian right. The scope of the court was modified under the emperors, its membership increased to 180, and its method of procedure changed in some respects from the republican conditions under which the 105 centumvirs had sat for over 250 years. Its dignity and importance persisted under imperial auspices.

The correspondence of the conditions as to the number of the court, the high question at issue, and the competitive demands of the petitioners in 1291, points to more than a suggestion of some relationship in constitution between the old Roman tribunal and the *pro re nata* court which was to pronounce the celebrated *dreituriel jugement* of 1292.

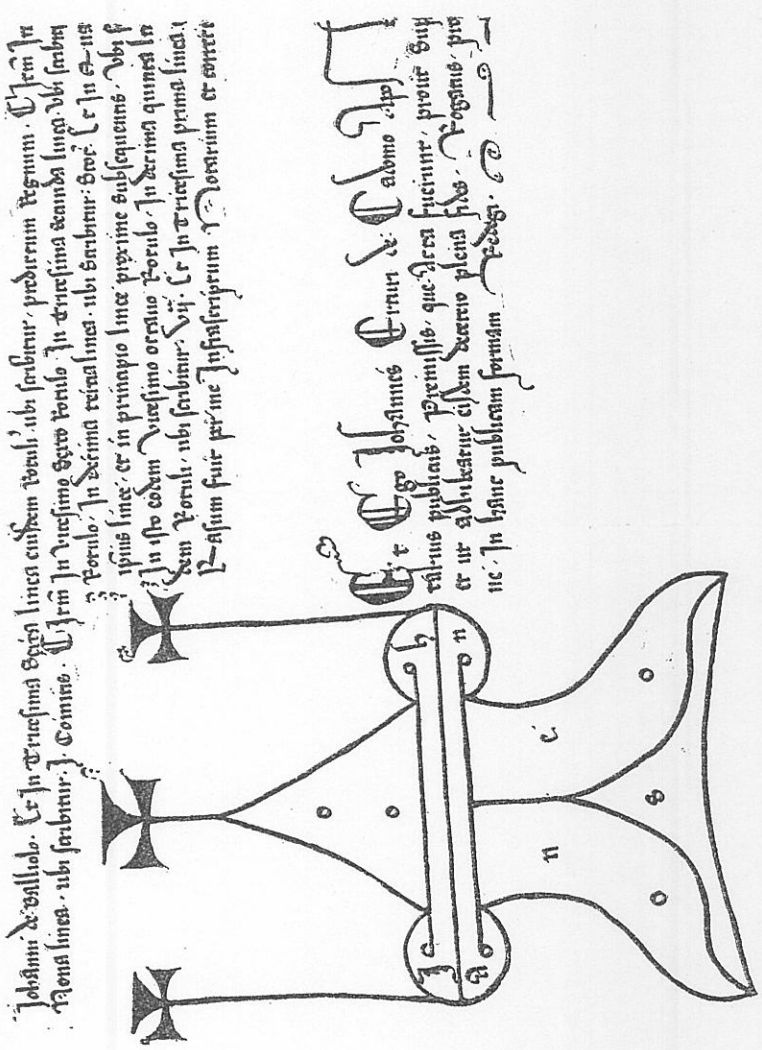
It will be convenient to recall certain stages of the cause; how its origin draws back to an appeal against the Scottish regents

[1] Digest, i. 2. 29: v. 2. 13. 17: xxxiv. 3. 30. Code, iii. 31. 12: vi. 28. 4.

[2] Cujas, *Opera Omnia* (1595), i. 263, iv. 230. Jacobus Raevardus, *Protribunalium Liber*, in Ziletti, *Tractatus Universi Juris* (1584), vol. iii. p. i. fo. 92. Nicolas Boer, in *additio* to Jo. Montaigne, *De Parlamentis*: Ziletti, *Tractatus*, vol. xvi. 273 verso. Heineccius *Antiquitatum Romanarum Syntagma* (ed. 1841), lib. iv. 6. 9. Kahl (Calvinus), *Lexicon Juridicum* (ed. 1684), under *centumviri, centumvirale, hasta.*

[3] Fresquet, *Droit Romain*, ii. 393-395. Rudolph Sohm, *Institutes of Roman Law*, translated by J. C. Ledlie, ed. 1907. Greenidge, *Legal Procedure in Cicero's time*, 1901. Muirhead, *Law of Rome*, ed. 1899. H. J. Roby, *Roman Private Law*, 1902, ii. 314-315. W. A. Hunter, *History of Roman Law.*

[4] Claudius Cantiuncula, *De Officio Judicis*, ii. cap. i. sec. 15, in Ziletti, *Tractatus*, ii. part i. fol. 78, commenting on the Code, iii. 31. 12.



NOTARIAL SIGN OF JOHN OF CAEN, A.D. 1293.

favouring Balliol, addressed by Brus to the 'King of England and his royal crown' (Palgrave, xiii. xlviii. 17), how at the very outset on June 3, 1291, with the unanimous approval of the claimants the King issued an order of court for the appointment of auditors, and how King Edward assigned June 5th as the day for their nomination. On that date accordingly these auditors are recorded by the notary who kept the roll to have been duly appointed by the 'noble men vindicating their right to the realm of Scotland' (*nobilibus viris jus ad Regnum Scocie sibi competere vendicantibus*) and by King Edward himself. On the part of the King of England there were 24; on the part of Brus and others 40; and on the part of Balliol, John Comyn and others, 40; in all 104 auditors, nominated in presence of distinguished witnesses, including Master John Caen, 'notary public, specially called and required,' while the other notary Master Andrew Tange separately executed a public instrument, attested by his notarial sign, testifying that he also was present, and saw and heard the whole proceedings (Rymer, i. 767-767. Palgrave, Illustrations No. ii. pp. iv to xvi).

On June 6 in the King's chamber in Norham Castle (Rymer, i. 767-768) the litigants, claiming by hereditary succession to vindicate their right to the realm of Scotland (*qui ex successione hereditarie ad Regnum Scocie jus sibi vendicant*), were received by the King, who adjourned the cause until August 2. At Berwick Castle, on Friday, August 3 (Rymer, i. 775), the 24 auditors from England, the 40 Scottish auditors for Brus, and the other 40 Scottish auditors for Balliol, began to receive in the deserted church of the Friars Preachers, near the castle of Berwick, the petitions of the twelve claimants (*vendicantium*) to the realm of Scotland, and on 12th August the hearing was adjourned until 2nd June, 1292 (Rymer, i. 777).

Not one of the petitions (*ib.* 775-777) has the technical term 'vindicate' in its composition, but that rather pedantic word is reiterated in minute after minute of the proceedings. It was not a word in current vocabulary use either in early English or early Scottish legal style. It occurs only in the echoes of Roman law, which at the end of the thirteenth century had begun to make themselves very definitely heard in Great Britain.[1] On

[1] Bracton used the term *rei vindicatio*, although very rarely, and when he did so was usually taking over some passage from Azo or other civilian. Bracton, *De Legibus Angliae*, ff. 9, 103. Maitland's *Bracton and Azo* (Selden Soc.), pp. 105, 106, 116, 121, 176. A considerable search for instances of the use of the term *vindicatio* or *vindicare* in the records of actions of right, etc., has yielded no examples. That early examples exist may be probable enough, but it appears certain that normally the term did not pass current in the early law reports, in the sense in which it is employed in the reports of the Scottish Crown case.

2nd June, 1292, the King and the 104 auditors sat again and ultimately the cause was adjourned until 14th October (*ib.* 777). At the important sitting on that day, according to the great roll, but really perhaps on November 5, the King asked the bishops, prelates, earls, barons, and councillors, as well as the auditors, the vital questions of the cause, and they all 'unanimously in agreement and finally[1] replied' that of two claimants the one remoter in degree lineally descending from the first-born daughter was to be preferred to the one nearer in degree issuing from the second daughter (*ib.* 779). Thereupon the cause was adjourned for judgment (*ad audiendum judicium*) until Thursday, 6th November, at which date the magnates and auditors answered other questions, after which a readjournment was made until Monday, 17th November. On that date (*ib.* 780) in the hall of the castle of Berwick in full parliament (*in pleno parliamento*), present also the 24 English and the 80 Scottish auditors and 'the foresaid petitioners being called

[1] This comprehensive proposition is quite correct, but it does not advert to the extremely interesting and important facts set forth in the *Annales Regni Scotiae* (1) that Edward on Monday, 3 November, 1292, put the vital question of the principle of hereditary descent, not to his Auditors as a body, but to his whole Council (*totum Consilium suum*) which comprised 51 persons, the list of whom includes very nearly all of the 24 auditors nominated *pro rege* the year before (Rishanger, 259-260); (2) that they agreed in approving the principle of primogeniture above quoted (*ib.* 260); (3) that on Wednesday, 5 November, 1292, in presence of the King and his whole Council a certain form of judgment (*quaedam forma judicii*) nonsuiting Brus was drawn up (*ordinata*) and accepted by the whole Council (*ib.* 261-262); (4) that next day, Thursday, 6 Nov., 1292, this 'form of judgment' was laid before the 80 auditors of Scotland and the 24 for the King and was answered separately, and with separate approval by all the available members of the 80, virtually by them all (*ibid.* 262-265); (5) that thereupon on same day the King formally gave judgment that Brus 'had not right in his petition to the realm of Scotland according to the form and mode of his petition' as in the question with Balliol; (6) that subsequently after intermediate decision as regards partibility of the realm and other points on which the 80 of Scotland advised (*ibid.* 354), the King on 17th November, 1292, at Berwick gave judgment by Brabazon, auditor as well as chief justice, and awarded the foresaid realm of Scotland to Balliol, as nearest heir of Margaret, Lady of Scotland (*ibid.* 358). It will be observed here that the *Annales* uses the precise words which on 19 November, 1292, were embodied in the precept of sasine, although in the notarial narrative of the great roll (Rymer, i. 780) the terms of the judgment itself are not so set forth (*ibid.*). Whether or not the *Annales* can be interpreted as being or representing the *notes et remembraunces* of John of Caen will depend on the character and degree of such differences and coincidences.

who vindicated right to the aforesaid realm of Scotland,' the judgment was given in accordance with the 'relation' or report of the auditors that the remoter in degree in the first line of descent is to be preferred to the nearer in degree in the second line; and therefore, runs the decision,—'it was considered that the aforesaid John of Balliol should recover and have seisin of the foresaid realm of Scotland, with all its pertinents in said kingdom.'

And so the great cause reached its close in an award of possession of the Kingdom of Scotland to Balliol, to whom a precept, by Edward, with the formula *teste meipso*, was accordingly granted (*ib.* 780) on November 19. The award of possession, that eminently natural consummation, appears to have been the essential point and significance of *vindicatio* in Roman law also. The use of the term both by John of Caen, the notary of the great roll, and prior to him by Andrew of Tange[1] in the protocols, was in terms of Roman law perfectly correct. This, however, would be less remarkable were it not that the term was by Roman law specially apt for cases of centumviral judgment. The preceding considerations might be left to present their own argument, their direct hint of source for the form of the judgment, but there is a final fact which possibly removes the problem from the region of speculation altogether and justifies, if it does not compel, a definite conclusion regarding that source.

In the manifesto by which on 8th February, 1340, Edward III. set forth his claim to the kingdom of France, he found it necessary to denounce David II. of Scotland, and to maintain that the crown of Scotland had been duly and competently awarded to John Balliol as king, and that Robert the Bruce had been a mere tyrant and sacrilegious perjurer. The reference to the award is of a revealing significance. In the manifesto of 8th February, 1340, which is the proclamation *Super titulo ad Regnum Franciae*, Edward III. declares that David II. has no right to the Kingdom of Scotland, which, he says, on the question of succession arising between

[1] Master Andrew, son of William of Tange, a clerk of the diocese of York and apostolic notary, not only appears as attesting along with John of Caen, the chief of the separate protocols in 1291-1298 (Palgrave, Illustrations, pp. vi, xvi, xxvii, 150). After the great suit was decided Master Andrew notarially certified the homage of King John Balliol (Bain's *Calendar*, ii. p. 152). He attested the Ragman Roll in 1296 (Bain's *Calendar*, ii. p. 214). He is also mentioned in 1318 and 1321 as having attested 'the Great Roll of 48 pieces beginning *Quoniam antiquorum* as to the King's right to Scotland' (Bain's *Calendar*, iii. pp. 115, 137). This is the chief Roll of fealties and homages in 1291. *The Ragman Rolls*, Bannatyne Club (1834), pp. 3-56.

John Balliol and Robert Bruys, was disputed at law between them, and was 'by centumviral judgment' adjudged to the said John —*per centum virale judicium judicatum fuit praefato Johanni* (Rymer, ii. 1110).

Surely we have here a plain intimation that some tradition of the English diplomatic service or chancery had preserved the name by which the award of the Scottish crown had in legal circles been characterised. It was a *Centumvirale Judicium*: a term of legal technique of unknown antiquity even in Cicero's time, revived for a unique occasion. The name thus applied in 1340 to the famous trial was no misnomer. It deserves to be noted that John of Caen, the papal notary of the court in 1291-1292, who had been the King's procurator[1] in France in 1278 and at Rome in 1289, was now a master of the English chancery,[2] and that William of Kylkenny, one of the panel of 24 auditors (Rymer, i. 766) nominated by Edward I., was styled in the nomination 'professor of civil law' (*juris civilis professor*). This is by no means a sole proof of contact with Roman law. Francesco Accursi the younger, a famous civilian of Bologna, was for some time in the service of Edward, and has been referred to as his favourite jurist. At any rate, he had from the English King a retaining fee of £40 a year.[3]

The *Magnus Rotulus* itself, let us remember—in whatever light the judgment and its mixed motives may by patriots and counter-patriots be regarded from a political standpoint—is an example of a judicial report and decision so splendid that it has been declared in Pollock and Maitland's *History of English Law* (ed. 1898, i. 197) to be 'the most magnificent of all the records of King Edward's justice.' This superb compliment to the French notary is by at least a full half a misdirection, in that it fails to render the honours due to John of Caen's Yorkshire colleague Andrew of Tange, whose name never appears on the Frenchman's version of the great roll. *Tulit alter honores.*

As for the series of facts and phrases which now go to correlate the shaping of this unique auditorial court and judgment of Edward I. to a remote model of the foremost classical and legal note, is it too much to regard the chain of connexion submitted in this article as irresistible? If the 'centumviral judgment' of

[1] *Roles Gascons*, ed Bémont, Nos. 1158-1160.

[2] Pollock and Maitland, *History of English Law*, 1895, i. 197. Jenks, *Edward Plantagenet, the English Justinian*, 1902, pp. 159, 248, 340.

[3] Rymer, 23 October, 1290.

Edward I. was not in truth a rebirth of Roman parentage why should the chancery of Edward III. have given it the Roman name? To engraft after nearly a millennium the old centumvirs upon the new creation of Anglo-Scottish auditors was a feat of distinction worthy of the cleverest of Renaissance jurists. A fine—even more than an adroit—adaptation of Roman precedent to a high occasion, it reflects by its felicity no small credit upon the unknown civilian—was he himself a notary or a centumvir?—who out of the most dignified memories of Roman law suggested as a precedent for the frame of the tribunal which Edward I. was to erect, a court of such antiquity, standing and appropriateness for the pattern. If by chance the emblematic spear was not set up to denote the ultimate authority of military force behind the tribunal, shall we not say that all men of discernment saw it clearly enough in the air? Thus the term *Centumvirale Judicium* used in the chancery of Edward III., a capitally correct label for the award in *Brus* v. *Balliol*, becomes a footnote of international and legal history imparting fresh point to the epithet which designated Edward I. as 'the English Justinian.'[1]

GEO. NEILSON.

[1] The plate (page 9) is from a photograph by Mr. A. P. Monger, for which I owe my thanks to Mr. H. Rodney of the Public Record Office, London, for facilities and instructions to the photographers. It shews the notarial mark of John of Caen attached to the *Magnus Rotulus Scotiae*, edited in Rymer's *Foedera*. The length of line in the roll made it necessary to cut off most of the notarial docquet which begins *Et Ego Johannes Erturi de Cadomo*. At the top of the plate is seen, correspondingly docked, the end of John of Caen's long and conscientious declaration of erasures, etc., in his extension of his historical instrument.

Two Features of the Orkney Earldom

AS lords not only of that once formidable archipelago, the Orkney Islands, but of the Shetlands, all Caithness and Sutherland, and at one period of a considerable part of Scotland besides, the ancient Orkney Jarls had much more than a local influence. The Orkneys were in fact but one sector in a long chain of kindred communities always in part under these chieftains, and during at least the reign of Earl Thorfinn the Mighty, entirely under their sway. This paper touches on two characteristic features of the Norse Jarls' rule, the constant dividing of their realm into lots or shares, and their 'gœðings' or vassal nobility, through whom they exercised authority. The second feature I have referred to very briefly once before,[1] but the first has not, so far as I know, been dealt with previously.

The Earls' Shares of Orkney.

It may be observed in the first place that the system of sharing their realm did not extend to Caithness (then including Sutherland), which was always in the gift of the Scots King as overlord, and was apparently granted to whichever of the joint earls he preferred. Shetland presumably was divided, but it is only of Orkney that we have any particulars.

We first actually know that the isles were shared on the death of Sigurd the Stout at Clontarf in 1014, though from later analogies it seems probable that they were divided also at an earlier date among the three sons of Torf Einar, since all three appear to have held the title of Jarl contemporaneously; but the Saga touches that period very briefly. On the other hand, it seems certain that they were not shared among the five sons of Earl Thorfinn Skullsplitter, for these are described as succeeding one another in the title. Apart from these two cases, there were no occasions for division before 1014.

[1] Introduction to the *Records of the Earldom of Orkney*.