

Arbitration in the *Ius Commune* and Scots Law

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Famously, the late Lord Cooper, a highly distinguished Scottish judge and scholar, once observed that "there is a sense in which it is true to say that Scots law has no history," due to a lack of continuity in its development.¹ Though this view is no longer widely held, it is still true in a different sense that the history of much of Scots law has yet to be written. The law of arbitration is one such area: at present it has almost no history. A recent short but valuable treatment of the Scottish position by David Sellar represents one of the few attempts to begin writing its history within a broader framework, building upon the earlier work of Lord Cooper himself.² Tracing its history is relevant to an understanding of the interaction of the courts with private and informal methods of dispute resolution. Arbitration seems to imitate the formality of court procedure, taking account of legal rules, and yet operate primarily within the private sphere, forming a bridge between what could be called public and private justice. Jenny Wormald has made the point in her work on the bloodfeud in Scotland in noting how "the procedure used in the private settlement could very well mirror that of the courts, for arbitration was common in both."³

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¹ Lord Cooper [T. M. Cooper], *Select Scottish Cases of the Thirteenth Century* (Edinburgh, 1944), lxi.

² W. D. H. Sellar, "Assistance in Conflict Resolution in Scotland," 64 *Trans. Jean Bodin Soc'y* 267 (1997). Other valuable overviews include R. L. C. Hunter, *The Law of Arbitration in Scotland*, 2nd ed. (Edinburgh, 2002), ch. 2 ("The History of Dispute Settlement Law in Scotland"); W. J. Gilmour, "The Development of Arbitration in Scotland," 41 *Arbitration* 199, 199–202 (1974).

³ J. M. Wormald, "The Sandlaw Dispute," in W. Davies and P. Fouracre (edd.), *The Settlement of Disputes in Early Medieval Europe* (Cambridge, 1986), 203.

At this point, however, historians of the common law of England might wonder how the *law* of arbitration could merit such attention, indeed might question whether such a thing existed in the medieval and early modern period. In England arbitrations seem to have been largely social rather than legal facts, although inevitably there could be interaction with the procedures of the common law and more particularly the Chancery. However, the medieval common law does not appear to have regulated the conduct of arbitrations as a matter of law.⁴ In Scotland, by contrast, over time the medieval common law does appear to have extended to the regulation of arbitration procedure, and to have adopted a variety of legal rules to this end. By the 14th century, indeed, such rules are incorporated for the first time into the secular legal treatise known as *Regiam Majestatem*, the most important surviving medieval Scottish law book. The rules in question were not native inventions, however, but clearly derive from 13th-century canon law, which was in turn reflected in Scottish 13th-century practice. In particular they adopt the language of and reflect the canonist distinctions between the offices of arbiter, arbitrator, and amicable compositor. The purpose of this article is to draw together several threads in order to set in context the influence of the *ius commune* on arbitration in Scots law between the 13th and 16th centuries. The process of reception or borrowing of the 13th-century canon law rules has already been demonstrated in a seminal article by Peter Stein,⁵ and my aim is to place this development in a broader context of the development of arbitration in the *ius commune* and show how such borrowings may have been understood in Scots law.⁶ The terminology of arbiter, arbitrator, and amicable compositors or amiable compositeurs are in wide

⁴ A. M. Godfrey, "Arbitration and Dispute Resolution in Sixteenth-Century Scotland," 70 *T. v. R.* 109, 112, 114 n.29 (2002).

⁵ P. Stein, "The Source of the Romano-Canonical Part of Regiam Majestatem," 48 *Scot. Hist. Rev.* 107, 109 (1969).

⁶ I acknowledge that, though convenient, the label "Scots law" is somewhat anachronistic in relation to the period surveyed in this article. I am using it in this context to stand for the medieval statute and common law of Scotland. It was for the Scottish "institutional writers" of the 17th century to formulate a broader view of "Scots law" which incorporated other sources such as the *ius commune*. See J. W. Cairns, "The Civil Law Tradition in Scottish Legal Thought," in D. L. Carey Miller and R. Zimmermann (edd.), *The Civilian Tradition and Scots Law* (Berlin, 1997), 199.

use in modern legal systems, and such a study may help remind us of the historical reasons for such distinctions.⁷

I. Terminology in Scotland

While suggestive, the mere adoption of medieval canon law rules in a treatise like *Regiam Majestatem* tells us little directly about the practice of arbitration, the practical significance of its terminology, or how this developed between the 13th and 16th centuries. My starting point is therefore to adduce some other evidence of practice in Scotland and especially whether the practice of arbitration did rest upon usage of the canonist terms arbiter, arbitrator, and amicable compositor. The terms were certainly not restricted to appearances in treatises, being frequently referred to in records of arbitrations, compromises, and court proceedings, and to this extent the canon law model of arbitration clearly became firmly embedded in Scottish legal culture. Whether or not the terms were used with any distinct technical definition in mind is a difficult question, but they were certainly used.

In Lord Cooper's *Select Scottish Cases of the Thirteenth Century*,⁸ for example, not just arbitration but amicable composition is featured, though Cooper's presentation of translated summaries of the records does not seem to distinguish between arbiters and arbitrators — he uses the term arbiter, but it is unclear whether he has adopted it as a generic term or whether it is a literal translation of the term found in the records.⁹ However, if we move forward to the 16th century, the first century in which Scottish court records survive in copious amounts, we find the Scottish Lords of Council — a secular civil tribunal — in 1531 sitting judicially but then determining *as arbiters* a "pley debatable" between the second earl of Menteith, Alexander Graham, and Thomas, Walter, and Patrick Graham.¹⁰ The record states that decree was given "as juges arbitors for stansching of all pleis quarell and debate amangis the said partiis."¹¹ Previously, in 1530, the matter had been the subject of court action proper, but in 1531 had

⁷ I am very grateful to James Hope for sharing with me information and observations about modern English and international arbitration practice.

⁸ Above, note 1.

⁹ Cooper (note 1), 49.

¹⁰ The latter were assignees of the late countess of Menteith, grandmother of the earl.

¹¹ National Archives of Scotland [NAS] CS 5/43, f.79. The general dispute is passingly referred to in J. S. Cameron, *James V: The Personal Rule 1528–1542* (East Linton, 1998), 138.

then been referred to a private set of "jugis arbitratours," though it is related that by the time it finally came before the Lords of Council there was "na thing done therein,"¹² reminding us that a reference to arbitration was not necessarily effective in resolving a dispute.¹³ On another occasion a matter was submitted "in amicablewis" [*sic*] to be decided before the Lords of Council, seemingly a phrase indicative of amicable composition.¹⁴

Did any of these terms bear a technical significance? Was any technical difference understood to arise between an arbiter and an arbitrator? In the 16th century, when a dispute was submitted for private rather than judicial determination to the Lords of Council, the capacity in which they were to act is variously narrated as "judges arbiters and amicable compositors," "judges arbitrators and amicable compositors," "judges arbiters," or just as "amicable compositors." Were the different terms adopted intentionally? What lay behind these distinctions and especially the appointment of the Lords in more than one capacity? To establish the meaning of these terms in Scots law it is first necessary to consider their meaning in canon law, and then the nature of the borrowing which sees them appear in *Regiam* by the 14th century.

II. Terminology in the *Ius Commune*

Arbitration procedure and terminology had derived historically from Roman law.¹⁵ In the *legis actio* and formulary systems there was little distinction made between *iudex* and *arbiter* since both acted in a private capacity following reference from the magistrate. Buckland observed that "there was no fundamental distinction; an *arbiter* was a *iudex*."¹⁶ Whereas initially the arbiter "was probably an expert who decided questions involving the exercise of discretion," the *iudex* "in later law certainly exercised the functions of *arbiter* also."¹⁷ The *iudex* of classical law was of course, like the arbiter, a layman. *Digest* 4.8 contains many extracts of

¹² As narrated in proceedings on 15 November 1531; NAS CS 5/43, f.75.

¹³ For an example of Scottish arbitration proceedings from the early 13th century failing to end a dispute, which was eventually settled 21 years after being first litigated, see Cooper (note 1), 13.

¹⁴ NAS CS 6/4, f.70r.

¹⁵ For an overview of the development of the *compromissum* and the role of the *arbiter* in Roman law and the *ius commune*, see R. Zimmermann, *The Law of Obligations* (Oxford, 1996), 526–30. For a short account, see P. G. Stein, "Arbitration under Roman Law," 41 *Arbitration* 203 (1974).

¹⁶ Buckland, *Text-Book of Roman Law*, 636.

¹⁷ *Id.* at 617.

detailed opinions on the operation of arbitration. However, the later currency of arbitration stemmed from its development in late antiquity, in particular through the role of the bishop in the early church as "a mediator and reconciler of disputes between members of his congregation."¹⁸ By the 4th century bishops could be seen as exercising the role of an arbiter more generally,¹⁹ James Brundage commenting that "the judicial functions of bishops in the early stage of this development mainly involved arbitration."²⁰ Norms regarding procedure in episcopal courts therefore embraced the practice of arbitration from the earliest times, drawing at first upon rules developed by the Roman jurists.²¹ From these antecedents, and following the 12th-century revival of Roman law, it is therefore of no surprise that by the 13th century there were many sources in the vast canonical literature by then developed which treated procedure by arbitration, and which the Scottish texts in *Regiam Majestatem* resemble — Azo's *Summa Codicis*, Tancred's *Ordo Iudiciarius*, Raymond of Penafort's *Summa de Casibus*, Hostiensis's *Summa*, and Goffredus de Trano's *Summa in Titulos Decretalium*. It is the last of these that has been proved the most likely source for the Scottish *Regiam* following Peter Stein's pioneering research.²² By way of further explanation, it is sometimes argued that the 13th century seems to have witnessed increasing resort to arbitration across the whole of Europe, evidenced by the fact that Gratian's *Decretum* of 1140 makes only passing reference to arbitration, whereas the *Liber Extra* of 1234 placed a number of decretals under the title *De Arbitris*.²³ Decisions arising from references in Scottish arbitrations account for some of the decretals included in the *Liber Extra*.²⁴

It is clear, however, that whatever the significance of the *arbiter* in Roman law, the concept was heavily developed through its association with ecclesiastical courts and the jurisdiction of the bishop from late antiquity. Scholars of the medieval distinctions between arbiter, arbitrator, and amicable compositor have indeed traced a complex development. Here I am indebted to and reliant

¹⁸ J. D. Harries, *Law and Empire in Late Antiquity* (Cambridge, 1999), 192.

¹⁹ *Id.* at 201, 210–11.

²⁰ J. A. Brundage, *Medieval Canon Law* (London, 1995), 12.

²¹ *Id.*

²² Comparisons considered in Stein (note 5), 109.

²³ K. H. Ziegler, "Arbiter, Arbitrator und amicabile compositor," 84 ZSS (rom. Abt.) 376, 378. I am grateful to Philip Simpson for providing me with a translation of this article.

²⁴ Sellar (note 2), 270; Cooper (note 1), 15.

upon the work of Karl-Heinz Ziegler and Linda Fowler.²⁵ Apart from the well-known distinction between the "arbiter" deciding according to law, and the "arbitrator" and "amicable compositor" deciding according to justice,²⁶ three further questions are significant for this discussion in the developments they have outlined. First, did proceedings result in a sentence or were the parties left to come to an accord? Second, was there a formal procedure or not? Third, was the result subject to review? The mature proposition was that an "arbiter" decided according to law and by formal procedure. By the 13th century this is contrasted with the appointment of an "arbitrator" who could decide according to justice and without formal procedure. The distinction is present in the late 13th-century *Speculum Iudiciale* of Durantis.²⁷ The term "arbitrator" as opposed to "arbiter" seems to have been unknown in Justinianic Roman law.²⁸ Early canonical jurists exploited and defined the term in the late 12th and early 13th centuries so as to adapt the Roman institution of *arbiter* to the practice of arbitration as it had developed, in particular to surmount the bar to a *iudex* acting as *arbiter* which was prescribed by Roman law,²⁹ as stated by Ulpian in *D.4.8.9.2 (13 ad edictum)*. After appointment as a *iudex* in a particular case, it would have been *ultra vires* for the *iudex* then to act as an *arbiter* in the same dispute. In any event, "arbitrator" became the distinctive office which was superimposed onto what Linda Fowler has described as "the already existent concept of an amicable agreement."³⁰ As Durantis put it, "Arbitrator vero est amicabile compositor."³¹ At first the arbitrator was understood, as in amicable composition, as not delivering a sentence but facilitating a settlement between the parties, though by the mid-13th century arbitrators can be found acting in this respect like arbiters in deciding disputes themselves.³² By this time, therefore, there seems to be a distinction between arbiters on the one hand, and arbitrators and amicable compositors on the other, though perhaps arbitrators who acted

²⁵ See note 23 above and note 30 below.

²⁶ Ziegler (note 23), 376.

²⁷ *Id.*

²⁸ *Id.* at 379 n.29.

²⁹ *Id.* at 378–79.

³⁰ L. Fowler, "Forms of Arbitration," in S. Kuttner (ed.), *Proceedings of the Fourth International Congress of Medieval Canon Law, Toronto 1972* (Vatican City, 1976), 136.

³¹ Zimmermann (note 15), 529.

³² Fowler (note 30), 143.

merely in amicable composition without giving a sentence form a third category.³³

The main difference established by Linda Fowler between arbiters and arbitrators was one of formality in procedure.³⁴ An arbiter used a formal procedure in imitation of a court of law. The arbitrator proceeded informally. At first there was also a difference in whether a party could appeal the decisions of arbiters and arbitrators, but during the 13th-century the distinction was elided, as the *arbitrium* of the arbiter became regarded by jurists as reviewable as much as the *arbitratus* of the arbitrator.³⁵ It was a feature of 13th century practice, however, that despite the development of these juridical concepts, parties tended to refer disputes to arbitration under a multi-jurisdictional commission to act as arbiter, arbitrator, and amicable compositor, suggesting that the distinctions under discussion were those which struck jurists as important rather than those which were necessarily relevant in practice. It has been suggested by Linda Fowler that "the litigants apparently did not care on the whole *how* the matter would be handled; they allowed the arbiter to decide this, and they defined the juridical relationship only when they wanted to question the outcome."³⁶ She regards this as advantageous for parties in providing for their convenience by promoting flexibility. In other words, when a submission was made the parties would not necessarily be sure or indeed care whether the resolution was achieved in the form of an *arbitrium* or a mere composition, and by deploying the widest form of commission they permitted the most appropriate form of disposal to be used in the light of the arbitration.

Though perhaps generally true of the 13th century, in at least one Scottish example this argument is open to question. The argument could be made that, having agreed to submit to the jurisdiction of an arbiter, the parties might sometimes have expected to come away with a decision rather than still be able to insist on a negotiated settlement. This stricter model seems to be

³³ In modern French arbitration it seems that arbitrators can be required by the parties to decide according to equity and not legal rules through being asked to decide as "amicable compositeurs." A decision in these circumstances which applied legal rules rather than equity can be set aside due to a failure to respect the "mission" of the parties: Cass. Civ. 2ème 15.02.2001 Halbout and Matenec H.D. c. Hanin, Bull Civ 2001 II n° 26, p. 19 (Cour de Cassation). I am very grateful to James Hope for this point and reference.

³⁴ Fowler (note 30), 143–44.

³⁵ *Id.* at 142.

³⁶ *Id.* at 143–44.

reflected in a Scottish case dating from 1240, *Inchcolm Abbey v. William de Hercht*.³⁷ It turned on a boundary dispute, which was referred to arbiters who found that, after taking evidence, they were unable to reach a determination. They advised the parties to submit to amicable composition, which they did, and the original arbiters (who presumably then facilitated the settlement) subsequently oversaw the marking out of the boundaries as agreed. The original commission was not apparently multi-jurisdictional, suggesting that at first the parties did care about having the matter determined through an arbitration and were not initially prepared just to settle. It was only in the light of the inconclusive arbitration proceedings that the parties considered and opted, on the initiative though not the decision of the arbiters themselves, for amicable composition. In the end, therefore, these particular parties did seem to have regard for the capacity in which the arbiters were determining their dispute, though the case also suggests that, nevertheless, it may often have been the achievement of a resolution and settlement which was the supreme aim of such proceedings, with the choice of procedure being a secondary matter influenced by the circumstances most likely to achieve this aim. Other Scottish evidence, however, lends some support to Linda Fowler's analysis. Paul Ferguson has discussed the 13th-century case of *Simon de Noisiaco, Rector of Dysart v. Dunfermline Abbey*,³⁸ in which the parties submitted to arbiters so that "they should have cognisance of the aforesaid cause, without appeal, just as the judges-delegate themselves, or that they should amicably and legitimately make a compromise between the parties."³⁹ Perhaps the reason for multi-jurisdictional commissions was that disputes referred to arbitration may by definition have often been incapable of a clear-cut legal resolution, if only due to lack of appropriate evidence, and that, when this impediment to a determination of the dispute by an arbiter was envisaged, it was convenient — though not necessary — to authorise such persons to act also as arbitrators and amicable compositors.

³⁷ Cooper (note 1), 49; D. E. Easson and A. Macdonald (edd.), *Charters of the Abbey of Inchcolm* [Scottish History Society, 3rd series, vol. 32] (Edinburgh, 1938), 19.

³⁸ Dunfermline Abbey, *Registrum de Dunfermelyn*, ed. C. Innes [Bannatyne Club, vol. 74] (Edinburgh, 1842), 66–68 (no. 111).

³⁹ P. C. Ferguson, *Medieval Papal Representatives in Scotland: Legates, Nuncios, and Judges-Delegate, 1125–1286* [Stair Society, vol. 45] (Edinburgh, 1997), 182.

III. Reception in Scotland

How were these concepts and institutions of the *ius commune* received into Scots law? As indicated already, arbitration occupies a notable part of the 14th-century *Regiam Majestatem*, the main medieval law book of Scotland, thought to be written not long after 1318.⁴⁰ It represents the first significant native source to give a treatment of arbitration, a Glanvillian-type manual to procedure in the King's Courts. In the opening section the anonymous author states that:⁴¹

To reduce to writing the whole of the laws and statutes of this realm would in our times be a wholly impossible task, not only by reason of the ignorance of those who recorded them but also because of the multiplicity and confusion of the cases. Still there are certain general rules in habitual observance in our courts which it does not appear to be either absurd or presumptuous to reduce to writing, but rather a very useful aid to memory. Some of these I have resolved to put into writing by the command of King David, with the advice and consent of the whole realm, spiritual as well as temporal, purposely employing a popular style and the language of the law courts so that the matter may be accessible to all.

This section is almost identical to the prologue to the late 12th-century English treatise, Glanvill's *Tractatus*, except for one addition: the attribution of the work to a command of David I of Scotland (1124–53), with the advice and consent of the whole realm. This is obviously mythical since almost none of the sources of *Regiam* yet existed in his reign, let alone a legal system of the sort described in the treatise. However, by adopting this quasi-legislative formula, the intention of the author seems to be to present the work as officially sanctioned and as describing legal rules observed in the courts.

The section on arbitration is one of the main canonist parts of a treatise which is otherwise based largely on Glanvill. About

⁴⁰ See generally P. Stein, "Roman Law in Medieval Scotland," in *The Character and Influence of the Roman Civil Law* (London, 1988), 280–88; A. Harding, "Regiam Majestatem Amongst Medieval Law Books," 1984 *Jur. Rev.* 97; H. L. MacQueen, "Regiam Majestatem, Scots Law and National Identity," 74 *Scot. Hist. Rev.* 1 (1995); Sellar (note 2), 270–71.

⁴¹ Lord Cooper [T. M. Cooper] (ed.), *Regiam Majestatem and Quoniam Attachamenta* [Stair Society, vol. 11] (Edinburgh, 1947), 57 (Latin), 58 (English); cf. G. D. G. Hall (ed.), *The Treatise on the Laws and Customs of the Realm of England Commonly Called Glanvill* (Oxford, 1993), 3 (Prologue of Glanvill).

two-thirds of the work is more or less copied from Glanvill, with some editing and revision at various points. Peter Stein first identified the additional canonist source as the 13th-century *Summa in Titulos Decretalium* of Goffredus de Trano.⁴² The passages from Goffredus are edited and modified as they appear in *Regiam*, presumably in order to reflect local Scottish practice and conditions. If so, this clearly implies that arbitration was not just a practice but an established procedure which was within the purview of the common law in Scotland in the early 14th century.⁴³ Evidence of arbitration hearings adduced by Lord Cooper demonstrates its practice in the 13th century. Writing of that period he remarked that "even in these early days there was evidently a marked demand for methods more flexible and equitable than those of the ordinary judicial tribunal, clerical or lay, and we find in a decrescendo of formality the *judex*, the *arbiter*, the *arbitrator*, and the *amicabilis compositor*."⁴⁴ However, during the 13th century arbitration seems to have been regulated only as a matter of canon law, and was associated particularly with resolving disputes which otherwise might have been argued before ecclesiastical rather than secular common-law judges. No systematic study has been made of arbitrations in this specific period, but of the nine examples cited by Lord Cooper in his *Select Scottish Cases of the Thirteenth Century*, four were initially disputes subject to litigation, and in every case this was before judges-delegate or papal legates rather than secular courts administering the common law.⁴⁵

To what extent arbitration was yet regulated in the secular courts in the 14th century is another difficult question. Given the ecclesiastical origins of arbitration, it seems far more likely that disputes over the conduct of an arbitration following a *compromissum* would be determined in the church courts, since the rules governing such matters were part of canon law. How and why the rules on arbitration were considered relevant to an account of the common law is therefore an interesting question. Their place in *Regiam* follows after the other principal borrowing from Goffredus, which is a series of chapters concerning pacts. There is a certain logic to the place of treatment in *Regiam* since the section on pacts follows one on procedure which ends with a title on con-

⁴² Stein (note 5), 109.

⁴³ *Id.* at 110–11, for a discussion of those significant changes introduced by the redactor.

⁴⁴ Cooper (note 1), xlix.

⁴⁵ *Id.* at 3, 13, 17, 34. Whether this may simply reflect the nature of the sources both extant and examined by Lord Cooper is a difficult question.

cord by the parties. This is based on Glanvill VIII.1 concerning "concord made in the king's court." Here Glanvill states that "it often happens that cases begun in the lord king's court are ended by amicable composition and final concord subject to the consent and license of the lord king or his justices";⁴⁶ *Regiam* repeats this but omitting the need for the consent of the king or his justices and adding the explanation that the concord may have arisen as a result of the agreement of the parties *or by arbitration*. Here *Regiam* adds the words "*ex pacto conventu seu per arbitrium*."⁴⁷ This gives a logical basis to the insertion thereafter of the canonist passages dealing with pacts and arbitration. Moreover, this ordering was one which was customary to any medieval canonist. In Book II of Justinian's *Codex* the title *De Pactis* was followed by that *De Transactionibus* dealing with submissions to arbitration, and this arrangement tended thereafter to be followed in the various collections of *Decretales*.⁴⁸ The author of *Regiam*, widely argued by scholars to be a canonist himself, might simply have been adopting a standard systematic structure in his account by discussing pacts and arbitration at this point, perhaps drawing as much upon canon-law practice as describing accurately what we would regard as the common law, as applied in the secular courts. Quite apart from this doubt, however, since *Regiam* came to be regarded as an authoritative account of the common law, the rules on arbitration seem in any event to have been received, regardless of whether this pre-dated their inclusion in *Regiam* itself.

IV. Effect of Reception

Through Goffredus the canon law of arbitration was therefore received with modifications into the Scottish common law as described in *Regiam Majestatem*. The matters dealt with included how many arbiters should be appointed (an odd not an even number, for God delights in odd numbers); who can act as an arbiter (not slaves, the insane, deaf or dumb); what questions may be referred to arbitration (any pecuniary, spiritual, or temporal issue except marriage, personal liberty, or criminal causes); the effect of an award by an arbiter (it must be accepted whether equitable or not, provided regularly given and not contrary to law); and how arbitrations should be ended procedurally (in the case of the death of a party or arbiter, expiry of time limits, or through agreement). A detailed comparison of the canon law and its Scottish redaction

⁴⁶ Glanvill (note 41), 94.

⁴⁷ Cooper (note 41), 94.

⁴⁸ I am very grateful to Gero Dolezalek for this point.

has been made by Peter Stein.⁴⁹ The bar on the *iudex*, or in the Scottish context the *ballivus ordinarius* or judge ordinary, acting as an *arbiter* is carried over from Goffredus, as well as the allowance that a *ballivus* can nevertheless act as an *arbitrator* in order to resolve a dispute through amicable composition.⁵⁰ On such matters the Scottish position is fully in line with canonist thought back in the mid-13th century. The *arbitrator* is not yet recognized as possessing power to decide a dispute. On some other matters, the Scottish redactor formulated rules differently from Goffredus. Whereas Goffredus merely observes, for example, that the enforcement of an award could be assisted by the threat of a penalty, in *Regiam* the validity of the award is itself conditional upon there being a penalty prescribed for non-observance.⁵¹ *Regiam* requires an arbiter to be of good repute, *bone fame*, whereas Goffredus states that the character of the arbiter has no bearing on the validity of an award. One difference which is at first sight puzzling is that though Goffredus states that matrimonial causes could not be compromised or settled, but required adjudication by *maiores iudices*, the rule in *Regiam* appears to depart from this. It states that causes relating to matrimony, personal freedom, and crimes cannot be decided by arbiters, but compromise is apparently allowed through arbitrators and amicable compositors.⁵² Clearly, though, questions such as the validity of a marriage could not under any circumstances have been the subject of out-of-court compromises, and so the allowance in *Regiam* must have concerned the incidental and especially financial consequences of a marriage or the *de facto* separation of a married couple.⁵³ For example, a reference to an arbitration from 1509 is recorded in a protocol book from the Archdiocese of Glasgow concerning a dispute over a husband's "non-adherence to his spouse and for not treating her with matrimonial affections" ("pro non adhesionem sue sponse et pro non tractatione matrimoniali affectione eiusdem").⁵⁴ A decree and sentence arbitral had been pronounced against the

⁴⁹ See the work cited in note 5 above.

⁵⁰ *Regiam Majestatem* II, c.4, in Cooper (note 41), 106–107; Stein (note 5), 110–11, 116–17.

⁵¹ Stein (note 5), 110, 119.

⁵² Chapter 6 of Book II of *Regiam* begins "Potest utique compromitti in causis pecuniariis, temporalibus et spiritualibus. Sed in matrimoniali, in liberali et causa criminali de jure non compromittitur in arbitros sed in arbitratos et amicabiles compositores." Cooper (note 41), 108.

⁵³ I am grateful to Gero Dolezalek for this point.

⁵⁴ Described in Gilmour (note 2), 199–200; see J. Bain and C. Rogers (edd.), *Liber Protocolorum M. Cuthberti Simonis* (London, 1875), vol. 8-I, No. 362, p. 435 (English translation), vol. 8-II, pp. 280–81 (Latin).

husband, George Lisle, concerning these matters, and financial penalties imposed.

As already mentioned, the practice of arbitration was clearly in evidence in Scotland in the 13th century, and has been discussed in an ecclesiastical context by Paul Ferguson in his analysis of the jurisdiction of papal judges-delegate,⁵⁵ as well as by Lord Cooper.⁵⁶ Though it is unknown whether *Regiam* was composed with official sanction,⁵⁷ it certainly came to be regarded as a formal source of Scots law by the 15th century, though still wrongly attributed to David I.⁵⁸ The continuing importance of arbitration as a common method of resolving disputes in the 15th century is suggested by the intervention of Parliament in 1427 to legislate on certain aspects of arbitration procedure, imposing a requirement in any submission to arbitration that there be an uneven number of arbiters, reinforcing the rule in *Regiam*.⁵⁹ Parliament laid down a procedure for choosing an "oversman" where a submission provided only for an even number of arbiters. In relation to clerics, the local bishop should choose one; for laymen, the choice fell to the local sheriff; for burgesses, it was the local provost and burgh council. It is interesting that the provisions of this statute suggest that arbitration in the early 15th century in Scotland could quite naturally be subject to the supervision of regular judicial officers, as well as to legislation emanating from Parliament. This supports the view that the appearance of the rules in *Regiam* on arbitration signal their reception into the common law of Scotland. Furthermore, it supports the argument that the courts which administered the common law of Scotland were not seen as occupying a separate plane from other methods of dispute resolution, and correspondingly do not seem to have been perceived as remote from the use of such methods.

Canonist writings such as the *Speculum Iudiciale* supplemented *Regiam* and statutory sources, though not necessarily so clearly as a source of the Scottish common law. That styles of submission to arbitration taken from the *Speculum* were in routine use is certainly evident in the later 15th century, for example

⁵⁵ Ferguson (note 39), 182–84.

⁵⁶ Cooper (note 1), xlix.

⁵⁷ The most recent assessment by Hector MacQueen "supports suggestions that *Regiam* had 'official' rather than 'private' origins; that is, the author was closely connected to and was perhaps commissioned by the king's court." MacQueen (note 40), 6.

⁵⁸ Cooper (note 41), 2 (Introduction).

⁵⁹ Act of Parliament of 1427, in T. Thomson and C. Innes (edd.), *The Acts of the Parliament of Scotland [APS]* (Edinburgh, 1814), vol. ii, p. 14, cap. 6. I am grateful to John Cairns for this reference.

in litigation before the King's Council.⁶⁰ Unsurprisingly, given the absence of a treatise on Scots law between the 14th and early 17th centuries, the statements concerning arbitration made by Sir James Balfour in his *Practicks* (completed in the early 1580s) do not represent any particular advance on those contained in *Regiam Majestatem*, which in fact comprise his main source.⁶¹ They suggest, however, both that arbitration remained a commonly used procedure, and that its supervision formed a regular part of the business of the Session, the central civil court reconstituted from the judicial sittings of the Council in 1532 under the guise of a College of Justice.⁶² Balfour may have simply plundered *Regiam* for a set of rules to fill in the relevant section of his *Practicks* whether or not those rules bore any relation to the actual conduct of arbitrations in 16th-century Scotland. With an eye to practice and procedure, though, he does state that in the tabling of actions matters concerning decrees arbitral were "commoun privilegit actiounis."⁶³ The late 16th-century Court of Session therefore maintained a case-load deriving in part from arbitration. Whether this role owed much directly to the presence of canonist rules on arbitration in Scots law as recognized in *Regiam* or whether it merely reflects the kind of institutional role which the English chancery had possessed in relation to arbitrations since the 15th century is another question. The canonist terminology itself certainly remained part of Scots law, styles of appointment such as "judge-arbitrator and amicable compositor" being found at the end of the 18th century and beyond.⁶⁴

⁶⁰ George Neilson and Henry Paton (edd.), *Acta Dominorum Concilii: the Acts of the Lords of Council in Civil Causes, vol. ii (1496–1501)* (Edinburgh, 1918), liv–lv (Neilson's Introduction); W. M. Gordon, "The Acts of the Scottish Lords of Council in the Late Fifteenth and Early Sixteenth Centuries: Records and Reports," in C. Stebbings (ed.), *Law Reporting in Britain* (London, 1995), 59 n.15; J. W. Cairns, "Historical Introduction," in K. Reid and R. Zimmermann (edd.), *A History of Private Law in Scotland*, (Oxford, 2000), 1:72.

⁶¹ P. G. B. McNeill (ed.), *The Practicks of Sir James Balfour of Pittendreich* [Stair Society, vol. 22] (Edinburgh, 1963), 2:411–17 ("Anent Arbitrie").

⁶² For recent debate on the creation of the College of Justice, see A. M. Godfrey, "The Assumption of Jurisdiction: Parliament, the King's Council and the College of Justice in Sixteenth-Century Scotland," 22/3 *J. Legal Hist.* 21 (2001); for a treatment within a broader framework, see A. A. M. Duncan, "The Central Courts before 1532," in *An Introduction to Scottish Legal History* [Stair Society, vol. 20] (Edinburgh, 1958), 321–40.

⁶³ P. G. B. McNeill (ed.), *The Practicks of Sir James Balfour of Pittendreich* [Stair Society, vol. 21] (Edinburgh, 1962), 1:272. I am grateful to John Cairns for this reference.

⁶⁴ Gilmour (note 2), 202.