

Compiling the Scottish ‘Practick’: The Method of Morison’s *Dictionary*

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ABSTRACT



Morison’s *Dictionary* is a nineteenth-century compilation of the earliest Scottish case reports, drawn from various manuscript and printed collections known collectively as the ‘practicks’. Although the *Dictionary* has been used widely since its publication, there has been little consideration of Morison’s method of compilation beyond some early criticisms levied by his contemporaneous indexer. This article reconstructs Morison’s method when compiling his *Dictionary*. It shows the extent of his use of the earlier *Folio Dictionary* to locate early-modern cases, particularly the volumes by Henry Home, Lord Kames. It also reveals his use of the manuscript traditions and printed editions of the practicks themselves, with reference to the collected decisions of Sir Richard Maitland of Lethington and the legal digests of Sir Robert Spottiswoode of Pentland and Sir James Balfour of Pittendreich. These examinations reveal both Morison’s method and its implications for how faithfully his *Dictionary* reflects the nature and content of the practicks included.

KEYWORDS Scottish legal history; compilation; authorial method; manuscript transmission; practicks; abridgments; Morison’s *Dictionary*; Henry Home, Lord Kames; Sir Richard Maitland of Lethington; Sir James Balfour of Pittendreich

I. Introduction

The study of early-modern court practice is critical to understanding the development and application of law in Scotland’s historical past. It was in the early-modern Court of Session where many of the doctrines as well as the mixed nature of Scots law – drawing on the traditions of English law, Roman law, civilian jurisprudence, and the canon law of the Roman Catholic Church – were established.

The principal sources for accessing information about early-modern Scottish court practice have long been collections of legal decisions and legal digests, collectively called the ‘practicks’. With no equivalent to the English Year Books,

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collections of legal decisions were compiled privately by practitioners and judges, reflecting each recorder's particular interests and idiosyncrasies. These then circulated among subsequent generations of Scottish lawyers as evidence of previous court practice. Legal digests of case law and other authorities were often started in response to centralized efforts to make the law accessible, but typically became associated with particular individuals, and indeed some private initiatives along these lines are equally notable. The distinction between the collected decisions and legal digests is somewhat arbitrary and unsatisfactory, not least because some lawyers collected practicks which included both the decisions of their practice and legal digests. However, what is important is that these sources were highly diverse in their nature and content, which variation became more pronounced through their circulation in manuscript in early-modern Scotland. Collections of legal decisions recorded by individuals began to be printed irregularly after Viscount Stair's *Decisions of the Lords of Council and Session* (1683–1687), while the printing of some of the legal digests followed in the eighteenth century; most collected decisions and digests remained unprinted.¹

At the beginning of the eighteenth century, the earlier 'practick' of the Scottish courts was thus still available only in these disparate manuscript traditions and a few printed versions. Accessing the court's earlier practick thus remained a significant challenge. Much the same difficulty had arisen earlier in England with the Year Books: with large quantities of case reports ordered chronologically, practitioners required tools to locate relevant previous cases. This had led to the rise of the English abridgements. Indeed, a broad comparison could be drawn between the Scottish digests and the English abridgements of the type produced by Henry Rolle in the seventeenth century and Charles Viner in the eighteenth century (i.e. digests of case law and other sources arranged by subject).² However, as in England, the Scottish digests became quickly dated; in contrast to England, there was no particular Scottish tradition of abridgements of case law specifically.³

¹On the practicks, see e.g. John W. Cairns, 'Historical Introduction', in Kenneth G.C. Reid and Reinhard Zimmermann, eds., *A History of Private Law in Scotland*, 2 vols., Oxford, 2000, vol.1, 14, at 173–174; Andrew R.C. Simpson and Adelyn L.M. Wilson, *Scottish Legal History*, vol.1, Edinburgh, 2017, especially chs.14–16; Gero Dolezalek, *Scotland Under Jus Commune: Census of Manuscripts of Legal Literature in Scotland, mainly between 1500 and 1600*, 3 vols., Edinburgh, 2010, vol.1, 133–150; Hector McKechnie, 'Practicks, 1469–1700', in *An Introductory Survey of the Sources and Literature of Scots Law*, Edinburgh, 1936, 25.

²Henry Rolle, *An Abridgment des Plusieurs Cases et Resolutions del Common Ley: Alphabeticalment digest desouth Severall Titles*, 2 vols., London, 1668; Charles Viner, *A General Abridgment of Law and Equity Alphabetically digested under Proper Titles*, 23 vols., Aldershot, 1746–1757. On which, see John D. Cowley, *A Bibliography of Abridgments, Digests[,] Dictionaries and Indexes of English Law to the Year 1800*, London, 1932, liv–lx; W.S. Holdsworth, 'Charles Viner and the Abridgments of English Law', 39 *Law Quarterly Review* (1923), 17, at 33–35. On Rolle and Viner, see respectively Stuart Handley, 'Rolle, Henry (1589/90–1656)', *Oxford Dictionary of National Biography*, Oxford, 2004, Online Edition, May 2008. Available online at: <https://doi.org/10.1093/ref:odnb/24021>; David Ibbetson, 'Viner, Charles (bap. 1678, d. 1756)', *Oxford Dictionary of National Biography*, Oxford, 2004, Online Edition, September 2006. Available online at: <https://doi.org/10.1093/ref:odnb/28317>.

³Abridgements of case law had emerged from the late fifteenth century in England, prior to the digest-style abridgements. On those earlier abridgements, see Cowley, *A Bibliography of Abridgments*, xxxix–

A notable attempt to address the difficulty in accessing the earlier practick of the Scottish courts was made by the eighteenth-century lord of session, Henry Home, Lord Kames, whose compendium of single-sentence summaries of earlier court decisions was printed in 1741,⁴ to which were added subsequent volumes by two further compilers. However, while this publication provided a mechanism for identifying relevant cases, it did not alleviate the burden of needing to follow the compendium's citations into the earlier source material for the full case note.

Some sixty years later, William Maxwell Morison made the earliest and only large-scale attempt to compile and print a digest of the pre-nineteenth-century decisions of the Scottish courts. Morison had been admitted as an advocate in the Court of Session in 1784, and was sheriff-substitute for Clackmannan near Stirling. His compilation of the earlier Scottish case notes was advertised in 1800 as a private project, supported by subscribers.⁵ He compiled thousands of notes on cases heard before 1808 from diverse manuscript and printed sources. He selected and excerpted the full case reports from these manuscript and printed sources, provided the date and parties' names as headings above the transcribed reports, and identified the specific printed and manuscript source(s) for each case entry in postscript citations. He sometimes additionally provided a brief marginal description of the *ratio* of the decision for ease of reference and searching. He arranged these case entries chronologically under subject headings, and ordered the subjects alphabetically. The resulting compilation, printed in 1801–1807, spanned thirty-eight printed volumes and became known as Morison's *Dictionary*.⁶ It was thereafter updated and printed under a slightly amended title, and with a synopsis and index taking the collection to forty-two volumes, in 1811.⁷

liv; Holdsworth, 'Charles Viner', 32–33. That the two genres of legal literature developed in the reverse order in Scotland likely reflects the difference in the tradition of case reporting: the English Year Books provided a wealth of historical case authority from the thirteenth century, whereas in Scotland the decisions practicks emerged shortly after the founding of the Court of Session in 1532.

⁴Henry Home, Lord Kames, *Decisions of the Court of Session, from Its First Institution to the Present Time. Abridged, and Digested under Proper Heads, in Form of a Dictionary*, 2 vols., Edinburgh, 1741.

⁵On Morison, see Francis J. Grant, *The Faculty of Advocates in Scotland 1532–1943, with Genealogical Notes*, 1944, 156; W.D.H. Sellar, 'Morison, William Maxwell (d. 1821)', *Oxford Dictionary of National Biography*, Oxford, 2004, Online Edition, September 2004. Available online at: <https://doi.org/10.1093/ref:odnb/67535>. An interesting comparison can be drawn here with Charles Viner's abridgement, which was published first privately and thereafter by subscription, albeit for different reasons. See Cowley, *Bibliography of Abridgments*, lviii–lx.

⁶William Maxwell Morison, ed., *The Decisions of the Court of Session from its Institution to the Present Time, Digested under Proper Heads, in the Form of a Dictionary*, 38 vols., Edinburgh, 1801–1807. Some copies of this first printed edition appear to be incomplete, including that on Heinonline, ending with volume 20, which concludes with the topic 'Meditatione fugae' and was printed in 1804.

⁷William Maxwell Morison, ed., *The Decisions of the Court of Session from Its Institution until the Separation of the Court into Two Divisions in the Year 1808, Digested under Proper Heads, in the Form of a Dictionary*, 42 vols., Edinburgh, 1811. Cases cited as in Morison (less forenames for brevity) per the 1811 edition. On which, see Kenneth Reid, 'A Note on Law Reporting' in Reid and Zimmerman, *A History of Private Law in Scotland*, vol.1, liv–lix, at lv–lvi.

Further synopses, indexes and supplemental material continued to be published into 1816.⁸

Some sharp criticisms were made contemporaneously by the *Dictionary's* indexer, William Tait, who criticized Morison for over-reliance on the earlier compendium by Kames. Tait believed that Morison thus omitted cases from his *Dictionary*, failed to correct inaccuracies in Kames's dating of cases, adopted but failed to improve on Kames's structure, and added erroneous marginal annotations to some case reports while borrowing other marginal annotations from Kames.⁹ In making these criticisms, Tait drew on Morison's own admissions, some sampling Tait undertook himself (but without divulging the specifics), rumour, and second-hand criticisms attributed to other (unidentified) advocates said to have closely studied the text.¹⁰

Despite Tait's criticisms, Morison's *Dictionary* became a key resource for Scots lawyers and, indeed, remains the principal source through which courts and scholars access pre-nineteenth-century Scottish cases. It continues to be cited by the courts in Scotland today: since 2017, judgments of the Court of Session, Sheriff Court and High Court of Justiciary have all referred to cases as printed within the *Dictionary*.¹¹ Within the same period, Morison's *Dictionary* has been cited in some twenty articles across Scotland's two law journals.¹²

However, despite the continued importance of Morison's *Dictionary*, there has been no further investigation into its method and its reliability in representing the texts of the original source materials. Nor have Tait's criticisms been freshly tested. This is particularly problematic as both Morison and Tait worked during a period when the nature of the practicks was poorly understood. Recent research has revealed much about the works which Morison transcribed, while studies on the transmission of Scottish law texts during the early-modern period raise new questions about Morison's

⁸On which, see William Tait, *Index to the Decisions of the Court of Session, Contained in All the Original Collections, and in Mr. Morison's Dictionary of Decisions*, Edinburgh, 1823, 515–516.

⁹*Ibid.*, 515–526.

¹⁰See e.g. *Ibid.*, 519.

¹¹*MacMillan v T Leith Developments Ltd* [2017] CSIH 23 at [23]; *Promontoria (Chestnut) Ltd v the Firm of Ballantyne Property Services and others* [2020] CSOH 56 at [58]; *Bowes and others v Highland Council* [2017] CSOH 53 at [26] and on appeal [2018] CSIH 38 at [7], [44]; *Senior-Milne v Advocate General for Scotland* [2020] CSIH 39 at [32]; *Royal Bank of Scotland v Donnelly* [2019] CSIH 56 at [30]; *Park's of Hamilton (Holdings) Ltd v the Scottish Football Association and Rangers Football Club Ltd* [2021] CSIH 61 at [16]; *Wallace-Martinez and another v Nisbet and others* [2023] SC EDIN 9 at [187]; *Chalmers v Machin* [2017] SC GLA 29 at [7], [24]; *Miller v Her Majesty's Advocate* [2019] HCJAC 7 at [12].

¹²See e.g. Euan West, 'The Interaction of Rights of Relief and Unjustified Enrichment in Scots Law', 24 *Edinburgh Law Review* (2020), 202, *passim*; Ilya A. Kotlyar, 'Destinations in Bonds in 17th to Early 18th Century Scots Law: Between Continental Influences and National Developments', 24 *Edinburgh Law Review* (2020), 342, *passim*; Eleanor J. Russell, 'The Liability of Roads Authorities Revisited', 4 *Juridical Review* (2018), 283, at 284; Euan B. Reid, 'The Publicity Principle and Security over Moveables in Scots Law: Fact or Fiction?' *Juridical Review* (2021), 155, at 162 and 171; Douglas J. Cusine, 'Colliers, Salters and Fishermen of Auchmithie', *Juridical Review* (2021), 137, *passim*.

work. Significantly different versions of some of the collections of legal decisions have been identified, while misattribution of case reports and misunderstanding of the nature of these collections has been shown to obscure the understanding of the tradition of these texts.¹³ Such moveability of manuscript sources (and indeed potentially even of printed sources¹⁴) presents challenges for the creation of an authoritative edition by a compiler such as Morison. A compiler must decide which version of the text will be presented, whether as it was originally written by the author or as it was understood by later readers, presuming, of course, that the compiler considers the question at all.

It is therefore both necessary and timely to re-examine Morison's method when compiling the Scottish practick into his *Dictionary*. This article will first investigate Morison's use of Kames's compendium, allowing a fresh testing of the criticisms levied by Tait. It will examine Morison's use of Kames both in general terms and specifically regarding one of the works indexed therein: the collected decisions of the sixteenth-century lord of session, Sir Richard Maitland of Lethington. In doing so, this article will also reflect on Morison's somewhat different use of two of the legal digests: the sixteenth-century digest by Sir James Balfour of Pittendreich and the seventeenth-century digest by Sir Robert Spottiswoode of Pentland. Morison's use of the manuscript tradition of Maitland's decisions will then be identified, allowing his *Dictionary* to be reappraised considering our now-increased understanding of the nature and circulation of the collections he compiled. Finally, conclusions will be drawn on the implications of Morison's method using Kames and the manuscript tradition for his representation of the original sources, as well as more broadly the accuracy and reliability of the *Dictionary* as a tool to access the historical practice of Scotland's courts.

II. Kames's *Dictionary* and the *Folio Dictionary*

By the mid-eighteenth century, Kames recognized the various collections of manuscript and printed case decisions as 'unwieldy by their bulk', motivating

¹³Adelyn L.M. Wilson, 'The Elchies Manuscript and the Method of Sir Richard Maitland of Lethington', 62 *Manuscripta: A Journal for Manuscript Research* (2018), 95; Adelyn L.M. Wilson, 'The Transmission and Use of the Collected Legal Decisions of Sir Richard Maitland of Lethington in Sixteenth- and Seventeenth-Century Scotland', 19 *The Library* (2018), 325.

¹⁴On the moveability of printed texts, see e.g. John W. Cairns, 'The Moveable Text of Mackenzie: Bibliographical Problems for the Scottish Concept of Institutional Writing', in John W. Cairns and Olivia F. Robinson, eds., *Critical Studies in Ancient Law, Comparative Law and Legal History: Essays in Honour of Alan Watson*, Oxford, 2001, 235; Adelyn L.M. Wilson, 'The Sources and Method of the *Institutions of the Law of Scotland* by Sir James Dalrymple, 1st Viscount Stair, with Specific Reference to the Law of Obligations', thesis submitted for the degree of Doctor of Philosophy, University of Edinburgh, Edinburgh, 2011, especially 6.1.1.2, 6.4.1.

the compiling of his own compendium.¹⁵ This work is no longer widely known. A thorough understanding of it is, however, required to appreciate the importance of its structure, content and editorial process to Morison's own method.

Kames's *Dictionary* classified Scottish case reports according to a system seemingly of his own devising, which he called his 'new plan'.¹⁶ His plan was scientific in a broad sense, but was criticized for being idiosyncratic and not particularly accessible.¹⁷ The plan relied upon three levels of categorization. The first division was into alphabetically-arranged titles on broad areas of law, procedural rules, legal institutions, and professional positions or offices. Larger subject titles were divided into narrower, thematically-arranged chapters and then into 'clauses', which were essentially paragraphs. Shorter titles without further sub-division were given where the subject matter was narrow or infrequently the subject of civil litigation.¹⁸ The choice and depth of treatment of topics reflect Kames's interests as a lawyer working in the eighteenth-century Court of Session.¹⁹ The number of titles, sub-headings and clauses which Kames devised was extensive: the list of these spans more than sixty pages in the printed version.²⁰

Kames discussed relevant cases within each clause. He drew these cases from seventeen collections of legal decisions as well as five digests of law.²¹ The *ratio* of each case is typically summarized within a single sentence, immediately followed by a citation to the collection of decisions or digest in which the case was found. Cases on the same point of law found in other practicks might be cited thereafter, with varying degrees of additional description. The order of the cases reflects an interest in developing a narrative on that point of law rather than, say, a chronological arrangement. This is in keeping with Kames's stated aim that his 'distribution has been to make the *ratio decidendi* evident as far as possible, from the very place in which the decision is found'.²²

It is unclear to what extent Kames undertook fresh research into the manuscript and printed sources: he explicitly relied 'upon an abridgement done by another hand',²³ but this abridgement is not further identified by

¹⁵Kames, *Dictionary*, vol.1, i. On Kames, see e.g. Alastair J. Durie and Stuart Handley, 'Home, Henry, Lord Kames (1696–1782)', *Oxford Dictionary of National Biography*, Oxford, 2004, Online Edition, September 2004. Available online at: <https://doi.org/10.1093/ref:odnb/13643>; Daniel J. Carr, 'Preface', in Henry Home, Lord Kames, *Principles of Equity*, 3rd ed., repr. with an introduction by Daniel J. Carr, Edinburgh, 2013, v–li; Andreas Rahmatian, *Lord Kames: Legal and Social Theorist*, Edinburgh, 2015. On the understanding of the importance of case law during this period, see e.g. Cairns, 'Historical Introduction', 172–177.

¹⁶Kames, *Dictionary*, vol.1, iv.

¹⁷Tait, *Index*, 513.

¹⁸See e.g. advocates and multiple-poiniding, Kames, *Dictionary*, vol.1, 24–26, 593–594.

¹⁹See e.g. the scant treatment of art and part liability: *Ibid.*, vol.1, 28.

²⁰*Ibid.*, vol.1, 'A Table of the Several Titles, with their Divisions'.

²¹*Ibid.*, vol.1, 'List of the Several Collections of Decisions from which this Work is Taken'.

²²*Ibid.*, vol.1, vii.

²³*Ibid.*, vol.1, vii.

him. Gero Dolezalek, during the compilation of his three-volume census of Scottish legal manuscripts, raised the possibility that it might be the late seventeenth- or early eighteenth-century manuscript Advocates Library Adv. MS. 24.2.3,²⁴ but this has yet to be further investigated. Nonetheless, some inferences can be made about Kames's use of the abridgement from his declaration that 'he has been careful to consult the originals, wherever he had suspicion of error'.²⁵ This seems to indicate that he used the abridgement to a significant extent, both when identifying cases for inclusion in his *Dictionary* and for the details of his case summaries.

Supplements by two later compilers became appended to Kames's collection. Alexander Fraser Tytler, Lord Woodhouselee produced two supplementary volumes, which were printed in 1797 as the third and fourth volumes of Kames's collection.²⁶ Woodhouselee adhered largely to Kames's arrangement but added new titles on the election of Members of Parliament, policing, literary property and insurance.²⁷ He excerpted cases from manuscript and printed collections which were not available through Kames's original volumes.²⁸ In 1804, a further *Supplement* was printed.²⁹ It was published anonymously but was subsequently attributed to a 'Mr. McGrugar',³⁰ probably the Thomas McGrugar who was admitted to the bar in 1786.³¹ This volume added cases heard before 1796 but which were not included by Woodhouselee, most notably those heard by the High Court of Justiciary, and added a title on jury trials to the existing structure.³² The complete set of these works – by Kames, Woodhouselee and McGrugar – became known as the *Folio Dictionary*.³³

However, soon after its publication, Morison's *Dictionary* superseded the *Folio Dictionary*. Tait observed of the *Folio Dictionary* in 1823: 'It is almost entirely disregarded, not only by those who have the larger [Morison's]

²⁴Dolezalek, *Census*, vol.2, 204. On Adv. MS. 24.2.3 generally, see *ibid.*, 203–212.

²⁵Kames, *Dictionary*, vol.1, vii.

²⁶[Alexander Fraser Tytler, Lord Woodhouselee], *The Decisions of the Court of Session, from Its First Institution to the Present Time, Abridged, and Digested under Proper Heads, in Form of a Dictionary*, 2 vols., Edinburgh, 1797, vol.3, vi. Note that Woodhouselee published only two volumes, but they were printed as numbers three and four, following on from Kames's two volumes; this convention will be followed in this article for ease of reference. On Woodhouselee, see Alexander du Toit, 'Tytler, Alexander Fraser, Lord Woodhouselee (1747–1813)', *Oxford Dictionary of National Biography*, Oxford, 2004, Online Edition, September 2004. Available online at: <https://doi.org/10.1093/ref:odnb/27965>.

²⁷Woodhouselee, *Dictionary*, vol.3, vi–vii.

²⁸*Ibid.*, vol.3, viii. See also Tait, *Index*, 512.

²⁹[Thomas McGrugar], ed., *Supplement to the Volumes Third and Fourth of the Dictionary of Decisions; Containing All the Omitted Cases, Abridged and Digested Under Proper Heads*, Edinburgh, 1804.

³⁰Tait, *Index*, 515.

³¹Grant, *Faculty of Advocates*, 133.

³²[McGrugar], ed., *Supplement*, iii–iv.

³³See e.g. Charles Purton Cooper, *Reports of Cases in Chancery, Decided by Lord Cottenham; Commencing 7th July, 1846*, 2 vols., London, 1846–1848, vol.2, 449 n.†; Charles C. Soule, *The Lawyer's Reference Manual of Law Books and Citations*, Boston, 1883, 137. See also Tait, *Index*, 512; Reid, 'A Note on Law Reporting', lv.

Dictionary, but by those also who have it not'.³⁴ Tait's criticisms of Morison can, in part, be contextualized within his appreciation of Kames's work as well as the wider *Folio Dictionary*, which he had lauded as 'invaluable'.³⁵ Additionally, Tait identified that Morison used the volumes by Kames and Woodhouselee extensively, citing them collectively as the '*Folio Dictionary*'. The research outlined below certainly confirms Morison's extensive use of Kames's volumes, as well as (if to a lesser extent) his use of those volumes by Woodhouselee. Yet, the third part of the *Folio Dictionary*, McGrugar's *Supplement*, does not appear to have been used by him.³⁶ Morison did not include a title on jury trials, and a comparison shows that a sample of McGrugar's cases were not received.³⁷ The term '*Folio Dictionary*' was therefore seemingly used by Morison to describe the volumes by Kames and Woodhouselee only, and will be used hereafter in that same manner.

III. Morison's Use of the *Folio Dictionary*

Morison relied heavily upon the *Folio Dictionary*. As Tait identified, Morison explicitly adopted its 'mode of General Classification' as his own structure, including the titles added by Woodhouselee. He praised this scheme as 'so ingenious ... that it is unnecessary, and would be improper[,] to employ another'.³⁸ Morison made only minor changes to the scheme: he renamed 'chapters' to 'divisions' and 'clauses' to 'sections', and adjusted the wording of some headings. Furthermore, as will be shown in the following sections, and again somewhat validating Tait's criticisms, Morison also relied upon Kames and Woodhouselee to identify and locate cases in the practicks, and borrowed from the *Folio Dictionary* some of his marginal descriptions of cases. Going beyond what Tait identified, it will also be shown that Morison sometimes drew from the *Folio Dictionary* the substantive text of his entries on cases rather than excerpting them from the original sources. These elements of borrowing will be explored in turn below, principally with reference to the collected legal decisions of Sir Richard Maitland of Lethington, after which Morison's parallel use of the legal digests of Sir Robert Spottiswoode of Pentland and Sir James Balfour of Pittendreich will be considered.

³⁴Tait, *Index*, 512.

³⁵*Ibid.*, 512.

³⁶*Cf. Ibid.*, 515.

³⁷*Nicolson v Nicolson* (1770), under 'Adultery'; *Blackwood v Creditors of Miln* (1752), under 'Execution'; *Dalrymple v Grant* (1712), under 'King's Advocate'; *Dundas v Fergusson* (1780), under 'Procurator'; *MacLeod v MacKenzie* (1712), under 'Term Legal and Conventional'. [McGrugar], ed., *Supplement* 5, 45, 96, 144, 191 respectively.

³⁸Morison, *Dictionary*, vol.1, vi.

1. Morison's explicit use of the *Folio Dictionary* to identify earlier cases

It is already known that Morison used the *Folio Dictionary* to identify and locate some of the cases which he excerpted from the practicks. Tait stated that: 'He has given at full length what they have abridged: in every other respect, his Dictionary is just a new edition of Kames' Dictionary, with Woodhouselee's and McGrugar's Supplements, and the Faculty Decisions up to 1808, incorporated'.³⁹ The extent of this reliance can be identified because Morison typically cited the relevant page of the *Folio Dictionary* in his postscript citations. A digital search of Morison's 1811 edition suggests that it contains more than 11,500 such postscript citations of the *Folio Dictionary*. Nearly 8300 entries apparently cite Kames's two volumes: almost 5300 cite the first volume, and more than 3000 cite the second volume.⁴⁰ This is, of course, an imprecise method of research: the transcription which is searched by the online engine may erroneously differ from the original printed page,⁴¹ while there may also have been errors in Morison's original printed text.⁴² Nonetheless, even if broadly correct, this suggests a significant reliance by Morison on Kames and Woodhouselee.

Yet, Morison became generally disinclined to cite the *Folio Dictionary* in the latter volumes of his *Dictionary*: a digital search suggests that volumes thirty-seven and thirty-eight, as the last two volumes with excerpted reports, together give around eighty references to the *Folio Dictionary*, which is considerably lower than the average of circa 550 citations per double volume. Yet, as will be shown below, Morison continued to use the *Folio Dictionary* to access earlier case notes for those latter volumes. The change of practice was therefore in his explicit citation of the *Folio Dictionary*, rather than his use of it.

These observations are important because an analysis of the entries themselves shows that the *Folio Dictionary* was Morison's principal tool for locating interesting cases in the manuscript and printed traditions of pre-eighteenth-century cases. Indeed, it would seem he used Kames's volumes in particular: while his reliance on Kames's volumes to access early-modern source material appears to have been extensive, a digital search of

³⁹Tait, *Index*, 518.

⁴⁰Search conducted on the Heinonline.org Scottish Legal History collection and the British and Irish Legal Information Institute (baillii.org) texts. Both seemingly provide access to the same copy of the 1811 edition: see the smudging and erosion of the page numbers on Mor. 3080, 8906.

⁴¹For example, baillii.org gives 'Cairlncross' for 'Cairncross' in *Hoppringle v Cairncross* (1566) Mor. 15,959, although a search for 'Cairncross' nonetheless identifies this entry.

⁴²For example, thirty-two cases are dated by Morison to 1741 or later but are also cited as being found in Kames's volumes, e.g. *Donaldson and others v the Magistrates of Kinghorn* (1789) Mor. 1890. It is possible that some of these cases might be found in Kames but have been given the wrong date by Morison. Examples of this include *Baillie v Stewart* (1741) Mor. 15,600 and *Strang and Robertson v Fleet* (1907) Mor. 11,005, which are both mentioned by Kames, who gives the dates 1731 and 1709 respectively: Kames, *Dictionary*, vol.2, 436, 115.

Woodhouselee's volumes suggests that no cases heard in the sixteenth or seventeenth centuries were received from them by Morison.⁴³

However, Kames summarized only a selection of the early-modern cases, hence (in part) the need for those supplementary volumes to be added later. Thus one of Tait's central criticisms of Morison's *Dictionary* – which he attributed to the overuse of Kames – was the omission of a high number of the case reports extant in the practicks. He calculated that around 2800 case-notes from printed collections and some 10,000 entries from manuscript collections were lacking.⁴⁴ In making this calculation, Tait provided lists of the collections of legal decisions which Morison sampled, along with the total number of entries thought to be in each collection overall and the number included in Morison. As will be shown below, Tait's understanding of the nature and content of these collections was flawed, so these details are incorrect for at least some of the practicks. However, his wider point that most entries from within these collections are omitted by Morison is correct.

These observations all raise important questions about Morison's method generally and his reliance upon Kames's compendium specifically. It also raises questions about the extent to which Morison provides a reliable source with which to access early-modern cases. These questions can only be answered through a more detailed investigation. Given the size of Morison's *Dictionary*, it is necessary to examine only a sample of the entries and draw conclusions as to his method thereupon, with the assumption that these findings would likely be applicable to the wider text by extension. The collected legal decisions of Sir Richard Maitland of Lethington provides a useful such sample – particularly because recent studies have provided a detailed understanding of the original recording of these notes by Maitland, the subsequent manuscript transmission through the sixteenth and seventeenth centuries, and how the nature and reputation of this collection of decisions changed during that process of transmission.⁴⁵

2. Identifying relevant cases in Maitland's decisions

Sir Richard Maitland of Lethington was a lord of session in the sixteenth century and maintained the second-earliest collection of notes on cases heard by the Court of Session. He began recording cases within a fortnight of taking his seat in December 1550 and seems to have stopped doing so in 1577. He made altogether some 400 notes on cases, written in the

⁴³For occasional citations of early-modern cases within notes on eighteenth-century cases, see e.g. Woodhouselee, *Dictionary*, vol.3, 392. Digital search undertaken on the Eighteenth Century Collections Online text. Available online at: <http://find.galegroup.com/ecco/>.

⁴⁴Tait, *Index*, 516–517.

⁴⁵Wilson, 'The Elchies Manuscript'; Wilson, 'The Transmission and Use'.

vernacular, sometimes including more than one action between the same parties within a single note. The earlier cases tended to be short and perfunctory, with increasing levels of detail as time went on. It has been suggested elsewhere that this reflected his likely motivation for recording cases as being to teach himself the law in Scotland, having been a political appointment to the bench rather than being promoted from practice.⁴⁶

Maitland gifted some early presentation copies of his collection to fellow members of the judiciary while he continued to record cases, but these appear to have had little impact on the manuscript tradition. Once he finished recording case notes, he allowed the collection to be copied again, and over time this led to two distinct branches of descendant manuscript texts. One, elsewhere termed the α group, remained close to the original text. The other, termed δ group after a subsequent common ancestor, became the most sought-after version of the text even though (and indeed almost certainly because) it differed in important ways. In these copies, the text of Maitland was bound with two other sixteenth-century collections of legal decisions, those by John Sinclair and Alexander Coville of Culross; this was the origin of the continued understanding of an association between these three practicks.⁴⁷ Also added were nearly another 100 case-notes made by different, unidentified recorders, largely relating to cases heard between 1564/5 and 1570, which were inserted into Maitland's decisions and interrupted the chronological order of his case-notes. These were added as a block into the text and, lacking any explicit alternative provenance, became attributed to Maitland.⁴⁸ Conversely, a subsequent loss of text within some of the manuscripts of this group at this same place meant that around ninety entries either by or inserted into Maitland became wrongly attributed to Colville, whose decisions followed those of Maitland in this group of manuscript copies. This loss of text also meant that, by the eighteenth century, the dominant view was that Maitland's collection contained cases heard only until 30 July 1565, even though some of the cases reported earlier in that collection than either the insertion or the loss of text were heard in 1570.⁴⁹ Finally, the δ group added additional detail to some of the case reports, which was likely

⁴⁶On these points, see Wilson, 'The Elchies Manuscript'. On Maitland's life, see Michael R.G. Spiller, 'Maitland, Sir Richard, of Lethington (1496–1586)', *Oxford Dictionary of National Biography*, Oxford, 2004, Online Edition, September 2004. Available online at: <https://doi.org/10.1093/refodnb/17831>. On the court during this period, see A.M. Godfrey, *Civil Justice in Renaissance Scotland: The Origins of a Central Court*, Leiden, 2009, especially chs. 3–9.

⁴⁷Wilson, 'The Transmission and Use', 339. On Sinclair, see Gero Dolezalek, 'The Court of Session as a *lus Commune* Court – Witnessed by "Sinclair's Practicks", 1540–1549', in Hector L. MacQueen, ed., *Miscellany IV*, Edinburgh, 2002, 51; Athol L. Murray, 'Sinclair's Practicks', in Alan Harding, ed., *Law-Making and Law-Makers in British History: Papers Presented to the Edinburgh Legal History Conference, 1977*, Edinburgh, 1980, 90. A provisional text of Sinclair's practicks by Murray and Dolezalek is available online at: <http://www.uni-leipzig.de/~jurarom/scotland/dat/sinclair.html>. On Colville, see J.D. Ford, *Law and Opinion in Scotland during the Seventeenth Century*, Oxford, 2007, 202–204.

⁴⁸Wilson, 'The Transmission and Use', 343–347; Dolezalek, *Census*, vol.3, 45–46, 315.

⁴⁹Wilson, 'The Transmission and Use', 350–351, 358–359.

initially added as marginalia but became intercalated into the text such as to appear in later copies as if original. This included citations of learned authority, most notably of Roman law and continental juristic literature.⁵⁰

These misattributions of case notes, both to Maitland and those by Maitland to Colville, are found in Kames. He attributes Maitland's latter cases to Colville and describes Maitland's decisions in his list of sources as spanning the period 'from December 1550, to July 1565'.⁵¹ However, he does not attribute to Colville those cases heard after 1565 but which appear in Maitland prior to the insertions and loss of text. Kames is therefore reflective of the odd contradiction in the transmission of Maitland that, having declared that this collection ends in 1565, Kames nonetheless attributed to him cases heard up to December 1570.⁵² Morison's use of Kames, as well as some of the manuscripts identified below, meant that his *Dictionary* likewise reflects this distorted understanding of the collections of Maitland and Colville. Thus, for example, twenty-eight of Morison's entries wrongly attribute to Colville case-notes which were recorded by Maitland.⁵³

Overall, 140 of the case entries in Morison's *Dictionary* were recorded by Maitland or were insertions added and attributed to Maitland,⁵⁴ from a total collection of approximately 500 case notes overall (including the insertions). This differs from Tait's understanding: he wrongly suggested that around 120 case-notes from Maitland had been included in Morison's *Dictionary*, from an overall total of 360 cases.⁵⁵ While he must in any case have failed to identify all the cases which Morison excerpted from Maitland, these numbers suggest that Tait's understanding of this collection, like that had by Kames and Morison, was affected by the misattribution of Maitland's latter decisions to Colville.

These 140 entries provide an appropriately-sized sample group for a detailed study of Morison's method and will – for brevity – be referred to simply as notes by Maitland, obscuring for immediate purposes the misattribution of some. The *Folio Dictionary* is explicitly cited for 113 (i.e. eighty-one per cent) of these 140 entries. Morison was thus prepared to acknowledge a heavy reliance upon Kames in accessing Maitland. Typical of the latter

⁵⁰*Ibid.*, 341–343.

⁵¹Kames, *Dictionary*, vol.1, 'List of the Several Collections'.

⁵²*Home of Manderston v Tenants of Oldhamstocks* (1570), cited at Kames, *Dictionary*, vol.1, 313; vol.2, 421.

⁵³This includes an entry which appears 100 entries prior to the erroneous division of the text, which was erroneously attributed to Colville by Maitland but not by Kames: *Sinclair v Manderson* (1565) Mor. 6424; Kames, *Dictionary*, vol.1, 433. It does not seem likely that Morison was attempting to correct a perceived anomaly: he did not 'correct' the attribution of other cases and did not attribute the next case (heard on the same day) to Colville: *Home v Home* (1565) Mor. 10,172. Cf. a case which is erroneously attributed to Maitland by Kames and Morison: *Commendator of Kilwinning v Laird of Blair* (1590) Mor. 2712; Kames, *Dictionary*, vol.1, 171.

⁵⁴Morison entered some cases more than once and combined other case-notes into single entries, so 131 of the items recorded by or attributed to Maitland are entered in Morison's *Dictionary*.

⁵⁵Tait, *Index*, 409.

volumes, however, Morison's method regarding citation of Kames changed towards the end of the *Dictionary*. None of the last fifteen entries on notes from Maitland – those after the title 'Thirlage' in volume thirty-six – cite the *Folio Dictionary* despite all being discussed in Kames. Nonetheless, Morison's use of Kames in even these latter entries is highly likely despite the lack of explicit citation. Although there is no clear evidence of borrowing in six of these latter entries,⁵⁶ in seven he adopted Kames's summary for his own marginal description,⁵⁷ and in another two he replicated Kames's wording as his own entry text.⁵⁸ This textual borrowing clearly identifies Kames as a source for these entries, and can be shown to be typical of Morison's wider practice.

3. Morison's use of Kames's summaries for his own marginal descriptions

Morison provided marginal descriptions for some of the entries in his *Dictionary*. Tait indicated that 'The marginal abridgments of the more early Decisions were taken from Lord Kames' Dictionary, and the Supplements of Lord Woodhouselee and Mr. McGrugar, when the abridgments in these works happened to be short: the others were devised by Mr. Morison himself.'⁵⁹ Tait is correct in his identification of the source of many of Morison's marginal descriptions. Indeed, seventy-one (i.e. fifty-one per cent) of the sample entries used Kames's summary of that case as the marginal description. Most of these are taken verbatim, although sometimes Morison lightly abbreviated Kames's text for his own use.

Additionally, sometimes Kames's summary of a case in Maitland would be applied to a case drawn from a different collection. Where Kames cited more than one case on a point of law, Morison would borrow Kames's summary for his marginal description of the case which appears first in his own *Dictionary*. Kames's summaries of Maitland are therefore found alongside two

⁵⁶(1) *Tutor of Congilton v the Lady* (1550) Mor. 16,222; (2) *Laird of Rankellor [sic] v Lord Lindsay* (1552) Mor. 16,457; (3) *Laird Lochleven v Arnot* (1565) Mor. 16,650; (4) *Hospital of Leith v Town of Kinghorn* (1576) Mor. 16,651; (5) *A v B* (1550) Mor. 16,649; (6) *Lady Coluthie v Carnegie* (1558) Mor. 16,650. Cf. Kames, *Dictionary*, vol.2, 483, 503, 523, 525, 529 (twice). These six entries were not given marginal descriptions, which will be shown to be where the borrowing from Kames would normally be found. There would also seem to be a reduction in the proportion of entries given marginal descriptions in these final titles, which indicates another change in Morison's method in this part of his compilation. Thus, although different from Morison's practice earlier in the *Dictionary*, his presentation of these six entries does seem in keeping with his slightly revised treatment of cases here.

⁵⁷(1) *Hoppringle v Cairncross* (1566) Mor. 15,959; (2) *Craig v Johnston* (1574) Mor. 16,231; (3) *Dishington v Hamilton* (1558) Mor. 16,227; (4) *Prior of St. Andrew's v Kinnier* (1555) Mor. 16,225; (5) *Douglas v Foreman* (1565) Mor. 16,230; (6) *Laird of Cowdenknows v Tenant of Didiston* (1551) Mor. 16,457; (7) *Dalrymple v Kennedy* (1567) Mor. 16,517. Kames, *Dictionary*, vol.2, 469, 479, 485, 486, 489, 503, 510 respectively.

⁵⁸(1) *Lord Lethington v Lord Corstorphin[e]* (1555) Mor. 16,650; (2) *Maxton v Maxton* (1569) Mor. 16,518. Kames, *Dictionary*, vol.1, 230, vol.2, 511.

⁵⁹Tait, *Index*, 518–519.

cases reported by Sinclair,⁶⁰ and one case found in Balfour's digest.⁶¹ Morison twice adhered to this practice even where the citations in Kames were separated by short sections of non-substantial text.⁶² On two other occasions, minor errors meant that the summary was applied to the later case chronologically: once because Morison arranged a later case recorded by Colville to be before an earlier case drawn from Maitland and Balfour,⁶³ and once where the summary was simply applied to the later case from Maitland and the earlier case from Sinclair was left without a marginal description.⁶⁴

Overall, some seventy-seven (i.e. fifty-five per cent) of Morison's entries on Maitland's case-notes have or can thus be associated with marginal descriptions which are borrowed from Kames. Morison explicitly cited the *Folio Dictionary* under seventy of these entries;⁶⁵ the other seven have no such citation, but the replication of Kames's summaries verbatim,⁶⁶ or almost verbatim,⁶⁷ proves the origins of these marginal descriptions despite the lack of citation. It is notable that all seven entries which lack a citation of the *Folio Dictionary* despite the borrowing of the marginal description are found in the latter part of the *Dictionary*, by which point Morison had stopped citing this source for the entries on Maitland.

It is possible that this pattern of borrowing is more widespread than has been identified here. Another two entries which do not cite the *Folio Dictionary* have marginal descriptions which are broadly comparable to Kames's summaries but are insufficiently close to conclude that they were borrowed from him.⁶⁸ However, whatever the case with those two entries, it was certainly not Morison's practice to routinely devise original marginal

⁶⁰(1) *Oliphant v Bochtie* (1554) Mor. 2724; (2) *Grundiston v Lawson* (1561) Mor. 8978. Kames, *Dictionary*, vol.1, 173, 579.

⁶¹*Bryson v Somervill* (1565) Mor. 1703. Kames, *Dictionary*, vol.1, 106.

⁶²(1) *Glentoris v Kirkpatrick* (1543) Mor. 8978 [Sinclair]; *Grundiston v Lawson* (1561) Mor. 8978 [Maitland]; Kames, *Dictionary*, vol.1, 579. Morison borrowed Kames's summary for *Glentoris*, less an observation that the Latin maxim given was 'conform to the common law', and noted that *Grundiston* was 'found as above'. (2) *Cuninghame v Drumquhassie* (1567) Mor. 7409; Kames, *Dictionary*, vol.1, 497, as 'Ld. Polmais v [blank]'. The other case cited for the same point of law – taken from the decisions of the seventeenth-century lord of session Alexander Gibson of Durie – appears twice in Morison: *Lands v Dick* (1630) Mor. 7411, which cites Kames and provides the summary as the entry text, and *Landes v Dick* (1630) Mor. 4789, which cites Durie only.

⁶³*Ld Kinfauns v Ld Craigie* (1552) Mor. 10,337; Kames, *Dictionary*, vol.2, 74.

⁶⁴*Parson of Muckarsie v Abercromby* (1558) Mor. 7935 [Maitland, Balfour]; *Bishop of Aberdeen v the executors of the late Bishop* (1541) Mor. 7934 [Sinclair, Balfour]; Kames, *Dictionary*, vol.1, 528.

⁶⁵This number an entry borrowed along with a report in Colville, which cites the *Folio Dictionary* beneath the text excepted from Colville: *Ld Kinfauns v Ld Craigie* (1552) Mor. 10,337.

⁶⁶(1) *Craig v Johnston* (1574) Mor. 16,231; (2) *Dalrymple v Kennedy* (1567) Mor. 16,517. Kames, *Dictionary*, vol.2, 479, 510.

⁶⁷(1) *Hoppringle v Cairncross* (1566) Mor. 15,959; (2) *Dishington v Hamilton* (1558) Mor. 16,227; (3) *Prior of St. Andrew's v Kinnier* (1555) Mor. 16,225; (4) *Douglas v Foreman* (1565) Mor. 16,230; (5) *Laird of Cowdenknows v Tenant of Didiston* (1551) Mor. 16,457. Kames, *Dictionary*, vol.2, 469, 485, 486, 489, 503.

⁶⁸(1) *Laird of Innerquharity v Ogiivie* [sic] (1563) Mor. 10,429; (2) *Frenchman v Scotsmen* (1566) Mor. 11,857. Cf. Kames, *Dictionary*, vol.2, 80, 177.

descriptions for the entries excepted from Maitland. For whatever reason, he chose not to supply marginal descriptions for twenty-four of the entries from Maitland which explicitly cited the *Folio Dictionary*. Only the remaining five entries which cite the *Folio Dictionary* seem to have marginal descriptions devised by Morison – at least, these marginal descriptions were not borrowed from either Kames or the manuscripts which will be shown below to have been used by him.⁶⁹

Yet, despite Tait's criticism, it is important to observe that Morison did not (at least always) rely upon the *Folio Dictionary* uncritically. For example, Kames's summary was received verbatim by Morison as his marginal description of *Cranston v Brown* (1567), under which entry he cited the *Folio Dictionary* and the relevant manuscript and added the postscript 'This case is called by mistake in the Fol. Dic. Home against Kennedy'. He is correct in this observation: the summary correctly applies to *Cranston v Brown*, which is the case immediately before that which would properly be cited as *Dalrymple and Home v Kennedy* in Maitland.⁷⁰ In this instance, therefore, Morison was able to recognize and correct Kames's confusion.⁷¹

4. Morison's use of Kames's summary as his own entry text

Beyond borrowing Kames's text for marginal headings, as observed by Tait, Morison also sometimes copied the single-sentence case summaries in the *Folio Dictionary* as the text of his own substantive entry. The substantive texts of twelve (i.e. nine per cent) of Morison's entries from Maitland were copied from Kames, in full and verbatim or nearly so.⁷²

Eight of these twelve entries are on cases which are additionally entered elsewhere in Morison under different subject headings. On each occasion, the case-note as excerpted from the manuscript is provided in the entry appearing first in the *Dictionary*; the entry for the second appearance of

⁶⁹This includes one marginal description which simply compares the entry to that above. See (1) *Hamiltons v the Sheriff-Depute of Perthshire* (1564) Mor. 10,505; (2) *Brown v Abbot of Dunfermline* (1566) Mor. 15,069; (3) *Laing v N* (1565) Mor. 13,807; (4) *Borthwick v Lord St John* (1570) Mor. 15,313; (5) *A v B* (1566) Mor. 13,299. Adv. MS. 24.1.5 fos.80r-v, 92r-v, 105v, 107r, 108v. Kames, *Dictionary*, vol.2, 93, 411, 337–338, 426, 308.

⁷⁰*Cranston v Brown* (1567) Mor. 3172; *Dalrymple v Kennedy* (1567) Mor. 16,517. Kames, *Dictionary*, vol.1, 210. See the cases in Maitland's authorial holograph (his original manuscript): Advocates Library Adv. MS. 31.2.2(i) fos.76v–77r. On this manuscript, see Wilson, 'The Elchies Manuscript'; Dolezalek, *Census*, vol.2, 354–365.

⁷¹Cf. for an example of Morison's less critical use of Kames's summaries, Adelyn L.M. Wilson, 'Stair, Mackenzie and Risk in Sale in Seventeenth Century Scotland', 15 *Fundamina* (2009), 169, at 177.

⁷²Another two cases were so briefly described in the manuscript copies of Maitland that Kames simply copied their wording, but Morison's citation of the manuscripts here allows the presumption that he excerpted the texts from the manuscripts: *Lord Angus v Laird of P* (1554) Mor. 7544; *A v B* (1554) Mor. 14,081. Kames, *Dictionary*, vol.1, 504, vol.2, 352. For these two cases in the three manuscripts shown below to have been used by Morison, see Advocates Library Adv. MS. 24.1.4, fos.98v, 99r; Adv. MS. 24.1.5, fos.60v, 61r; Advocates Library Adv. MS. 25.4.11, fos.148r, 148v (although with slightly different wording).

the case replicates Kames's summary and cross-references the previous note.⁷³ Normally Morison cited the *Folio Dictionary* in both entries, although twice he failed to do so beneath the first entry,⁷⁴ and twice he omitted this reference in the latter entry where he received the text from Kames.⁷⁵ Morison's motivation in borrowing Kames's text for these eight duplicate entries seems clear: it was a pragmatic practice which offered both time and cost savings. The provision of shorter entries on the second occurrence of these cases in his *Dictionary* avoided the unnecessary repetition of these entries' transcriptions; borrowing Kames's summaries saved Morison from devising original descriptions; the cross-references to the fuller excerpted entries ensured that the longer text found within the manuscript tradition remained available to readers. Interestingly, there is only one example of case being entered twice where Morison did not receive Kames's summary for the latter entry, although it is unclear whether Morison understood that he had already supplied a note on the same case given the corruption of the parties' names. Some suggestion that he did not is found in him having transcribed these entries from two different manuscripts.⁷⁶

The other four of the twelve entries Morison borrowed from Kames are, however, not duplicates but the only entries on those cases. Morison did not cite a specific page or folio of any manuscript for these four cases, but each one provides a cross-reference to elsewhere in the *Dictionary*. One of these might reflect a lapse in the rigour of Morison's method: he relied on a description of the same case drawn from Balfour entered elsewhere in the *Dictionary*, and simply cross-referenced this below the entry from Maitland;⁷⁷ no difficulties with the manuscript tradition would seem to explain

⁷³(1) *Cunningham v Lady Semple* (1553) Mor. 3091, 12,650; (2) *Lord Lethington v Lord Corstorphin[e]* (1555) Mor. 3418, 16,650; (3) *Bryson v Somerville* (1565) Mor. 1703, 8906; (4) *Maxton v Maxton* (1569) Mor. 11,335, 16,518; (5) *Balfour v Balfour* (1569) Mor. 7855, 13,377; (6) *Home v Tenants of Oldhamstocks* (1570) Mor. 4684, 15,226; (7) *Countess of Argyle v Tenants* (1573) Mor. 327, 6184; (8) *Murray v Livingston* (1575) Mor. 328, 6144.

⁷⁴(1) *Murray and Tenants v Livingston* (1575) Mor. 328 and *The Same Parties* (1576) Mor. 328, with the reference to Kames and a cross-reference to the former entry given in *Murray v Livingston* (1575) Mor. 6144. (2) *The Countess of Argyle v Tenants of Dollar and the Earl of Argyle* (1573) Mor. 327, with the citation of Kames and cross-reference to this entry being found in *Countess of Argyle v Tenants* (1573) Mor. 6184.

⁷⁵(1) The relevant page in Kames was cited beneath only the first entry on *Laird of Lethington v Laird of Corstorphine* (1555) Mor. 3418, 16,650. Kames, *Dictionary*, vol.1, 230. (2) Morison used one of Kames's summaries as the marginal description alongside his first entry on *Maxton* and used a subsequent summary as his second entry's text without anywhere providing a reference to that second page. *Maxton v Maxton* (1569) Mor. 11,335, 16,518; Kames, *Dictionary*, vol.2, 134, 511.

⁷⁶*Laird of B v a Poor Boy* (1553) Mor. 15,209. Cf. *A v B* (1553) Mor. 8410, which supplies an erroneous citation which should probably indicate Kames, *Dictionary*, vol.2, 563.

⁷⁷*Lady Lovat v Frasers* (1567) Mor. 2189 [Maitland], cross-referencing the title of Morison in which is found *Lovat v Fraser* (1567) Mor. 3878 [Balfour], but with no reciprocal cross-referencing. Cf. the reciprocal cross-referencing seen in *Melvill v Dumbar [sic]* (1566) Mor. 5993 [Spottiswoode], and *Dunbar v Melville* (1566) Mor. 6001 [Maitland, citing the *Folio Dictionary*].

Morison's failure to follow up on the reference to Maitland.⁷⁸ However, the others can be explained by his likely being unable to provide a full transcription of Maitland for these entries, and his attempting to use Kames to provide his readers with as much detail as possible. One such entry cross-refers to a more recent case on the same topic recorded by the seventeenth-century judge, Sir Alexander Gibson of Durie, entered earlier in the *Dictionary*;⁷⁹ Morison's provision of a transcript of Maitland's decision in this instance was likely hindered by the case's omission from the manuscript he used for the collection early in his compilation.⁸⁰ The inability to locate the full case-note in the manuscripts because of an erroneous date or omission might also explain the other two entries for which no transcription is provided. Both entries also provided cross-references which seem to indicate that further information about the cases would be found at a later point in the *Dictionary*, but if that was Morison's intention then in neither instance was that fulfilled.⁸¹ The conclusion is therefore unavoidable that the record of these cases preserved in Morison's *Dictionary* has been entirely transmitted through Kames.

5. Morison's use of Kames to access the legal digests

As is clear from the above analysis, Morison also provided entries drawn from the legal digests, sometimes as parallel reports of the same case alongside excerpts of the case drawn from different practicks. The legal digests as a

⁷⁸Peter G.B. McNeill, ed., *The Practicks of Sir James Balfour of Pittendreich, Reproduced from the Printed Edition of 1754*, 2 vols., Edinburgh, 1962–1963, vol.1, 221; Kames, *Dictionary*, vol.1, 133; Adv. MS. 24.1.4, fo.138r; Adv. MS. 24.1.5, fo.97r; Adv. MS. 25.4.11, fo.169r. The last of these manuscripts omits the year, but the text is chronologically ordered and the surrounding notes provide the year so this item could have been located.

⁷⁹On Durie's life, see Vaughan T. Wells, 'Gibson, Alexander, Lord Durie (d. 1644)', *Oxford Dictionary of National Biography*, Oxford, 2004, Online Edition, May 2006. Available online at: <https://doi.org/10.1093/ref:odnb/10609>. Durie's *Decisions*, although a highly important source, is yet to be fully researched: Alexander Gibson of Durie, *The Decisions of the Lords of Council and Session in Most Cases of Importance ... July 1621 to July 1642*, Edinburgh, 1690.

⁸⁰*Executors of the Bishop of Dunblane* (1564) Mor. 3842; *Mackie v Dumbar* [sic] (1628) Mor. 1788; Kames, *Dictionary*, vol.1, 273; Adv. MS. 24.1.4 omits the case; Adv. MS. 24.1.5, fos.117v–118r; Adv. MS. 25.4.11, fo.180v.

⁸¹(1) *Crichton v Lord Rossie* (6 March 1573) in Kames and Morison is rather in the manuscripts *Crichton of Innernyte v the heirs of Charters* (6 and 13 March 1563/[4]). Morison provides the cross-reference 'See This case voce TUTOR and PUPIL' below the entry borrowed from Kames. However, the title as printed was called rather 'Tutor – Curator – Pupil' and this case does not appear therein. *Crichton v Lord Rossie* (1573) Mor. 2178; Kames, *Dictionary*, vol.1, 132; Adv. MS. 24.1.4, fo.116r; Adv. MS. 24.1.5, fo.78v; Adv. MS. 25.4.11, fo.159v. (2) *Lord Clova v Ramsay* (1567) was cited in Kames and Morison as being heard in 1567. However, one of the manuscripts used by Morison omits the case, another gives the date 7 June 1566, and the third omits the date but arranges the case between June 1566 and January 1566/7. It is unclear what is meant by the cross-reference below this entry in Morison, which reads only 'See Appendix': the only case found in the appendix to 'Tenor' dates from 1801 and does not seem relevant. See *Lord Clova v Ramsay* (1567) Mor. 15,784. Kames, *Dictionary*, vol.2, 449; Adv. MS. 24.1.4 omits the case; Adv. MS. 24.1.5, fo.109r; Adv. MS. 25.4.11, fo.175v. Cf. *John Scotland v John Robertson* (1801) Mor. App. 'Tenor' 1.

genre of legal literature normally provided extracts or brief descriptions or summaries of cases and other legal authorities which, read together, would provide a loose narrative outline on the law. These extracts and discussions were then arranged under subject headings, which might themselves be organized topically or alphabetically. The sixteenth-century digest of Sir James Balfour of Pittendreich, for example, had a topical arrangement, in a structure that has been criticized as ‘lacking in organisation’ but which very broadly reflects the Roman institutional structure of the nature of law, the law of persons, the law of things (including land law, obligations and matters connected to commerce) then finally actions (including jurisdictions, court procedure and crime).⁸² Conversely, the seventeenth-century digest of Sir Robert Spottiswoode of Pentland was arranged alphabetically, although a parallel manuscript tradition of the same text rearranged the titles topically.⁸³

A parallel report from one of the legal digests is provided alongside twenty-two (i.e. sixteen per cent) of the 140 entries drawn from Maitland: four from Spottiswoode,⁸⁴ and eighteen from Balfour.⁸⁵ These entries provide a small sample to allow further conclusions to be drawn on Morison’s method in identifying and locating case-notes in the manuscripts and printed sources, and to test whether Morison’s use of Kames in accessing Maitland might extend to this other type of source.

As with Maitland, Morison clearly used Kames to identify relevant cases in the legal digests. Three of these entries’ parallel reports from both Spottiswoode and Maitland were clearly identified and located by Morison using the *Folio Dictionary*: Kames cited both Spottiswoode and Maitland in respect to those three cases, and Morison cited the *Folio Dictionary* in the entry. It is of small interest that Morison made the editorial decision to vary the order of the reports from the order of Kames’s citations, always giving Spottiswoode’s description of the case first (whereas Kames twice cited Spottiswoode first,⁸⁶ and once mentioned Maitland first⁸⁷). Similarly,

⁸²McNeill, ed., *Balfour’s Practicks*, vol.1, xli–xlii, quotation at xli.

⁸³Dolezalek, *Census*, vol.1, 133, 136.

⁸⁴Morison’s citations show that he used the recent printed edition: John Spottiswoode, ed., *Practicks of the Laws of Scotland, Observed and Collected by Sir Robert Spottiswoode of Pentland*, Edinburgh, 1709. On Spottiswoode’s digest, see e.g. John W. Cairns, ‘Ius civile in Scotland, ca.1600’, 2 *Roman Legal Tradition* (2004), 136, at 159–167; Ford, *Law and Opinion*, especially 182–190, 200–215; Simpson and Wilson, *Scottish Legal History*, vol.1, especially 282–284, 302–305. On Spottiswoode’s life, see David Stevenson, ‘Spottiswood, Sir Robert, Lord Dunipace (1596–1646)’, *Oxford Dictionary of National Biography*, Oxford, 2004. Available online at: <https://doi.org/10.1093/ref:odnb/26169>.

⁸⁵His citations show that Morison used the recent printed edition: [Walter Goodal], ed., *Practicks: or, A System of the More Ancient Law of Scotland. Compiled by Sir James Balfour of Pettindreich*, Edinburgh, 1754. On Balfour’s life, see Peter G.B. McNeill, ‘Balfour, Sir James, of Pittendreich (c.1525–1583)’, *Oxford Dictionary of National Biography*, Oxford, 2004, Online Edition, September 2004. Available online at: <https://doi.org/10.1093/ref:odnb/1188>. On Balfour’s digest, see e.g. McNeill, ed., *Balfour’s Practicks*, vol.1, xi–lxv; Simpson and Wilson, *Scottish Legal History*, vol.1, especially 211–213.

⁸⁶*Abbot of Kilwinning v N* (1566) Mor. 7253; *Laing v N* (1565) Mor. 13,807; Kames, *Dictionary*, vol.1, 489, vol.2, 338.

⁸⁷*McDougal v Campbell* (1566) Mor. 3082; Kames, *Dictionary*, vol.1, 200.

six of these entries give cases for which Kames cited both Maitland and Balfour; it seems likely that Morison used Kames to access the reports. This includes four occasions where Morison explicitly cited the *Folio Dictionary* – including one where the different practicks reported different hearings of the case.⁸⁸ On the other two occasions, Kames cited both Balfour and Maitland, and evidence of Morison's textual borrowing from Kames in at least one of these two entries proves that he used that discussion.⁸⁹ It is, in many ways, unsurprising that Morison would have used Kames to access the legal digests as he did for Maitland. Where brought to his attention by Kames, it would have been worth Morison's time to examine these sources as well: the private nature of early-modern case reporting meant that the digests might provide a description of a case independent from those notes found in any single collection of legal decisions. That reports would differ might be particularly true in comparisons with Balfour: Gordon showed that Balfour used the (now lost) court registrum rather than contemporary private collections of legal decisions for information about cases.⁹⁰

However, unlike his treatment of Maitland, it seems that Morison also undertook a more comprehensive search of the legal digests to find additional cases described therein. In doing so, he also used these legal digests as a second tool to access, identify and locate relevant case notes in Maitland. Thus, the fourth and final parallel report of Spottiswoode and Maitland, *Tutor of Congilton v the Lady* (1550), is found towards the end of his *Dictionary*, by which point Morison had stopped explicitly acknowledging the *Folio Dictionary* as a source. He therefore did not cite the *Folio Dictionary* for this entry, even though it seems probable that he became aware of at least Maitland's report of this case through Kames's citation of it. However, Kames did not cite Spottiswoode for this case, nor did he cite an earlier hearing of it, found in Balfour and entered elsewhere in Morison's *Dictionary*. It seems instead that Morison identified the discussions of this case in Spottiswoode (and Balfour) independently, likely through a more comprehensive reading of the digests. He made the association between Spottiswoode's and Maitland's reports, perhaps because the brevity and content of Spottiswoode's report suggests he took the case from Maitland. Morison entered Balfour's report separately, probably because it supplied a

⁸⁸(1) *Wishart v Laird of Arbuthnot* (1573) Mor. 3605; (2) *Rig v Tenants of N* (1562) Mor. 4197; (3) *Queen's Advocate v Todrig* (1565) Mor. 12,650. Kames, *Dictionary*, vol.1, 252, 297, vol.2, 265; (4) *Law v Law* (1553) Mor. 2365; McNeill, ed., *Balfour's Practicks*, vol.1, 233–234; Kames, *Dictionary*, vol.1, 149.

⁸⁹(1) *Ld Kinfauns v Ld Craigie* (1552) Mor. 10,337; Kames, *Dictionary*, vol.2, 74. Kames cited Balfour and Maitland's reports on this case, along with a later case recorded by Colville on the same point of law. Morison entered both cases in his *Dictionary* and borrowed Kames's summary for his marginal description of Colville's case (which was erroneously entered before *Ld Kinfauns*). (2) *Lady Coluthie v Carnegie* (1558) Mor. 16,650; Kames, *Dictionary*, vol.2, 529. No textual borrowing is apparent in this instance.

⁹⁰William M. Gordon, 'Balfour's Registrum', in Hector L. MacQueen, ed., *Miscellany IV*, Edinburgh, 2002, 127. On Spottiswoode's use of earlier practicks, see Ford, *Law and Opinion*, especially 185–186, 201–206.

different date to that given by Kames and the manuscript copy of Maitland which he used for this transcription.⁹¹

The suggestion that Morison independently consulted the digests is supported by the other entries which give parallel reports from Balfour alongside Maitland. For seven entries, Morison cited the *Folio Dictionary* for the note taken from Maitland;⁹² in all seven instances, Kames cited only Maitland as a source for the case. In each of these seven cases, Morison provided the entry from Maitland above that of Balfour. It seems likely that Morison found these citations in Kames, then transcribed the reports from the relevant manuscript of Maitland. He must then have added below this Balfour's descriptions after locating the parallel reports through other means, given Kames did not cite Balfour for some of these cases. It seems likely that Morison consulted Balfour independently,⁹³ then associated the descriptions in Balfour with those reports from Maitland which he had found through Kames. That process of association is particularly interesting where Balfour's citation of the case was problematic.⁹⁴

Indeed, it seems likely that Morison's further consultation of Balfour allowed him a second tool to identify cases in Maitland, ones which had not been cited by Kames. Four of the cases where Morison gave parallel reports from Balfour and Maitland were not cited by Kames so could not have been located by him using the *Folio Dictionary*. It seems plausible

⁹¹*Tutor of Congilton v the Lady* (1550) Mor. 16,222, 16,226; Kames, *Dictionary*, vol.2, 483; Adv. MS. 24.1.5, fo.52r; Spottiswoode, ed., *Spottiswoode's Practicks*, 345; McNeill, ed., *Balfour's Practicks*, vol.1, 118. Spottiswoode gave only the year of the case, not the full date. Most manuscripts of Maitland – and his original report – likewise gave only the year: e.g. Adv. MS. 31.2.2 (i), fo.1r. For another example of Morison entering separately two hearings from different sources found in Kames, see *Dischington v Hamiltoun* (1558) Mor. 16,227 [Balfour]; *Dishington v Hamilton* (1558) Mor. 16,227 [Maitland]; Kames, *Dictionary*, vol.2, 485. The marginal description alongside the excerpt from Maitland was copied almost verbatim from Kames, as discussed above.

⁹²(1) *Parson of Muckarsie v Abercromby* (1558) Mor. 7935; (2) *Dishington v Hamilton* (1558) Mor. 8913; (3) *Rollock v Dingwall* (1566) Mor. 5114; (4) *Vicar of Bowton v Cockburn* (1566) Mor. 7935; (5) *Home of Manderston v tenants of Oldhamstocks* (1570) Mor. 4684; (6) *Lord Drummond v the Lady* (1575) Mor. 5386; (7) *Marjoribanks v Balfour* (1575) Mor. 14,686.

⁹³It is possible that sometimes Morison found the parallel report in Balfour while seeking therein another case cited nearby in Kames. For example, Kames cited Maitland for *Rollock v Dingwall* (1566), then summarized Balfour's note on *Lockhart v Lockhart* (1568) citing the relevant title therein (but not the specific page or chapter). Morison received both cases, citing the *Folio Dictionary* for both. Plausibly Morison found Balfour's summary of *Rollock* in chapter eleven while searching for *Lockhart*, found in chapter fourteen. See *Rollock v Dingwall* (1566) Mor. 5114 [Maitland, Balfour]; *Lockhart v Lockhart* (1568) Mor. 5115 [Balfour]; Kames, *Dictionary*, vol.1, 349; McNeill, *Balfour*, vol.1, 259–260. Morison may likewise have found Balfour's description of *Dishington v Hamilton* (1558) – again not mentioned by Kames – when searching in the relevant title for the next-summarized case in the *Folio Dictionary*, a note from Balfour. See *Dishington v Hamilton* (1558) Mor. 8913; *Henryson* (1548) Mor. 8913; McNeill, ed., *Balfour's Practicks*, vol.1, 115, 118; Kames, *Dictionary*, vol.1, 576.

⁹⁴As in the case of *Home of Manderston*, which Balfour cited only by date and without reference to the parties: *Home of Manderston v Tenants of Oldhamstocks* (1570) Mor. 4684; McNeill, *Balfour's Practicks*, vol.2, 562; Kames, *Dictionary*, vol.1, 313.

that Morison found these citations in Balfour instead. It is also possible that another case, which is discussed by Kames but not acknowledged as such by Morison, was also identified through Balfour.⁹⁵ Using Balfour independently of Kames would have provided some additional cases of interest, but that Morison took the time to then follow up in Maitland is interesting. It is possible that he did so because he sought a more detailed description of the case than Balfour provided: three of the entries from Balfour are only around seventy words or fewer,⁹⁶ although the fourth spans more than 260 words.⁹⁷

IV. Morison's Use of the Manuscripts of Maitland

The above examination confirmed that Morison used Kames to identify and locate relevant cases within Maitland, Spottiswoode and Balfour. Morison additionally undertook a wider examination of the legal digests, which allowed him to access a small number of further cases in Maitland which Kames had not cited, although he does not appear to have undertaken an independent consultation of the manuscript copies of Maitland.⁹⁸

Yet, even though Morison was heavily reliant on Kames, he did also advance the text. He returned to the manuscripts to provide a full transcription of the entries as well as a citation of the relevant page in the manuscript he used to ensure what he called 'the authenticity of this Edition'.⁹⁹ He assured the reader that he preserved the entries faithfully as they were found in the source materials: 'The corrections *on the text*, will extend only to dates, references, punctuation, and such like'.¹⁰⁰ Morison's use of the manuscripts of Maitland is thus critical to the overall reliability of the text of this collection as preserved in his *Dictionary*.

Morison did not acknowledge in the front matter of his *Dictionary* which manuscript copy (or copies) of Maitland he consulted. However, this information can be reconstructed through a comparison of the twenty extant manuscript copies of Maitland with the wording of Morison's transcriptions and the page or folio numbers given in his citations. Such a comparison shows that Morison used three separate manuscript copies of Maitland's

⁹⁵*Abbot of Dunfermline v the Heirs of Crichton* (1574) Mor. 9090. Cf. Kames, *Dictionary*, vol.1, 590.

⁹⁶(1) *Earl of Morton v the Duke* (1557) Mor. 14,685; (2) *Laird of Traquair v Home* (1562) Mor. 5389; (3) *Balfour v Balfour* (1566) Mor. 7324; McNeill, *Balfour's Practicks*, vol.1, 220, 236, 269.

⁹⁷*Stewart v the Queen and her Comptroller* (1559) Mor. 4659; McNeill, *Balfour's Practicks*, vol.2, 563–564.

⁹⁸A small challenge to this possibility is found in the final two cases excepted from Maitland, neither of which are found in the *Folio Dictionary* or Balfour: *Spaniard v Tenant* (1551) Mor. 14,725; *Lord Drummond v Wishart* (1562) Mor. 14,081.

⁹⁹Morison, *Dictionary*, vol.1, vii.

¹⁰⁰Morison, *Dictionary*, vol.1, vii (emphasis in the original).

text. This would not be unusual: the use of more than one manuscript to consult a single source appears to have been common among earlier compilers of Scottish legal materials.¹⁰¹

1. 'L. Hailes's Copy', *Advocates Library Adv. MS. 25.4.11*

Morison identifies the source of his transcription of one case entry as 'Maitland MS. L. Hailes's Copy, fol. 44'.¹⁰² A manuscript now held in the Advocates Library – Adv MS. 25.4.11 – contains a copy of Maitland's decisions which can be dated to around 1600 and bears an inscription identifying it as 'formerly the property of Lord Hailes'.¹⁰³ This was certainly the source of Morison's transcription of that entry. First, the case appears on folio forty-four according to the contemporaneous series of foliation, per Morison's citation.¹⁰⁴ Secondly, a comparison of the precise wording of the entry in the manuscript and in Morison's *Dictionary* shows that these are essentially identical texts. The only difference between them is Morison's modernization of spellings and his pluralization of one word which was singular in the manuscript. Such variations are typical of copying errors and, in scribal terms, would be inconsequential for identifying relationships between texts.¹⁰⁵ This evidence therefore strongly suggests, first, that this manuscript was Morison's source for this transcription and, secondly, that he copied it carefully.

However, none of the other entries from Maitland were borrowed from this manuscript. This might be explained by the nature of this manuscript's text: the copy is essentially complete but many entries have been abridged, sometimes extensively. Perhaps Morison found that this text was less helpful for his purposes than those other two manuscripts which he used, both of which provided more fulsome entries.

¹⁰¹Goodal, *Balfour's Practicks*, x; Adelyn L.M. Wilson, 'The "Authentick Practique Bookes" of Alexander Spalding', in Andrew R.C. Simpson et al, eds., *Continuity, Change and Pragmatism in the Law: Essays in Memory of Professor Angelo Forte*, Aberdeen, 2016, 175–236, at 214–225.

¹⁰²*Laird of B v a Poor Boy* (1553) Mor. 15,209.

¹⁰³Adv. MS. 25.4.11, fo.ii; Dolezalek, *Census*, vol.2, 303. On Hailes, see Patrick Cadell, 'Dalrymple, Sir David, Third Baronet, Lord Hailes (1726–1792)', *Oxford Dictionary of National Biography*, Oxford, 2004. Available online at: <https://doi.org/10.1093/ref:odnb/7046>.

¹⁰⁴Adv. MS. 25.4.11, fo.147r.

¹⁰⁵On variants in law texts as evidence for textual relationships see, e.g. Wilson, 'The Transmission and Use'; Adelyn L.M. Wilson, 'The Textual Tradition of Stair's *Institutions*, with Reference to the Title "Of Liberty and Servitude"', in Hector L. MacQueen, ed., *Miscellany VII*, Edinburgh, 2015, 1–125, especially at 46–65. On this methodology more generally, see e.g. Pieter van Reenen and Margot van Mulken, eds., *Studies in Stemmatology*, Amsterdam, 1996; Pieter van Reenen et al, eds., *Studies in Stemmatology II*, Amsterdam, 2004. On scribal practice generally, see e.g. Harold Love, *The Culture and Commerce of Texts: Scribal Publication in Seventeenth-Century England*, Amherst, MA, 1993 repr. 1998; H.R. Woudhuysen, *Sir Philip Sidney and the Circulation of Manuscripts, 1558–1640*, Oxford, 1996; Arthur F. Marotti, *Manuscript, Print, and the English Renaissance Lyric*, Ithaca, NY, 1995; Peter Beal, *In Praise of Scribes: Manuscripts and Their Makers in Seventeenth-Century England*, Oxford, 1998.

2. The 'Second copy', *Advocates Library Adv. MS. 24.1.4*

Only one other entry gives any specific indication as to the manuscript copy used for the transcription, with the entry for *Dalrymple v Kennedy* (1567) citing 'Maitland MS. p. 96. (Second copy.)'.¹⁰⁶ This page number is correct to only one of the twenty extant manuscripts, Adv. MS. 24.1.4, which contains a seventeenth-century copy of Maitland's text.¹⁰⁷ This manuscript can be identified as Morison's second-most frequently used copy of Maitland.

Morison provides page numbers which correspond to this manuscript for thirteen of the entries taken from Maitland, including *Dalrymple*.¹⁰⁸ A comparison of the wording of a sample of these thirteen entries confirms that they could have been transcribed from this manuscript. For example, in *Dalrymple*, Morison provides no words or phrases which are not found in this manuscript, although there are some insubstantial differences.¹⁰⁹ That this manuscript was indeed the source for these transcriptions can be confirmed further by a textual comparison of sample entries from Morison with all twenty extant manuscript copies of Maitland. This shows that Morison's text of these entries is closer to that of Adv. MS. 24.1.4 than any other extant manuscript's text.

One example of this is particularly interesting in terms of its scribal history. In 1574, Thomas Craig of Riccarton (the author of a notable Scottish treatise principally on Scottish feudal land law, *Jus feudale*¹¹⁰) pursued his fellow advocate and distant cousin, William Johnston, for the tutorship of a shared nephew. Maitland's report on this case is an excellent example of the extent to which the text can change through transmission by manuscript: the case-note as originally written by Maitland was replaced by a completely different, and much longer, version in a common ancestor of twelve of the

¹⁰⁶*Dalrymple v Kennedy* (1567) Mor. 16,517.

¹⁰⁷On which manuscript, see Dolezalek, *Census*, vol.2, 159–165.

¹⁰⁸This includes *Laird of Rankellor [sic] v Lord Lindsay* (1552) Mor. 16,457, citing page 34 of the manuscript. However, this entry is found on page 14 by the manuscript's contemporary pagination [Adv MS. 24.1.4, fo.96v]. The similarity of these two texts suggests that Morison transcribed this entry from this manuscript, but that his citation was subject to a copying or printing error. More than fifteen variants are present in Morison's text of this entry. Although these are common to sometimes several manuscripts and are often insubstantial, Morison's text preserves all the variant readings present in Adv. MS. 24.1.4.

¹⁰⁹Including the omission of six words or short phrases, the rearrangement of one phrase, and substitution of seven words.

¹¹⁰Thomas Craig of Riccarton, *Jus feudale tribus libris comprehensum*, London, 1655; James Avon Clyde, trans, *The Jus Feudale by Sir Thomas Craig of Riccarton*, 2 vols., Edinburgh, 1934. A new annotated edition of *Jus feudale* by Leslie Dodd is in progress, the first volume of which was published as Thomas Craig of Riccarton, *Jus feudale tribus libris comprehensum: Book one*, trans. Leslie Dodd, Edinburgh, 2017. On Craig's *Jus feudale*, see, e.g. John W. Cairns, 'The Breve Testatum and Craig's *Jus feudale*', 56 *Tijdschrift voor Rechtsgeschiedenis* (1998), 311; Cairns, 'Ius Civile in Scotland, ca.1600', 150–158; John W. Cairns et al, 'Legal Humanism in Renaissance Scotland', 11 *Journal of Legal History* (1990), 40, at 48–59; Ford, *Law and Opinion*, especially 39–52; Simpson and Wilson, *Scottish Legal History*, vol.1, especially 285–287, 296–300. On Craig, see John W. Cairns, 'Craig, Thomas (1538?–1608)', *Oxford Dictionary of National Biography*, Oxford, 2004, Online Edition, September 2004. Available online at: <https://doi.org/10.1093/ref:odnb/6580>.

extant manuscript copies of Maitland, which all received this revised report. Morison's transcription reflects this revised report.¹¹¹ Indeed, his entry's text preserves around thirty variant readings. All but two are shared with Adv. MS. 24.1.4;¹¹² three variant readings unique to Adv. MS. 24.1.4 among the manuscript tradition are present in Morison's transcription.

The evidence from these close comparisons is confirmed by there being in other entries erroneous details common to both Adv. MS. 24.1.4 and Morison's *Dictionary*. Both omit the date for *Abbot of Balmerinoch v Grange-Durham*,¹¹³ and in *Laird of Cowdenknows* both misspell the defender's lands of 'Duddingston' as 'Didistoun'.¹¹⁴ Both also give erroneous dates for the only hearings of three cases and for both hearings of a fourth case.¹¹⁵ Three of these errors are found only in Adv. MS. 24.1.4 and its three most closely related texts.¹¹⁶

There is thus clear evidence for the identification of Adv. MS. 24.1.4 as Morison's 'second copy' of Maitland, from which thirteen cases (i.e. nine per cent) of his entries on Maitland were transcribed.¹¹⁷ Yet, two further points might be made about Morison's use of this manuscript. Firstly, in identifying those entries excerpted from this manuscript, it can be concluded that Morison worked through the titles of his *Dictionary* sequentially rather than through the manuscripts chronologically: those transcriptions drawn from the second copy are nine of the first ten entries and five of the last eight in the *Dictionary*, so he only used this manuscript at the beginning and end of the *Dictionary*. Secondly, several of Morison's entries on cases from other sources refer to 'Pitmedden's copy' of Sinclair,¹¹⁸ or the decisions, cases or appendix 'at the end of Pitmedden's copy of Colvil'.¹¹⁹ A full textual comparison of these entries is outwith the scope of this research. However, it is very probable that this is the same manuscript which has been used for these entries: an inscription in

¹¹¹*Craig v Johnston* (1574) Mor. 16,231. On this substitution, see Wilson, 'The Transmission and Use', 343. On this group, see also below.

¹¹²(1) An omission unique to Morison's transcription was presumably an error on his part. (2) A substitution of a single word could be explained by Morison's misunderstanding of the spelling and handwriting in Adv. MS. 24.1.4.

¹¹³*Abbot of Balmerinoch v Grange-Durham* (1555) Mor. 1777; Adv. MS. 24.1.4, fo.100r.

¹¹⁴*Laird of Cowdenknows v Tenant of Didiston* (1551) Mor. 16,457; Adv. MS. 24.1.4, fo.92r. The manuscript does not supply a date for *Cowdenknows*, but the date provided for the previous case in that collection is the same as is provided for *Cowdenknows* in Morison. He seemingly assumed that both cases were heard on the same day.

¹¹⁵(1) *Tutor of Pitcur v Lord Gray* (1552) Mor. 2244; (2) *Law v Law* (1553) Mor. 2365; (3) *Bryson v Somervill* (1565) Mor. 1703; (4) *Weir v the L of Lie* (1566) Mor. 605. Adv. MS. 24.1.4, fos.90r, 97r-v, 124r-v, 128r-v.

¹¹⁶See also Edinburgh University Library, MS. La.III.429, fos.72v, 73r, 108r-v; Yale University Beinecke Library, Osborn fb 246, fos.167v, 168r, 200v; Signet Library, MS. 37, fos.13r-v, 14r, 14r (although subject to a further corruption of this variant), 43r. On these manuscripts, see Wilson, 'The Transmission and Use', 336–337; Dolezalek, *Census*, vol.3, 169–175, 262–267, 371.

¹¹⁷In addition to those mentioned above: *Laird Lochleven v Arnot* (1565) Mor. 16,650; *Countess of Argyle v Tenants of Dollar and the Earl of Argyle* (1573) Mor. 327; *Murray and Tenants v Livingston* (1575) Mor. 328; *The Same Parties* (1576) Mor. 328. Cf. Adv. MS. 24.1.4, fos.123r-v, 151v–152r, 161r, 165v–166r.

¹¹⁸*Laird of Craigie v Hepburn* (1541) Mor. 6046.

¹¹⁹See e.g. *Anderson v Craig* (1600) Mor. 13,424; *Colt v Cunningham* (1600) Mor. 9495; *Lord Forbes v Marquis of Huntly* (1600) Mor. 8362.

Adv. MS. 24.1.4 identifies that it was copied from a manuscript owned by Sir Alexander Seton of Pitmedden.¹²⁰ If this is correct, then the so-called appendix could be identified as selected abstracts from the decisions of Sir Thomas Hamilton, 1st Earl of Haddington.¹²¹

3. Morison's principal manuscript, Advocates Library Adv. MS. 24.1.5

Morison also used a third manuscript, and it is this third manuscript which was his principal source for Maitland's text. Indeed, it seems clear that the explicit references to the 'second copy' and the Hailes manuscript were to distinguish them from this principal manuscript, which is otherwise unidentified. This third manuscript can be identified as the mid-seventeenth-century copy, Adv. MS. 24.1.5.¹²²

One hundred and eight of the entries taken from Maitland give page numbers correct to Adv. MS. 24.1.5. The use of this evidence to identify this manuscript as the source for these entries is all the more convincing because there are significant problems with its pagination. These problems make this manuscript's pagination unique, and explain what otherwise would have had to be (given the page references given) an erratic and unjustifiable restructuring of Maitland in Morison's source.¹²³

Only five of Morison's entries from Maitland have not now been identified by this research as having been transcribed from either Kames or one of these three manuscripts. A comparison of their wording shows that at least three of these were copied from this same principal manuscript, but that the page numbers given in their citations were subject to printing errors.¹²⁴ The final two entries are those on *Ld of Kinfauns v Ld Craigie* (1552) and *Olipphant v Bochtie* (1554). Morison cannot have transcribed these entries from Adv. MS. 25.4.11 (the Hailes manuscript) because their texts are significantly abridged therein and so differ considerably from

¹²⁰Adv. MS. 24.1.4, fo.iir; Dolezalek, *Census*, vol.2, 159. On whom, see George Stronach, 'Seton, Sir Alexander, of Pitmedden, First Baronet, Lord Pitmedden (1639?–1719)', rev. Clare Jackson, *Oxford Dictionary of National Biography*, Oxford, 2004, Online Edition, September 2004. Available online at: <https://doi.org/10.1093/ref:odnb/25115>.

¹²¹On which, see Dolezalek, *Census*, vol.2, 162–164. On Haddington's decisions, see Sara Brooks, 'The Decision Practicks of Sir Thomas Hamilton, First Earl of Haddington', 8 *Edinburgh Law Review* (2004), 206. On Haddington's life, see Julian Goodare, 'Hamilton, Thomas, Earl of Melrose and First Earl of Haddington (1563–1637)', *Oxford Dictionary of National Biography*, Oxford, 2004, Online Edition, September 2004. Available online at: <https://doi.org/10.1093/ref:odnb/12126>.

¹²²On which manuscript, see Wilson, 'The Transmission and Use', 349–350; Dolezalek, *Census*, vol.2, 165–168.

¹²³First, the number '120' was omitted, so page 121 immediately follows page 119. Secondly, page 123 was erroneously identified as page 113, so the subsequent page numbers are ten higher than they should be; what had been identified as pages 121–122 were corrected retrospectively by the paginator. The effect of this is that there are two series of pages identified as pages 111–119.

¹²⁴See e.g. *Grundiston v Lawson* (1561) Mor. 8978, cf. Adv. MS. 24.1.5, fo.72r. The citation specifies page 113 but the case is on page 133. Morison skipped a line of text from this entry but otherwise all but two of the variants in Morison are found in Adv. MS. 24.1.5.

what is found in Morison's *Dictionary*; the note on *Oliphant* is incomplete in the 'second copy', Adv. MS. 24.1.4, which indicates that this manuscript was not Morison's source for this note at least. Morison's transcription of these two notes is, however, very close to the text of Adv. MS. 24.1.5, while that of *Ld of Kinfauns* is also very close to the 'second copy' as well. The differences are, in scribal terms, insubstantial: modernization of spelling, the omission of a few words, etc. Setting aside the possibility that a fourth, closely related but now lost manuscript was used for just these two texts – which seems rather unlikely – these notes can probably be considered to have been taken from this principal manuscript, but that Morison merely omitted the relevant page number from his citations.¹²⁵ Overall, therefore, at least 111 but perhaps 113 (i.e. eighty to eight-one per cent) of the entries in Morison were transcribed from this manuscript.

4. Situating Morison's transcriptions within the manuscript tradition

The identification of the three manuscripts used by Morison is important because, as mentioned above, the manuscript tradition is known to have two distinct branches: the α group, closer to Maitland's original text, and the δ group, with various important changes introduced at the turn of the sixteenth to seventeenth centuries.¹²⁶ All three of the manuscripts used by Morison were part of that latter group.

All three manuscripts were thus part of the tradition which received the 100 extra cases as insertions, and indeed Morison's use of them meant he received twenty-four such insertions. Conversely, it was mentioned above that one branch of the δ group suffered a loss of text. Adv. MS. 24.1.4 sits within this group. This loss in the 'second copy', and the resulting impression of an incompleteness of its text in comparison to Adv. MS. 24.1.5, might explain why the latter manuscript was favoured by Morison.

That loss of text also led to the misattribution of the latter part of Maitland's collection to Colville, which again affected the second copy, Adv. MS. 24.1.4. That misattribution occurred in an influential group of texts, such that other copies of Maitland were contaminated with this attribution by later annotators – including Morison's principal manuscript, Adv. MS. 24.1.5.¹²⁷ Morison thus wrongly attributed twenty-six of the cases which were recorded by Maitland to Colville. His reliance on manuscripts within the δ group would have reinforced rather than corrected Kames's erroneous understanding on this point, discussed above.

¹²⁵*Ld Kinfauns v Ld Craigie* (1552) Mor. 10,337; *Oliphant v Bochtie* (1554) Mor. 2724. Adv. MS. 25.4.11, fo.145v, 149v. Adv. MS. 24.1.4, fos.95v, 100r. Adv. MS. 24.1.5, fos.57r, 62r.

¹²⁶Wilson, 'The Transmission and Use', 332–355.

¹²⁷Adv. MS. 24.1.5, fo.120v; Wilson, 'The Transmission and Use', 358–359. See also Dolezalek, *Census*, vol.2, 166.

Morison's use of three manuscripts from δ group also affected the texts he transcribed. The text of the group's common ancestor ('manuscript δ ') was significantly expanded through a process of annotation and insertion by one of its earlier owners. As part of this process, the owner of that ancestor manuscript extensively supplemented Maitland's text with citations of learned law.¹²⁸ Early-modern collections of decisions from the Court of Session generally made frequent reference to the learned law, capturing those authorities which had been pleaded before the bench.¹²⁹

However, Maitland only rarely cited the learned laws in his case-notes, and indeed provided few citations of Scottish authorities. The owner of that ancestor manuscript therefore systematically added citations and discussions of Roman law and civilian thinking to his copy of Maitland. These additions brought the text into line with the pattern of learned citation which contemporary advocates would have expected and required, and is probably the reason why this version of the text appears to have been more widely sought than the versions closer to that as originally written by Maitland.¹³⁰ All three manuscripts used by Morison preserve this learned version of the text. Several entries in Morison provide learned discussions, maxims or citations which were not included in the text as written by Maitland and can instead be attributed to these revisions.¹³¹ This includes the learned discussion of tutorship in Morison's aforementioned entry on *Craig v Johnston* (1574). Morison also preserved the similarly revised version of *Maxton v Maxton* (1569), which included discussion of D. 41.2.3, and the amended texts of *Bryson v Somervill* and of *Laird of Colliston v The Earl of Errol*, which were revised to include learned discussion and Latin maxims but did not directly cite the books of Roman law.¹³² The citations of C. 5.71 in Morison's entry on *Douglas v Foreman* (1565) and D. 2.14.47.1 in the entry on *Lord Symington v Weir* (1566) were likewise added to the text in this group.¹³³ Information about additional hearings of some cases and cross-references to other cases

¹²⁸Wilson, 'The Transmission and Use', 341–343.

¹²⁹Simpson and Wilson, *Scottish Legal History*, vol.1, especially chs. 6–10, 15; A.M. Godfrey, 'Ius Commune, Practick and Civil Procedure in the Sixteenth-Century Court of Session', 72 *Tijdschrift voor Rechtsgeschiedenis* (2004), 283. For an example of learned citation in pleadings from the seventeenth century, see e.g. Sir George Mackenzie of Rosehaugh, *Pleadings in Some Remarkable Cases before the Supreme Courts of Scotland since the Year 1661*, Edinburgh, 1673.

¹³⁰Wilson, 'The Transmission and Use', 341–343.

¹³¹Citations in those entries which will shortly be identified as insertions from other collections of decisions might have been added to the text by the owner of manuscript δ but might also have been original to those collections. This includes the citations of D 26.2.27.1 and C 5.36.4 in *Heirs of Andross v Dischington* (1566) Mor. 8938.

¹³²*Maxton v Maxton* (1569) Mor. 11,335; *Bryson v Somervill* (1565) Mor. 1703; *Laird of Colliston v the Earl of Errol* (1575) Mor. 3605. Cf. Adv. MS. 31.2.2(i), fos.84r-v, 61v–63r, 97v–98v.

¹³³*Douglas v Foreman* (1565) Mor. 16,230; *Lord Symington v Weir* (1566) Mor. 5037. Cf. Adv. MS. 31.2.2(i), fos.63r, 68v.

found in Morison's entries can also be attributed to his use of manuscripts from δ group.¹³⁴

In this regard, there is an important distinction between the text as written by Maitland and as understood by later lawyers. Those wishing to access the text as written by Maitland will find Morison's *Dictionary* misleading with respect to the original pattern of learned citation. Furthermore, given the provenance of the learned authority added to the reports found in Morison's *Dictionary*, it is unclear (at least without confirming it in the paper processes) whether these citations and the discussion of them set out in the reports were actually led as part of the court proceedings. They may have been added by a judicial colleague or advocate familiar with the cases' pleadings to add in the authorities considered by the court; at the same time, they might have been fictions added by a lawyer unconnected to these cases with the aim of enhancing the collection with useful references to the learned tradition at relevant points. In receiving some of these expanded reports, a false impression of the use of learned law in the court during the period might also thus be given by Morison's *Dictionary*. The question thus arises as to whether Morison might have chosen these manuscripts because of this learning, but that would seem unlikely. Rather, his selection was probably pragmatic: plausibly these were the three manuscript copies of Maitland held by the Advocates Library at the time.¹³⁵

V. Conclusion

This article has revealed much of Morison's method in compiling his *Dictionary*, with particular reference to the entries taken from Maitland's decisions. He began with the *Folio Dictionary*, the structure of which he copied almost exactly. He used Kames's volumes as an index to the early-modern material, noting the names and locations of the cases mentioned by Kames and reordering them chronologically under these borrowed subject headings. He retained many of Kames's summaries to act as his own marginal descriptions or, where he intended to provide a note on the same case under more than one title, as the latter entry's substantive text. The borrowing is so widespread that only around forty of Morison's 140 entries featuring Maitland's decisions have no text taken from Kames.

Only after this use of the *Folio Dictionary* does Morison seem to have moved on to work with the original source materials for the content of his entries. It was Morison's provision of the full case-notes from these earlier

¹³⁴See e.g. *Bryson v Somervill* (1565) Mor. 1703; *Home of Manderston v Tenants of Oldhamstocks* (1570) Mor. 4684; *Laird of Colliston v the Earl of Errol* (1575) Mor. 3605. Cf. Adv. MS. 31.2.2(i), fos.61v–63r, 86r, 97v–98v.

¹³⁵*A Catalogue of the Library of the Faculty of Advocates*, 3 vols., Edinburgh, 1742–1807, vol.1, 142, 360 and 550.

sources which was his advancement on the *Folio Dictionary* and its single-sentence summaries. When consulting the manuscripts, it seems he worked through the titles of his *Dictionary* sequentially rather than by the manuscripts' own order. He transcribed the relevant case-notes carefully and provided a citation of the specific page (if not the specific manuscript) from which he had worked. However, the overlap in the cases entered by Kames and Morison shows that the latter did not undertake a substantial re-examination of the manuscripts to find additional cases for inclusion. Additionally, where he could not find the relevant case in these manuscripts, he again relied upon the *Folio Dictionary*, excerpting instead Kames's summary for the entry text and sometimes providing cross-references to other relevant cases.

Morison used three manuscript copies to excerpt notes from Maitland's decisions. He realized that one, Adv. MS. 25.4.11, was abridged so made little use of it. Another, Adv. MS. 24.1.4, appears to have been the manuscript he started with but, as it was apparently incomplete, he eventually used it only as a secondary copy. The third, Adv. MS. 24.1.5, was his principal copy for accessing the cases noted by Maitland. His use of these manuscript copies of Maitland's decisions means that Morison's *Dictionary* reflects the text as found in a particular branch of the manuscript tradition, which diverged in important ways from the original text. In these manuscripts, and thus in Morison's *Dictionary*, additional cases recorded by other lawyers were attributed to Maitland, while some of Maitland's notes were attributed to Colville. Entries were also substituted or rewritten, and many were supplemented with citations of learned authority, often framed as further debates between the parties. While it is possible that such additional content was added by someone familiar with these cases, caution needs to be exercised with regards to assuming that any such citations found in Morison reflect contemporaneous court practice.

This can be contrasted with his method of locating cases in the legal digests, identified with reference to those of Balfour and Spottiswoode. While Morison again used the *Folio Dictionary* to locate relevant cases in the legal digests, he also appears to have searched these sources more comprehensively for cases beyond those mentioned by Kames. This more expansive use of the digests might be explained by their subject-based structure of treatment being more accessible than the chronological structure of the decisions, as well as the fact that these digests were printed whereas the decisions remained largely in manuscript. In undertaking this wider consultation of the digests, Morison appears to have found them useful as a secondary mechanism for identifying relevant cases in Maitland.

Overall, therefore, this research has revealed much about Morison's method. While Tait's own understanding of the Scottish practicks was flawed, some of his criticisms of Morison broadly stand. The extent of his

reliance on the *Folio Dictionary* means Morison's own *Dictionary* is probably best understood as a rather mechanistic compilation. That he borrowed his subject categories, order of titles and most of his marginal headings suggests his *Dictionary* cannot really be seen as providing a separate intellectual framework. Additionally, his reliance on Kames and, to a much lesser extent, the digest practicks to identify cases without, it seems, an independent search of the collected decisions means it added relatively little in terms of enabling fresh insight into which cases might be of interest. As Kames had entered only a small selection of the earlier court practick in his compilation, Morison likewise included only a small proportion of the extant cases. His *Dictionary* cannot therefore be regarded as offering a complete picture of either the nature or content of the practicks he included.

Rather, Morison's contribution was to make excerpted reports from the practicks accessible while removing the need to follow citations of cases into the diverse manuscript and printed traditions. Yet, he did not seemingly consider the implications of there being diverse textual traditions for some of the practicks, which had been acknowledged by compilers of earlier Scottish materials since at least the eighteenth century.¹³⁶ Indeed, his choice of manuscripts was seemingly pragmatic, based on their accessibility in the Advocates Library, although with some consideration of their apparent completeness. Thus, even his checking of three of the manuscript copies of Maitland – which are closely related within a particular branch of the wider manuscript tradition – failed to provide the opportunity for Morison to correct the error found in Kames of misattribution of the latter part of Maitland's decisions to Colville, and additionally provided a false sense of the learning and pattern of citation in some of the entries received. Nonetheless, the widespread use of Morison's *Dictionary* subsequently has, in effect, resulted in the excerpts he provided taking on a form of authority as the version of record.

It is not intended that these findings should detract from the achievement of Morison's *Dictionary* or its utility, but rather that the future use of that text can be better informed. Such idiosyncrasies as have been identified by this research are perhaps to be expected in a project the size of that undertaken by Morison. Indeed, as Kames lamented in the preface to his own compilation: '[It is] next to impossible, through the course of a long work, to carry on that strict application and attention, one may have at certain times. The mind must often flag, and in such intervals, is too happy to take things upon trust'.¹³⁷

¹³⁶Goodal, *Balfour's Practicks*, x; Adelyn L.M. Wilson, 'The "Authentick Practique Bookes" of Alexander Spalding', in Andrew R.C. Simpson et al, eds., *Continuity, Change and Pragmatism in the Law: Essays in Memory of Professor Angelo Forte*, Aberdeen, 2016, 175, at 214–225.

¹³⁷Kames, *Dictionary*, vol.1, vii.

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