

# The ‘authentick practique bookes’ of Alexander Spalding

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## **Introduction**

Towards the end of his career and the beginning of mine I was fortunate to have Angelo Forte as both my colleague and my mentor. We met at the British Legal History Conference in Oxford in 2007, when I was in the first year of my doctoral studies. I have very fond memories of that conference, and one of the most treasured is of a dinner at a local restaurant which he, Andrew Simpson and I shared. Angelo and I stayed in touch after that event, and, a year later, it was he who first encouraged me to apply for the lectureship which I still hold. He was formally my first mentor as a new lecturer, and I had the pleasure of teaching Honours courses in Scottish and European Legal History with him before his retirement. As several of the contributions in this volume show, his presence is still missed by colleagues in the School of Law and across the University.

One of Angelo’s great interests was the practical application of law, as is evident in many of his works on legal history. One of his collaborative projects was the editing and analysis of an eighteenth-century manuscript stylebook from the Aberdeen Sheriff and Commissary courts.<sup>1</sup> Angelo Forte

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<sup>1</sup> The author would like to thank: Professor Gero Dolezalek for introducing her to A.U.L., MS. 558 (‘the Aberdeen manuscript’) and for sharing with her some of his unpublished notes on Maitland’s practicks; the Aberdeen Humanities Fund for its generous support of this research through a Hunter Caldwell award; the Aberdeen University Library Special Collections Centre for access to its collections and for the digitization of the Aberdeen manuscript as an in-kind contribution to the project; the Royal Faculty of Procurators in Glasgow, the National Library of Scotland, St Machar Cathedral and National Records of Scotland for allowing her to access their manuscript holdings; Professor John Ford and Dr Andrew Simpson for reading earlier drafts of this article; Professor John Finlay for his assistance on a point about notaries in Scotland, and Jamie Ross and Katherine Anderson for their work as research assistants on this project.

and his colleague, Michael Meston,<sup>2</sup> identified twenty-eight styles or writs in that manuscript which were relevant to practice in the local Commissary court between 1698 and 1722.<sup>3</sup> Analysis of these writs allowed them to conclude that this was ‘an active and busy court’<sup>4</sup> and reflect on its jurisdiction and procedure more generally.<sup>5</sup> One of the reasons that the stylebook is so important is that in October 1721 ‘an accidental dreadful Fire happened within the Town of *Aberdeen* [...] whereby the Office, commonly called the Commissar Clerks Office, was suddenly consumed, and at the same Time the Registers and Records therein [...] were intirely burnt and destroyed’.<sup>6</sup> Hence David Stevenson noted that ‘Any document relating to [the] Aberdeen commissary court before 1721 is given particular interest’.<sup>7</sup>

Further insight into the workings of this court is made possible by two more recently identified manuscripts. When preparing his three-volume census of Scottish legal manuscripts, *Scotland under Jus Commune*, Gero Dolezalek discovered two manuscripts which were witnesses to the text of a set of ‘practique bookes gathered befor the Lords and uthers famous inferiour Judicatories’ compiled by ‘Alexander Spalding Advocat befor the Commissar off Aberdein’.<sup>8</sup> Practicks were collections of legal material compiled by practitioners of the law. Legal writing in the first half of the seventeenth century was largely concerned with the compilation of practicks. Some of the best-known are probably those collections by the King’s Advocate, Sir Thomas Hope,<sup>9</sup> and by the Lords of Council and Session, Sir Robert Spottiswoode

<sup>2</sup> M. C. Meston and A. D. M. Forte (eds), *The Aberdeen Stylebook 1722* (Stair Society Publications Series vol. 47, Edinburgh, 2000); A. D. M. Forte and M. C. Meston, ‘Legal Life in Aberdeen in the Late Seventeenth and Early Eighteenth Century – the Aberdeen Stylebook of 1722’, *Aberdeen University Review*, 59 (2002), 197–208. They also acknowledge the earlier involvement of their then colleague Michael Christie [Meston and Forte (eds), *The Aberdeen Stylebook*, 1].

<sup>3</sup> *Ibid.*, 14–15.

<sup>4</sup> *Ibid.*, 17.

<sup>5</sup> *Ibid.*, 12–18.

<sup>6</sup> An Act for Supplying the Records of the Commissary Court of Aberdeen, Burnt or Lost in the Late Fire There, 8 Geo I (1721), c.28; Meston and Forte (eds), *The Aberdeen Stylebook*, 3; Forte and Meston, ‘Legal Life in Aberdeen in the Late Seventeenth and Early Eighteenth Century’, 197.

<sup>7</sup> David Stevenson, ‘The Commissary Court of Aberdeen in 1650’ in David Sellar (ed.), *Miscellany Two* (Stair Society Publications Series vol. 35, Edinburgh, 1984), 144–7, 145.

<sup>8</sup> Gero Dolezalek, *Scotland under Jus Commune: Census of Manuscripts of Legal Literature in Scotland, Mainly Between 1500 and 1660* (3 vols, Stair Society Publications Series vols 55–7, Edinburgh, 2010), I, 136, 140 and III, 17–21, 301–3. Quotations from the Aberdeen MS., fol. i. On the foliation of this manuscript, see below.

<sup>9</sup> Printed as: James Avon Clyde (ed.), *Hope’s Major Practicks 1608–1633* (2 vols, Stair

of Pentland,<sup>10</sup> Sir Alexander Gibson of Durie,<sup>11</sup> and Sir Thomas Hamilton, 1st Earl of Haddington.<sup>12</sup> John Ford has also shown the significance of the manuscript versions of Stair's *Institutions of the Law of Scotland* circulating in the 1660s and 1670s under the title of his practicks.<sup>13</sup> These and other lesser-known collections of practicks allow significant insight into the administration of justice in the Court of Session during this period. However the focus of these collections of practicks on the business of the Session means that they show little of practice in the courts of the localities. Spalding's collection, however, offers insight into the method of a parochial compiler of practicks, and into the business of some of the courts of the North East of Scotland during the period – including the Aberdeen Commissary court from which so little material survives. However, before this collection of practicks can be used as a source for this kind of information, it is necessary first to understand the identity of its compiler, the nature of and relationship between the two known extant manuscript texts, the character of the collection of practicks itself, its purpose, and its later use and circulation among the legal community in Scotland.

### Alexander Spalding

No details about Alexander Spalding's early life are known. That he was probably born in the 1580s is suggested by the fact that he entered the Society of Advocates in Aberdeen in 1609.<sup>14</sup> Admission to the profession appears to have been, at least by the mid-seventeenth century, by consent of

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Society Publications Series vols 3–4, Edinburgh, 1937–8); Sir Thomas Hope of Craighall, *Minor Practicks, or, a Treatise of the Scottish Law* (Edinburgh, 1726).

<sup>10</sup> Printed as Sir Robert Spotiswoode of Pentland, *Practicks of the Lawes of Scotland* (Edinburgh, 1706).

<sup>11</sup> Printed as Sir Alexander Gibson of Durie, *The Decisions of the Lords of Council and Session in Most Cases of Importance, Debated, and Brought Before Them; from July 1621, to July 1642* (Edinburgh, 1690).

<sup>12</sup> Unprinted, but on the extant manuscript copies see: Sara Brooks, 'The Decision Practicks of Sir Thomas Hamilton, First Earl of Haddington', *Edinburgh Law Review*, 8 (2004), 206–30; Dolezalek, *Scotland under Jus Commune*, I, 141–2.

<sup>13</sup> J. D. Ford, *Law and Opinion in Scotland during the Seventeenth Century* (Oxford, 2007), 85–8.

<sup>14</sup> John Alexander Henderson, *History of the Society of Advocates in Aberdeen* (Aberdeen University Studies vol. 60, Aberdeen, 1912), 338. Unfortunately, no record of the birth of an Alexander Spalding (or similar) has been found after 1560 in the online database of the National Records of Scotland and the Court of the Lord Lyon, *Scotland's People*, [www.scotlandspople.gov.uk](http://www.scotlandspople.gov.uk), accessed 8 April 2014.

both the Sheriff and the current procurators. John Henderson found that a petition in 1656 by an Aberdonian notary public named Andrew Thomson to the Sheriff Principal asked the latter to, “with the advice and consent of the procurators of his judicatory, admit the petitioner to be an ordinary procurator before the *samen judiciary*.”<sup>15</sup> Henderson suggested that this was indicative of more than mere rhetoric: ‘by the middle of the sixteenth century the procurators [...] in practice in Aberdeen acted in concert for the defence of their interests as well as for the maintenance of the dignity and standing of their profession. Only those of good character, education and ability were admitted as members’.<sup>16</sup> The education referred to here should probably not be understood to be the same university learning in Roman law generally undertaken by those aspiring to audience in the College of Justice. John Cairns has noted that rather ‘Local faculties and societies of procurators and writers in Scotland, including such leading bodies as the Writers of the Signet in Edinburgh, the Faculty of Procurators in Glasgow, and the Society of Advocates in Aberdeen, required those seeking admission to their ranks to serve an apprenticeship for a number of years.’<sup>17</sup> Henderson’s list of advocates in Aberdeen does not provide a full biographical record for each man entered, but does in many cases indicate the method by which they were educated or trained. Of the fifty-two men recorded as having entered as an advocate in the sixteenth century, fourteen are recorded by Henderson as having (or ‘probably’ having) undertaken education in a university;<sup>18</sup> another can be presumed to have done so because he had held the position of Civilist at King’s College before entering the profession.<sup>19</sup> Three of the men who entered as advocates in Aberdeen in the sixteenth century are recorded as having served apprenticeships.<sup>20</sup> Of the sixty-eight men recorded as having entered as an advocate in the seventeenth century, twenty-four are recorded as having undertaken university education<sup>21</sup> – again another two can be presumed to have done so because they were respectively the Civilist

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<sup>15</sup> Henderson, *History of the Society of Advocates in Aberdeen*, xii.

<sup>16</sup> *Ibid.*, ix.

<sup>17</sup> John W. Cairns, ‘Lawyers, Law Professors, and Localities: the Universities of Aberdeen, 1680–1750’, *Northern Ireland Legal Quarterly*, 46 (1995), 304–31, 305.

<sup>18</sup> Henderson, *History of the Society of Advocates in Aberdeen*, 85, 91, 116, 118, 125, 152, 229 (twice), 241, 289, 301, 304, 311, 364.

<sup>19</sup> *Ibid.*, 219.

<sup>20</sup> *Ibid.*, 125, 150, 304.

<sup>21</sup> *Ibid.*, 77, 85, 104, 144, 182, 189, 198, 207, 228, 229, 235, 242, 255, 289, 290, 301, 302, 303, 307, 315–16, 317, 353, 357, 360.

at King's College<sup>22</sup> and Dean of Faculties at Marischal College<sup>23</sup> – and seventeen are recorded as having served apprenticeships.<sup>24</sup> Ten of these 120 advocates are recorded as both having attended a university and undertaken an apprenticeship, two in the sixteenth century and probably eight in the seventeenth century.<sup>25</sup> The entries for these ten men might be indicative of a pattern of professional education which was not uncommon in Aberdeen during the wider period. Alexander Spalding's entry in Henderson's list makes no reference to his having undertaken either a university education or an apprenticeship. That he was not university educated is suggested by there being no references to Spalding with the title 'Mr' found in official, contemporary records.<sup>26</sup> Nor does his name appear in the graduation lists of either King's College or Marischal College,<sup>27</sup> although this does not necessarily mean that he did not attend either institution, and he may alternatively have attended one outwith the local area. Nonetheless, it seems plausible that Spalding entered the Society in 1609 on the basis of having completed an apprenticeship.

Although speaking about the 1680s, Cairns has shown that 'Admission [to the Society of Advocates in Aberdeen] was linked to admission to practice as a procurator before the Commissary Court.'<sup>28</sup> Henderson suggested that, once

<sup>22</sup> *Ibid.*, 318–19; on James Scougal, see below.

<sup>23</sup> Henderson, *History of the Society of Advocates in Aberdeen*, 351.

<sup>24</sup> *Ibid.*, 77, 93, 144, 185, 207, 267, 289, 290, 301, 302, 303 (twice), 316, 351, 353, 357, 361.

<sup>25</sup> *Ibid.*, 125, 304 and 77, 289, 290, 301, 302, probably 351, 353, 357 respectively.

<sup>26</sup> Perhaps one of the most telling examples of such a lack is in an entry in the burgh's records, in which Spalding is the third man mentioned in a list of three and the only one not given the title 'Mr': 'Mr Thomas Sandelandis Mr Johne Lundie and Alexr Spalding' [Alexander MacDonald Munro (ed.), *Records of Old Aberdeen MCLVII–MCMIII* (2 vols, New Spalding Club, Aberdeen, 1899–1909), I, 75]. Later references by historians to Spalding as 'Mr' can presumably be dismissed, e.g. William Orem, *A Description of the Chanorrie, Cathedral, and King's College of Old Aberdeen in the Years 1724 and 1725* (Aberdeen, 1791), 122.

<sup>27</sup> Peter John Anderson (ed.), *Officers and Graduates of University and King's College Aberdeen MVD–MDCCCLX* (New Spalding Club, Aberdeen, 1893); Peter John Anderson (ed.), *Roll of Alumni in Arts of the University and King's College of Aberdeen 1596–1860* (Aberdeen, 1900); Peter John Anderson (ed.), *Fasti Academiae Mariscallanae Aberdonensis: Selections from the Records of the Marischal College and University MDXCIII–MDCCCLX* (3 vols, New Spalding Club, Aberdeen, 1898), II; Peter John Anderson (ed.), *Fasti Academiae Mariscallanae Aberdonensis: Selections from the Records of the Marischal College and University MDXCIII–MDCCCLX*, III (an index by James Fowler Kellas Johnstone, New Spalding Club, Aberdeen, 1898), 168.

<sup>28</sup> Cairns, 'Lawyers, Law Professors, and Localities', 314.

admitted to the profession, Spalding practised only or substantially in Old Aberdeen,<sup>29</sup> which is where the Commissary court sat at this time.<sup>30</sup> It will be argued in this article that Spalding was the original reporter of all or most of the contemporary decisions in the collection of practicks attributed to him. If this is correct, it would seem that his practice was based substantially in the Commissary courts, largely that in Old Aberdeen but also, for a period in the late 1620s and 1630s, that in the neighbouring county of Moray. There are also, however, eight notes on cases heard in the Aberdeen Sheriff court, most of which are said to have been heard in the early 1620s thus making them some of the earliest of the contemporary cases recorded. There is also an entry in the diet books in the printed Sheriff court records for 22 March 1620 which names an Alexander Spalding as the ‘procurator’ for an Andrew Downie in Maynis of Kyntor, who had been acquitted by the Baillie court of Kintore for assaulting a William Cowper in Bogheids and now defended a Sheriff court action on the basis of that acquittal.<sup>31</sup> Pleading before the Sheriff court in New Aberdeen would have required Spalding to undertake additional trials.<sup>32</sup> It seems that he did so and was admitted to the Sheriff court in the early years of his career, but, as his practice became more established, he undertook work in the Commissary courts in preference to that in the Sheriff courts. It certainly appears that he built up a successful practice. He rose to become Clerk Depute in the Aberdeen Commissary court, although it is not clear when this appointment was made.<sup>33</sup> He also accumulated sufficient wealth to acquire ‘a good lodging, well slated, with a timber-fore-stair’ on Colledge Wynd in Old Aberdeen.<sup>34</sup>

Spalding’s personal life has been the subject of more interest than his professional life. The parish records note that on 7 February 1608 he married his first wife, ‘Christan Hervie’.<sup>35</sup> However he was a serial adulterer,<sup>36</sup> which,

<sup>29</sup> Henderson, *History of the Society of Advocates in Aberdeen*, 338.

<sup>30</sup> Stevenson, ‘The Commissary Court of Aberdeen in 1650’, 144.

<sup>31</sup> David Littlejohn (ed.), *Records of the Sheriff Court of Aberdeenshire* (3 vols, New Spalding Club, Aberdeen, 1904–7), II, 127.

<sup>32</sup> Cairns, ‘Lawyers, Law Professors, and Localities’, 314.

<sup>33</sup> Orem, *A Description of the Chanonry, Cathedral, and King’s College of Old Aberdeen*, 122; Henderson, *History of the Society of Advocates in Aberdeen*, 338.

<sup>34</sup> The house is no longer extant, as it ‘became ruinous, and at last was demolished to build the yard-dyke, and to help to build the kiln and malt-barn in the end of said yard’ [Orem, *A Description of the Chanonry, Cathedral, and King’s College of Old Aberdeen*, 122].

<sup>35</sup> Available on *Scotland’s People*, [www.scotlandspeople.gov.uk](http://www.scotlandspeople.gov.uk), accessed 8 April 2014.

<sup>36</sup> Old Machar Cathedral Archive, kirk session records volume one (1621–39), e.g. 42,

as David Stevenson has noted, 'made him notorious.'<sup>37</sup> Towards the end of April 1623 his then mistress, Euphame Lillie, fell pregnant.<sup>38</sup> Spalding was convicted at the kirk session the following January of adultery and of trying to secure an abortion, and spent the next three months in public penitence.<sup>39</sup> Stevenson has speculated that the abortion was unsuccessful, and that the child born to Euphame was John Spalding, the historian after whom were named the three successive historical societies called the Spalding Club.<sup>40</sup> If this is correct, John would have been subsequently legitimized by his father's later marriage to Euphame.<sup>41</sup> Alexander Spalding also had at least three daughters; Stevenson has noted that '[o]ne was disciplined for fornication with a covenanter, and after the English conquest of Scotland two of them married members of the Cromwellian garrison.'<sup>42</sup>

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69–73.

<sup>37</sup> David Stevenson, 'The Inappropriate Fate of John Spalding', *Scottish Historical Review*, 75 (1996), 98–100, 98.

<sup>38</sup> Old Machar Cathedral Archive, kirk session records volume one (1621–39), 69.

<sup>39</sup> *Ibid.*, 69–73; Stevenson, 'The Inappropriate Fate of John Spalding', 98.

<sup>40</sup> Stevenson, 'The Inappropriate Fate of John Spalding', 98, 100. John Spalding was Commissary Clerk during the reign of Charles I as well as a royalist and Episcopalian [James Bruce, *Lives of Eminent Men of Aberdeen* (Aberdeen, 1841), 262]. He is best known for his historical account of his own time. This was first printed as *The History of the Troubles and Memorable Transactions in Scotland, from the year 1624 to 1645 [...] from the Original MS. of John Spalding, then Commissary Clerk of Aberdeen* (2 vols, Aberdeen, 1792). However a new edition was prepared shortly thereafter for the Bannatyne Club on the basis of three other manuscripts and was printed as *The History of the Troubles and Memorable Transactions in Scotland and England from MDCXXIV to MDCXLV* (2 vols, Bannatyne Club, Edinburgh, 1828–9). The editors of the latter edition believed that the manuscript on which the former edition was based – which was apparently destroyed by the printer – was misidentified, and that it was 'merely a garbled copy of' a manuscript which was at the time owned by Lord Forbes [*History of the Troubles* (Bannatyne Club edn), I, v]. The next edition which could be said to advance the text was that published by the Spalding Club as the *Memorials of the Troubles in Scotland and in England. A.D. 1624 – A.D. 1645* (2 vols, Spalding Club, Aberdeen, 1850–1). This version is a printing of a single manuscript, which the editors suggested might be Spalding's authorial holograph and certainly 'the most authentic version' of the text [*Memorials of the Troubles*, I, xii–iv]. References below are to the Bannatyne Club and Spalding Club editions.

<sup>41</sup> Stevenson, 'The Inappropriate Fate of John Spalding', 98; David Stevenson, *King or Covenant? Voices from Civil War* (East Linton, 1996), 97. Unfortunately, no entry for this marriage has been found in the records of the parishes of Aberdeen and Old Aberdeen on *Scotland's People*.

<sup>42</sup> David Stevenson, 'Spalding, John (b. 1624?, d. in or after 1669)' in H. C. G. Matthew and Brian H. Harrison (eds), *Oxford Dictionary of National Biography* (Oxford, 2004), <http://www.oxforddnb.com/view/article/26078>, accessed 28 July 2014; *idem*, 'The Inappropriate Fate of John Spalding', 99.

Stevenson has found that ‘After his disgrace in 1624 there is a twenty-year gap in Alexander’s life. There is no record of his presence in Old Aberdeen, suggesting that he may have moved away for a period, perhaps in the aftermath of the 1623–4 scandal.’<sup>43</sup> The evidence of Spalding’s practicks suggests that at least most of this period he spent in Moray, moving back to the Aberdeen area in 1637–8.<sup>44</sup> It seems likely that his final years were spent there. No record of Spalding’s death has been found. However it is probable that he died – or at least stopped practising – in the second half of the 1640s. On 27 September 1644 he, a Thomas Sandilands and a John Lundie were ‘ellectit nominat and chuisit’<sup>45</sup> as baillies; Lundie declined on the grounds that he was already the Humanist and ‘maister of the gramer schwill’ and Spalding ‘refusit to accept the said office in respeck of his inhabilitie and weiknes greiwet with the gutt in his seit kneis and legis and that he may not walk vp nor doun stairis’.<sup>46</sup> The latest mention of him found in the records of the burgh is in an item dating from 11 June 1647; although the record mentions his house rather than his own activities, the wording makes it likely that he was still alive at this time.<sup>47</sup> The latest cases which were subject to a full note in Spalding’s practicks were heard in the mid-1640s and the latest date found is 1648.<sup>48</sup> If it is correct that he was born in the 1580s, he would have been in his mid-to-late fifties or sixties at this time.

Spalding practised during a difficult period of national history. At the time when he began to record his practicks – the late 1610s – King James VI was absent, having relocated to England after receiving that crown. In 1625 James VI died and his son became Charles I. Tensions between the new king and his people led to the Bishops’ Wars of 1638–9, and eventually to the British Civil Wars in the 1640s;<sup>49</sup> Spalding appears to have stopped adding to his practicks during the civil war period. The thirty years during which Spalding’s practicks were compiled also represent a period of extremes for the North East region.

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<sup>43</sup> Stevenson, *King or Covenant*, 97.

<sup>44</sup> See below.

<sup>45</sup> Munro (ed.), *Records of Old Aberdeen*, I, 75.

<sup>46</sup> *Ibid.*, I, 76.

<sup>47</sup> *Ibid.*, I, 78.

<sup>48</sup> Aberdeen MS., fos 34r–v (modern foliation).

<sup>49</sup> On which, see e.g. Stuart Reid, *Crown, Covenant and Cromwell: the Civil Wars in Scotland, 1639–1651* (London, 2012); Trevor Royle, *Civil War: the Wars of the Three Kingdoms, 1638–1660* (London, 2004), parts 1–3; Maurice Lee, *The Road to Revolution: Scotland under Charles I, 1625–37* (Urbana and Chicago, 1985), especially chapters 4–7; David Stevenson, *The Scottish Revolution, 1637–1644: The Triumph of the Covenanters* (Newton Abbot, 1973).



From the later 1610s to 1638, Aberdeen prospered. During this period, the population of Old Aberdeen was probably fewer than 1,000 and that of New Aberdeen somewhere around 8,000.<sup>50</sup> Valuation rolls are not available for these decades, but it is likely that there were no more than 100 heritors within the parishes of Aberdeen. Robin Callander has shown that most of the land in the shire was held by the various branches of a small number of powerful families, although there were many who owned small holdings (including members of these families).<sup>51</sup> This was a period of significant trade, with expansion of national and international trade between 1615 and 1624, and again between 1630 and 1638.<sup>52</sup> Around fifty men graduated each year in Aberdeen – either from King's College or from Marischal College – 'fully a quarter of the output of all of Scotland's universities'.<sup>53</sup> It was also generally a period of increased industry and wealth, and consequently of luxury, charity, and expansion and lavish improvement of the city.<sup>54</sup> However, in 1637, Aberdeen failed to declare itself in favour of the rebellion after the St Giles Riots in Edinburgh;<sup>55</sup> by May 1638, Aberdeen was the only royal

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<sup>50</sup> Gordon DesBrisay, "'The civill wars did overrun all": Aberdeen, 1630–1690' in E. Patricia Dennison, David Ditchburn and Michael Lynch (eds), *Aberdeen Before 1800, A New History* (East Linton, 2002), 238–66, 239; Kennedy suggested that the population was around 7,800 in 1615 [William Kennedy, *Annals of Aberdeen, from the Reign of King William the Lion, to the End of the Year 1818; with an Account of the City, Cathedral, and University of Old Aberdeen* (2 vols, London, 1818), I, 186–7]; Macniven has suggested that, based on the birth rate, there were between '6,000 to 12,000 inhabitants, though the outer limits of that range are implausible' [Duncan Macniven, 'Merchants and Traders in Early Seventeenth Century Aberdeen' in David Stevenson (ed.), *From Lairds to Louns: Country and Burgh Life in Aberdeen, 1600–1800* (Aberdeen, 1986), 57–69, 69 fn. 2]. A list of inhabitants of Old Aberdeen from 1636 lists just over 800 persons [Munro (ed.), *Records of Old Aberdeen*, I, 347–55]. On an analysis of the professions of these people, see Grant G. Simpson, *Old Aberdeen in the Early Seventeenth Century: A Community Study* (Friends of St Machar's Cathedral Occasional Papers, series one, 3, 1975 rept 1995), 5–6.

<sup>51</sup> This is certainly the pattern of landholding found in the valuation rolls of the 1660s, on which see Robin Callander, 'The Pattern of Land Ownership in Aberdeenshire in the Seventeenth and Eighteenth Centuries' in David Stevenson (ed.), *From Lairds to Louns: Country and Burgh Life in Aberdeen, 1600–1800* (Aberdeen, 1986), 1–9, especially 2–4.

<sup>52</sup> Macniven, 'Merchants and Traders in Early Seventeenth Century Aberdeen', 60, 63.

<sup>53</sup> E. Patricia Dennison, David Ditchburn and Michael Lynch, 'Preface' in idem (eds), *Aberdeen Before 1800: A New History* (East Linton, 2002), xxv–xxviii, xxvi.

<sup>54</sup> Macniven, 'Merchants and Traders in Early Seventeenth Century Aberdeen', 60, 63, 67; DesBrisay, "'The civill wars did overrun all'", 239–40

<sup>55</sup> DesBrisay, "'The civill wars did overrun all'", 242.

burgh which had not subscribed to the National Covenant.<sup>56</sup> Thus, ‘In the evening of Friday 29 March 1639, Old Aberdeen became the first town in the Scottish wars to come under military occupation’ by a force of 2,000 men under the command of Lord Fraser and the Master of Forbes.<sup>57</sup> The following day, New Aberdeen was occupied by an army of 9,000 men led by Montrose.<sup>58</sup> The burghs were then successively invaded, plundered, and fined by the two opposing sides. The next period of relative peace in the region began in February 1642, but burgh life would nonetheless have been hard. The burghs were in debt,<sup>59</sup> and were pressed for men.<sup>60</sup> Alexander Spalding’s son, the historian John Spalding, noted in 1642 that there was also a ‘gryte skarsitie of white fishes on our hail costis [...] so long hes scarslie beine sein heir in Scotland’;<sup>61</sup> there was a drought in June of that year, and a late harvest, so much of which was sent to Ireland that food ‘becam scarce and deir.’<sup>62</sup> After the signing of the Solemn League and Covenant in August 1643, the burghs were again pressed for men for the Covenanting army.<sup>63</sup> Aberdeen’s short period of peace ended in March 1644, when a royalist host under the command of Sir John Gordon of Haddo seized New Aberdeen, captured prominent Aberdonian Covenanters, and took them to Strathbogie; occupation of the burgh by Huntly followed shortly thereafter. The burgh was then captured by the Covenanting forces under the command of the Marquis of Argyll on 2 May, but was not subjected to the normal penalties. The burghs (or at least the Covenanters within the burghs) again enjoyed a period of relative peace and favour. In September 1644, however, Montrose marched a royalist, Irish force of 1,500 men on Aberdeen.<sup>64</sup> The burghs tried to resist, but a breach of the rules of war on the burghs’ part – the shooting of the drummer who accompanied the messenger calling for surrender – led to a rout of the local forces, many of whom were killed by the invaders; John

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<sup>56</sup> *Ibid.*, 243; Spalding, *History of the Troubles*, I, 64; *idem*, *Memorials of the Troubles*, I, 100.

<sup>57</sup> DesBrisay, “‘The civill wars did overrun all’”, 249.

<sup>58</sup> DesBrisay, “‘The civill wars did overrun all’”, 249; *Extracts from the Council Register of the Burgh of Aberdeen 1625–1642* (Scottish Burgh Records Society, Edinburgh, 1871), 154–5.

<sup>59</sup> Spalding, *History of the Troubles*, II, 40; *idem*, *Memorials of the Troubles*, II, 137; DesBrisay, “‘The civill wars did overrun all’”, 256.

<sup>60</sup> Spalding, *History of the Troubles*, II, 42; *idem*, *Memorials of the Troubles*, II, 140.

<sup>61</sup> Spalding, *History of the Troubles*, II, 54; *idem*, *Memorials of the Troubles*, II, 154. Spelling of the quotation is correct to the earlier printed edition.

<sup>62</sup> Spalding, *History of the Troubles*, II, 55; *idem*, *Memorials of the Troubles*, II, 155.

<sup>63</sup> DesBrisay, “‘The civill wars did overrun all’”, 256.

<sup>64</sup> *Ibid.*, 256–8.

Spalding commented that 'horribill wes the slauchter in the flight'.<sup>65</sup> Four days of violence, rape and plunder of the burgh followed; John Spalding noted the events in graphic detail.<sup>66</sup> Gordon DesBrisay has suggested that 'No Scottish burgh had suffered like Aberdeen, and none would again until the English sack of Dundee in 1651'.<sup>67</sup>

## Spalding's Practicks

### (1) The Extant Manuscripts

Only two copies of Alexander Spalding's practicks are known to survive, and are held by the University of Aberdeen and the Royal Faculty of Procurators in Glasgow respectively. Unfortunately, neither of the extant manuscripts is Spalding's own authorial holograph. Rather, both are copies which were apparently completed around thirty to forty years after Spalding finished his work.

#### (a) *The Aberdeen Manuscript*

The Aberdeen manuscript is the more complete copy, or, at least, it contains more material said to have been drawn from Spalding's practicks. A flyleaf designed as a title page describes the contents of the manuscript as a copy of the 'authentick practiq[ue] bookes gathered befor the Lords and uthers famous inferiour Judicatories wher Regiam Majestatem and divers acts of Parliament is also often Quoted Be Alexander Spalding Advocat befor the Commissar off Aberdein'.<sup>68</sup> If this attribution of the content to Spalding is correct – and the text of the collection suggests that it is – then his practicks had three parts: an extensive index called the 'Table' which extends to eighty folios; a systematic digest comprising more than 100 folios described as 'the first pairt'; and a ca.180-folio collection of notes on cases interspersed with legal miscellany called 'the second pairt'. The use of the terms 'Table' and 'pairts' will be followed here.

The Aberdeen manuscript records on the front flyleaf that its content was 'Collected and coppied out of' Spalding's 'authentick practiq[ue] bookes'. This description might indicate that it is a first-generation copy, made directly from Spalding's authorial holograph. The title page also notes that the copy

<sup>65</sup> Spalding, *History of the Troubles*, II, 264; idem, *Memorialls of the Trubles*, II, 406.

<sup>66</sup> Spalding, *History of the Troubles*, II, 264–5; idem, *Memorialls of the Trubles*, II, 406–8.

<sup>67</sup> DesBrisay, "The civill wars did overrun all", 259.

<sup>68</sup> Aberdeen MS., fol. 1 (modern foliation).

was started on 19 November 1673; no date of completion is provided in the manuscript. However it is likely that the manuscript was completed in a reasonably timely manner, if only because one scribe appears to have written all, or at least the significant majority of, the text. The front flyleaf, which is styled as a title page, records that the manuscript was ‘wreiten with the hand off Patrick Whyt’. He is identified on the *recto* of folio eighty-one, which is also styled as a title page, as having entered as a notary public on 16 December 1673.<sup>69</sup> If this date is correct,<sup>70</sup> this means that Whyt had not yet been admitted to the profession when he began this copy. The Notaries Act 1587 required applicants to ‘have served and been in company with one of the lords of session, commissaries, writers to the signet or some of the

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<sup>69</sup> Unfortunately, it has not been possible to learn more of Patrick Whyt. His name does not appear in the lists of graduates in the arts from either King’s College or Marischal College for twenty years prior to his admission as a notary [Anderson (ed.), *Officers and Graduates of University and King’s College*; Anderson (ed.), *Roll of Alumni in Arts of the University and King’s College*; Anderson (ed.), *Fasti Academiae Mariscallanae Aberdonensis*]. No record of his birth or death has been found in the parish records of Aberdeen or Old Machar, as digitized and available on the website *Scotland’s People*, [www.scotlandsppeople.gov.uk](http://www.scotlandsppeople.gov.uk), accessed 18 April 2014. The parish records of Aberdeen include a record of the marriage of a Patrick Whytt to a Bessie Muir in 1682, but it is not clear that this is the same man: other Patrick Whites were prominent in the area at the time, including the hookman who was Deacon of the Hammermen Trade and was several times Deacon-Convener of the Crafts in the 1690s and 1710s [Ebenezer Bain, *Merchant and Craft Guilds: A History of the Aberdeen Incorporated Trades* (Aberdeen, 1887), 45]. However Whyt does appear to have remained in the area: what has been identified as a roll of court from 1680 held by the University of Aberdeen Special Collections Centre [MS. 3175/813/1] contains on the last folio of the document, which has now become detached, the phrase: ‘In witness whereof [?] be Patrick Whyt notar public in aberdeine’. The ‘Witnesses to the subscription of the said’ are then listed as ‘Maister Robert Scott Maister Alexander davidson of Newtoun Alexr forbes of Ballogie and the said Patrick Whyt’. The signatures of these men – as well as those of a Will[iam] Urquhart and a Hugh Murray – follow at the end of the document. The forms of some of the letters in Whyt’s signature in this later document are visually distinct from those in the signatures in the Aberdeen manuscript – particularly the letter ‘y’ – but this does not necessarily defeat the suggestion that this might be the same man.

<sup>70</sup> The author is most grateful to Professor John Finlay, who very kindly responded to an enquiry about Whyt by searching for a record of his admission in two volumes of the Register of Admissions of Notaries which together cover the years 1667 to 1680 [National Records of Scotland, NP2/10–11]. However no record of Whyt’s admission could be found. Nor is Whyt’s admission recorded in the repertory associated with Lord Pitmedden in Adv. MS. 25.2.5. Indeed the only business recorded therein for that December was the admission of two advocates, Alexander Campbell and James Borthwick, in the weeks commencing Tuesday 2 December and Tuesday 9 December respectively [Adv. MS. 25.2.5, II, pp.180–1]. The implications of the absence of Whyt’s name in the admission records have not been investigated further.

sheriff, steward or bailie clerks of the shire or common clerks of the head burghs of this realm and have served them truly the full space of seven years' before they might be admitted as a notary, and also to present to the Lords of Session a competent copy of a legal document such as a charter, instrument, or contract.<sup>71</sup>

The Aberdeen manuscript was written on folio bundles which consistently comprised six leaves; the order in which they were to be bound was recorded on the first page of each bundle in the upper left hand corner. A recent hand has added foliation in pencil on every tenth leaf of the manuscript.<sup>72</sup> The copyist, or at least a contemporary hand, had numbered only the folios on which the first and second parts were written; those leaves on which the Table was copied were not foliated at that time. There are some problems with the seventeenth-century series of foliation which cannot be attributed to the binding, including: the omission of the numbers eight and seventy-five to seventy-seven; the original mis-numbering of what should have been folios 234–7, 249–53 and 255 as 334–7, 229–33 and 235;<sup>73</sup> and a disruption to the order of content.<sup>74</sup> It may be that such problems are attributable to Whyt's inexperience as a notary. However, overall, the Aberdeen manuscript generally appears to be a competent and careful copy.

### (b) *The Glasgow Manuscript*

The flyleaves of this manuscript are extensively annotated and decorated, so

<sup>71</sup> *RPS*, 1587/7/39. On notaries in the eighteenth century, and on the admission of notaries during that period, see John Finlay, *Admission Register of Notaries Public in Scotland, 1700–1799* (2 vols, Scottish Record Society Publications, New Series vols 36–7, Edinburgh, 2012), especially 1–25.

<sup>72</sup> There are problems with this modern foliation. That the numbers appear on only every tenth page does not make it easy to use. The twelfth folio is numbered as if it were the tenth, so here the first twelve folios have been referred to as folios i, ii, and one to ten. There are only eight folios between those numbered 290 and 300, so here the foliation has been interpreted to run consistently from folio numbers 290 to 298 then to 300. These issues aside, the modern foliation is more useful as a method of reference to the whole manuscript than the contemporary foliation so will be used here.

<sup>73</sup> Aberdeen MS., fos 326–9, 341–6 respectively (modern foliation).

<sup>74</sup> *Ibid.*, fos 345r–7v (modern foliation). Here the scribe erred by turning two folios in the first instance then attempted to use up the resulting blank space when the error was noticed; the contemporary foliation seems to then have been added subsequently in a manner which tried to take account of the localised rearrangement of the text. Had the manuscript been paginated rather than foliated, this might have been successful, but in fact the insertion of the folio numbers out of order actually makes reading the manuscript more difficult.

provide significant information about its provenance. The most important of the annotations is found on the *recto* of the third flyleaf at the front of the manuscript: ‘Ane Booke Containing Some Practiques Belonging To Master James Scougall Comissar of Aberdein and wrytin Be Mr Robbert Rose his servitor Begun May the 20 1681’; later the words ‘1682 Aberdein’ have been added, presumably recording Rose’s completion of the copy.

Scougall’s signature appears numerous times on the flyleaves, often with his office as Commissary of Aberdeen. Scougall was described by George Brunton and David Haig as the son of John Scougall, Lord Whitekirk.<sup>75</sup> However it appears that James was actually a son of John’s brother, Patrick.<sup>76</sup> James was likely born in 1651 in Saltoun, where Patrick was parson at the time. In 1664 Patrick was made Bishop of Aberdeen and Chancellor of King’s College, so the family relocated to Aberdeen.<sup>77</sup> James cannot have been older than fourteen at this time.<sup>78</sup> He matriculated at King’s College in the arts under the regent William Johnston in 1665, and graduated in 1669.<sup>79</sup> He was then admitted as a Guild Burgess of Aberdeen in February 1672, and to the Society of Advocates in 1676. He received the office of Commissary in March 1681 in succession to his oldest brother, John. He was thereafter the Rector and Civilist of King’s College, and the Provost of Old Aberdeen.<sup>80</sup> He passed as an advocate in Edinburgh without trial in 1687,<sup>81</sup> and became a Commissary of Edinburgh in 1693.<sup>82</sup> If his biographers are correct, it would appear that Scougall held the office of Commissary in both Aberdeen and Edinburgh from 1693 until 1698 when he sold the northern office. In 1696 he was elevated as a Lord of Session, taking the name Lord Whitehill. He died without issue in December 1702.<sup>83</sup>

<sup>75</sup> George Brunton and David Haig, *An Historical Account of the Senators of the College of Justice, from its Institution in MDXXXII* (Edinburgh, 1832), 464.

<sup>76</sup> Henderson, *History of the Society of Advocates in Aberdeen*, 318–19; Brunton and Haig, *Historical Account*, 375.

<sup>77</sup> David George Mullan, ‘Scougal [Scougall], Patrick (1607–1682)’, *Oxford Dictionary of National Biography* (Oxford, 2004), <http://www.oxforddnb.com/view/article/24943>, accessed 18 January 2014; Kennedy, *Annals of Aberdeen*, II, 401.

<sup>78</sup> His older brother, Henry, was said to be fourteen when the family relocated [Bruce, *Lives of Eminent Men of Aberdeen*, 271].

<sup>79</sup> Anderson (ed.), *Roll of Alumni in Arts of the University and King’s College of Aberdeen*, 28.

<sup>80</sup> Henderson, *History of the Society of Advocates in Aberdeen*, 318; Kennedy, *Annals of Aberdeen*, II, 403.

<sup>81</sup> Brunton and Haig, *Historical Account*, 464.

<sup>82</sup> Henderson, *History of the Society of Advocates in Aberdeen*, 319.

<sup>83</sup> *Ibid.*, 318–19.

The signature of the servitor and scribe Robert Rose (or Ross) appears with the description 'witness' on the *recto* of the first flyleaf, and twice more on the *verso* of the last flyleaf. Little is known of Robert Rose. He was made an Honorary Burgess in Aberdeen on 8 August 1681, and is described in that record as 'servitor to Mr James Scogall'.<sup>84</sup> Rose is also here described as 'Mr', which indicates that he was university-educated. This might be the same 'Robertus Rose' who graduated in the arts from King's College on 24 August 1680, and who is described in the *fasti* of graduates as 'Invernessensis'.<sup>85</sup>

The Glasgow manuscript contains partial copies of two collections of practicks.<sup>86</sup> The first seven paginated pages contain a copy of chapters sixty-seven to ninety-five of Hope's *Minor Practicks*, which comprise the substantial part of the title 'Of testaments'. The copy appears to be reasonably close to the text as printed in 1726, with the addition of what could be described as headings or explanations of topics in the margin. The scribe has not acknowledged this as a copy of Hope, although it was not unusual for scribes to fail to do so.<sup>87</sup>

There then follows a partial copy of Spalding's first part. Many titles of the first part are included here, out of order but preserving the title numbers which are seen in the Aberdeen manuscript. Thus Rose would have been aware that he was making only a partial copy. The copy was apparently made

<sup>84</sup> Munro (ed.), *Records of Old Aberdeen*, I, 276.

<sup>85</sup> Anderson (ed.), *Officers and Graduates of University and King's College*, 211. Rose is not mentioned further in Henderson, *History of the Society of Advocates in Aberdeen* or in the printed Sheriff court records. There is on the penultimate flyleaf of the Glasgow manuscript an inscription which could be read as 'Commiss: of Abd Roby Ross Ought this booke', which might normally indicate that he achieved this office. However this does not appear to be the case. Scougall sold the office of Commissary to Robert Paterson, who was in turn succeeded by his son, also called Robert Paterson [on these two men, see Henderson, *History of the Society of Advocates in Aberdeen*, 291; Forte and Meston, 'Legal Life in Aberdeen in the Late Seventeenth and Early Eighteenth Century', 199]. In February 1745 Peter (aka Patrick) Duff of Premnay was confirmed as Commissary [Henderson, *History of the Society of Advocates in Aberdeen*, 156; 'Preferments', *The Scots Magazine. Containing a General View of the Religion, Politics, Entertainment, &c. in Great Britain: and a Succinct Account of Publick Affairs Foreign and Domestic*, VII (February 1745), 98]. Although not certain, it is likely that Duff inherited this office directly from Robert Paterson the younger, who died the same year. Duff held this office until at least shortly before his own death in 1763 [*Memorial for Patrick Duff of Premnay, Esquire, Commissary of Aberdeen* ([Edinburgh], 1762); *Memorial for the Commissaries of Edinburgh, relative to a Bill of Advocation presented for Patrick Duff of Premnay, Esq; Commissary of Aberdeen* ([Edinburgh], 1762)].

<sup>86</sup> Cf. Dolezalek, *Scotland under Jus Commune*, III, 301–3.

<sup>87</sup> See, for example, Dolezalek, *Scotland under Jus Commune*, II, 11, 156.

at the instruction of Scougall,<sup>88</sup> so it is plausible that he specified the number and order of the titles. The new arrangement runs as follows: testaments and executors appear first; then the titles on process in their original order; then those on pursuers, defenders and procurators; then libels and summons as well as messengers; then sentences; then those that can broadly be regarded as being on obligations; then heirs; then prescription; and, finally, improbation and probation. The titles which appear in the Aberdeen manuscript but not in the Glasgow manuscript relate to property law and family law, broadly construed. But the titles on property and family law were not completely ignored by Rose: Spalding's title on prescription is copied into this manuscript. This selection is perhaps counter-intuitive: the titles on family law particularly would have been relevant to Scougall's practice as a judge in the Commissary courts. It is plausible that he had access to or preferred to consult different material for these matters, or perhaps he had these titles of Spalding's practicks copied into a different volume which has not survived or has not yet been identified.

Rose's practice was to write the substantive text on the right-hand side of the page, and thus leave a substantial margin on the left, presumably for annotations. On the page which should be paginated p.170 begins a three-page 'Table of the titles contained in this book'.

(c) *The Relationship between the Two Manuscripts*

It is possible to discern something of the relationship between the two manuscripts. The Aberdeen manuscript, which is the older of the two, does not appear to be an ancestor of the Glasgow manuscript. Spalding borrowed from the practicks of Sir James Balfour of Pittendreich a citation of the case *Merchants of Avinzeon v the heirs of Falcastel* (1532). The Aberdeen manuscript omits the name of the town (which might correctly have been Avignon); the Glasgow manuscript includes it as 'Avinyeane'.<sup>89</sup> Certain conclusions can be drawn on the basis of this (admittedly slim) evidence. It does not seem to have been Rose's normal practice to check the citations found in his model manuscript: none of the other errors in the citations which Spalding borrowed from Balfour have been corrected. Thus it seems likely that the Aberdeen manuscript's omission of 'Avinzeon' precludes it from having been an ancestor text of the Glasgow manuscript. Rather it seems that both descend independently from Spalding's authorial holograph. It is plausible (given the

<sup>88</sup> Glasgow MS., iii *recto*.

<sup>89</sup> Aberdeen MS., fol. 148v (modern foliation); Glasgow MS., 120.



similarity of the texts and the wording of the Aberdeen manuscript's title page) that they may both have been copied directly from Spalding's manuscript.

Indeed there is evidence to suggest that they both descend from the same ancestor, which contained a copy of the Table and both 'pairts' and was foliated. Spalding's authorial holograph (or an intermediate ancestor shared by both extant manuscripts) must have contained extensive cross-referencing within the text: the first pairt alone seems to have contained more than 200 cross-references. The cross-references which appear in the Aberdeen manuscript are almost all correct to the contemporary foliation of that manuscript. The Glasgow manuscript also gives all the cross-references found in the Aberdeen manuscript (including those which refer to sections of text which were not copied into the former) and gives the same numbers for the folios, titles and chapters as the Aberdeen manuscript. Thus the cross-references in the Glasgow manuscript seem to refer to the foliation of the Aberdeen manuscript rather than to its own pagination. The most logical explanation for this is that the cross-references were received into both extant manuscripts from a common ancestor in which the text was generally contained on the same pages as it is in the Aberdeen manuscript. If this is correct, it would suggest that Whyt was careful to adhere to the spacing of the text of his model manuscript, probably as an expression of a more general concern to provide as accurate a copy as possible. This also raises questions about the Glasgow manuscript. These cross-references would have been useless to Scougall or another reader of this manuscript unless he also had on-going access to the complete collection of Spalding's practicks. It is plausible that Rose was also highly concerned about making an accurate copy of the model manuscript, so included cross-references which would be unhelpful if the copy was separated from its parent text.

The conclusion that both scribes may have been highly concerned with providing a faithful copy, to the extent of pedantry, is reassuring to the modern reader: the two extant copies might be presumed to be close enough to Spalding's authorial holograph to allow some conclusions to be drawn about it.

## (2) The First Pairt

Spalding's first pairt broadly adheres to Hector McKechnie's description of the so-called digest practicks: 'collections of "rollments of court" [...] some of the later ones [of which] were elaborated by the inclusion of abstracts

of statutes and other sources, such as the *Regiam Majestatem* and the “auld laws”, and of “practical observations” [...] digested under subject heads [...] constituting a digest or encyclopaedia of law’.<sup>90</sup> There are sixty-seven titles in Spalding’s first part, although errors in the numbering of the titles (preserved in both extant copies so plausibly attributable to the authorial holograph) mean that the final title is wrongly identified as the sixty-fourth.<sup>91</sup> Spalding’s first part is quite short: the sixty-seven titles are contained on only around 100 folios in the Aberdeen manuscript. There is considerable variation in the length of Spalding’s titles,<sup>92</sup> but more than half of them are around two pages or less of continuous text, and around twenty-five are closer to a single page, of the Aberdeen manuscript. The first part owes much to earlier works of Scots law.

(a) *Spalding’s Use of the Practicks of Sir James Balfour of Pittendreich*

Dolezalek has noted of the Aberdeen manuscript, ‘I take it that the author used Balfour’s Practicks.’<sup>93</sup> This conclusion was based on two observations: that ‘Several series of chapter headings correspond to parallel series in Balfour’, and that some of the citations which he sampled appeared in both works.<sup>94</sup> Dolezalek’s conclusion is undoubtedly correct. Indeed there is evidence that Spalding used Balfour extensively and probably compiled the first part of his practicks with a copy of Balfour in front of him. Spalding drew from Balfour: the order in which he arranged many of the titles, the names of titles, the structure of material within titles, much of the text, and many of the citations therein. Thus much of Spalding’s first part can to some extent be regarded as an abridged, updated version of sections of Balfour’s practicks. But Spalding does not appear to have been uncritical in his use of Balfour. Rather, he was selective about the material he borrowed, reordered some of that material, and reworked passages for conciseness. This assumes, of course, that Spalding

<sup>90</sup> Hector McKechnie, ‘Practicks, 1469–1700’ in *An Introductory Survey of the Sources and Literature of Scots Law* (Stair Society Publications Series vol. 1, Edinburgh, 1936), 25–41, 28.

<sup>91</sup> The titles ‘Moveable airshipe pertayneing to male or female’ and ‘Of the aith, and first the aith De Calumnia seu de Malitia’ are not numbered; ‘Of Testaments and letter willes’ and ‘Of executors’ are both numbered as title twenty-seven.

<sup>92</sup> Notably long titles include ‘The ordour of proponeing of exceptiones emergent and de novo ad aures dilator and peremptor’ (title forty-nine) and ‘Of warrand’ (title forty-two), both of which amount to approximately nine pages of continuous text.

<sup>93</sup> Dolezalek, *Scotland under Jus Commune*, III, 18.

<sup>94</sup> *Ibid.*.

worked from a complete copy, but it is also possible that he worked from a copy of Balfour which was already so abridged.<sup>95</sup>

Around sixty manuscripts containing copies of Balfour's practicks have been identified by Dolezalek; the specific copy which Spalding owned, or at least used, has not been identified as such. In the eighteenth century, Walter Goodal completed an edited text of Balfour's practicks, which took account of 'all the Manuscript Copies we could find';<sup>96</sup> unfortunately, Goodal did not identify which manuscripts he used, or how many he examined. Peter McNeill's assessment of this work in 1963 was 'that Goodal was a careful and meticulous scholar', and that a new edition based on a fresh consultation of the manuscripts did 'not appear to be justified by the extra usefulness of such treatment'.<sup>97</sup> The Stair Society thus reprinted Goodal's earlier edition, with new appendices, indices, and so on. This printed text has necessarily been relied upon here as the principal reading of Balfour, as a comprehensive comparison between Spalding and the manuscripts of Balfour's practicks has been outwith the scope of this research. Balfour's text as it is printed does appear to have been at least reasonably close to the manuscript version used by Spalding.

Spalding's method was to summarise, often in a single sentence, selected chapters (i.e. paragraphs) within a title of Balfour and, generally, to retain his citations.<sup>98</sup> Selective copying from Balfour was relatively common practice in

<sup>95</sup> N.L.S. MS. 2941, which dates from the mid-1640s, has been discussed by both McNeill and Dolezalek as an example of an abbreviated copy of Balfour's practicks. See Peter G. B. McNeill (ed.), *The Practicks of Sir James Balfour of Pittendreich, Reproduced from the Printed Edition of 1754* (2 vols, Stair Society Publications Series vols 21–2, Edinburgh, 1962–3), I, xxxv; Dolezalek, *Scotland under Jus Commune*, II, 31–2.

<sup>96</sup> Walter Goodal (ed.), *Practicks: or, A System of the More Ancient Law of Scotland. Compiled by Sir James Balfour of Pettendreich* (Edinburgh, 1754), xi.

<sup>97</sup> McNeill (ed.), *The Practicks of Sir James Balfour of Pittendreich*, I, lvi–lvii.

<sup>98</sup> The two compilers' titles 'Of Coniunctie' provide a typical example [McNeill (ed.), *The Practicks of Sir James Balfour of Pittendreich*, I, 101–5; Aberdeen MS., fos 91r–v (modern foliation)]. Spalding's first paragraph summarises Balfour's extensive fourth chapter and retains the citations of the acts later given the short titles of the Liferent Caution Acts 1491 and 1535 [RPS, 1491/4/10, 1535/23]. Spalding's second paragraph summarises Balfour's lengthy first chapter, retaining (and possibly attempting to correct) the citation of *Regiam Majestatem*. Both compilers cite *Regiam Majestatem* at the end of this passage, Balfour citing 2,16 and Spalding citing 2,18 [McNeill (ed.), *The Practicks of Sir James Balfour of Pittendreich*, I, 101, cap.1; Aberdeen MS., fol. 91r (modern foliation)]. Neither citation is correct, at least to Skene's edition, in which the relevant text is *Regiam Majestatem*, 2,15,10–11. Spalding's third paragraph abridges Balfour's second, but ignores the repeat citation of *Regiam Majestatem* and adds a brief comment. Spalding's fourth paragraph condenses into a single sentence Balfour's

the early-seventeenth century. Thus, for example, the Tinwald manuscript<sup>99</sup> contains a copy of Balfour's practicks about which Dolezalek has remarked: 'the present MS merely selects text passages from Balfour, shortening many of them and omitting many references.'<sup>100</sup>

Spalding's practice of selective copying of material within a title is also seen on a broader scale by comparing the order of their titles. Spalding's first pairt does not contain titles or any large quantity of material on what can broadly be regarded as matters of public law. He thus appears to have ignored the first twelve titles of Balfour's practicks, which focus on such issues. Again, this was not uncommon: these titles were also excluded from the copy in Adv. MS. 25.3.6.<sup>101</sup> But thereafter Balfour supplies titles on what might be considered to be matters of private law, broadly construed. The content and order of the first twelve titles of Spalding rely to a significant extent on these titles in Balfour.<sup>102</sup>

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sixth chapter, retaining Balfour's citation of *John Graham v Christian Forsyth* (1527) but omitting the parties' forenames. Spalding's fifth paragraph similarly abridges Balfour's seventh chapter, but corrupts Balfour's citation of *Janet Dunbar v Gilbert Kennedy* (1530). Spalding's sixth paragraph reworks Balfour's eighth chapter, retaining only a citation of the date 1533 from Balfour's two citations of cases which provided the dates 1534 and 1553 but not the parties' names. Spalding's seventh paragraph summarises Balfour's ninth chapter, retaining the citation of *Malcolm, Lord Fleming v Janet Home* (1534) but omitting the lord's forename. Spalding's eighth paragraph summarises Balfour's tenth and eleventh chapters, retaining the citation of the Wife's Ratification Act 1482 but not that of a case heard in 1505. Spalding here adds: a citation of *Regiam Majestatem*, 2,16,16; a citation of chapter twenty of *Quoniam Attachamenta*; a reference to a case said to have been heard in Edinburgh in 1636; two cross-references to title one of his first pairt ('Of the husband and the wife'); and a reference to a separate volume belonging to Spalding which he called his stylebook. It is worth noting that this is a different stylebook to that which was edited by Forte and Meston [on which, see above]. Spalding's final paragraph summarises Balfour's fourteenth chapter, retaining but corrupting the citation of *MacNathane v Lamond* (1554), after which Spalding adds a cross-reference to his Table.

<sup>99</sup> Adv. MS. 22.3.4, which has been dated to the early-seventeenth century by Dolezalek, *Scotland under Jus Commune*, II, 139.

<sup>100</sup> Dolezalek, *Scotland under Jus Commune*, II, 140. When copying the title on conjunctie, the scribe of the Tinwald manuscript included only chapters one, five to ten, and twelve to fourteen [Adv. MS. 22.3.4, 6–7]. Similarly, the copy in Adv. MS. 25.3.6, which Dolezalek has dated to the early-seventeenth century [Dolezalek, *Scotland under Jus Commune*, II, 291–4], drew only on chapters one, two, and four to seven [Adv. MS. 25.3.6, fos 49r–v].

<sup>101</sup> Adv. MS. 25.3.6, fos 33r–65v.

<sup>102</sup> Spalding's first title, 'Of the husband and wife', draws on the corresponding title in Balfour, 'Materis concerning the husband and the wife', borrowing citations from at least its first, third, fifth, and ninth to fourteenth chapters, as well as possibly the

Indeed a pattern of heavy reliance on Balfour's practicks continues for much of Spalding's first pairt, and there is generally one title in Spalding for most of the titles in Balfour. However this pattern of borrowing does break down in places. Spalding sometimes drew material from more than one title in Balfour into a single title in his own collection.<sup>103</sup> Conversely, Spalding divided into two titles Balfour's examinations of minors, of probation by oaths, and improbation. He also reversed Balfour's order of the titles on probation and exceptions. Additionally, as has already been seen, Spalding continued to ignore certain titles, specifically Balfour's titles on: hire and herezeld, buying and selling, fairs and markets, money, parliament, the College of Justice, ambassadors, assize, attachments, and so forth. He also appears to have taken little, if anything, from Balfour's titles on homage and fealty,

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fifteenth chapter of Balfour's title 'Of the wife's dowrie and tierce'. Both compilers then discuss marriage, with Spalding borrowing from the first, second, fifth, sixth and seventh chapters of the relevant title in Balfour. Both then have short titles on tocher-goods, with Spalding borrowing from the fifth and sixth chapters of that title in Balfour as well as the thirteenth chapter of his title on conjunctie which follows. Spalding, too, gives a title on conjunctie after that on tocher-goods; a comparison of the two compilers' titles on this subject has already been provided [see above, fn. 98]. Both follow their discussion of conjunctie with a title on terce, Spalding borrowing from at least Balfour's second to sixth, thirteenth to fifteenth, eighteenth, nineteenth, twenty-fifth, and twenty-seventh to thirty-third chapters. Their next titles are on tutors, Spalding borrowing from at least Balfour's third, fifth to tenth, twelfth, thirteenth, fifteenth to eighteenth, and thirty-sixth chapters. Both compilers then discuss curators, Spalding seemingly borrowing from all but the sixth of Balfour's seventeen chapters. Balfour then gives one title, 'Of superiouris and vassallis', whereas Spalding gives two short titles, 'Of superiors' and 'Of vassals', drawing on Balfour's first, fourth and tenth chapters. Spalding then ignored Balfour's titles on beggars, hostelries, policies, schools, the king's patrimony, the forest laws, and kirk patrimony. He borrowed a citation of the Manses and Glebes Act 1563 for his title on feus, but otherwise he seems to have also ignored Balfour's title 'Anent benefices'. Both then have a title on teinds, with Spalding borrowing from at least Balfour's first and eighth chapters. Both compilers then discuss prescription, Spalding borrowing from at least Balfour's first, second, and fourth to ninth chapters. Both then examine possession, with Spalding apparently borrowing from all but Balfour's first and fifth chapters.

<sup>103</sup> Material from Balfour's titles 'Anent payment' and 'Of generall discharge' was drawn into a single title addressing both issues; material from Balfour's titles 'Of alienatioun and infetment' and 'Anent alienatioun of heritage and landis' was drawn into a single title in Spalding, called 'Of alienation and infetment'; material from Balfour's titles 'Anent covenant and paction', 'Of borrowing and lending', 'Anent pledgis and cautioneris', 'Anent thingis laid in wad' and 'Anent a lenne' was drawn into a single title, 'Of pactione, borrowing, lending and pledges & cautioners'; material from Balfour's titles 'Of courtis' and 'Anent jugeis' was drawn into a single title on both; and material from Balfour's titles 'Anent probatioun be witnessis' and 'Anent probatioun be confessioun' was drawn into a single title.

non-entry of heirs, repledging, and sentence and execution, and less than one might otherwise expect from the titles on testaments and wills and on executors.

Spalding's method in using Balfour has meant that his pattern of citation also owes much to that collection of practicks. There are between 1,300 and 1,400 citations and general references to authority in Spalding's first part. More than 650 of these appear to have been borrowed from Balfour. Around 580 of these references are to cases, and forty-five are to statutes. Spalding also borrowed from Balfour at least one general reference to the 'practick' of the Lords of Council and Session as well as references to the Synod of Perth in 1540 and the 'King's register'. Spalding also drew from Balfour references to the medieval law books, including almost twenty citations of *Regiam Majestatem*, three of the *Leges burgorum*, three of *Quoniam Attachiamenta*, three of *De exceptionibus*, one of the Forest Laws and one of *De Bastardia*; these are Spalding's only references to the latter three of these works.

Sir John Skene's Latin edition of the medieval law books and statutes of the early kings first appeared in print in 1609, and a second Latin edition was printed in 1613.<sup>104</sup> A Scots translation of the volume was also printed in 1609.<sup>105</sup> Balfour collected his practicks when the medieval law books still circulated only in manuscript, and the different copies did not always divide the text in the same places.<sup>106</sup> However Spalding's references to these texts which were borrowed from Balfour generally adhere to Skene's 1609 Scots edition; one even supplies the relevant folio number therein.<sup>107</sup> As will be shown in the following section, it was this edition (rather than either Latin edition) of Skene's work that Spalding himself used. This makes it plausible that it was he who checked these borrowed references in the printed text, but it is also possible that the citations had already been so updated in the manuscript copy of Balfour from which he worked.

<sup>104</sup> Sir John Skene, *Regiam Majestatem Scotiae veteres leges et constitutiones* (1st edn, Edinburgh, 1609; 2nd edn, Edinburgh, 1613).

<sup>105</sup> Sir John Skene, *Regiam Majestatem, The Auld Lawes and Constitutions of Scotland* (Edinburgh, 1609).

<sup>106</sup> This was also noted by Goodal in the preface to his edition of Balfour's practicks [Goodal (ed.), *Practicks: or, A System of the More Ancient Law of Scotland, Compiled by Sir James Balfour of Pettendreich*, ix]. Goodal noted that the index to Skene's edition was useful for identifying citations of these older collections [Goodal (ed.), *Practicks*, x] and there is an implication here that the references in his printed edition of Balfour were brought into line with Skene's edition.

<sup>107</sup> Aberdeen MS., fol. 97v (modern foliation); McNeill (ed.), *The Practicks of Sir James Balfour of Pittendreich*, I, 125.

The extent of Spalding's reliance upon Balfour means that McNeill's observations regarding Balfour's structure can also be applied, at least to some extent, to the first pair: 'The work is lacking in organisation: neither the work as a whole nor the topics mentioned are treated in any systematic or generalized way. [...] The paragraphs within each title have less organization than the titles.'<sup>108</sup> However because Spalding ignored Balfour's titles on public law (broadly construed), as well as those which McNeill calls the titles on 'miscellaneous matters', there is a broad general arrangement.<sup>109</sup> Spalding first examines the law of persons in seven titles, then property law (broadly construed) in nineteen titles, then succession in ten titles, then procedural law in the remaining titles.

However Spalding's titles on procedural law do not adhere to this same pattern of borrowing from Balfour's practicks, which did not have titles on many of the topics of procedural law discussed in the first pair.<sup>110</sup> Rather, here Spalding used a different text as his principal source.

(b) *Spalding's Use of Sir John Skene of Curriehill's Regiam Majestatem, The Auld Lawes and Constitutions of Scotland (1609), Lawes and Acts (1597) and De verborum significatione (1597)*

Included towards the back of Skene's 1609 Scots edition of the medieval law books was his *Ane Short Forme of Proces Presentlie Used, and Observed Before the Lords of Counsell, and Session*.<sup>111</sup> This tract spans almost twenty folios in the printed edition, and is divided into thirty-six titles called chapters. A second version of this text was started by Skene and developed by the Writer to the Signet, Habbakuk Bisset.<sup>112</sup> Skene's *Forme of Proces* was Spalding's second most important source for the first pair. That his citations of it sometimes include folio numbers which are correct to the printed edition shows that it was this first printed version, rather than the later revision by Skene and Bisset, which he used.

Skene's first two chapters set out introductory matters and explain that the judicial process could be divided into three stages: 'The first, is the summons:

<sup>108</sup> McNeill (ed.), *The Practicks of Sir James Balfour of Pittendreich*, I, xli–xlii.

<sup>109</sup> *Ibid.*, I, lviii, lxiii.

<sup>110</sup> For example, messengers, *de jure litem*, probation of the reply, circumdiction, conclusion, and improbation of writs.

<sup>111</sup> On which, see Ford, *Law and Opinion*, 52, 507–9.

<sup>112</sup> Ford, *Law and Opinion*, 52, 508; Sir Philip J. Hamilton-Grierson, 'Introduction' in idem (ed.), *Habbakuk Bisset's Rolment of Courtis* (3 vols, Scottish Text Society, Edinburgh and London, 1920–6), III, 1–3.

The second, is *litiscontestation*: The third, is the sentence definitive.<sup>113</sup> Skene discusses the first of the three stages of process in chapters three to fourteen; his fifteenth chapter, ‘Of *litiscontestation*’, is on the second stage; the remaining chapters address the third stage and ancillary matters. Spalding makes around fifty explicit references to Skene’s *Forme of Proces*,<sup>114</sup> most of which are to the chapters on the latter two stages. Spalding refers to only five of the fourteen chapters relating to the first stage of process: the fourth, ‘Execution of the summons’; the ninth, ‘Of procurators’; the tenth, ‘The calling of ane warrant’; the eleventh, ‘The order of proponing of exceptions’; and the thirteenth, ‘Exceptions dilatours’. Spalding cites Skene’s chapter ‘Of *litiscontestation*’ on the second stage. He relied upon all of Skene’s chapters which discuss the third stage of process, and explicitly cites all but chapters thirty and thirty-one, ‘The indirect maner of improbation’ and ‘Of the sentence’.

Indeed Spalding’s use of the chapters relating to Skene’s third part was considerable. From his title on *litiscontestation* onward, Spalding’s structure no longer adheres to that of Balfour’s *practicks* but rather owes more to Skene’s *Forme of Proces*. Both Spalding and Skene examine probation after *litiscontestation*, whereas Balfour first examines exceptions. Spalding then examines the order of proponing of exceptions, explicitly drawing on Skene’s chapters eleven to fourteen and twenty-one to twenty-five. Spalding then gives a short title, ‘Of *essongzies*<sup>115</sup> and excusationes’, on the failure of either party to attend court or send a representative, which seems to owe nothing to Skene and little to Balfour. However, from the next title, ‘Of probatione and diverse kinds thereof’, Spalding’s structure matches Skene’s exactly, with Spalding’s first pair concluding with ‘Of the sentence’, which is the thirty-first of Skene’s thirty-six chapters.

Spalding’s use of Skene’s work in some of these later titles was extensive, and his practice was to borrow both sections of text and citations from his source.<sup>116</sup> Indeed he borrowed from Skene citations of various sources,

<sup>113</sup> Sir John Skene of Curriehill, ‘Ane Short Forme of Proces Presentlie Used, and Observed, Before the Lords of Counsell, and Session’ in idem, *Regiam Majestatem, The Auld Lawes and Constitutions of Scotland* (Edinburgh, 1609), chapter 2, fol. 109v (second series of foliation).

<sup>114</sup> This total counts citations such as ‘Sie the samen in the forme of proces used befor the Lords at the 11. 12. 13 & 14 chapdors theroff’ [Aberdeen MS., fol. 168r (modern foliation)] as four references, as it contains references to four sections of the text.

<sup>115</sup> Correctly ‘*essoiners*’. On the marginal notes and the possibility that these were authored by Spalding, see below.

<sup>116</sup> Spalding’s title ‘Probatione of the lybell be witness’ is a good example of his use of Skene. Here Spalding borrows almost verbatim the first two sections of Skene. He



specifically: fifteen citations of legislation, five citations of acts of sederunt, citations of five texts of *Regiam Majestatem*, citations of five texts of *Quoniam Attachiamenta*, and a citation which refers to two texts of *Modus tenendi curias*. He also borrowed three references to Roman law and another to a source which has not been identified.<sup>117</sup> All the references to or borrowed from Skene appear in the second half of Spalding's first pairt, specifically from title thirty-nine ('Of procurators') onwards.

Spalding's method in using Skene was thus in keeping with his practice when using Balfour. It seems that Spalding drew what he wanted from Skene and then turned to Balfour to take what – if anything – was relevant. His title 'Of probatione be wreit' opens with a paragraph which copies Skene's *Forme of Proces*, 21,1 almost verbatim, borrows Skene's citations of *Regiam Majestatem*, 1,25 and *Quoniam Attachiamenta*, cap.81, then cites the relevant

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then paraphrases the third, adds an (erroneous) citation of Skene, refers to 'the order observit befor the Commissaries of Edinburgh', includes a cross-reference to a later title of his first pairt, and cites his separate stylebook. Spalding did not return to Skene's fourth and final section, but rather discusses a case of 1642 and provides another reference to the first pairt. Spalding then gives two very short titles, 'Probatione of ane exceptione be witnesses' and 'Probatione of the repleye be witnesses'. In the former, Spalding borrows almost verbatim Skene's entire chapter, but disregards the lengthy Latin statement in the middle of the first section and condenses Skene's citation which follows ('*l.1. et ibi gl. ff. de probationib.*') to just 'lib. 1. De probationibus'. Spalding also adds, after the text of section three, a note that a defender cannot call witnesses beyond those 'contained in the summonds of the day of the peremptor'. Having copied the full entry of Skene's *Forme of Proces*, he adds a citation to that chapter. He then briefly notes in a new paragraph that the Commissaries of Edinburgh and Aberdeen differ from each other and from the Session in 'ther forme of granting of diligence', and provides a cross-reference to another title of the first pairt. In 'Probatione of the repleye be witnesses', Spalding again receives Skene's text almost in its entirety. He shortens Skene's first citation – '*l.2. ff. de exceptionib.*' – to 'lib.2. de exceptionibus', omitting the siglum which indicates that it is a citation of Justinian's Digest; he disregarded the citation of the Codex which immediately follows in Skene. Spalding was relatively free with his copying of the middle of Skene's second section, and his text gives a citation of the chapter as a whole at the end of his title.

<sup>117</sup> The citation in Spalding reads, 'lib. 3. cap. 87.' [Aberdeen MS., fol. 189r (modern foliation); Glasgow MS., 165]. This is certainly borrowed from Skene's *Forme of Proces*, 30.1 [fol. 122r] where there is a compound citation, '*lib. 3. c. 87. c. inter. 6. de fid. instr. extr. l. comparationes. 19. cum. Authent. seq. C. de fid. instr.*' The citation 'lib. 3. c. 87.' is styled in the manner in which Skene normally cites *Regiam Majestatem*, but there is not an eighty-seventh title in the third book of that collection. Nor does this appear to relate to the other works cited here by Skene, specifically the *Liber Extra* of Canon law and the *Codex* of Roman law and the *Authenticum* thereon. [*Corpus juris canonici emendatum et notis illustratum. Gregorii XIII. pont. max. inussu editum* (4 vols, Rome, 1582), II, 2,22,6; the modern reference for the Roman law passage is C.4,21,20].

chapter of Skene.<sup>118</sup> The next paragraph draws on Balfour's second chapter, and borrows (if corrupts) the citation of *Gibson v Moneypenney* (1488).<sup>119</sup> For the rest of this seven-page title, Spalding's text is highly reminiscent of Balfour, until at the end he provides a cross-reference to his second pairt and a short comment without any authorities. This same practice is found in the other titles for which Spalding used both sources: Spalding borrowed from Skene then from Balfour.

Spalding's extensive copying from Skene's *Forme of Proces* is interesting because this is a printed work. However copying from a printed book was not uncommon. Bawcutt has noted of literary manuscripts: 'Many items in these Scottish miscellanies were copied from printed books [...] scholars are becoming increasingly aware of how common it was, throughout this period, to copy not only extracts, but sometimes whole books.'<sup>120</sup> The justification which Bawcutt has given for this practice is that these persons 'were unable to acquire the printed texts that they desired'.<sup>121</sup> This may have been Spalding's motivation: it is plausible that Spalding did not own a copy of Skene but borrowed it.<sup>122</sup> However he draws upon Skene's *Forme of Proces* with sufficient frequency to allow the conclusion that he was highly familiar with its contents.

Indeed Spalding also makes frequent reference to the medieval law books and early Scottish statutes, and it is clear that he used Skene's 1609 Scots edition to access these too. Spalding does not always acknowledge that this was his source for these texts, and where he does do so he refers to it not by its printed title but as 'the book of the Majestie'. This was a common moniker in the early-modern period for *Regiam Majestatem*, after which Skene's edition is named.

Thus Spalding gives four citations of the collection of the laws of the Baron courts, one of which acknowledges that the version used was 'wreitine in the book of Majestie'.<sup>123</sup> The *Leges burgorum* is cited by Spalding twelve times

<sup>118</sup> A marginal addition beside this text summarises Skene's second section, and cites Skene's chapter and the folio number. On the marginal notes and the possibility that these were authored by Spalding, see below.

<sup>119</sup> A marginal annotation beside this paragraph cites *Quoniam Attachiamenta*, 81,24 and a different title of Spalding's first pairt.

<sup>120</sup> Priscilla Bawcutt, 'Scottish Manuscript Miscellanies from the Fifteenth to the Seventeenth Century' in Peter Beal and A. S. G. Edwards (eds), *English Manuscript Studies, 1100–1700: Scribes and Transmission in English Manuscripts 1400–1700* (London, 2005), 46–73, 57.

<sup>121</sup> Bawcutt, 'Scottish Manuscript Miscellanies', 57.

<sup>122</sup> Ford, *Law and Opinion*, 40.

<sup>123</sup> Aberdeen MS., fol. 142r (modern foliation).

(plus once in the annotations, on which see below); six of these citations state that the collection is 'contayned within the Majestie' and three of these six give the folio number within Skene's collection. Spalding also used this version of *Quoniam Attachiamenta*, which is cited thirty times by him and is also said to be 'in the book of the Majjes]tie'.<sup>124</sup> Of his eighteen citations to early Scottish statutes included in Skene's volume, four state that the source is 'in the book of the Majestie' (or similar).<sup>125</sup> The Table to Skene's volume is also cited twice in the first pairt, as 'the table of the book of Majestie'.<sup>126</sup> *Regiam Majestatem* itself is cited by Spalding around fifty times.

Many of Spalding's citations of the medieval law books and early statutes include folio numbers as well as title or chapter numbers. The folio numbers provided are correct only to Skene's 1609 Scots edition. Thus, for example, both the Aberdeen and Glasgow manuscripts give the citation 'Quoniam attachiamenta fol. 81. cap. 24 at the end of the fourt vers'.<sup>127</sup> Chapter twenty-four is contained on folio 81v of the 1609 Scots edition of Skene's work, but on folio 112v in the 1609 and 1613 Latin editions. It appears to have been Spalding's usual practice to cite the folio on which the relevant title or chapter begins, rather than the folio on which a specific paragraph or verse is found. For example, a citation of *Regiam Majestatem*, again found in both manuscripts, reads: 'Sie the first book of the Matie fol. 6. cap. 6. at the xiiij & xv vers'.<sup>128</sup> *Regiam Majestatem*, 1,6 does indeed begin on folio 7r of the Scots edition, but the fourteenth and fifteenth verses are found on folio 7v; in the Latin editions the chapter begins on folio 12r and the verses are found on the *verso*.

As Spalding relied upon Skene for his citation of older statutes, so he seems to have done so for more recent statutes. Spalding makes quite extensive reference to legislation passed in the reigns of the Stewart monarchs. Generally he gives the name of the monarch, the parliament number, and the chapter. However on two occasions he gives more detail. Thus in title thirty-six, 'Of Regalitie', Spalding explains that 'the first attacker is judge frae whome ther is no replegiatione', after which he gives a citation, '[a. 6. par. 11. cap. 29. fol.

<sup>124</sup> Aberdeen MS., fol. 150v (modern foliation); Glasgow MS., 128.

<sup>125</sup> Aberdeen MS., fos 103v, 119v, 143r, 157v (modern foliation); Glasgow MS., 10. Spalding also once refers to a statute of Malcolm II as being 'of Regiam Majestatem', which seems to refer to the copy of the statutes of Malcolm II printed in Skene's volume [Aberdeen MS., fol. 142v (modern foliation)].

<sup>126</sup> Aberdeen MS., fos 111r, 158r (modern foliation).

<sup>127</sup> Aberdeen MS., fol. 166r (modern foliation); Glasgow MS., 47.

<sup>128</sup> Aberdeen MS., fol. 152r (modern foliation); Glasgow MS., 133.

81.<sup>129</sup> This citation seems to relate to Skene's *Laws and Actes of Parliament, maid be King James the First and His Successours Kings of Scotland* (1597). The relevant act – which is quite long – is printed in this volume from folio 76v. However it is at folio 81r that the statute discusses issues of replegation of offenders by Regality courts. If the suggestion that Spalding used this volume is correct, then his citation of the folio on which the relevant passage is found appears to deviate from his previously-discussed practice of citing the folio on which the start of the relevant chapter of Skene's edition of the medieval law books is found. It is possible that he changed his practice because of the length of the act or simply because he was using a different source and his previously-discussed practice did not survive the change. Spalding must also have used supplementary collections of later statutes: he makes reference to legislation of James VI passed after his twentieth parliament as well as acts of Charles I.<sup>130</sup>

Finally, Spalding also made use of Skene's *De verborum significatione*. There are seven citations of Skene's work in the text of Spalding's first pair; another is added in the marginal annotations. Of these citations, two are of the entry 'Curialitas' while the entries 'Eneya' (on heirs), 'Bastardus', and the acts of council included in the entry 'Feodum' are each cited once. Two of the references cite only letters within the dictionary: that to the letter 'E' probably refers to 'Eneya' again and that to the letter 'F' should probably be interpreted as referring to 'Felonia'. The marginal citation is of the letter 'C' and again refers to the content of the entry 'Curialitas'.

### (c) *Spalding's References to Other Scottish Lawyers*

Spalding also makes references to the legal opinions of contemporary Scottish advocates. On several occasions he draws on such opinions, mentioning notable lawyers as having 'resolved' cases or the legal issues discussed therein. It seems clear that Spalding is using the term 'resolved' here in the sense of settling a legal question,<sup>131</sup> which would be in keeping with the practice of

<sup>129</sup> Aberdeen MS., fol. 144v (modern foliation).

<sup>130</sup> See e.g. Aberdeen MS., 98v for citations of the statutes later given the short titles the Teinds Act 1612 [RPS, 1612/10/12] and the Church Lands Act 1621 [RPS, 1621/6/27], which were passed in James VI's twenty-first and twenty-third parliaments respectively, and fol. 101r for a citation of the Act in Favour of Orphans, Fatherless and Others 1641 [RPS, 1641/8/201], which was passed during the reign of Charles I.

<sup>131</sup> On the various contemporary definitions of 'resolved', see 'Resolve, v.' in *Dictionary of the Scots Language* (2004), available at [www.dsl.ac.uk/entry/dost/resolve](http://www.dsl.ac.uk/entry/dost/resolve), accessed

many of his contemporaries of treating the opinions of prominent lawyers as a source of law.<sup>132</sup> What is less clear, however, is how Spalding became aware of these opinions.

First, Spalding often refers to Thomas Nicolson. Mr Thomas Nicolson of Cockburnspath was the King's College Civilist from 1619 and the Commissary in Aberdeen until his death, probably in 1625.<sup>133</sup> Spalding makes several references in the second part to a Thomas Nicolson which are clearly to this man in his capacity as Commissary. However there are also references to a Thomas Nicolson in the first part in the context of cases which were heard after Cockburnspath's death. There was in the seventeenth century another relevant Thomas Nicolson: the compiler of practicks and Lord Advocate, Sir Thomas Nicolson of Carnock.<sup>134</sup> Spalding appears to refer to this Thomas Nicolson twice in the text of the first part, specifically as having 'resolved' the cases *Laird of Glengarrrie v certain tenants* (1628) and *Robert Innes of Drany v Christen Innes* (1635).<sup>135</sup> There are only three extant manuscript copies of the practicks of Sir Thomas Nicolson of Carnock.<sup>136</sup> The Advocates' Library manuscript seems to have been a careful copy, does not appear to have been abridged, and does not give any dates after 1646, when Nicolson died.<sup>137</sup> However neither of the cases cited by Spalding appears in this manuscript. Nor does it seem that any of Spalding's other case descriptions could have been drawn from Nicolson's practicks.<sup>138</sup>

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<sup>132</sup> Ford, *Law and Opinion*, passim.

<sup>133</sup> Anderson (ed.), *Officers and Graduates of University and King's College*, 31; Francis J. Grant, 'Nicolson of that ilk, Lasswade and Lochend' in idem, *The County Families of the Shetland Islands* (Lerwick, 1893), ii.2; Act in favour of Maister James Nicolson of Colbrandspeith 1633 [RPS, 1633/6/159].

<sup>134</sup> Ford has stressed the importance of not confusing the two men and of attributing the practicks to Carnock: Ford, *Law and Opinion*, 469.

<sup>135</sup> Spalding's use of the title 'Mr' (rather than 'Sir') in relation to these two cases is correct: Nicolson was promoted to the Baronetcy in 1637 [*The Present State of Great Britain and Ireland* (5th edn, London, 1723), part II, 158; John Burke, *A General and Heraldic Dictionary of the Peerage and Baronetage of the British Empire* (4th edn, London, 1833), 226–7].

<sup>136</sup> Adv. MS. 24.3.3, Signet Library, MS. 36, and E.U.L., Dc.4.13. Dolezalek has noted that the copy held by the Signet Library includes various insertions made by later lawyers and that the Edinburgh University Library copy is heavily abridged [Dolezalek, *Scotland under Jus Commune*, III, 167, 188–9].

<sup>137</sup> Dolezalek, *Scotland under Jus Commune*, II, 219; Ford, *Law and Opinion*, 469.

<sup>138</sup> Thus, for example, Nicolson records a case between William Wood of Colpnay and Andrew Mair in Cookstoune, heard on 24 February 1620, in which Wood complained that Moir had failed to give his oath 'in the terme assigned' and had failed to respond

Similarly, Spalding refers to Sir Thomas Hope, who was also a compiler of practicks and was the Lord Advocate from 1626 until his death in 1646.<sup>139</sup> Spalding referred to Hope three times in the first pairt. First, the fullest of Spalding's three citations is in the context of a discussion of an heir's power to make assignations before he is served as heir, a point which is said in the Aberdeen manuscript to have been 'resolved in Edinburgh be the kings advocat Sir Thomas Hope betwixt Sir Robert Gordone and Robert Innes of Drany in October 1636 years'; the Glasgow manuscript gives the year as 1639.<sup>140</sup> It is likely that these dates are broadly correct: James Gordon has recorded that in '1636, Sir Robert [Gordon] bought the Lands of Drany in Murray from Robert Innes of Drany'.<sup>141</sup> The other two references to Hope are made in the context of inhibitions of teinds of fish. In the title 'Of teynd's', Spalding states that: 'Inhibitiones upon teynd fisches sould be srved yeerlie in Januar whilk will serve to that tyme tuelff moneth Resolvit in Edinburgh be Sir Thomas Hope advocat Sie fol. 25. tit.'.<sup>142</sup> The citation here is a cross-reference to Spalding's title 'Of interdictione and Inhibitione', specifically to a paragraph in which he summarises several rules about inhibitions, then states: 'And Inhibitiones upon teynd wheat fisches sould be srvit yeerlie in Januar Resolvit be Sir Thomas Hope advocat in October 1536'.<sup>143</sup> Finally, there is also a reference in an annotation to a case about payment of debts by a tutor which is described as having been 'resolved be Sir Thomas Hope advocat in Edinburgh in causa Issobell forbes ane of the exrs of umqle Gorge forbes in Craigy Tarves against Thomas forbes of Wattertoun her Tutor of Law before the Commissaries of aberdeine feb. 1642';<sup>144</sup> again, it is likely that this date is at least broadly correct.<sup>145</sup>

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to citations to do so [Adv. MS. 24.3.3, entry 220]. This appears to be a later hearing in the on-going litigation between these parties than that which was recorded by Spalding in the second pairt, which was heard 'febr. 20' and in which it was found that Moir could not be bound by a contract which had been signed by a notary on his behalf – but not by the notary whom he had authorized to do so – and so had to give his oath [Aberdeen MS., fol. 198v (modern foliation)].

<sup>139</sup> David Stevenson, 'Hope, Sir Thomas, of Craighall, first baronet (1573–1646)' in *Oxford Dictionary of National Biography* (Oxford, 2004), online edn of May 2009, <http://www.oxforddnb.com/view/article/13736>, accessed 27 July 2014.

<sup>140</sup> Aberdeen MS., fol. 126r (modern foliation); Glasgow MS., 148.

<sup>141</sup> James Gordon, *History of Scots Affairs from MDCXXXVII to MDCXLI* (3 vols, Spalding Club, 1841), I, xxxvii.

<sup>142</sup> Aberdeen MS., fol. 98v (modern foliation).

<sup>143</sup> *Ibid.*, fol. 112r (modern foliation).

<sup>144</sup> *Ibid.*, fol. 94r (modern foliation).

<sup>145</sup> The family's papers record that in 1639 'Isabel Forbes, daughter of George Forbes

These references are somewhat puzzling. A date of 1536, if correct, would make the case too early to have been recorded by Hope. Nor does the case description seem to have been borrowed by him from an earlier source and included in either his *Major practicks* or *Minor practicks* in any relevant title. However it seems likely that the date is not correct. The paragraph before the one in which Spalding cites Hope refers to inhibitions and the arrestment of goods. Here Spalding cites another action in the on-going litigation between Innes of Drany and Gordon, which was heard in Edinburgh in 1637. It is conceivable that the case said to have been heard in 1536 was actually heard in 1636 as part of this on-going litigation between these two parties; this would make sense as Drany is coastal so the property may have included the right of teinds of fish. If this is correct, it seems likely that Whyt simply erred in copying the date in the relevant citation.

However neither *Gordon v Innes* (ca.1636) nor *Forbes v Forbes* (1642) appears in the printed edition of Hope's *Minor Practicks*. Hope stopped compiling his *Major Practicks* in 1633, so the cases are too late to have been recorded by him therein. Hope's son, Lord Kerse, updated Hope's latter work with references to cases in the later 1630s and early 1640s.<sup>146</sup> However these particular cases do not appear to have been among these updates.<sup>147</sup> Nor do they appear in the (admittedly incomplete) 'Short not of the decisions and interloquitors givine be the Lords of Counsell and Sessione', which was explicitly drawn from Hope's *Major Practicks*, rearranged and extensively updated with cases from the

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of Craigie' was given a liferent over her husband's property 'conform to the Marriage Contract between him and Thomas Forbes of Watertoun, her guardian' [*Memoranda Relating to the Family of Forbes of Waterton* (Aberdeen, 1857), 4].

<sup>146</sup> Ford, *Law and Opinion*, 44–5, 250.

<sup>147</sup> Adv. MS. 6.1.2 is described as a 'Law Repertorie [...] Collected by the Lord Kerse, who was a Lord of Session in the Reign of King Charles the ist. and Son to Sir Thomas Hope of Craighall [obscured] then Lord Advocate' [fol. 1v]. On the nature of this manuscript as an updated version of Hope's *Major Practicks*, see Dolezalek, *Scotland under Jus Commune*, II, 97–8. On Kerse's updates generally, see Ford, *Law and Opinion*, 44–5. The references in Spalding do not appear to correspond to the text of the relevant titles, specifically: for the 1636/1536 case(s): 'Of interdictiones' [Adv. MS. 6.1.2, fos 61v–62v], 'Of inhibitions' [Adv. MS. 6.1.2, fos 59r–61r], 'Of fishings' [Adv. MS. 6.1.2, fol. 93r], or any of the titles in the fourth part [Adv. MS. 6.1.2, fos 126r–150r]; and for the 1642 case: 'Of payment and discharge' [Adv. MS. 6.1.2, fos 57v–59r] and 'Of tutors and curators' [Adv. MS. 6.1.2, fos 147r–150r]. These titles were updated by Kerse. See e.g. the citation of *Bower and others* (1642) [Adv. MS. 6.1.2, fol. 131r].

1630s and 1640s<sup>148</sup> – possibly by Thomas Veatch, Hope’s god-son, whose own practicks follow thereafter in this manuscript.<sup>149</sup>

It thus seems that Spalding’s references to Nicolson and Hope could not have been drawn from their practicks. It is, of course, possible that notes on these cases were added as annotations to manuscript copies of these practicks which have not been found, or that Spalding was working from manuscript collections which were wrongly attributed to Nicolson and Hope. However it is at least equally plausible that Spalding was involved in these cases, or at least that he had an interest in their conclusion, and so monitored the progress of the cases and the discussions thereupon. One of the references to Nicolson and at least one (but possibly more) of those to Hope are given in the context of litigation pursued by Robert Innes of Drany. The lands of Drany are in Moray, where Spalding was probably practising during the relevant years. There are several cases recorded in Spalding’s practicks in which Robert Innes of Drany was a party,<sup>150</sup> so it is plausible that Spalding was his regular counsel. The same might be said of Spalding’s reference to Nicolson in the context of *Laird of Glengarrrie v certain tenants* (1628). The description of this case in his first pairt accords very closely with the description of a case in his second pairt which was ‘Resolvit in Edinburgh in the Laird of Glengaries cause in anno 1628.’<sup>151</sup> Although there is no mention of Nicolson in this latter entry, it seems plausible that this refers to the same hearing or to a hearing in the same on-going litigation. If this is correct, then it seems likely that Spalding was involved in the case. Indeed the Laird of Glengarrrie is named as a party litigant

<sup>148</sup> MS. 2935, fos 37r–41v. On which, see Ford, *Law and Opinion*, 45 fn. 187; Dolezalek, *Scotland under Jus Commune*, II, 27–8. The latest date found in this copy is 1646 on fol. 41v. This manuscript is a legal miscellany, compiled over many decades by different hands. The ‘Short not’ is copied in a seventeenth-century hand on paper with a watermark of a one-handled pot topped with a crescent, which was a design common in the seventeenth century [See e.g. POT.003.1 (date: 1640), POT.411.1 (date: 1645), POT.124.1 (date: 1649), &c in Daniel W. Mosser and Ernest W. Sullivan II (eds), *The Thomas L. Gravell Watermark Archive*, available at [www.gravell.org](http://www.gravell.org), accessed 1 July 2014].

<sup>149</sup> Ford, *Law and Opinion*, 45 fn.187; Dolezalek, *Scotland under Jus Commune*, II, 28.

<sup>150</sup> See e.g. an action in 1630 over the right to payments from the tenants on lands held in liferent by Innes’ mother in law, Margaret Meldrum [Aberdeen MS., fol. 109r (modern foliation)]; an action of divorce against his wife, Christen Innes [Aberdeen MS., fos 171r, 180r–v, 225r–v (modern foliation)]; an action against James Geddes in 1636 [Aberdeen MS., fos 198r–v (modern foliation)]; and an action possibly against ‘Mr William Rait, the common procurator for the Kings College off auld aberdeine’ in 1623 [Aberdeen MS., fos 257v–8r (modern foliation)].

<sup>151</sup> *Ibid.*, fol. 296r (modern foliation).



later in the second part in relation to a case heard in 1629.<sup>152</sup> It is plausible that, as with Innes of Drany, Spalding was involved in litigation relating to Glengarrig with some regularity.

There is even some evidence in the second part of Spalding's practicks to suggest that the expert lawyers said to have 'resolved' these legal issues may also have been themselves involved in the relevant cases. For example, chapter 399 is a very detailed entry about the several actions pursued by and against: Walter Barclay, Laird of Towie and widower of Anna Drummond, Lady Fraser; Elizabeth Barclay, their daughter; William Innes of Kinnermonie, Elizabeth's spouse; and Margaret Innes, Kinnermonie's daughter. In relation to one of the actions brought before the Aberdeen Commissary court, Spalding sets out the various alledgences and answers then concludes the relevant paragraph by saying 'this wer the reasones of the advocaciones and ansres maide to ilk reasone by Resolutione of Sir Thomas Nicolsone advocat 14 Januar 1642'.<sup>153</sup> There is an implication here that Nicolson was somehow involved in the case and gave his opinion in that context. Similarly chapter 418 notes a case in which William Conn 'craves to be s[e]rvit aire' to the lands of Artroquhy, which were held by his grandfather and uncle, with the Laird of Delgatie as superior. After setting out Delgatie's answer, Spalding notes 'It was found and resolvit so in Edinburgh be Sir Thomas Nicolsone in August 1642',<sup>154</sup> which may imply that Nicolson was counsel for Delgatie or at least supported the interpretation of the law put forward by Delgatie's counsel. Chapter 436 is another long entry, which sets out several actions which arose from the marriage contract of William Ammand of Catterline and Isobel Forbes, daughter of George Forbes of Craigie, Tarves. One of these actions was pursued by the executor of Ammand, John Kennedy of Kermuckes, against Forbes' tutor-of-law, Thomas Forbes of Watterton. Here Spalding sets out Kennedy's arguments and states: 'It was also resolvit be Sir Thomas Nicolsone that the contract of marriage past betwixt the said umple William Ammand and Issobell forbes (nottit in the words above within) will carrie the right of the hail soumes perteyneing to the wiff whidder heretable or moveable and the soume will perteyne to the husbands aires and exrs'. Spalding gives significant detail as to the rationale of this argument. At the end of the entry, Spalding concludes by noting that the executors were successful on the basis of *jus mariti*, and that the case was 'resolvit be Sir Thomas Nicolsone Junij 1644'. Two of the annotations provide

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<sup>152</sup> Ibid., fol. 309r (modern foliation).

<sup>153</sup> Ibid., fol. 343r (modern foliation).

<sup>154</sup> Ibid., fol. 355v (modern foliation).

further resolutions set out by Nicolson in the case. The wording here suggests that Nicolson's opinion was expressed on these specific facts as well as on the point of law more generally, and as such he may have been directly involved with the litigation or at least consulted in anticipation of the hearing.<sup>155</sup> None of these three cases seem to correspond to the entries in Nicolson's practicks.

Spalding also describes cases as having been 'resolved' by another seventeenth-century advocate, Sir Lewis Stewart of Kirkhill. Stewart is now obscure but was prominent in the seventeenth century.<sup>156</sup> His father, William Stewart, was a clerk in Edinburgh but his maternal grandfather is recorded as having been the Lord of Session, Sir John Bellenden of Auchinoull.<sup>157</sup> Stewart was educated in the civil law in France, before being admitted as an advocate in 1613.<sup>158</sup> Although he initially struggled to adjust to practising Scots law,<sup>159</sup> he nonetheless became a successful advocate who was spoken of highly by Sir George Mackenzie,<sup>160</sup> Robert Burnett,<sup>161</sup> and Alexander Spalding's son, the historian John Spalding.<sup>162</sup> Stewart was knighted in 1633,<sup>163</sup> and did work

<sup>155</sup> There are several other entries in the text of the second pair (and annotations alongside it) which refer to Nicolson, but all of these appear to be cross-references to one of these three cases [Ibid., fos 323r, 339v, 340v, 341v, 348r, 356r modern foliation]. The dozen references to 'Sir Thomas Nicolson' in the Table also refer to these three cases [Ibid., fos 3v, 4r, 14r, 15r, fol. 30r (twice), 33r, 38v, 43v, 66r, 67v, 69v, 75r, (all modern foliation)]. Similarly there are annotations alongside the first pair which refer to 'Sir Thomas Nicolson' having 'resolved' cases which are identifiable by their description as those recorded in chapters 418 and 436 [Ibid., fos 94v, 125v modern foliation].

<sup>156</sup> *The Critical Review, or Annals of Literature, Extended and Improved by a Society of Gentlemen, New Arrangement* (London, 1792), IV, 58 noted that the editors were 'convinced that he must have uncommon learning who has ever heard of' Stewart.

<sup>157</sup> A. W. Cornelius Hallen (ed.), *The Scottish Antiquary, or Northern Notes & Queries* (Edinburgh, 1891), V, 4–5.

<sup>158</sup> Ford, *Law and Opinion*, 46.

<sup>159</sup> James Crabb Watt, *John Inglis, Lord Justice-General of Scotland. A Memoir* (Edinburgh, 1893), 39 fn. 1; Ford, *Law and Opinion*, 46.

<sup>160</sup> Sir George Mackenzie, *Jus Regiam: or, the Just and Solid Foundations of Monarchy in General; and More Especially of the Monarchy of Scotland: maintain'd against Buchannan, Naphtali, Dolman, Milton, &c* (London, 1684), 192 where Sir Lewis Stewart is described as 'the Learned Sir Lewis Stewart, one of the most famous Lawyers we ever had'. This cannot be regarded as an objective statement, however, as Mackenzie here was citing Stewart as authority against the views put forward by George Buchanan.

<sup>161</sup> Thomas Craig of Riccarton, *Jus feudale tribus libris comprehensum* (Edinburgh, 1655), 'Ad Lectorum', 3 where Stewart is lauded by Burnett as '*Viri Clarissimi, mihi amicissimi & plurimum colendi D. Ludovici Steuart de Kirkhill Equitis*'.

<sup>162</sup> Spalding, *The History of the Troubles*, I, 261; idem, *Memorials of the Troubles*, I, 345.

<sup>163</sup> Hallen (ed.), *The Scottish Antiquary*, 5.

on behalf of King Charles I in the late 1630s and early 1640s.<sup>164</sup> Probably as a result of this, he was fined £1,000 by the interregnum government's Ordinance of Pardon and Grace.<sup>165</sup> Stewart is not known to have collected practicks,<sup>166</sup> and his legal and historical papers largely relate to the sixteenth century or earlier and contain no notes which seem to derive from Stewart's own practice.<sup>167</sup>

Nonetheless, Spalding makes two references to cases having been 'resolved' by 'Sir Lues Stewart advocat' in the first pairt; another is added in an annotation. One of these is particularly interesting in identifying Spalding's practice. This reference to Stewart appears to be part of a long discussion of a case pursued by Elspet Douglas, relict and executrix to the late Mr Patrick Dumbarr, parson of Duffes, and her new husband, Mr John Gray, minister at Dornoch. This case was initially pursued against Marie Innes, relict and executrix of the late Alexander, Bishop of Moray, and her new spouse, John Urquhart of Leathers. The pursuers received a decree for payment from the Commissary of Moray. The defenders attempted to suspend that decree, but Urquhart died before 'the discussing wherof'.<sup>168</sup> Innes subsequently married William Hay of Fetterletter, and a new action was lodged in the same Commissary court against Innes and Hay, which was heard in March 1635. After setting out the first alledgences and answers, Spalding stated 'Sir Lues Stuart advocat resolved that the persewars might pass frae ther first decret' and provided some expansion of this point.<sup>169</sup> He then stated 'Upon the whilk resolution the Comisir of Murray decernit of new agayne the said Marie Innes exrix and William hay now her spous for his entress to pay the said obligatione debt restand be the said Bischope March

<sup>164</sup> Spalding, *The History of the Troubles*, I, 261; idem, *Memorials of the Troubles*, I, 345; *A Diary of the Public Correspondence of Sir Thomas Hope of Craighall, Bart., 1633–1645, from the Original, in the Library at Pinkie House* (Bannatyne Club, Edinburgh, 1843), 73, 76.

<sup>165</sup> *Diary of the Public Correspondence of Sir Thomas Hope*, 126; '12 April 1654: An Ordinance for Pardon and Grace to the People of Scotland' in C. H. Firth and R. S. Rait (eds), *Acts and Ordinances of the Interregnum, 1642–1660* (London, 1911), II, 875–83.

<sup>166</sup> Dolezalek did not find a collection of practicks which could be attributed to him when compiling *Scotland under Jus Commune*.

<sup>167</sup> Adv. MS. 22.1.14. Several of these documents were printed in eighteenth- and nineteenth-century volumes. See, for example, Patrick Fraser Tytler, *History of Scotland* (9 vols, Edinburgh, 1828–43), IV, 401–3; Hugo Arnot, *A Collection and Abridgement of Celebrated Criminal Trials in Scotland, from AD 1536 to 1784 with Historical and Critical Remarks* (Glasgow, 1812), 420–6; J. A. Carmichael, *Various Tracts concerning the Peerage of Scotland, Collected from the Public Records, Original Instruments, and Authentick Manuscripts* (Edinburgh, 1791), 119–24.

<sup>168</sup> Aberdeen MS, fol. 89r (modern foliation).

<sup>169</sup> Ibid..

1635.<sup>170</sup> Spalding's wording here implies that Stewart may have been somehow involved in the case on behalf of the pursuers, whether that be as their counsel or in a consultative capacity. The second reference to Stewart is found in the context of litigation between the same parties: 'Resolved in Ed[inbur]gh be Sir Lues Stuart advocat in Edinburgh in december 1635 in causa douglas dumbarr contra Marie Innes & Wm Hay now her spous'.<sup>171</sup> It seems highly probable that this was a later hearing in the same series of litigation between these four parties. It thus seems likely that Spalding was also involved or was at least aware of this case when it was litigated in Moray, where he appears to have been practising at the time,<sup>172</sup> and seems to have retained some interest in the case when it was relocated to Edinburgh.

It is thus plausible that Spalding recorded the names of Hope, Nicolson and Stewart in cases in which he was involved or at least in which he had an interest. Somehow he became aware of these experts' legal opinions, whether that was through their direct involvement as counsel in the case, consultation in anticipation of litigation, or some less formal context.<sup>173</sup> Unfortunately, none of the relevant cases have been found for the said months in either the Court of Session's general or particular minute books or in the Edinburgh Commissary Court's diet books;<sup>174</sup> thus it has not been possible to confirm this theory with reference to the paper processes. However it is perhaps more important to acknowledge that Spalding drew on expert legal opinion in this manner than to identify specifically how he became aware of that opinion. It is also important to note that Spalding's understanding of expert lawyers was not restricted to the most prominent practitioners and office-holders in Edinburgh. Other less well-known advocates and legal practitioners are occasionally noted by him as having resolved or contributed to the resolution of cases. For example, he said of a case heard in 1642 – in the Table<sup>175</sup> but not

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<sup>170</sup> Ibid.

<sup>171</sup> Ibid., fol. 93r (modern foliation).

<sup>172</sup> On which, see below.

<sup>173</sup> On consultations by advocates, albeit in a later period, see John Finlay, 'Consulting Counsel in Eighteenth-Century Scotland' (presented at the Scottish Legal History Group Annual Conference, Edinburgh, 4 October 2014); idem, 'Pettyfoggers, Regulation, and Local Courts in Early Modern Scotland', *Scottish Historical Review*, 87 (2008), 42–67, 44, 57–8; idem, 'The Lower Branch of the Legal Profession in Early Modern Scotland', *Edinburgh Law Review*, 11 (2007), 31–61, 39–40, 52.

<sup>174</sup> CS8/18, 21; CS9/7–8; CS10/5–6; CS11/8–9; CC8/1/45–6, 49, 51–2. The Edinburgh Commissary court's minute books for this period have been lost.

<sup>175</sup> Aberdeen MS., fol. 51v (modern foliation).

in the entry in the second pair<sup>176</sup> – that it was resolved by Roger Mowat, who had demitted the office of King's College Civilist two years before.<sup>177</sup> Spalding also recorded in the second pair that he himself successfully 'resolvit' a case pleaded in the courts in Edinburgh in July 1633.<sup>178</sup>

### (3) The Second Pairt

The second pairt of Spalding's practicks is longer than the first, comprising 448 entries (called 'chapters') contained on 180 folios of the Aberdeen manuscript. Most chapters consist of notes on single cases, but: some record more than one case; some set out legislation or other regulations; some are very general in their nature; and some record a mixture of general and case-specific information. Thus the second pairt is somewhat akin to a collection of decisions practicks and somewhat akin to a legal miscellany or commonplace book.

#### (a) *The Notes on Cases Heard in the Seventeenth Century*

Around 260 of the cases recorded in the second pairt are said to have been heard between the second half of the 1610s and the mid-1640s. More than half of these appear to relate to the North East region. One hundred and twenty-three are explicitly said to have been heard in the courts in Aberdeen. Another forty-three were litigated by or against persons whose territorial designation relates to a place in the environs of the city; it seems plausible that these cases might also have originated in the regional courts or have been of interest to a local lawyer. Thus of the nine cases recorded in Spalding's practicks which were heard in the second half of the 1610s, all but one relate to Aberdeen. More than ninety of the cases recorded are said to have been heard between 1620 and 1624,<sup>179</sup> sixty of which relate to Aberdeen and one of which relates to the neighbouring county of Moray. There are no cases recorded for 1625 to 1627. Seventeen are then recorded for the years 1628 and 1629, which can be associated with courts or persons from Edinburgh, Aberdeen, Moray and

<sup>176</sup> *Ibid.*, fos 362r–3r (modern foliation).

<sup>177</sup> Anderson (ed.), *Officers and Graduates of University and King's College*, 32; Francis J. Grant (ed.), *The Faculty of Advocates in Scotland, 1532–1943* (Scottish Record Society, Edinburgh, 1944), 157.

<sup>178</sup> Aberdeen MS., fol. 305r (modern foliation).

<sup>179</sup> Chapter 70 is said to have been heard in 1602, but given the Commissary who heard the case (James Sandilands) was not then born, it is likely that this should have read '1620'. On Sandilands, see the following footnote.

Invernesshire. Sixty-five of the cases recorded are said to have been heard in the 1630s: most of those heard in the first three quarters of this decade relate to the Moray area; there is a slight dip in the number of cases recorded in 1637 to 1638; and the cases heard in the last part of that decade relate instead to the Aberdeen area. Finally, there are notes on seventy-five cases which were heard in the first half of the 1640s, sixty of which appear to be related to Aberdeen. It is plausible that many of the other hundred or so cases recorded as having been heard during the seventeenth century may also relate to the courts or inhabitants of the North East region, even though this is not mentioned explicitly in the entry. Additionally, another twenty-two cases which appear to relate to Aberdeen are given no date, but at least some also appear to have been heard during this time. For example, three of these were said to have been heard by James Sandilands, who was Commissary in Aberdeen between at least 1620 and 1642.<sup>180</sup> Thus there is here a significant corpus of cases that: (a) were heard during this thirty-year period, and (b) relate to legal practice in the Aberdeen, and to a lesser extent the Moray, areas.

It seems probable that Spalding was the original reporter of these cases. First, the dates accord with what is known of his life. The recording of cases seems to have started around a decade after Spalding's admission to the Society of Advocates in Aberdeen in 1609,<sup>181</sup> which is consistent with Ford's observation that some copyists or writers of epitomes and compendia began their work around ten years after admission.<sup>182</sup> The reporter worked in

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<sup>180</sup> Sandilands succeeded John Leith of Blairton, who died in 1620 [Henderson, *History of the Society of Advocates in Aberdeen*, 241]. There is clear evidence that Sandilands initially held his appointment jointly with Thomas Nicolson of Cockburnspath: Spalding notes that in September 1621 a decision was made by 'Mr Thomas Nicolsone and Mr James Sandilands Commiss[a]ries of aberdeine' [Aberdeen MS., fol. 241v (modern foliation)], and on 8 February 1622 they are again recorded as hearing a case together as 'Mr Thomas Nicolsone and Mr James Sandilands Commissaries of aberdeine' [Aberdeen MS., fol. 242r (modern foliation)]. Nicolson probably died in 1625 [see above], after which Sandilands held the office alone for some time. However, from at least January 1640, he apparently shared the office jointly with his second son: Spalding records both 'Mr James Sandilands and Thomas Sandilands Commissa' deciding a case in that month [Aberdeen MS., fos 330r–v (modern foliation)] and refers to commissaries or judges in the plural in several cases thereafter [Aberdeen MS., fos 330v–1r, 332r–v, 332v–3r, 338v, 339r–v, 339v–40r (all modern foliation)]. It seems that they continued to share the office until at least July 1642 [Aberdeen MS., fol. 352v (modern foliation)], after which Spalding makes reference to only Thomas hearing cases.

<sup>181</sup> Henderson, *History of the Society of Advocates in Aberdeen*, 338.

<sup>182</sup> Ford, *Law and Opinion*, 83.

the Moray area between 1628 and 1636, before resettling in Aberdeen in the late 1630s for the final part of his career. There is evidence that this was also true of Spalding. The editors of the historical account written by Alexander's son, John Spalding, believed that the family resided in Moray 'for a time';<sup>183</sup> comments within John Spalding's account which indicate this can be found for at least dates from 1635 to 1637.<sup>184</sup> The Register of the Privy Council has a record for 1642 which mentions an 'Alexander Spaldie, notary in Elgine, now in old Aberdene'.<sup>185</sup> The Aberdeen manuscript contains notes on cases heard up until the year in which Spalding complained that his health was failing.<sup>186</sup> Secondly, Spalding seems to have been involved in at least some of the cases, either as a litigant or as counsel. Chapter 442 records an action pursued by an Alexander Spalding in 1644 in the Aberdeen Commissary court. Chapter 350 includes a case 'raised in my owne name' against William Gordon of Arradoull in 1642. It is likely that this phrasing indicates that the case was pursued by or on behalf of Spalding, and indeed the aforementioned Register of the Privy Council record from 1642 mentions both Spalding and Gordon of Arradoull.<sup>187</sup>

Certainly the entries contemporary with Spalding's practice do not appear to have been copied from the well-known collections of practicks of the time. There is no correspondence between the cases reported here and those noted in the practicks of Nicolson,<sup>188</sup> Hope or Haddington.<sup>189</sup> Only one of the entries in Spalding is directly comparable with the entries in the printed edition of the practicks of Sir Alexander Gibson of Durie. Spalding gives an entry for a case heard in 1636 pursued by Archibald Stewart in Elgin, son and assigney of Robert Stewart, against Colin Lawson. The Lords of Session are said to have heard this case further to a decret made in favour of Robert Stewart by the Commissary court of Moray. Durie made an entry for a case heard on the same day, which does not give the names of parties; this case is certainly the one described in more detail by Spalding.<sup>190</sup> The difference in the

<sup>183</sup> Spalding, *Memorials of the Troubles*, I, xviii–ix.

<sup>184</sup> Spalding, *History of the Troubles*, I, e.g. 32, 45, 49, 50; idem, *Memorials of the Troubles*, I, e.g. 57, 76, 80–1, 83.

<sup>185</sup> P. Hume Brown (ed.), *The Register of the Privy Council of Scotland* (second series, Edinburgh, 1906), VII, 338.

<sup>186</sup> Munro (ed.), *Records of Old Aberdeen*, I, 76.

<sup>187</sup> Brown (ed.), *The Register of the Privy Council of Scotland*, VII, 338.

<sup>188</sup> Adv. MS. 24.3.3.

<sup>189</sup> Adv. MS. 24.2.1, II, fos 141r–238r; N.L.S., MS. 3170, 121–200.

<sup>190</sup> Durie, *Decisions*, 809.

detail provided in the entries indicates that Spalding could not have taken this case description from Durie, or at least from a version close to the text as it was later printed. Rather, it seems that Spalding recorded this case because it was relevant to his provincial practice, which during that time appears to have been based in Moray.<sup>191</sup> That Spalding did not make use of these collections of practicks is in keeping with current understanding of when they began to circulate: those of Hope began to circulate after 1643, even though he had stopped recording cases a decade earlier,<sup>192</sup> and those of Durie began circulating in the 1650s.<sup>193</sup>

If Spalding did record the seventeenth-century cases noted in the second pairt, then this gives some insight into his professional activities, such as the number and type of cases in which he was involved each year, and the frequency with which his clients pursued multiple actions, either within the same court on different aspects of the relevant point or on appeal to higher courts. It might also be possible to deduce something of his method when compiling his second pairt. It is plausible that Spalding originally recorded these cases around the time of their hearing, so the content of the second pairt might have been compiled chronologically. If this is correct, then it would suggest that the copying of the chapters comprising miscellaneous material can generally be dated to around the time of the cases entered in the surrounding chapters.

(b) *The Notes on Cases Heard in the Sixteenth Century, and Spalding's Use of Maitland's Practicks*

Spalding also relied on older collections of practicks when compiling the second pairt, including the sixteenth-century collection attributed to Sir Richard Maitland of Lethington. The textual tradition of Maitland's manuscripts is not yet fully understood. However Dolezalek's *Scotland under Jus Commune* has examined in detail seventeen manuscript copies; this present research is much indebted to his printed work, and to his unprinted notes on these manuscript volumes, which he was kind enough to share. Dolezalek's examination of the Elchies manuscript<sup>194</sup> has allowed him to conclude (in keeping with the

<sup>191</sup> Further to this, Spalding has an entry for *George Cumming v James Cumming*, said to have been heard in June 1628; Durie has an entry for 14 November 1628 which is probably a later hearing of the on-going litigation between those same parties [Durie, *Decisions*, 396–7].

<sup>192</sup> Ford, *Law and Opinion*, 44, 54.

<sup>193</sup> *Ibid.*, 80.

<sup>194</sup> Adv. MS. 31.2.2 (i).



earlier suggestions of Athol Murray and the eighteenth-century owner of this manuscript, Patrick Grant of Elchies)<sup>195</sup> that this manuscript might have been Maitland's authorial holograph. Dolezalek's comparison of this manuscript with the texts of the other extant manuscripts allows tentative conclusions to be drawn about the textual tradition of Maitland's practicks. He has shown, for instance, that some copies of Maitland's practicks appear to be incomplete, ending with cases heard in 1566;<sup>196</sup> Spalding had access to a more complete copy (or copies) than this. Other extant manuscripts have entries which are not in the Elchies manuscript. Dolezalek identifies these entries as later insertions.<sup>197</sup> These additions may have been added to one manuscript and then intercalated into the copies which descended from it. Scribes or annotators of manuscripts which were not thus descended might also add these to their copy, meaning the additions could also become perpetuated through other branches of the manuscript tradition. Notes on particularly important cases might be added independently to more than one manuscript, although some differences in the texts of the entries would then be likely. Manuscripts without these additions may have descended from a different ancestor, or perhaps their copyists omitted them.<sup>198</sup> Only a critical and comprehensive study of the extant manuscripts will reveal their interrelationships, but this is outwith the scope of this present study.

Rather it is important for this research to get a reasonable impression of what the text (or texts) of Maitland's practicks comprised in those manuscript copies which were circulating in the seventeenth century. The Orr manuscript<sup>199</sup> was recently transcribed and edited by Sutherland and printed by the Scottish Record Society,<sup>200</sup> so is probably now the best known version of the text.<sup>201</sup> Sutherland has not found a record of this manuscript's date of completion, but has suggested that scribal slips in entries 164–9 which give the date 1661

<sup>195</sup> Dolezalek, *Scotland under Jus Commune*, II, 356; Signet Library, MS. 34, fol. 1r which is now lost but is transcribed in Dolezalek, *Scotland under Jus Commune*, III, 150.

<sup>196</sup> E.g. E.U.L., La.III.411 [Dolezalek, *Scotland under Jus Commune*, III, 250].

<sup>197</sup> Dolezalek, *Scotland under Jus Commune*, III, especially 45–6, 315.

<sup>198</sup> On manuscript transmission of legal texts in Scotland, see 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* (Stair Society Publications Series vol. 62, Edinburgh, 2015), 1–124, 32–45.

<sup>199</sup> G.U.L., MS. Gen. 1333.

<sup>200</sup> Robert Sutherland, *The Practiques of Sir Richard Maitland of Lethington, from December 1550 to October 1577* (Scottish Record Society, Edinburgh, 2007).

<sup>201</sup> The entries of Maitland's practicks will here be referred to by their item number in the Orr manuscript unless otherwise stated.

rather than 1561 are ‘not conclusive [evidence], albeit suggestive’ of a date after 1661.<sup>202</sup> Further, watermarks found in the volume by Dolezalek are of a style which was common in the seventeenth century,<sup>203</sup> so would tend to support a dating of the manuscript to that century. Another manuscript copy, the Tinwald manuscript,<sup>204</sup> has been dated by Dolezalek to the first half of the seventeenth century, and has been described by Sutherland as ‘the most orderly and consistent of the MSS’ which he examined.<sup>205</sup> Both Dolezalek and Sutherland identify it as being ‘closely related to the Orr MS’, but note that the Tinwald manuscript provides headings for the entries whereas the Orr does not.<sup>206</sup> The Hailes manuscript<sup>207</sup> has been dated to around the turn of the sixteenth to seventeenth centuries by Dolezalek.<sup>208</sup> Both Dolezalek and Sutherland have noted that this manuscript copy heavily abridges the text, and Sutherland has noted that its text is somewhat distinct from that of the Orr manuscript.<sup>209</sup> The Gilmour manuscript<sup>210</sup> has been dated to around the middle of the seventeenth century by Dolezalek,<sup>211</sup> who has also found that there are two ‘overlapping’ copies of Maitland’s practicks in the volume (possibly resulting from part of the text being misplaced, a replacement text being made, and then the former being found and both copies being bound into the manuscript).<sup>212</sup> He has also suggested that the text of this manuscript is an ancestor of Adv. MS. 24.1.8<sup>213</sup> and may itself descend from EUL, La.III.429<sup>214</sup> – as may Signet Library,

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<sup>202</sup> Sutherland, *The Practiques of Sir Richard Maitland*, 4.

<sup>203</sup> Dolezalek, *Scotland under Jus Commune*, III, 314. The description of the watermark with the pot and initials ‘P|PL’ seems particularly close to a watermark found in a volume from London dating from 1653 [POT.126.1 in the *Gravell Watermark Archive*], but for the latter being topped with a crescent and that in the Orr manuscript being topped with a fleur-de-lis.

<sup>204</sup> Adv. MS. 22.3.4.

<sup>205</sup> Dolezalek, *Scotland under Jus Commune*, II, 139; Sutherland, *The Practiques of Sir Richard Maitland*, 7.

<sup>206</sup> Dolezalek, *Scotland under Jus Commune*, II, 146; Sutherland, *The Practiques of Sir Richard Maitland*, 7.

<sup>207</sup> Adv. MS. 25.4.11.

<sup>208</sup> Dolezalek, *Scotland under Jus Commune*, II, 303.

<sup>209</sup> Dolezalek, *Scotland under Jus Commune*, II, 311; Sutherland, *The Practiques of Sir Richard Maitland*, 7.

<sup>210</sup> Adv. MS. 24.1.11.

<sup>211</sup> Dolezalek, *Scotland under Jus Commune*, II, 178.

<sup>212</sup> *Ibid.*, II, 180–1.

<sup>213</sup> *Ibid.*, II, 171.

<sup>214</sup> *Ibid.*, III, 264.

MS. 37<sup>215</sup> and Adv. MS. 24.1.4.<sup>216</sup> Finally, Adv. MS. 24.1.5 has been dated by Dolezalek to the late-seventeenth or early-eighteenth centuries.<sup>217</sup> Although a late copy, this has been consulted here because Dolezalek has shown that its 'text is much better than in the Orr MS [...] it is less shortened, and in particular fewer references to *Jus Commune* are left out' and because Sutherland has suggested that it also 'includes many items not in [the] Orr' manuscript.<sup>218</sup>

Spalding included entries drawn from Maitland's practicks at two points when compiling the second pairt. First, the thirty-one entries which appear at the start of Spalding's second pairt were drawn from Maitland, and correspond to items 296–316 and 318–26 of the Orr manuscript. These entries relate to cases heard between 1568 and 1570, although the order in which these case notes are presented in Spalding's practicks is only roughly chronological.<sup>219</sup> This borrowing from Maitland was interrupted only once. Entry eighteen in Spalding's second pairt is partly drawn from Maitland's practicks (Orr item 313) but starts with a brief discussion of *Robert Innes of Drany v James Geddes* (1636). It is probable that this first part of the entry was originally added to Spalding's practicks as a later annotation (whether on a looseleaf insert, in the margin, or in a space above the item borrowed from Maitland) and was intercalated at the start of the entry by the copyist of the Aberdeen manuscript or an intermediate ancestor, if there was one. The order in which Spalding gives these entries of Maitland's practicks has not been found in any of the other manuscript copies of Maitland examined for this research. A small change to the order of these entries in the Gilmour manuscript – the relocation of the entry known as Orr item 305 to after that known as Orr item 306 in both the once-misplaced and replacement texts – is much less significant than the changes to the order seen in Spalding. But the omission of entries was not uncommon: the entries known as Orr items 304 and 318 were omitted by

<sup>215</sup> *Ibid.*, III, 171.

<sup>216</sup> *Ibid.*, II, 161 and III, 264.

<sup>217</sup> *Ibid.*, II, 165.

<sup>218</sup> *Ibid.*, II, 166; Sutherland, *The Practiques of Sir Richard Maitland*, 7.

<sup>219</sup> The first four cases discussed by Spalding were heard during the summer session of 1568 (Orr items 298–300, 302), then he discusses three cases heard in the summer session of 1569 (Orr items 303–5), then five from the winter session of 1569–1569/70 (Orr items 306–11), one heard in July 1568 (Orr item 301), another nine heard during the winter session of 1569–1569/70 (Orr items 308, 312, 314–15, 313, 316, 318–20), three heard in November to December 1570 (Orr items 321–2), one heard in July 1570 (Orr item 324), another heard in December 1570 (Orr item 325), one said to have been heard in the year 1570 (Orr item 326), then finally two heard during the summer of 1568 (Orr items 296–7).

the copyist of the Hailes manuscript, and there are two entries in the Elchies manuscript – therein numbered 316 and 317 – which are not present in the Orr, Tinwald or Spalding manuscripts.

An examination of these thirty-one entries reproduced by Spalding gives some indication of the place of his text within the textual tradition of the manuscripts of Maitland. Orr items 314–16, 321–4 and 326 do not appear in the Elchies manuscript; if the latter was the authorial holograph, it would follow that these entries may have been additions which became perpetuated through the textual tradition. These entries are also found in the Tinwald and Spalding manuscripts in the same place as they appear in the Orr manuscript. They are found much further on in the text and out of chronological order in Adv. MS. 24.1.5, the Hailes manuscript and both texts of the Gilmour manuscript.<sup>220</sup> These entries comprise part of what Dolezalek in his unpublished notes on the Gilmour manuscript has identified as a series of around eighty entries which were additions to the text.<sup>221</sup> There are several possible reasons why the location of these entries might differ in the manuscripts. It is plausible that these entries were initially added on looseleaf inserts, and the text was intercalated into different parts of the manuscript in its first generation descendants.<sup>222</sup> Perhaps there was a deliberate conflation by one copyist of entries which he found in another model manuscript, but that their discovery came too late for them to be incorporated into his text in chronological order. Perhaps they were originally incorporated as a miscellany of notes as an appendix, and the copyist of an intermediate ancestor manuscript rearranged them into chronological order. This is all, however, entirely speculative. What is perhaps clearer is that the location of the added entries might suggest that

<sup>220</sup> Hailes MS., fos 178v, 181r–v; Adv. MS. 24.1.5, fos 114v–15r, 118v–120r; Gilmour MS., once-misplaced text, entries 380–2, 405–8, 410; Gilmour MS., replacement text, entries 387–9, 412–15, 417.

<sup>221</sup> The eighty additional entries in the Hailes and Gilmour manuscripts and Adv. MS. 24.1.5 also include a second, rather different entry for the case which is the subject of the entry known as Orr item 325, *Alexander Home of Manderstone v certain tenants* (1570) [Hailes MS., fos 172v, 181v; Gilmour MS., replacement text, entries 325, 416; Gilmour MS., once-misplaced text, entries 319, 409; Adv. MS. 24.1.5, fos 103v, 119v–120r]. The copyist of the replacement text of the Gilmour manuscript observed this repetition and numbered this second entry as both 416 and 325. This second entry for *Home of Manderstone* (but not the first) gives the reference to a sixteenth-century case pursued by a John Leslie of Waughtone, which is cited at the end of the (only) entry for this case in the Orr and Tinwald manuscripts [Orr MS., item 325; Tinwald MS., 369–70]. This reference is not given in Spalding's text.

<sup>222</sup> Dolezalek tentatively noted this possibility in his unpublished notes on the Gilmour manuscript.

the text in Spalding's practicks is related more closely to those in the Orr and Tinwald manuscripts than to those in the Hailes and Gilmour manuscripts and in Adv. MS. 24.1.5.

This inference is supported by a comparison of the manuscripts' texts of Orr items 299–301. Both Dolezalek and Sutherland have noted the similarity of the Orr and Tinwald manuscript copies, in terms of the correspondence of the entries,<sup>223</sup> as well as their content and the similarity of their texts.<sup>224</sup> It seems that Spalding's text here is also similar to those in these two manuscripts.<sup>225</sup> However the text of the Spalding manuscript seems to be somewhat further removed from the text in the Elchies manuscript than those in the Orr and Tinwald manuscripts. This suggests that either Spalding was relatively free in his copying of the text, or that his model manuscript was less closely related to the Tinwald and Orr manuscripts than they may have been to each other. There are also sufficient variants shared by the Hailes, Gilmour and Adv. MS. 24.1.5 texts to presume that they, too, share a common ancestor more recent than the Elchies manuscript.<sup>226</sup> It may be that the Gilmour texts and Adv. MS. 24.1.5 are more closely related again, but this is difficult to assess because the text of the Hailes manuscript was short-copied and so it often omits or abridges phrases which may have had a variant reading in an ancestor text.

There is also some evidence for these interrelationships in the headings given for each of the thirty entries. Dolezalek has suggested that the headings of the entries on the first thirty-five folios of the Elchies manuscript were added separately to the margins after the entries themselves were completed. However, from folio thirty-six, the headings 'now figure in separate lines

<sup>223</sup> Dolezalek, *Scotland under Jus Commune*, II, 146.

<sup>224</sup> Sutherland, *The Practiques of Sir Richard Maitland*, 7.

<sup>225</sup> The Spalding, Orr and Tinwald texts add 'peaceable and' to 'continual possession' to Orr item 299. All three give 'the infetment' rather than 'any infetment' and give 'decerned' rather than 'ordained' later in the passage. In Orr item 300, all three give 'principal donator' whereas the Elchies and other manuscripts give 'who was donator'. All three give 'constitute by the king' rather than 'to the king'. In Orr 301 they give 'warrandice of certain lands set in tack' whereas the Elchies and other manuscripts give rather 'certain warrandice of tacks of lands set' (although the Hailes manuscript omits 'certain'). All three also omit 'to the pursuer his'.

<sup>226</sup> In Orr item 299, for example, the phrase 'of their mailles and duties' is omitted in the Hailes manuscript and is only 'of their duties' in the Gilmour texts and in Adv. MS. 24.1.5. These texts also omit the territorial designation of Sir Robert Carnegy of Kinnaird, the father of the defender. All also describe the defender as 'bound' to his father rather than 'heir' to him. All give 'and the tenents to pay their duties' instead of 'be the said lords and the saids tenents ordained to pay the mailles and duties'. All also omit 'for the causes forsaid' at the end of the entry.

between the items of the main text, and their colour of ink no longer differs from the main text.<sup>227</sup> The Hailes manuscript does not preserve these headings, but instead gives distinct, generally short headings in the margins beside the text. Nor are the headings of these thirty entries present in the Orr manuscript. But headings are given in the other manuscripts consulted; Dolezalek has noted that this was one of the main differences between the Orr and Tinwald manuscripts.<sup>228</sup> The headings of Orr items 296–310 are broadly consistent in the Elchies, Tinwald and Spalding manuscripts, in Adv. MS. 24.1.5, and in both texts of the Gilmour manuscript, subject to minor variations and orthographical fluctuation. However, for Orr items 311–12, 318–20 and 325, the headings present in the Tinwald and Spalding manuscripts seem to be quite close to each other but quite distinct from those found in the Elchies and other manuscripts. Rather, the headings in the Spalding and Tinwald texts are generally fuller and more detailed than those provided in the other manuscripts. Thus, for example, the Elchies manuscript gives as the heading for Orr item 311: ‘Off ane tennentis fermes that may poyndit for his masteris dett’.<sup>229</sup> However the Tinwald manuscript gives ‘fermis of tennentis may be poyndit for thair maisteris debt, becaus the tennentis fermis ar comptit the maisteris proper debt’,<sup>230</sup> the Spalding manuscript gives the same but for substituting the word ‘gear’ for the final occurrence of ‘debt’.<sup>231</sup>

Thus it seems likely from this limited textual comparison that the text in this part of Spalding’s manuscript can be located in the same family group as those of the Tinwald and Orr manuscripts. It is plausible, however, that the Orr and Tinwald manuscripts may be more closely related to each other than to Spalding’s text. For example, both omit from Orr item 322 the territorial designation of the laird pursuing the case;<sup>232</sup> Spalding gives this as Blenerne, as do the Hailes manuscript and both texts in the Gilmour manuscript,<sup>233</sup> while Adv. MS. 24.1.5 shortens the name to ‘B’.<sup>234</sup> This difference might suggest that Spalding copied from a parent manuscript which included the name, but that

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<sup>227</sup> Dolezalek, *Scotland under Jus Commune*, II, 358.

<sup>228</sup> *Ibid.*, 146.

<sup>229</sup> Elchies MS., fol. 83r.

<sup>230</sup> Tinwald MS., 361–2.

<sup>231</sup> Aberdeen MS., fos 196v–7r (modern foliation).

<sup>232</sup> Tinwald MS., 367–8.

<sup>233</sup> Hailes MS., fol. 181r; Gilmour MS., replacement text, entry 413; Gilmour MS., once-misplaced text, entry 406.

<sup>234</sup> Adv. MS. 24.1.5, fol. 119r.

the Orr and Tinwald manuscripts descend through an intermediate ancestor which omitted it.

Spalding appears to have copied from Maitland's practicks somewhat selectively, ignoring the citations which appear at the end of certain entries. First, Spalding omitted a citation of a sixteenth-century case pursued by a John Leslie of Wauchtone, a citation of which often appears in Orr item 325 in the other manuscripts.<sup>235</sup> He may have done so because the citation omits the name of the defender and the date on which the case was heard. Secondly, it seems that he ignored the three citations of the Digest which appear at the end of Orr item 321 in the Tinwald, Gilmour, Hailes and apparently the Orr manuscript (although Sutherland has misidentified these as 'appear[ing] to refer to other practicks'<sup>236</sup>).<sup>237</sup> Spalding's practicks generally lacks citations of learned and civilian law, and it has already been shown that (with limited exceptions) he ignored the citations of learned authority in Skene.<sup>238</sup> Therefore, his practice would generally indicate that he was uninterested in these types of citations so deliberately omitted them. That said, he did retain the citations of C.3,32,15 and C.3,32,17 found in Orr item 326.

The second place where Spalding appears to have borrowed from Maitland is roughly 100 entries further into the second pairt, in a place which suggests that the copy was made between the end of the summer session of 1620 and the end of the winter session of 1620–1. Spalding's chapter 131 refers to litigation brought in 1636 by Robert Innes of Drany, this time against Christen Innes, his spouse. After this, Spalding gives a series of entries relating to cases which appear to have been drawn from the manuscripts of Maitland's practicks. If it is correct that this section of Maitland's text was copied by Spalding some time later than the aforementioned entries, it may have been copied from a different manuscript of Maitland than that which he had previously used. Indeed it was not uncommon for early-modern lawyers to use more than one manuscript copy of a text, as is also seen in Balfour's practicks.<sup>239</sup>

<sup>235</sup> See above, fn. 221.

<sup>236</sup> Sutherland, *The Practiques of Sir Richard Maitland*, 234.

<sup>237</sup> Tinwald MS., 367; Gilmour MS., replacement text, entry 412; Gilmour MS., once-misplaced text, entry 405; Hailes MS., fol. 181r.

<sup>238</sup> See above, especially fn. 116.

<sup>239</sup> Goodal notes that Balfour's use of different manuscript copies of *Regiam Majestatem* 'obliged him to refer to particular Copies, such as *lib. Carneg. Ersk. Galbraith. Kintor. Purves, Scon. and liber meus*' [Goodal (ed.), *Practicks: or, a system of the more ancient law of Scotland, compiled by Sir James Balfour of Pettindreich*, x].

The first ten chapters here are an assorted miscellany of case notes drawn from various parts of Maitland's practicks. Spalding's chapters 132–4 note three cases which were heard in January to February 1569/70: *Margaret Sutherland v Laird of Carden*, *George Meldrum v Laird of Balcomy* and *Maxton v Maxton*. The first two of these cases do not appear in the Elchies manuscript for the dates provided. However the case of *Maxton v Maxton* is present in that manuscript and is described at some length.<sup>240</sup> None of these three entries appear in the Tinwald or the Orr manuscripts, but all three appear in both texts of the Gilmour manuscript as well as in the Hailes manuscript and Adv. MS. 24.1.5.<sup>241</sup> However there are four notable differences between the texts of these entries in Spalding and those in the other manuscripts. First, Spalding's entries are much shorter and are generally abbreviated even more than those in the Hailes manuscript. Secondly, the headings (if any) in Spalding accord only very approximately with those in the other manuscripts. Thirdly, the other manuscripts consistently give the parties' names in Spalding's entry 132 as *Margaret Sandilands v Forrester of Carden*, and in entry 133 'Balcomy' was corrupted in the two texts of the Gilmour manuscript and in the Hailes manuscript and abbreviated to 'B' in Adv. MS. 24.1.5. Finally, the other manuscripts have two entries for *Maxton v Maxton*, both on the same date, whereas Spalding appears to have ignored the first entry and paraphrased the second. This all suggests that either Spalding (or the copyist of an intermediate ancestor text) heavily short-copied and was generally quite free with the copying of these entries.

Thereafter, Spalding provides entries for four cases, heard in May 1574, December 1554, March 1554/5 and January 1551/2. These entries are present in the Elchies manuscript, but it and the Gilmour, Tinwald and Orr manuscripts and Adv. MS. 24.1.5 give different headings and generally fuller accounts of the cases than Spalding;<sup>242</sup> the Hailes manuscript provides different headings again,<sup>243</sup> and abridges the entries but not in the same way or generally to the same extent as Spalding.<sup>244</sup> Thereafter, Spalding gives an entry for *Drummond v*

<sup>240</sup> Elchies MS., fos 84r–v.

<sup>241</sup> Gilmour MS., replacement text, entries 376, 382, 384–5; Gilmour MS., once-misplaced text, entries 370, 375, 377–8; Hailes MS., fos 177r–8r; Adv. MS. 24.1.5, fos 112v, 113r–v, 113v–14r.

<sup>242</sup> Elchies MS., fos 19r, 22r, 25r, 91r–v; Tinwald MS., 260, 263, 267, 382; Gilmour MS., non-duplicated text entries 88, 98, 118; Gilmour MS., replacement text entry 437; Gilmour MS., once-misplaced text entry 430; Adv. MS. 24.1.5, fos 61r, 62r, 64r–v, 124r; Orr MS., entries 89, 99, 116, 346.

<sup>243</sup> With the exception of the December 1554 case for which it gives the same heading as the other manuscripts.

<sup>244</sup> Hailes MS., fos 148r–v, 149r–v, 150v, 183v.



*Drummond* (1551). The corresponding entry in the Elchies manuscript is very short but gives a postscript reference to a case of *Hamilton* (no date) and the heading 'of witness'.<sup>245</sup> This entry is found, somewhat rephrased in places but with the same heading, in the other manuscript copies, although only the Gilmour manuscript gives the cross-reference to *Hamilton*.<sup>246</sup> Spalding's text differs slightly in the wording from the others, gives a much longer heading, and omits the reference to *Hamilton*. Spalding then gives entries for the cases *Hew Cunningham v Lord Simple* and *Elizabeth Balfour v Lord Lindsey*, which he recorded as having been heard in May 1554 and February 1558/9 respectively. These two cases are found in the Elchies and other manuscripts, but with some differences in the entries. The other manuscripts generally give these cases as having been heard in May 1553 and March 1561/2, although both dates are omitted in the Gilmour manuscript, as is typical of the entries at the front of that collection. The other manuscripts also generally provide fuller accounts of the cases, although the Hailes manuscript abridges particularly the latter entry but with different wording to Spalding. They generally give 'Isobel Balfour' rather than Elizabeth. Finally, with the exceptions of the Tinwald and Orr manuscripts, the other manuscripts give the defender's title as 'Lady' rather than 'Lord'.<sup>247</sup> It is unclear why these ten entries appear together and in this order in Spalding. There does not seem to be a common theme to these entries, which are on diverse matters. It is plausible that he used on this occasion an incomplete manuscript copy of Maitland which had been selectively updated by means of an appendix at the front of the manuscript.

After writing out this miscellany of case notes, Spalding copied most of the fifty-seven entries at the beginning of Maitland's practicks. However he omitted those entries known as Orr items two, six, twenty, twenty-six, thirty-six, thirty-nine to forty-two, forty-six, forty-seven, fifty-one, fifty-four and fifty-five. This same pattern of omission has not been found in any of the other manuscript copies of Maitland, but some do fail to preserve the original order of the entries: the Hailes manuscript omits the first and fifth entries; the Hailes and Gilmour manuscripts and Adv. MS. 24.1.5 relocate entry nine to after entry two.

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<sup>245</sup> Elchies MS., fol. iiii [*sic*] *recto*.

<sup>246</sup> Tinwald MS., 241; Gilmour MS., entry 26; Hailes MS., fol. 142v; Adv. MS. 24.1.5, fol. 53v; Orr MS., item 26.

<sup>247</sup> Elchies MS., fos 15v, 41v; Tinwald MS., 255–6, 286; Hailes MS., fos 147r, 154v; Gilmour MS., entries 69, 176; Adv. MS. 24.1.5, fos 59r, 72r; Orr MS., items 69, 174.

As was his previous practice, Spalding here intersperses the entries drawn from Maitland with more recent case law. Between Orr items seventeen and eighteen, Spalding gives a general chapter about determining the price of corn. Between Orr items thirty-three and thirty-four, he gives a general chapter about the reduction of decreets. He adds references of more recent cases to Orr item fifty-six, and includes a chapter on a case about pupils heard in 1621 before Orr item fifty-seven. These interrupting chapters are not relevant to the topics under discussion in the entries immediately preceding. It may be that these notes resulted from events in his own practice which occurred around the time he was copying out these sections of Maitland.

A comparison of the manuscripts' texts of Orr one, three, four and five shows that the text in Spalding's copy is somewhat distinct from those in the other manuscripts. The difference is particularly noticeable in entries one and four, for which Spalding gives sections of text which either read differently or appear to be additional to what is found in the other manuscripts. Spalding's headings, too, are much fuller in their description of the cases than those of the other manuscripts. Thus it would seem that the second time Spalding copied out sections of Maitland's practicks, either the text on which he relied was quite different to these other manuscripts in terms of its headings and the wording of the entries, or he was now freer and more pragmatic when copying from his model manuscript. That two of the cases described are not in the Elchies, Orr or Tinwald manuscripts but were in the Gilmour and Hailes manuscripts and in Adv. MS. 24.1.5 might suggest that the model manuscript used in this place by Spalding was more closely related to the latter three manuscripts than to the others.

Overall, Spalding's reliance on Maitland was significant. Almost eighty chapters in the second pair appear to have been drawn wholly or partially from Maitland's practicks. It is not clear why Spalding borrowed only these entries; it is plausible that the entries found at the beginning of the second pair were borrowed because their dates roughly accord with the end of Balfour's practicks. Nor is it clear why Spalding copied out entries of Maitland's practicks at these points in the compilation of his second pair. It could be that he had the time to do so: these borrowed entries (as well as some general entries) appear between those notes on cases heard in the summer session of 1620 and two entries for March 1621; it is plausible that his practice was relatively quiet in the intervening months so he returned to copying out Maitland's practicks. It is clearer why Spalding chose Maitland's practicks particularly: this was likely the most recent collection of notes on

cases which was readily available.<sup>248</sup> One further (very tentative) observation can be made about Spalding's borrowing from Maitland. Spalding (or at least the copyist of the Aberdeen manuscript) provided headings for each chapter in his second pairt. It is possible that he adopted this practice from Maitland, either because he believed that the headings would be a useful tool when later identifying entries or because he wished there to be a consistency in the styling and format of the entries in his collection.

(c) *Spalding's Use of Balfour's Practicks*

It seems that Spalding also relied upon Balfour's practicks in the second pairt in much the same way as he did in the first pairt. Spalding's chapters 313, 315–20 and 322 appear to have been drawn almost entirely from Balfour. Chapter 313 discusses a case said to have been heard on 29 April 1540. The text of this entry appears to have been drawn from Balfour, specifically chapter fifteen of his title, 'Alienation of heretage'.<sup>249</sup> Spalding's chapter 314 comprises a note about *Andrew Fairnie v John Walker* (1555); its context within Spalding's practicks would suggest that the case was found in his manuscript of Balfour, although it has not been found in the printed edition or in what would seem to be the relevant sections of those manuscript copies consulted.<sup>250</sup> However Spalding's chapter 315, on *James Henderson v William Henderson* (1568), seems to have been taken substantially from Balfour's twelfth chapter of the same title on alienation of heritage, although there are minor differences and Spalding adds a comment at the end of the entry. Chapter 316, on *William Silver v Oliver Silver* (1542), was also drawn from that same chapter and title of Balfour's practicks, which records the surname as 'Symmer'. Chapter 317 in Spalding has notes on five cases, which were borrowed from Balfour's title 'Of fraudfull and doubill alienatiounis' chapters three, four, six, one and seven respectively, with some minor differences which can be attributed to errors in copying. Chapter 318 discusses a case heard in Moray in 1633. This was probably recorded by Spalding contemporaneously with the compiling of his collection, interrupting the process of copying from Balfour. Chapter

<sup>248</sup> See above.

<sup>249</sup> Sinclair's practicks also provides a note on this case, but dates it to 19 April [See the provisional text of Sinclair's practicks by Athol L. Murray, entry 8, available at <http://www.uni-leipzig.de/~jurarom/scotland/dat/sinclair.htm>, accessed 13 November 2014].

<sup>250</sup> N.L.S., MS. 2941, fos 38v–41v; Adv. MS. 22.3.4 [Tinwald MS.], 13–19; Adv. MS. 25.3.6, fos 33r–8v; Adv. MS. 24.1.10, fos 112r–14r, 115v–21r; Adv. MS. 24.2.4b, fos 105v–7r, 107v–11v.

319 comprises notes on twelve cases. The first eleven of these items were borrowed from Balfour's title 'Anent Arbitrie', again with minor differences which can be attributed to errors in copying. The twelfth case note appears to have been drawn from chapter two of this same title of Balfour. However the citation of *Regiam Majestatem* found at the very end of this chapter in Spalding (and repeated in the margin alongside) does not appear in the printed edition of Balfour. Rather, it seems plausible that this citation was added by Spalding himself, as it refers specifically to the folio number within Skene's edition. Chapter 320 borrows notes on six cases and a general item from Balfour's title 'Anent arresitment', chapters two, three, six, ten, one and nine respectively, again with some minor differences in the entries. The copying from Balfour is then interrupted again by the addition of a note on a case heard in Moray in 1632 (chapter 321) which again is likely to have been contemporary or nearly contemporary with the copying from Balfour. Finally, chapter 322 includes three notes on two cases borrowed from chapter three of Balfour's title 'Anent skaith and damage done be beistis or done to beistis'. Again, however, there are some minor differences between their accounts of the cases.

The first two titles drawn on here, 'Alienation of heretage' and 'Of fraudfull and doubill alienatiounis', were also used by Spalding in the first pairt. Indeed all five of the cases found in the second pairt which were drawn from 'Of fraudfull and doubill alienatiounis' are cited in his first pairt, which also makes further use of this title of Balfour. The rest of the content, added after the first of the two entries on recent cases heard in Moray, was from the latter part of Balfour's practicks, the part that was ignored after Spalding began copying instead from Skene's *Forme of Proces*.

(d) *Spalding's Chapters and Items which Are Not Case Notes*

Around 100 of Spalding's chapters in the second pairt do not explicitly relate to cases. Many of these seem to set out general points of law, often with cross-references to other parts of the manuscript or to Scottish legal authorities. Some are very brief, with the most notable examples hardly expanding upon the title of the heading, such as chapters thirty-seven and sixty-three. Some such chapters add a citation to this repetitive text, including chapter 207 (which cites an act of parliament and Skene's *Forme of Proces*) and chapter 209 (which provides a cross-reference to chapter thirty-three of the second pairt and a note on *Thomas Gordon of Grandbolme v Thornton* (1620), which was heard in the Aberdeen Commissary court).

Some of these 100 chapters, however, relate quite explicitly to statutory authorities or other regulations. Chapter 344, 'Forme of ane edict of executrie usit befor the Commissares of Edinburgh', appears to be a command from the Edinburgh Commissary to the inferior Commissary courts. The heading of chapter 130, 'Ane act made at Edinburgh the 12. July 1620 agaynes Dyvors and Bankrupts unlawfull dispositione Not set doune heire in this booke because it is ratified and set doune in the 23 parliament of King James the sixth cap 18',<sup>251</sup> is on an otherwise blank page. It is plausible that Spalding originally intended to write out the text of the 1620 act, but changed his mind after the latter act was passed. Whyt, it seems, preserved this blank space in his copy.

(e) *Spalding's Overall Citation and Use of Authority*

The citation and use of authority in the second pairt is generally consistent with what has already been observed of the first pairt. Spalding's borrowing of entries from Maitland meant that he received the two citations of Roman law present in the entry known as Orr item 326 as well as an opaque reference to 'all lawes' in Orr item 297. Spalding's chapter 370 refers to a large quantity of authority, including the 'daylie practique of this kingdome', a case heard in Edinburgh in 1638, *Regiam Majestatem*, and the 'cannon and civill law' generally. There are also rather opaque references to 'the books of Rome' in chapter 366 and an 'act of canone' in chapter 292; the latter is probably a reference to canon law, but the former might be a reference to the canonist courts or to court books in Rome or to the books of Roman law, the *Corpus iuris civilis*. No further references to the learned laws or laws of foreign jurisdictions have been found.

However there are many references to Scottish legal sources. Most refer to the activities or regulations of the courts. There are more than thirty citations of cases in this pairt. Also related to the activity of the courts, there are an additional three references to the books of Counsel and Session, three to the various Commissary books, two to injunctions addressed to the Commissaries from Bishops, one to an Act of Sederunt, and one to an act (possibly meaning a decret) of the local court in Geight. Legislative authorities are the next most cited source, including thirty-five citations of acts of parliament (some of which do not cite the act specifically but assume that the reader will himself know which act is relevant) as well as a reference to a decision of the General Assembly. There are also several citations of medieval law books, including

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<sup>251</sup> The Bankruptcy Act 1621, *RPS*, 1621/6/30.

six of *Regiam Majestatem* (one in an entry borrowed from Maitland), three of the *Leges burgorum* (one of which was borrowed from Balfour), one of *Quoniam Attachiamenta*, and one of the Forest laws (which was also borrowed from Maitland). Skene's works are also cited: the *Forme of Proces* is cited five times and *De verborum significatione* is cited three times. There are also ten more general references to the 'practick' or common law of Scotland (two of which are in entries borrowed from Maitland), and one discussion of customary law specific to the town of Elgin in Moray. It may well be that these citations are indicative of the use of authority by the advocates who were working in these courts during the period.

(f) *Spalding's Method when Compiling the Second Pairt*

It is possible to speculate as to Spalding's method when compiling this second pairt of his practicks. It seems that he began by copying thirty-one entries from Maitland. He does not appear to have selected entries which were particularly related to his practice, but rather he seems to have chosen a specific starting point and copied the entries which followed. Perhaps this process of copying from Maitland inspired him to maintain his own collection of notes on cases. It seems likely that he wrote his notes shortly after the relevant cases were heard, and that he added various other materials to his manuscript between court appearances. Some of this material was borrowed from other collections of practicks, and may have been copied out by Spalding at these times because his professional business was not then demanding on his time. Some of these entries are of a more general nature and probably related to matters arising from his on-going practice if not to a specific (or at least explicitly-named) case. He would sometimes go back and add extra items to existing chapters, thus interrupting the original, roughly-chronological order of items.

(4) The Subsequent Annotation of Spalding's First and Second Pairts

Mention has already been made of the annotations which were added to Spalding's practicks. Many of the annotations provide cross-references within the text; the Table as well as the first and second pairts are cited. Sometimes the cross-references found in the annotations are simply repetitions of those cross-references already provided in the text of the entry, such as that alongside chapter 109 of the second pairt. Sometimes these cross-references are to material which contradicts the substance of the current discussion, such as the annotation alongside chapter 107 which notes that the reader might 'sie

this practique changed fol. 264. cap. 440' (later corrected to '420'). Similarly, the annotation alongside chapter 218 states 'contrair to this practique resolvit in Februar 1643', which is almost certainly a reference to chapter 425 of the second pair even if not acknowledged as such.

There is some evidence to suggest that the annotations were added by Spalding. First, all of the annotations found in the Aberdeen manuscript can be found in the Glasgow manuscript where it includes that title, with one exception which can be explained as a minor scribal error: a citation which reads 'fol. 136. cap. 96. cap. 97.' in the Aberdeen manuscript is instead 'fol. 136. cap. 99.' in the Glasgow manuscript.<sup>252</sup> Thus it seems clear that the annotations were present in the text of the common ancestor, which was plausibly Spalding's authorial holograph. Secondly, sometimes the annotations add information about the case which is the subject of the main entry. This would indicate that these annotations were made by a lawyer who was suitably familiar with the case to supply these details. Thirdly, none of the citations in the annotations update the text with later sources but again date only up to the mid-to-late 1640s.<sup>253</sup> Thus there are no annotations which can be dated to a time after Spalding probably stopped practising. Fourthly, there are references in the annotations to 'my uther practique book' or 'my styill book',<sup>254</sup> presumably the same volume or volumes mentioned frequently by Spalding in the main body of the text. If this is correct, it indicates that either he made these annotations or that they were made by someone who received both volumes. Fifthly, there are some self-referencing comments. The annotator notes that a case was 'practized in anno 1644 at my owne instance contrari Thomas Mersr' alongside chapter 399, and again alongside chapter 295 that a case was 'practized at my own instance' in the Aberdeen Sheriff court in November 1642 and subsequently in Edinburgh. Neither of these cases have been found in the first or second pairs of Spalding's practicks, but they are again during the period of his practice and at least the latter was heard in Aberdeen. Further, there is a note made alongside chapter 443 that 'I have the coppie of the compt immesit amongst my wreits' in relation to an Aberdeen case probably heard in 1645. Again, this locates the annotator of at least this remark to Aberdeen during the period, with access to the papers

<sup>252</sup> Aberdeen MS., fol. 170v (modern foliation); Glasgow MS., 65.

<sup>253</sup> The latest date found in the annotations is in a note which states that a rule was 'daylie practised before the Commissr of Aberdeen in anno 1647' [Aberdeen MS., fos 317r-v].

<sup>254</sup> *Ibid.*, fos 226v, 253v (modern foliation).

led in evidence in a case which might plausibly have been litigated by Spalding. Finally, the annotations include citations drawn from the same sources and editions as Spalding has previously been shown to have used: Skene's *De verborum significatione*,<sup>255</sup> the 1609 Scots edition of Skene's *Regiam Majestatem*,<sup>256</sup> and Balfour's *practicks*.<sup>257</sup>

If it is correct that these marginal annotations were made by Spalding, then the question arises as to why he would have annotated his text in this manner. It has already been shown that Spalding updated some of the entries by adding items about cases heard sometimes many years after that which was the subject of the original entry. It is plausible that some of these annotations were initially added in a manner which meant that they became intercalated into the text of the descendant copies, perhaps written into spaces between the existing entries. It is also plausible that Spalding then annotated the margins when the space between entries was used. The copyists of the Aberdeen and Glasgow manuscripts then continued to present these as marginal annotations rather than intercalating them into the text.

#### (5) The Table

The first eighty folios of the Aberdeen manuscript preserve what is aptly called 'ane table qrin ilk practique is to be found after the order of the Alphabet'.<sup>258</sup> There are more than 200 entries in the Table. The entries vary considerably in length, with some comprising only a couple of sentences and others occupying more than a folio; the entry for 'Executors', for example, comprises almost eleven pages. The copyist of the Aberdeen manuscript usually left considerable space between titles in the table, presumably so that additional notes could be added later. Indeed some entries (such as those on 'Bankrupts' and 'Interrogators') appear to have been later additions, and there were later annotations made to the entry 'Executors'.

The general style of the entries is a series of statements or propositions

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<sup>255</sup> *Ibid.*, fol. 193r (modern foliation).

<sup>256</sup> The citation '2 book of the Matie, fol. 38. cap. 48, 49.' [Aberdeen MS., 194v (modern foliation)] corresponds to that edition; it is highly probable that this volume was also used to access the statutes of King Alexander II, also cited in the annotation of the same chapter.

<sup>257</sup> McNeill (ed.), *The Practicks of Sir James Balfour of Pittendreich*, I, 206 is the source of the citation of '3 June 1538 Kinghorne v Lamington' which is cited in the annotation alongside the seventh chapter in the second part [Aberdeen MS., fol. 194v (modern foliation)].

<sup>258</sup> *Ibid.*, fol. i.



about the law, each of which is cross-referenced within Spalding's practicks or to other domestic legal sources such as statutes, cases and medieval legal treatises.<sup>259</sup> Occasional folio references in the Table's citations of *Regiam Majestatem*, *Quoniam Attachiamta*, the *Leges burgorum*, *Form of Process before the Baron courts*, and statutes of the early kings again allow the identification of Skene's 1609 Scots edition as the source used for these references.<sup>260</sup> However in the Table Spalding also refers to the *Statutes of Guild*,<sup>261</sup> which

<sup>259</sup> The entry for 'Alienations', the first in the Table, provides a good example of this. The entry is, as is typical, written in two columns; this entry spans a column and a half. It is almost 440 words in length, including twenty-three citations. The entry first cites a specific folio of the corresponding title of the first pairt, 'Of alienatione and infeftment'. There are also another four citations of the first pairt, namely: another two of 'Of alienatione and infeftment'; one (which errs in its citation) of the title 'Of pertinentis of lands'; and one of the title 'Of restitutione of minors in integrum'. All five of the citations of the first pairt give the title number and the folio of the section that is relevant; this is in keeping with Spalding's method of citation of Skene's *Laves and Actes*, but not of his 1609 Scots edition of *Regiam Majestatem*, seen in the first pairt [on which, see above]. There are also nine citations of the second pairt, seven of which cite single chapters and two of which cite three chapters of this collection. The choice of chapters cited here is rather puzzling. Chapter 130 is the entry which refers to (but does not copy out) the 1620 act 'agaynes Dyvors and Bankrupts unlawfull dispositione'. Chapters fifteen and 160 were two of those borrowed from Maitland, and chapters 313 and 315–17 included eight items drawn from Balfour; chapter 314 was also probably drawn from Balfour but has not been found therein. Only five of the cited chapters comprised cases which were probably recorded by Spalding himself, specifically chapters 312, 309, 355, 376 and 415. Further to these cross-references within Spalding's volume, there are also eight citations of statutes. Four of these are of the older statutes of Kings William, Robert II, and David II, including a general reference to the statutes of 'K. William and King Robert'. These references were almost certainly drawn from Skene's *Regiam Majestatem*, and that of a sixteenth-century statute (the Fraud Act 1540 [RPS, 1540/12/77]) was probably drawn from Skene's *Laves and Actes*. The other three citations of statutes (of the Bankruptcy Act 1621 [RPS, 1621/6/30], Feuing of Wardlands Act 1605 [RPS, 1605/6/40], and another which is also probably of the Feuing of Wardlands Act 1605) must have been consulted in a different collection. Spalding's only other citation in this section is to 'the 117 chapter of the burrow laws'. This was again almost certainly consulted in Skene's 1609 Scots edition of *Regiam Majestatem*. Other, longer entries of the Table inevitably have a greater number and range of sources cited.

<sup>260</sup> For example, at 'Arbiters', Spalding states, 'ane judge ordinar sould not be ane arbi-ter judge yet be consent of pairtie he may be judge arbi-ter 2 book of the Mâtie fol. 20. cap. 4.' [Aberdeen MS., fol. 6r (modern foliation)]; the relevant passage (*Regiam Majestatem*, 2,4) appears on folio 20r of Skene's 1609 Scots edition.

<sup>261</sup> For example, at 'Arles' Spalding states, 'Arles or earnest given and taken makes the bargane good Sie the 3d book of the Mâtie cap. 10. and statuts of gild cap. 22 & 4.' [Aberdeen MS., fol. 2r (modern foliation)]. This refers to *Regiam Majestatem*, 3,10,6 and the *Statutes of Guild*, 22,4, both of which are relevant. Another reference to the *Statutes*

were contained in Skene's volume but are not cited in the first or second pairs. This suggests that the Table partly supplements the information in the first and second pairs; indeed there is sometimes little correspondence between the patterns of citation in the Table and first pair.<sup>262</sup> Thus it seems that the Table was not merely supposed to serve as an epitomised version of Spalding's first and second pairs, or as an annotated index of their citations. Rather, it may have been intended to be more akin to an alphabetical commonplace book which might be supplemented over time. If this is correct, it is perhaps no coincidence that the latest dates found in the Aberdeen manuscript – of 1648 – are found in the Table.<sup>263</sup>

### **Conclusion: Spalding's aim in writing, when he did so, and the later distribution of his work**

The question remains as to why Spalding compiled these practicks. It seems credible (and will be suggested below) that Spalding began by compiling the second pair. Here he drew together sections of Maitland and Balfour with his own, more recent experiences of practice. In the 1620s and 1640s these sources had not yet been eclipsed by more recent collections: most of those collections which are now thought of as being early-to-mid-seventeenth century collections did not circulate until much later. The practicks of Sir Thomas Hope began to circulate after 1643, even though he stopped recording cases a decade earlier.<sup>264</sup> The earliest manuscript of Spottiswoode's practicks dates from 1657, indicating that it was circulating around this time.<sup>265</sup> The practicks of Sir Alexander Gibson of Durie also began circulating in the 1650s.<sup>266</sup> Thus none of these would have been available when Spalding practised and so, it would seem, he collected his own decisions for his later use and reference. However

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*of Guild* indicates that this collection was consulted in Skene's 1609 Scots edition: the citation under 'Burdessis' [Aberdeen MS., fol. 12v] of 'statuts of gild fol. 147. cap. 46' corresponds to folio 147r of that edition.

<sup>262</sup> Indeed, returning to the example of the entry entitled 'Alienations', none of the chapters of the second pair cited in the Table here were also cited in the corresponding title of the first pair. Of the statutes cited in the Table, only three are cited in the first pair in either this or the subsequent title on fraudulent alienations. The first pair and the Table also cite different chapters of the *Leges burgorum*: the Table cites chapter 117 whereas the first pair twice cites chapter 119.

<sup>263</sup> Aberdeen MS., fos 34r–v.

<sup>264</sup> Ford, *Law and Opinion*, 44, 54.

<sup>265</sup> Ford, *Law and Opinion*, 53; N.L.S., MS. 2712.

<sup>266</sup> Ford, *Law and Opinion*, 80.

the length and lack of coherent structure of the second part would have meant that it would have become difficult to use. It is plausible that Spalding began the first part with the intention of providing a form of index to the decisions in the second part, locating his case notes within the context of the available literature. He obviously found the practicks of Balfour very useful, but it was clearly not all relevant to his practice and was much out of date. Thus rather than simply annotate Balfour with more recent citations and commentary, Spalding more pragmatically began a new digest which was initially arranged in the same way as Balfour and received what was relevant from it but also provided access to the second part. That the first part was quite short and the items terse might indicate that this was not intended to be a full reference work, but an expanded index which would allow one to identify easily the relevant sources and citations on each topic. As time passed, it became increasingly voluminous and could be recognised as a collection of digest practicks in its own right, hence the addition of the Table, and the further layer of cross-referencing to it.

However, although it is possible to speculate as to how and why Spalding wrote his work, it is very difficult to determine with any level of certainty when he compiled the first part. There are two pieces of evidence which might suggest that much of the first part was written in the later 1630s and was subsequently updated. First, there are only a couple of cases entered in the second part for the years 1637 and 1638. This might suggest that Spalding's practice was quiet during these years, for whatever reason. There is an indication in the history by John Spalding that there was a disruption in the administration of justice in the Sheriff courts of both Aberdeen and Inverness in the latter part of 1637, and a 'hindering of justice' in the Session, but there is no discussion of the local Commissary;<sup>267</sup> there is nothing in the printed records of the burghs' councils (or at least the sections extracted) which would indicate that this court had stopped sitting.<sup>268</sup> Thus it might be that his practice was affected by some personal issue or by the broader political circumstances of the time, being the period of the Bishops' Wars. Previous spells of relative inactivity in Spalding's practice appear to have been used to copy sections of Maitland and Balfour into the second part. However no such addition was made during these years. Perhaps this is because he began a new work at this

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<sup>267</sup> Spalding, *History of the Troubles*, I, 49, 52; idem, *Memorialls of the Troubles*, I, 81, 84. Spelling of quotation correct to the earlier printed edition.

<sup>268</sup> *Extracts from the Council Register of the Burgh of Aberdeen 1625–1642*, 105–44; Munro (ed.), *Records of Old Aberdeen* provides no extracts from the council minutes for these years.

time, instead copying sections of Balfour and Skene's *Forme of Proces* into a new work which became the first pairt.

Secondly, there are only nine references in the first pairt to the last hundred-or-so entries in the second pairt, which relate mainly to cases heard after 1636; there are also only around a dozen cases cited independently of the second pairt which date from this period. Many of the references to cases heard in the late 1630s and 1640s are found at or towards the end of the titles of the first pairt.<sup>269</sup> This might indicate that these citations were added as appendices to the texts of titles which had already been written. The citations of cases heard in the late 1630s or early 1640s which appear to be integrated into the middle of titles tend to be found in titles which are at the end of Spalding's work – those in which the material is drawn from Skene's *Forme of Proces* in preference to or in addition to Balfour's practicks.<sup>270</sup> Only four citations of cases heard in the 1630s or 1640s appear in the middle of titles earlier in the work.<sup>271</sup> Thus it is possible to speculate (very tentatively) that Spalding may have used the period when his practice was quieter in 1637 and 1638 to begin to write the new work which became the first pairt. He copied large sections of Balfour at that time, updating it with references to other works and with reflections from his own practice. It is possible that the titles based more on Skene's work were added later, hence the citations of cases heard in the 1640s seem to have

<sup>269</sup> A case heard in 1643 is the last citation in 'Of payment'; cases heard in 1637 and 1638 are the final two citations in 'Of tutors'; a case heard in 1638 is the final citation in 'Probationes'; a case heard in 1636 is cited at the end of 'Of husband and wife'; a case heard in 1636 is cited in the penultimate paragraph of 'Of conjunctifie'; chapter 384 of the second pairt (relating to a case heard in March 1641) is cited at the very end of 'Of curators'. The titles on testaments and executors seem to have been particularly heavily updated. Thus chapters 364, 393 and 394 (relating to cases heard in 1639, 1641 and 1642) are cited consecutively at the end of 'Of executors'; chapters 352 (probably relating to a case or cases heard in 1636) and 431 (on a case heard in 1643) and a case of 1636 are also cited in this title, again probably as additions but not at the end of the title. At the end of 'Of testaments' is cited chapters 352 relating first a case heard in 1636 and items relating to cases heard in 1620, 1640 and 1641, which were probably additions; Spalding appears to then have updated an earlier part of this title with a reference to chapter 416 (a case of December 1642) to contradict the dicta of the previous passage.

<sup>270</sup> Title forty-one has the citation of the latest case cited, said to have been heard in 1647; title forty-nine has a citation of a case heard in 1644; title fifty-five has citations of three cases heard in 1638 and two cases heard in 1641; and title fifty-six has a citation of a case heard in 1642.

<sup>271</sup> A case of 1636 is cited in the middle of the title 'Of airs'; a case of 1637 is cited near the start of 'Of terce'; a case of 1637 is cited in the middle of 'Of interdiction'; and a case of 1638 is cited in the middle of the title 'Of tutors'.

been integrated into the text of the entries rather than added as appendices. It is, however, impossible to be certain of this given the loss of the authorial holograph. But the hypothesis that Spalding may have continued to revise and edit the text of the first pair is consistent with the suggestion above that he updated his second pair.

Spalding appears to have used relatively few sources when compiling his practicks, but relied upon these heavily. He had a copy of Balfour's practicks, a copy of the 1609 Scots edition of Skene's collection of the old laws, and may have consulted two different manuscript copies of Maitland's practicks. However he appears to have made no use of the practicks of Sinclair or Colville, which is surprising given that Colville included material relevant to the Commissary courts and that these two collections were often bound with copies of Balfour's practicks.<sup>272</sup> Nor did Spalding make explicit use of Craig's *Jus feudale*, despite the prominence of that work in the education of new advocates in the Court of Session.<sup>273</sup> Perhaps Spalding misunderstood the work as being relevant only to the practise of feudal law, even though some of Craig's titles would have been relevant to him (especially those at the end of the second book on curators, tutors, marriage, terce, courtesy, and conjunctie). Alternatively, perhaps his Latin was not of a sufficient standard to read Craig properly – there is no evidence that he was university educated, and he favoured the Scots translation of Skene's *Regiam Majestatem* – and maybe he did not have access to one of the epitomes of Craig's work in Scots translation.

It is possible to speculate as to why there was apparently only a limited circulation of copies of Spalding's practicks. First, most lawyers who could have afforded a copy of Spalding would likely already have had a copy of Balfour or Maitland, or would have prioritised attaining one of these over attaining one of Spalding's practicks. Many would also have had access to a copy of

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<sup>272</sup> Dolezalek has found all three collections in the following manuscripts: Adv. MSS 22.3.4, 24.1.4, 24.1.5, 24.1.8, 24.1.11, 25.4.11; Signet Library, MS. 34; E.U.L., La.III.338a, La.III.429. On these manuscripts, see Dolezalek, *Scotland under Jus Commune*, II, 139–49, 159–68, 170–5, 178–91, 303–15 and III, 149–63, 212–20, 262–7.

<sup>273</sup> Cairns has suggested that 'reducing that law to an ordered science, thereby making it easier for students to learn' was Craig's intention [John W. Cairns, 'Craig, Thomas (1538?–1608)' in *Oxford Dictionary of National Biography* (Oxford, 2004), <http://www.oxforddnb.com/view/article/6580>, accessed 28 July 2014]. The compendia indicate that *Jus feudale* was used in this way. For a list of extant copies of such compendia, see Dolezalek, *Scotland under Jus Commune*, I, 184–5; J. H. Baker, 'Migrations of Manuscripts', *Journal of Legal History*, 21 (2000), 123–8, 123. On the importance of the epitomes, see John W. Cairns, 'The *Breve Testatum* and Craig's *Jus feudale*', *Tijdschrift voor Rechtsgeschiedenis*, 56 (1988), 311–32, 331–2.

Skene's collection, which was anyway criticised by some contemporaries for not distinguishing between what was applicable and what was in desuetude.<sup>274</sup> The discussion drawn from Skene's *Forme of Proces* did not provide a comprehensive overview of procedural law, so reference to the original would still have been necessary. Spalding's practicks could thus conceivably have been perceived by many lawyers as superfluous to their requirements. Secondly, the recent material in Spalding's practicks was focused on the provincial Commissary courts, and by the time that it probably began to circulate in the mid-seventeenth century, the practicks of Hope, Durie, Nicolson, Haddington and Spottiswoode were also available. These compilations would have been more relevant to the practice of most lawyers than Spalding's practicks, and their compilers (two King's Advocates and three Lords of Session) were more prominent within the profession than a lawyer whose career peaked as a Clerk Depute in a provincial Commissary court.<sup>275</sup> Finally, Ford has shown that in the mid-seventeenth century there was an increasing focus on drawing together Scottish sources with the civil law.<sup>276</sup> However explicit engagement with the learned laws is almost completely lacking in Spalding's work. Thus, overall, it seems likely that Spalding's practicks failed to meet the standards of intellectual rigour of the period, was too reliant on works which were widely available and increasingly out of date, and too specific to the provincial Commissary courts to be widely regarded by his contemporaries as worth the investment required to make or procure a copy.

However, for legal historians working today, Spalding's compilation is a significant source. It allows insight into certain aspects of legal practice of the period, such as how provincial lawyers gathered authorities and materials on which to draw in their pleadings. It also allows insight into how a set of practicks which might be identified as 'digest practicks' might be compiled around and used in conjunction with a set of decisions. Spalding's work is also a unique source as to the operation of the Aberdeen Commissary court, the records of which were destroyed in a fire in the early-eighteenth century, and to the social history of the North East region more generally. Thus Spalding's work may indeed be more useful to legal historians today than it was to the practising lawyers of his day.

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<sup>274</sup> Ford, *Law and Opinion*, 38, 40.

<sup>275</sup> Cf. James Oldham, 'The Indispensability of Manuscript Case Notes to Eighteenth-Century Barristers and Judges' in Anthony Musson and Chantal Stebbings (eds), *Making Legal History: Approaches and Methodologies* (Cambridge, 2012), 30–52.

<sup>276</sup> Ford, *Law and Opinion*, 45–6.