

The Berne Manuscript

The Berne MS, so called because it was acquired in 1814 by way of donation from the Public Library of the Swiss city of that name, is now held in the National Archives of Scotland. It is the earliest surviving manuscript containing the texts of early Scottish laws.

Written throughout in a uniform hand, the greater part of the MS is in fact taken up by English material: a text of Glanvill, a register of the writs used in the courts running in the name of Henry king of England lord of Ireland and duke of Aquitaine, and a copy of the 1267 Statute of Marlborough.

These items and some marginalia help date the MS to the last years of the reign of Henry III (1216-1272). The MS also contains the March Laws of 1249. It is only in the last few folios that purely Scottish material can be found. First come what are called the *leges Scocie*, twenty two fairly miscellaneous chapters, some of which purport to be royal legislation. Then comes another collection headed "*Leges et consuetudines quatuor burgorum, Edinburg, Rokisburg, Berwic, Strivelin, constitute per dominum David regem Scocie*". This comprises fifty chapters of the much longer work containing the burgh laws; the text breaks off in mid-chapter at the end of the last surviving folio, suggesting that the MS is now incomplete. So it is probable that the MS continued with the remainder of the *Leges Quatuor Burgorum*; and it is legitimate to speculate that it contained further Scottish material.

What are we to make of this curious collection? A first point is that the English material -- Glanvill, a register of writs, some statutes -- is what one would expect to find in the collection of an English lawyer of the mid-thirteenth century. Lord Cooper argued from internal evidence that the MS was indeed the working library of a lawyer who had an extensive practice in the north and east of England and who also had clients amongst the members of the Anglo-Scottish nobility -- that is, those who held lands on both sides of the border. He drew particular attention to an apparent link with John Balliol I and his wife Dervorguilla.

Although, as Cooper himself conceded, "in all this there is a good deal of imaginative conjecture", more recent work on the Anglo-Scottish nobility of this period has shown the existence in their households of clerks who carried out legal work for them in both England and Scotland and who might therefore have required knowledge of and access to both systems of law. Cooper's suggestion of a specific Balliol connection may gain support from the fact that three chapters of the *leges Scocie* relate to Galloway: Dervorguilla Balliol had brought her husband extensive property mainly in the east of that province. It is also interesting to note that the first John Balliol was sheriff of Cumberland from 1248 to 1255 as was his brother Eustace from 1261 to 1265; in this office both would have had an important role in the administration of march law. But Balliol links will not account for the presence of the *Leges Quatuor Burgorum*, which was the most important collection of burgh laws in Scotland; if Berne represents a working library, then presumably its compiler's clients included others who had Scottish burghal connections.

Perhaps the greatest interest in the Scottish material attaches to the *leges Scocie*. Many of its twenty two chapters deal with crime: laws relating to stolen goods and the enforcement of obligations of warrandice in relation thereto, or to slaughter and other injuries to the person and the compensation payable for these wrongs. Four chapters deal with jurisdiction and procedure in the seignorial, shrieval and justiciary courts. Finally, as already noted, three of the

chapters relate to Galloway, all of them appearing to be judgments of the judices of that province, in one case acting with the judices of Scotia. Many of the other chapters proclaim themselves to be assizes, statutes or constitutions, sometimes with other references to known events which permit assignation to a particular date.

Without exception, these references point to the reign of William I (1165-1214). There are also some indirect hints in the texts: for example, the very first of the laws refers to and affirms a preceding constitution of king David, much in the style which we know to have been used in authentic twelfth century legislation. Sometimes external evidence allows us to fix dates for other chapters. A statement of the English chronicler Roger of Howden strongly suggests that c 16 is to be dated 1197. Two of the Galloway chapters seem to belong to the period from 1185 when Roland son of Uhtred recovered Galloway and brought the province within William's sway. One records a judgment "in the court of the lord king before Roland son of Uhtred"; it seems probable that this took place between 1187 and 1189. The other, also a report of a judgement, may possibly be dated 1186. The third Galloway chapter is probably of later date though not as late as 1228, the date suggested by the editors of APS. Overall we seem usually to end up in the reign of William. It can also be said that some of the otherwise undateable laws have a distinctly antiquated air even for the late thirteenth century, and their provenance may well go beyond the reign of William; for instance, it has been said that the final chapter, comprising the so-called *Leges inter Brettos et Scotos*, was probably originally composed c 1100. Another chapter defines "burthensak", certainly a jurisdictional term used in twelfth-century charters but found only rarely in the reign of Alexander III (1249-1286).

All this raises questions, however, for the hypothesis that Berne is a working lawyer's library. To what extent was this largely elderly material in the *leges Scocie* law current in the time of Alexander III? It is notorious that the compilers of medieval legal MSS frequently merely copied what they found written down elsewhere without much regard to its status as law used in practice. Thus the fact that many of the *leges* also appear in the miscellaneous collection bound in at the beginning of the early fourteenth century Ayr MS, and in *Regiam Majestatem*, proves only that their respective compilers probably drew on the same sources or ones closely related to those used by the writer of Berne, not that the laws were in force when each was at work. In order to establish that proposition, we need independent evidence, contemporaneous or later, for the operation of that law. For the thirteenth century, of course, it is precisely that kind of evidence which is lacking and it is virtually impossible to determine, for example, how far laws about fishing rights, or about when one might travel abroad at night, such as are found in the *leges*, were ever enforced in practice, even though they are stated to be legislative acts of the king.

However some of the chapters can be related to other evidence in such a way as to suggest something about late thirteenth century Scots law, if not perhaps to permit categorical statements on particular points. The statements in c 15, that suitors should come to the sheriff court held every forty days, but that they need only come to the pleas of the justiciar *ex precepto regis*, is at least consistent with other evidence of early practice in this connection and there seems no reason to suppose that it is not an accurate description of how things stood in the thirteenth century.

More difficult to assess is the first chapter which, as already remarked, purports to affirm a preceding statute of David I. It contains various provisions about the calling of warrantors by

the defender when it is alleged that goods are stolen. The goods are to be held at particular unnamed places. The accused is to be allowed various periods of time for the arrival of his warrantor, their length depending on where in Scotland the warrantor is to be found. If the warrantor does not come, his lord will answer. If the warrantor dwells in Moray, Ross, Caithness or "Argyll pertaining to Moray", then the accused should apply to the sheriff of Inverness who will send the king's sergeants with him to see that all is dealt with justly according to the assize of the land and the king. If the warrantor dwells in "Argyll pertaining to Scotia", the accused may apply to the earl of Atholl or the abbot of Glendochart to send witnesses with him; similarly, if the warrantor dwells in Kintyre or Cowal, then the accused may apply to the earl of Menteith for the same privilege.

Lord Cooper thought it unlikely that this scheme could ever have been operative; but the provision of witnesses for the men of his earldom is referred to in a late thirteenth-century charter of Maeldomhnaich earl of Lennox and it is probable that this should be linked with the service of "bode and witnessman" found in contemporary northern England, where lords seem to have had officers whose functions included the witnessing of the service of summonses, the making of arrests and the performance of transactions.

Thus the first chapter of Berne may mean that the officers of the sheriff of Inverness and the lords mentioned would testify to the transaction between the warrantor and the accused or to the proper calling of the former to fulfil his obligation. The reference to the abbot of Glendochart is particularly interesting in this respect. In his *Celtic Scotland*, W.F. Skene pointed out that the Columban abbey of St Fillan in Glendochart had passed into the hands of a lay abbot, and its lands into secular possession, but that there still survived as late as the fifteenth century an officer who had custody of the staff of St Fillan and "a certain jurisdiction which bears an obvious relation to that possessed ... by the abbot of Glendochart' under this law. That jurisdiction, which was later discussed in detail by W.C. Dickinson, involved the pursuit of stolen goods and may well have also included a witnessing function. This officer must have been operating in the reign of Alexander III and his later appearances therefore give a little support to the connection of the Berne chapter with current law in the thirteenth century.

If this be so, then some of the other chapters dealing with stolen goods and warrandice also gain credibility, since they clearly have some links with chapter one. There is a notably northern and western bias to the chapter; this is also reflected in chapter two which deals with all those warrantors who dwell in Galloway and "ultra" Forth and who are called by persons accused in Scotia. In context, "ultra" must mean on the other side of the Forth from Scotia, that is, to the south of the river. Such warrantors are to be convened at Stirling. Chapter seventeen also lists the places to which warrantors should come, which may well be the same as the unidentified places mentioned in chapter one where goods alleged to be stolen should be held pending the arrival of the warrantor. Again all the districts mentioned are in Scotia. The remaining chapters on warrandice lack this explicit Scotia connection but seem to work along similar lines. Taken as a whole, they suggest a system of rules comparable with those which had quite recently prevailed in England and which could still be found in Ireland and Wales.

The chapters on compensation for slaughter and other wrongs also tie in quite well with what is known of later medieval practice in Scotland. The final chapter, which unlike all the others is in French, refers to different kinds of payment, exigible at varying rates dependent on the nature of the injury and the status of the victim and called *cro*, *galanas* and *gelchach* or *kelchin*. A Latin

version of these rules found its way into *Regiam Majestatem*, which also mentions *cro* and *galanas* in another of its chapters. *Cro* also turns up as *croy* in legislation of 1432 so it seems likely that although, as already mentioned, the chapter may have very early origins it would still have been comprehensible in Alexander III's Scotland. Chapter eleven of the *leges Scocie* also explains what the *wergild* of a thief is in Scotia. This and the other terms mentioned are all familiar from Anglo-Saxon, Irish or Welsh sources, where they are used to describe the compensation payments which will settle a dispute or feud, either between an injured person and his assailant or between the kindred of a deceased and his slayer. The Berne chapter gives the payments due to the king, earl or thane if someone is slain within their "peace", so that potentially a killer was liable both to the kin of his victim and to the holder of any peace which the homicide might have broken. The rights of the kin and of the wider community were thus closely linked.

The twelfth and thirteenth centuries saw an increasing force in the concept of the king's peace reflected in the elaboration of the "pleas of the crown" and the development of a procedure of presentment of criminals by inquests of local communities prior to the justice ayres. In this way the king's special interest in particular breaches of his peace was clarified and the role of the community at large in prosecution became a more formal element in the system. These changes are evidenced in some of the *leges Scocie*. Thus in the chapter which seems to represent an 1197 statute, it is provided that the magnates and prelates have been sworn to assist the king to take "vindicta" of wrongdoers, while they themselves will not take "pecunia" from the accused whereby justice is not done. Another chapter speaks of how the king will have full right of groups of relatives who themselves vengefully slay the killers of members of their kindred "as far as they were fully breakers of his peace". Lastly, in the chapter containing the statute of 1180, it is provided that the magnates and prelates are not to hold their courts except when the king's sheriff or his sergeants are present to see that they are conducted rightly.