From Use to Law: the judicial recognition of community customary rights in Britain in the eighteenth and nineteenth centuries

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Abstract

The subject of the submitted works and synthesis is the history of the adjudication by the central courts of England and Scotland of legal claims that local custom, established by community praxis, creates legal rights over land that inure to the fluctuating members of local communities.

The thesis of the submitted works, to paraphrase E.P. Thompson, is that custom litigation lies at the interface between law and community praxis. Customary rights are created 'in fact' by the praxis of a community, but once contested are recognised as creating 'local law' (England) or 'legal rights' (Scotland) by the courts. The submitted works explore this interface.

The synthesis begins with an examination of the literature on custom in English and Scots law and explains the development of the published works with reference to this literature and their contribution to the development of it.

The synthesis goes on to explain how the English law of custom and the Scots law of community servitudes constitute a single subject. A doctrinal and functional comparison is made between the English law of custom and the Scots law of community servitudes. Using evidence drawn from court decisions and the Session Papers, the use of the English law of custom in community servitude cases in both pleadings by Scots advocates and judicial decisions of the Court of Session and the House of Lords is demonstrated.

The synthesis argues that the reception of custom is an iterative process and examines how the method adopted in the three works on Scots law reflects this thesis. The development of legal archaeology from method to methodology is explored, as is the significance of the method for both the published works and the synthesis. Once community praxis reaches the courts, it is mediated by legal doctrine, legal process and procedure, legal professionals (both

lawyers and judges) and extra-legal events. The synthesis concludes that the central argument that underlies both the submitted works, and the methodology employed to produce them, is that the reception of customary rights is a process not an event.

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Introduction

This synthesis draws together and presents the candidate's published work in the area of the judicial recognition of community rights in Britain in the eighteenth and nineteenth centuries. The submitted publications are made up of one article on the English law of custom and a chapter and two articles that on the Scots law of community servitudes/rights. Key requirements for a PhD by publication are that a clear link can be established amongst the published works such that they can be said to constitute a single study and that the works can be linked to the method or methodology used to produce them.

The intellectual links amongst the submitted works are detailed in the synthesis below, but it is important to note at the outset that the works have not merely been drawn together for the purposes of this submission. They were created as part of the candidate's intellectual, jurisdictional and geographical journey. What follows is a brief synopsis of that journey.

The writing of this synthesis has been to a significant and unanticipated extent an exercise in memoir. This was required by the candidate's understanding of the terms governing the production of this synthesis. For example, under the regulations for a PhD by publication, this synthesis should '[s]tress the coherence of the publications, linking them to the methodology adopted'.[1] The candidate's method or methodology, on which published articles are silent, had to be reconstructed without 'post hoc'ing' – that is without indulging in the logical fallacy 'post hoc ergo propter hoc'.[2] The individual journey that drove the candidate from one separately

[1] *8A Code of Practice for Research Degrees (Policy, Procedure and Guidelines) Academic Year 2017-18* 71.

[2] The verb form of this phrase is taken from the teaching technique of Cornell's former Dean, Stewart Schwab, who would call on students to identify 'post hoc'ing'.

published article to the next and the genesis of the method used is therefore usefully detailed to demonstrate the links between them.

'The Persistence of the Ancient Regime: Custom, Utility and the Common Law in Nineteenth-Century England' (hereinafter, *Persistence)* was written whilst the candidate was a student serving on the editorial board of the *Cornell Law Review*.[3] With the exception of a brief foray to the House of Lords Record Office to view materials on the Prescription Act, the sources available to the candidate were those available in the Cornell Law Library, circa 1992-93. The article is based mainly upon published law reports, taken together with both nineteenth and early 20th-century secondary sources, as well as contemporary works of jurisprudence, social and legal history.

Whilst writing *Persistence* in the United States, the candidate came across the Scottish case of *Dempster* v *Cleghorn* 1813.[4] It was indexed under 'custom' in the volume of House of Lords law reports that the candidate was consulting for an English case. The case, which dealt with the right of the community to kill rabbits on St Andrew's golf course, struck the candidate as one that might benefit from what has become known as 'doing a Simpson' – that is, an article focusing on a single case that analyses its production through a deep and thorough review of the factual basis of the case, its historical context, and the iterations of the case as it makes its way through the legal process. The case was from the wrong jurisdiction to be included in *Persistence* and so was photocopied and filed away.

Upon graduation in 1993, the candidate moved from Ithaca, NY to Lancaster University in the north of England to take up a lectureship. At the 1994 meeting of the British Legal History Conference in Durham, the candidate met Professor John Cairns and asked if he knew of any articles about the case of *Dempster*. He said 'no' but reminded the candidate that Scotland was a mixed jurisdiction and that written records of advocate submissions were held by the

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[3] 79 Cornell Law Review 183-218 (1993).

[4] [1813] 2 Dow 40.

Advocate's Library and Signet Library in Edinburgh.

Professor Christopher Gane, who would go on to be Professor of Scots Law and Dean of the Law Faculty of the University of Aberdeen, had been Head of the Law Department at Lancaster in the 1980s, so the library had a substantial Scots law collection. In those days, lecturers were given a small pot of research money to use as they liked. The candidate travelled to Edinburgh to begin her research on *Dempster v Cleghorn.* The Session Papers, together with records held by the National Record Office,[5] the record office of St Andrews University and the secondary sources available at the University of Edinburgh's law library proved fruitful in terms of detailing the story of the *Dempster* litigation.

In 1996 the candidate took up a post at Edinburgh University. In the library of Old College, the candidate found that seeking out a summary of the law that had been applied in *Dempster* proved to be more challenging than anticipated. Whilst there was an entry on the subject of 'custom' in Scots law by David Sellar in the Stair Memorial Encyclopaedia, it was obvious, as detailed below in the section on doctrine, that the term 'custom' in Scots law was used more narrowly than in English law. The doctrine applied in cases such as *Bruce v Smith*[6] was not the same as that applied in *Dempster.*[7]

The three submitted works on the recognition of local customary use rights in Scots law had their origin in a search for the law that lay behind the story of the St Andrews golf links and the extirpation of its rabbits by the inhabitants. The section on methodology, below, details the available sources and how those sources were used in the production of the three submitted works on Scots law.

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[5] The Scottish Record Office changed its name to the National Archives of Scotland in early 1999. In 2011, pursuant to the Scotland Public Records Act 2011, it merged with the General Register Office for Scotland to become the National Records of Scotland (NRS).

[6] 1890 17 R 1000

[7] David Sellar, 'Custom as a Source of Law' 22 Stair Memorial Encyclopaedia (Edinburgh: The Law Society of Scotland/Butterworths, 1987).

This brief foray into the autobiographical, whilst difficult to situate in the body of the synthesis, is nevertheless key to the exercise carried out in it. As recognised by Professor Baker in his chapter detailing his method, academic scholarly works are shaped by such mundane elements as geography and the availability of research funds.[8] This is especially true of works produced before the wide availability online of both primary and secondary sources. The contribution to scholarship of visiting physical archives also cannot be underestimated. The scholarly traveller gleans much about a legal culture through living and working in it – even if only briefly. Working in Scotland, for example, emphasised the small size of the legal community there and the significance of the relationships both amongst advocates and other members of the community.[9]

This brief autobiography also assists with the synthesis as an exercise in historiography. *Persistence*, for example, reflects the contemporary intellectual concerns and trends in the academy in the early 1990s and, indeed, earlier – the candidate had been introduced to the canon of the English Marxist social historians as part of a history degree in the early 1980s. The submitted works were shaped by what was being read by law professors and students at the time they were written, for example, the historical studies of Brian Simpson, which later would form the basis of the method used in *Rabbit Massacre* and the other works on Scots law.[10]

Finally identifying one's method and methodology after the fact fundamentally involves an exercise in academic genealogy. Beyond formal publications, the intellectual backgrounds and interests of

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[8] Sir John Baker, Reflections on "doing legal history", in Anthony Musson and Chantal Stebbings (eds.) *Making Legal History: Approaches and Methodologies* (Cambridge University Press 2012).

[9] See, e.g., Henry Cockburn's connections to the purser in the Glen Tilt litigation. *Test Cases* 229.

[10] Another historiographical footnote to that era is that Simpson's work appears to have been influenced by the work of the anthropologist Clifford Geertz, whose method of 'thick description' was a significant influence on historians in the 1980's.

professors who advised the candidate both formally and informally shaped the submitted works. As a student, and moreover, a student of history, any assessment of the methodology of the submitted works requires situating the candidate as part of a particular academic tradition that existed at a particular place and time.[11]

Such an exercise dates both the candidate and the submitted works, but the writing of this synthesis has shown that life experience can help to avoid scholarly mistakes. Whilst writing the section on *Legal Archaeology* for this synthesis, it was noted that Peter Fitzpatrick had suggested the term to Brian Simpson and that Julie Novkov had situated the methodology of legal archaeology in Foucault's scholarship – particularly as interpreted by Peter Fitzpatrick and Ben Golder.[12] Rather than hypothesise as to what Professor Fitzpatrick meant when he advised Brian Simpson what to name his method, the candidate wrote to him to ask whether he had published anything on the subject or would be willing to be interviewed as to why he suggested that Simpson call his method legal archaeology.

Having taught on a faculty peopled by post-modernists at the same time as Simpson was publishing *Leading Cases*, something about Fitzpatrick's advice struck the candidate as a quip reflecting contemporary intellectual theories and vocabulary rather than a deeply thought out proposal that there was a relationship to be drawn between Foucault's archaeology of knowledge and the methods of Brian Simpson. And so, it proved to be. He replied,

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[11] As Christopher Hill said in his introduction to *The World Turned Upside Down*, "History has to be rewritten in every generation, because although the past does not change, the present does; each generation asks new questions of the past and finds new areas of sympathy as it re-lives different aspects of the experiences of its predecessors." *The World Turned Upside Down: Radical Ideas During the English Revolution* (originally published 1975, Penguin 1991).

[12] AWB Simpson *Leading Cases in the Common* Law (Clarendon Press 1995) 10, Julie Novkov, 'Legal Archaeology' (2001) 64(2) Political Research Quarterly 348, 350.

> "Thank you for your intriguing email of the 2nd. I do so wish that it were possible for me to engage with your query, but I have not the faintest memory as to why I suggested this to Brian. I suspect it was a fleeting point made in a conversation about many things rather than something long-considered and responsible."[13]

His reply, as well as the scholarly instinct and ability to directly query the source, so as to avoid a post-hoc explanation of the development of the methodology of legal archaeology, can be ascribed in large part to the historical and legal training and development of the critical scholarly sensibilities appropriate to a candidate for the degree of Doctor of Philosophy. But it also reflects the personal experience of the candidate as a scholar and academic. This is the point of this unconventional foray into the autobiographical in the context of a synthesis of published works for a PhD by publication. In order to assess the scope, method and methodology of the previously published works, historiography, intellectual genealogy, geography and even autobiography must be considered in order to trace the development of the research questions posed, the methods used to answer them and the links amongst the final, resulting works submitted by the candidate for the award of a PhD by publication.

The submitted works, the context of the existing literature and their contribution to the advancement of the research area

The body of work that is the subject of this synthesis consists of three law review articles and one chapter on the subject of the reception of local custom by the central courts in Britain in the eighteenth and nineteenth centuries as either a source of law (England) or source of legal right (Scotland) (hereinafter the 'submitted works'). The local customs at issue in the submitted works concern community land use – that is the legal right of the (fluctuating) inhabitants of a distinct

[13] Email from Peter Fitzpatrick to the author (3 February 2018).

geographical locale to use land in particular ways as a result of long use.

The legal doctrines under consideration in the submitted works and the coherence of the publications submitted

The submitted publications are made up of one article on the English law of custom and a chapter and two articles that concern the Scots law of community servitudes/rights. The following section explains why these two, distinct doctrines from two distinct jurisdictions constitute a single study. Whilst constituting a singular research journey, the candidate has never had occasion to compare and contrast the English law of custom and the Scots law of community servitudes/community rights. What follows is first, a brief explanation of the elements of the relevant doctrines, and secondly, an explanation of how the legal history of the two distinct doctrines form a single two doctrines form a single study.

The English Doctrine of Custom

The legal doctrines under consideration in the submitted works concern the reception at law in the central courts in England and Scotland of community customs of land use in the eighteenth and nineteenth centuries. In England, the legal doctrine under consideration is that of 'custom'. Custom is the legal doctrine through which local use rights over land could be recognised by the central, royal courts of both law and equity as having created to *lex loci*, or local common law. *Lex loci* varied the common law but was not contrary or repugnant to it. In the context of a dispute over the use of land by copyholders or inhabitants where custom was claimed, the court would first determine whether a custom existed as a matter of fact and then go on to determine whether that custom was good custom at law. Where a good custom was found, the royal courts took judicial notice of it as *lex loci*, i.e., the controlling common law of the locality. The court would then apply that law to the dispute before it.

So take for example to the iconic case of *Hall v Nottingham*, which involved a custom of dancing around a Maypole on a village green.[14] Absent a custom to the contrary, the dancing villagers would have been committing trespass by going onto land that they did not own to dance. Once the custom was recognised by the court as *lex loci*, however, had a legal right, under the common law, to go onto the land and dance.

The fact that the court takes judicial notice of the custom highlights that custom or *lex loci* was not created by the common law court; it was recognised by it. The doctrine of judicial notice of custom as local common law originates in England's pluralist legal system. It was the mechanism that the royal courts used to recognise and enforce the law of other jurisdictions – whether manor, city or county or kingdom.

The source of *lex loci* could vary, but the 'customs' that are the subjected of the submitted works are by the praxis of a community. The source of law was the community praxis itself. The court merely acted to recognise the custom asserted as *lex loci*. Alleged customs have to be proved to exist both as a matter of fact and as a matter of law. Proof of fact involved evidence of long use. Proof of custom could be written, for example in the custumals of a manor, and/ or be testified to by older members of the community.

Once shown to have existed in fact, the alleged custom would have to be shown to exist as a matter of law. To be good custom at law, custom must be ancient – that is to have existed beyond the memory of man, the legal date of memory being 1189 by analogy to the writ of right. The antiquity of custom, however, was legally presumed and could only be rebutted by evidence of contrary use. By the nineteenth century, in the courts under study in *Persistence*, it was widely acknowledged that antiquity was a legal fiction. Ultimately, the Prescription Act (1832) did away with the requirement of proof of

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[14] n 25.

use ‘past the memory of man’ for copyhold customs, although it remained in place for the ‘easement-type customs’ that were claimed by communities.

The custom must have been exercised continuously – any significant interruption would indicate that the custom was not *lex loci* at all. Continuous community exercise of rights over land both gave rise to the custom and was evidence that the community recognised the custom and exercised it ‘as of right’.

The custom must be certain. The court took judicial notice of custom as a law that lay without its jurisdiction; therefore, both the substantive nature of the custom, as well as the limited area or jurisdiction to which the *lex* loci applied, must have been certain.

Finally, custom must be reasonable. By definition, custom varied the common law, but at the same time, it must not have conflicted with any fundamental principle of the common law, or, indeed, be contrary to positive law. Doctrine states that the test of reasonableness was applied to the custom as it was exercised at the time and in the context in which it was asserted. The court was not meant to consider the reasonableness of custom’s origins. This allowed the court to refuse to recognise customs that, whilst perhaps reasonable in their origins, were no longer so – either in the contemporary context or in the manner in which they were being exercised.

In *Customs in Common*, Thompson traced the influence of the decision in *Gateward’s Case* (1607)[15], a unanimous decision of the Court of Common Pleas that both established the four modern elements of good custom: antiquity, certainty, continuity and reasonableness and limited the class of persons who could claim a profit à prendre (the right to take something from the soil) by custom. Thompson’s central concern was the impact of *Gateward’s Case* in

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[15] 6 Co. Rep. 59b, 60b, 77 ER 344, 345 (KB 1607).

the eighteenth century and, in particular, the impact on landless cottagers.

A year after the decision in *Gateward's Case* the case of *Tanistry*[16] was heard by the Justices of King's Bench. *Tanistry* was a case that concerned the reception by the common law of the Irish system of inheritance under which the "oldest and most worthy man of the blood and surname" would inherit the estate of the deceased. The question in *Tanistry* was whether the adoption of English common law had abolished this custom or whether the court would take judicial notice of *Tanistry* as *lex loci* or local common law.

The case of *Tanistry* and the role of the common law in the conquest of Ireland is explored at length by Hans Pawlisch.[17] As a type of action, it is the more familiar application of the doctrine of judicial notice. In *Tanistry*, the plaintiffs asked the court to take judicial notice, and decide a case under, foreign, Brehon law. The fact that in *Tanistry* the same doctrine was applied to take judicial notice of the law governing the system of inheritance rights of a conquered country as was applied to judicially recognise the familiar, domestic customary rights of inhabitants sometimes generates confusion.[18] In England, the law of custom, using the same name, with the same doctrinal test, and the same theory of judicial notice was applied to judicially recognise vastly different subject matters.

In Scots law, the two factual situations are dealt with by very distinct doctrines. Rights in the nature of inhabitant customs attached to burghs are litigated as servitudes or community rights, whilst the doctrine of 'custom', the elements of which are the same as in English law, is reserved for the judicial recognition of customs that are 'foreign' to Scots law that are found within the jurisdiction, especially

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[16] (1608) Davis 28, 80 ER 516.

[17] Hans S. Pawlisch, *Sir John Davies and the conquest of Ireland: a study in legal imperialism* (CUP 1985).

[18] Christopher Jessel, *The Law of the Manor* (Wildy, Simmonds and Hill Publishing 2012) at 45-46.

Udal law. The doctrine denominated 'custom' in Scots law is very close to the doctrine of custom found in *Tanistry*. Dr. David Sellar recognises this in his chapter on custom in the *Stair Memorial Encyclopedia*. In his estimation,

> "[t]here is a clear parallel to be drawn between the leading case of *Bruce v Smith* [wherein the Court of Session refused to recognise the pursuer's customary right under the local, applicable, Udal law of Shetland to 1/3 of the proceeds of a whale drive] and the leading *Tanistry Case* in England. In both instances, the 'custom' in dispute derived from a legal order distinct from the common law: Udal law as distinct from Scots common law in the one, and Irish 'Brehon law' as distinct from English common law in the other."[19]

As we shall see, below, the doctrine that is closest by analogy to the doctrine in Scots law through which rights of a community are recognised by passage of time or prescription is that of servitudes. Dr Sellar states that the doctrine of 'Custom' in Scots law,

> "except as synonymous with use rights over a period of time, plays no part in the recognition of particular servitude rights."[20]

Whilst the doctrine of 'custom' in Scots law has nothing to do with servitudes that arise by prescription, as discussed below, servitudes held by incorporated communities on behalf of their inhabitants are analogous to rights that inured to English communities under the English doctrine of custom – custom in the *Gateward's Case* sense of the term:

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[19] David Sellar, 'Custom as a Source of Law' 22 Stair Memorial Encyclopaedia (Edinburgh: The Law Society of Scotland/Butterworths, 1987) paras 356-358, para 388.

[20] ibid para 392.

"usage which obtains the force of law, and is in truth the binding law, within a particular district or at a particular place, of the persons or things which it concerns."[21]

The Scots Law of Servitudes/Community Rights

The communities that created legal rights through praxis or long use in Scotland that are studied in the submitted works are incorporated burghs. By the eighteenth century, Scotland did not have the same, pluralist legal tradition as England. In part, this is because common land – other than that belonging to the Royal Burghs – had been enclosed in 1695.[22] Indeed, under Scots law, the inhabitants of an unincorporated locality in Scotland could not establish rightsquà a community on behalf of its inhabitants;[23] only incorporated burghs could hold use rights on behalf of their inhabitants.

When the Scots courts recognised community customary use rights at law, they did not recognise local common law; rather, praxis gave rise to a legal right recognised at common law, which was held by the burgh and the fluctuating community of burgh inhabitants. Such rights could be exercised over either burgh land or, in some circumstances, on land without the burgh. The doctrine pursuant to which such rights were recognised was the doctrine of servitudes, although from early in the nineteenth century, it was clear that not all the members of the Court of Session agreed that this was doctrinally correct.

The reasons for the diversity in judicial view of the appropriate doctrine to be applied to the community rights of burgh inhabitants varied and to some extent reflected familiarity of both the bench and bar with the English law of custom. Judicial unease was generated by

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[21] Thomas H. Carson, *Prescription and Custom: six lectures* (Sweet and Maxwell, Limited 1907) (quoting Tindal, C.J. Tyson v Smith, 9 Ad. & Ell. 421), 112.

[22] Division of Commonties Act 1695 (c.69) (act that enabled holders of common land to sue for division and take their portion as individual landholders).

[23] They could only claim such rights either as individual feuars of land or as a member of the public. *Harvey v Lindsay* (1853) 15 D 768, 774-6.

the fact that the doctrine of servitudes could not always be easily applied to claims of use rights by burgh inhabitants.

Firstly, the doctrine of servitudes required that a dominant and servient tenement exist, and ultimately the courts would find that only a royal burgh was infeft of land such that it could constitute a dominant tenement. This meant that similar rights held by burghs of barony and regality could not be recognised under the law of servitudes.

Secondly, where the use was one made of burgh land that formed part of the common good, upholding the legal right to use was not a matter of the private law of servitudes but rather the public law of enforcing the magistrates' obligation to protect the common good and deploy the burgh's resources in the interests of the inhabitants.[24] Ultimately, the rights recognised as servitudes would be reconstructed in the mid-nineteenth century as public law community rights. This is discussed further, below.

The doctrine of community servitudes as litigated in the eighteenth and nineteenth centuries as it applied to rights acquired by long use had three requirements. Firstly, as discussed above, servitudes were constituted between tenements. Secondly, where the servitude was created by long use, at least forty years' certain and continuous use must have been proven.[25] The final requirement had to do with the nature of the right claimed. The right had to have been judicially determined to fall within a category of use that the court would recognise could be claimed as a right of servitude. The category of recognised servitudes was not closed.

The submitted works demonstrate that the Scots courts were free to accept or reject alleged community servitudes on the ground that the use was, or was not, one recognised as a servitude at law. In the eighteenth and nineteenth centuries, new uses were added to the

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[24] *Urban Commons: from customary use to community right on Scotland's bleaching greens* (hereinafter 'Urban Commons') 328-330.

[25] Prescription Act 1617.

list of those that the courts would recognise under the doctrine of servitudes. Notably, as discussed at length in the submitted works, bleaching and golfing were recognised as 'new' servitudes by the Court of Session.

Doctrinal Coherence in the Submitted Publications

The submitted works, as a body of work, investigated the judicial reception of rights inuring to communities and the fluctuating inhabitants that lived there that arose through long use. In the English and Scots cases considered in the submitted works, the common factual denominators were that members of communities were seeking to have the central courts recognise that their use of land for particular purposes over a long period of time had created a legal right in the fluctuating inhabitants of the community to use the land for those purposes. In England, long use of land for particular purposes by inhabitants of a distinct, unincorporated locale can be claimed under the doctrine of 'custom'. In Scotland, the analogous doctrine for incorporated communities is that of 'community servitudes' or what came to be known as 'community rights' (hereinafter 'community servitudes/rights').

In English law, common law doctrines through which the royal courts recognised a legal right of the members of a community to use land owned by another include custom and prescription. Inhabitant custom is closely related to the doctrine of prescription.[26] Prescription, however, is personal – it is a doctrine under which a named person or corporate body claims a right to use land based upon a grant (whether real or as a matter of legal fiction) to an actual or juridical person. Custom, on the other hand, is local – it operates over a defined district and inures to, and can be claimed by, an undefined and fluctuating class of individuals that live in that locality.

[26] *Rowles v Mason* (1612) 2 Brownl 192,198, per Coke, CJ, 'Prescription and custom are brothers and ought to have the same age, and reason ought to be the father and congruence the mother, and use the nurse, and time out of memory to fortify them both'.

Despite the fact that the Scots burghs are corporations, the community servitudes/rights examined in the submitted works are more akin to rights arising by custom than prescription because they are, in most cases, alleged to have been created solely through long use. The submitted works are concerned with the recognition by the central courts of community use as the source of law or legal rights. It is the use that created the rule laid before the court for recognition.

Of course depending on the focus of the enquiry – the rights holder, the nature of the right or how the right is alleged to have been created – in some cases the custom/prescription distinction broke down. This is because the 'grant' in prescription cases not only could be, but was sometimes openly acknowledged to be, a fiction. The same community use would give rise to the same right, absent any genuine grant, but depending on the identity of the claimant – village or incorporated town – the claim would be made either by custom or prescription.

Servitudes and rights by prescription, however, had one, fundamental aspect in common; they could, in theory, be discharged by the rights holder. Where there has been a grant (prescription) or there are dominant and servient tenements, there are legal persons who can negotiate and discharge the claimed right. As John Baker has pointed out, in the case of custom, the rights are held by a fluctuating class of persons, and there is no juridical person who can discharge it.[27] In Scotland, the ability to discharge a right held by a royal burgh on behalf of its inhabitants, however, was circumscribed by the by the obligations of the magistrates to protect the 'common good'. This was why in *Dempster* the golf links had to be protected by the magistrates when the land was sold, and in *Magistrates of Kilmarnock v Wilson*

[27] Baker (n 14), "Such rights are in some respects analogous to easements, and were so called, though they were also sometimes called quasi-easements since they were not vested interests in land. But the analogy is misleading. Easements proper are rights capable of being granted to and released by the persons enjoying them, whereas customary rights are generally enjoyed by classes of persons which are continually fluctuating in membership, so that they are incapable of taking a right by grant or extinguishing it by release."

(1776) (*Kilmarnock*), the burgh's land had to be kept available for bleaching linen.[28]

From a doctrinal point of view, the interest in land in English law that is closest to that of the Scots servitude is an easement. Despite the acknowledged common law roots of easements and servitudes and shared legal elements, they are not co-extensive.[29] Moreover, the nature of the rights claimed as 'community servitudes' in the examined Scots law cases were more akin to rights that in England were claimed by prescription or its brother custom than they were easements. Such rights include the right to take water from a well and the right to recreation on the common good.

Whilst the doctrines that are drawn together in the submitted works are both distinct and different, they are analogous. The two doctrines of custom and community servitudes/rights had three central doctrinal features in common. Firstly, the doctrines were used by the courts of the respective jurisdictions to recognise rights that had been acquired through community use of land over a long period of time. In England, the doctrine of custom required that the use had been in existence for 'time immemorial'; in Scotland, the claimant of the right had to demonstrate 40 years' use. Whilst these time periods appear to be vastly different, the antiquity of English custom was a legal presumption and ultimately was recognised to be a legal fiction. In many cases, the accepted testimony to the existence of a custom by an elderly member of the community in both jurisdictions could amount to uses of equal longevity.

Secondly, in both jurisdictions and under both doctrines, a key point of legal contention was the identity of the appropriate claimant. In English law, *Gateward's Case* (1607) held that customs in the nature of a profit à prendre could not be claimed by mere inhabitants of a village or manor under the doctrine of custom. Only a copyholder

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[28] (1776) Hailes 738; *Urban Commons* 330.

[29] AGM Duncan, *Servitudes and Public Rights of Way*, in K. Reid., *The Law of Property in Scotland* (Law Society of Scotland/Butterworths, 1996) para 440,

could claim the right to take something from another's land by custom. Customs in the nature of an easement, however, could be claimed by any of the fluctuating inhabitants of an unincorporated village, manor or other locality. In Scots law, as is discussed in more detail, below, the case of *Home v Young* (1846) (*Eyemouth*)[30] centred upon the same question as that which was decided in *Gateward's Case*: could a landless cottager claim a right of use (in this instance a right to take water from a well) on the basis of community use?

Finally, the doctrines of custom and servitude/community rights demonstrate that whilst community use gave rise to the right that came to be adjudicated before the courts of the respective jurisdictions, neither in the case of custom nor in the case of community servitudes/rights did the law/legal rights where found truly represent law 'from below'. In both English and Scots law, the court had the final say over the nature of the uses that would be approved as having created a legal right that could be claimed by local inhabitants.

Despite similarities in the doctrines and the pleading of the English law of custom as persuasive authority, there were fundamental differences between the law through which customary rights of communities to land were recognised by the courts of the two jurisdictions.

In Scotland, the question of who could claim community use rights as legal rights and under what doctrine was subject to both a great deal of litigation and some doctrinal confusion in the eighteenth and nineteenth centuries. Indeed, in cases where the community was the pursuer, the identity of the pursuer, and therefore the nature of the right claimed, lay at the heart of the iterative nature of the pleadings discussed further below. Cases would begin with one group of pursuers and end up with another. A key reason why *Dempster* was remitted by the House of Lords was that, in Lord Eldon's view, the right was (belatedly) claimed by the incorporated town of St Andrews,

[30] (1846) 9 D 286.

but it had not been argued as such in the case below. In later litigation, a variety of categories of pursuers, capable of claiming the rights under different doctrines, would be gathered before the case would begin. Pursuers would fall away as the theory of the case emerged through a series of interlocutory hearings.

In England, from the early seventeenth century there was a definite doctrine with established legal elements that applied so that courts could recognise community use rights of unincorporated communities over land that arose by long, or prescriptive use as having created local common law. In Scotland, landless inhabitants of burghs of barony could not claim rights of servitude until the reconstruction of the doctrine as 'community rights' in the case of *Eyemouth*, and even after *Eyemouth* inhabitants of unincorporated villages could not claim community rights arising by long use at all quà an inhabitant of a community. They could only claim such rights either as individual feuars of land or as a member of the public.

In England, this was the point of the doctrine of custom. It enabled claims to be made by those who could not prescribe for rights in their own name or in the name of any certain person, in particular, a fluctuating body. This was because incorporeal rights affecting the ownership of land could be enjoyed, under a custom, by persons having no estate or interest in the land itself.

The thesis of this synthesis is that the development of the doctrine in the area of community rights is an iterative process. The emergence of the rule that burghs of barony could not, quà a corporation, hold use rights on behalf and for the benefit of their inhabitants is an example of this iterative process. Indeed, the law of servitudes as it applied to use rights of incorporated communities was mired in doctrinal confusion.

This confusion was in part fomented by decisions of the House of Lords in community servitude/rights cases. In the case of *Dempster*, at the House of Lords, Lord Eldon appeared to decide the case using the English law of custom rather than the Scots law of

servitudes. It was not unusual for the English law lords to take an English law rather than Scots law view of a case before them. In fact, Henry Brougham, who had argued the case for the golfing society, would many years after aver to the fact that their Lordships, and specifically Lord Eldon, would sometimes do this.[31]

In the case of *Jeffrey v Roxburgh*,[32] the House of Lords on appeal overturned the decision of the Court of Session that had found in favour of the burgesses and inhabitants' right to bleach linen on the small island of Ana in the river Tweed. The Court of Session had found in favour of the townspeople because the duke had admitted that he had allowed them to bleach their linen there for 'time immemorial'. The House of Lords gave no reasons for its decision, and three different explanations of the grounds for overturning the decision were provided by legal commentators.[33] The meaning of the case was not resolved for nearly a century.

The variety of views on the bench regarding the appropriate doctrine to apply to community rights, combined with the doctrinal confusion generated not least by the House of Lords, meant that the legal arguments made in community rights litigation were open-textured. In this context, English custom cases were referred to as persuasive authority both by advocates in their memorials and by members of the Court of Session when deciding Scots community servitude/rights cases. At the House of Lords, the Court of Session and in the legal arguments of advocates, the custom doctrine explored in *Persistence* was viewed by contemporaries as directly relevant to the Scots law cases explored in the three remaining submitted works.

By the mid-nineteenth century, however, the Court of Session had rejected the English model of customary rights. Instead, the First Division of the court in the case of *Eyemouth* re-characterised the rights claimed as community rights, which the court then upheld as a

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[31] (25 Nov1835) *Scottish Jurist* 36.

[32] 1 Pat 632.

[33] *Urban Commons* 327.

matter of public law. As the submitted work, *Test Cases* recounts, in the case of *Eyemouth* neither the burgh nor the woman claiming the right, owned land that could constitute a dominant tenement. In a sense, *Eyemouth* was Scotland's *Gateward's Case*. The focus of the *Eyemouth* litigation was that Alice Young, like Robert Smith in *Gateward's Case*, did not own land and therefore could not claim her right as a servitude. In *Eyemouth*, a poor woman was selected and sued by the judicial factor of the burgh of barony so as to vindicate the baron's exclusive use of the well. Unlike G*ateward's Case*, however, which removed rights from the poor and landless, in *Eyemouth*, the First Division re-characterised the rights of Young and the other inhabitants of the burgh as community rights in public law rather than see them disappropriated of their customary right to use a well.

The story of community customary rights in Scotland is one of both community practice and community need in search of a legal doctrine. The difficulties of recognising community rights through the law of servitudes were well recognised by communities, advocates and the judiciary, alike. These difficulties were exposed and wrestled within a series of test cases in the nineteenth century. Whilst the English common law of custom did not provide a ready doctrinal solution to the dilemmas posed by the strictures of the law of servitudes, the similarity of the dilemmas faced by the communities on both sides of the border claiming similar use rights naturally led advocates and judges to look to similar cases decided in England. Courts in both jurisdictions had struggled with the question of who could legally claim use rights over land. In England, the court in *Gateward's Case* significantly narrowed the class of inhabitants that could claim a profit à prendre by custom. A century and a half later, the First Division of Scotland's highest court wrestled with the same dilemma and arrived at a different view.

The Literature on Custom and the Candidate's Contribution to It

The following is a brief survey of the literature on custom both at the time the submitted works were written and subsequently. The submitted works were written and published either prior to, or simultaneously with, the doctrine of custom becoming a renewed focus of scholarship in England, Scotland and the United States.

In the US, a new scholarship of custom was generated by the decisions of US courts to use the English doctrine of custom to recognise customary access to land and to hinder development.[34] The adoption of custom doctrine is highly politicised, as is the scholarship responding to it.[35] This is because doctrines concerning community custom also relate to current legal debates over public trust doctrine in the United States, and the extent to which community customs over public trust land will serve, like custom doctrine in Oregon and Hawaii, to protect local community land use over the interests of developers and wealthy private landowners.

Such scholarship is also, jurisprudentially, a response to the late-twentieth century jurisprudence of the American property law scholars discussed in *Rabbit Massacre*, especially the work of Carol Rose, Greg Alexander and Ralph Ellickson.[36] All three of these

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[34] *Thornton v Hay* 462 P 2d 671 (Oregon 1969). David Bederman, (1996) 'The Curious Resurrection of Custom: Beach Access and Judicial Takings' 96 Columbia Law Review (1996), pp. 13475, David L. Callies, 'Custom and Public Trust: Background Principles to State Property Law', (2000) Environmental Law Reporter 30.

[35] David L. Callies & J. David Breemer (2000) 'The Right to Exclude Others from Private Property: A Fundamental Constitutional Right' 3 Wash. U. J. L. & Pol'y 39. This research was funded by the Pacific Legal Foundation, an organisation that describes itself as 'a group of individuals united in our belief that personal liberty is essential to a thriving and prosperous society. We use bold and innovative strategies to challenge burdensome laws in courts and legislatures across the country, and in the hearts and minds of the American public'. https://pacificlegal.org (accessed 1 Aug 2018).

[36] *Persistence* 125-9.

scholars, albeit from different perspectives, explore the importance of custom and customary rights in the United States, both within the formal legal order (Alexander and Rose) and outside of it (Ellickson). *Rabbit Massacre* applied Carol Rose's doctrine of the 'comedy of the commons' to the saga of the community's attempt to protect the St Andrews golf link both within and without the courtroom. It argues that the public law tradition of legal activism in the US that emerged from civil rights litigation can also serve to protect customary rights of access to land by local communities.

In Scotland, too, common good land has been both rediscovered and politicised, not least by land activist Andy Wightman.[37] Wightman was concerned with the mismanagement of common good land by local authorities. He argues that councils need to be both more transparent and more accountable to the people living within their local areas for their handling of the common good. His work is well grounded in both statute and common law. This body of law has been elucidated by the doctrinal work of Andrew Ferguson, in *Common Good Law.*[38] The nineteenth-century law of community servitudes/rights as explored in the candidate's work is an important foundation for both the modern law and the contemporary politics concerning the legal obligations of local authorities and the management of common good land.

Another jurisprudential line of scholarship that has developed since the publication of the submitted works focuses on custom as a source of law generally. David Bederman's *Custom as a Source of Law* is an example of such scholarship. Bederman briefly explores the concept of 'custom' as a source of law from a variety of disciplinary perspectives before examining it as a source of law in the context of different areas of domestic and international law. The work brings

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[37] Andy Wightman and James Perman, *Common Good Land in Scotland: A review and Critique* (Caledonia Centre for Social Development, Commonweal Working Paper No. 5), http://www.andywightman.com/docs/commongood_v3.pdf (accessed 1 August 2018).

[38] Andrew Ferguson *Common Good Land* (Avizandum 2006).

together disparate rules from disparate bodies of law under the single rubric of 'custom' in order to examine custom as a source of law.

Bederman's work differs from the approach of the submitted works and that of other, contemporary legal historians because it assumes that 'custom' can be treated as a uniform source of law. Most scholars of custom in English law recognise that the custom is used in multifarious ways in English law and jurisprudence and begin their work by carefully defining what they mean by 'custom'.[39]

Amanda Perreau- Saussine and James Bernard's introduction to their collection of essays *The Nature of Customary Law: Legal, Historical and Philosophical Perspectives*,[40] highlights the tendency of legal historians to focus on the specificity of the past when asked to discuss 'custom'. One example of this in the same volume is Professor Michael Lobban's essay 'Custom, common law reasoning and the law of nations in the nineteenth century'. His essay is a study of how English common law courts in the nineteenth century engaged with and sometimes incorporated the law of nations. His chapter examines in detail how courts incorporated or dismissed arguments based upon the law of nations into the common law and the effect of that incorporation on later doctrinal developments.[41] This approach – to address the nature of 'custom' through the examination of its reception by common law courts – is similar to that of the candidate's submitted works and eschews totalising conclusions about the nature and role of custom in law more generally.

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[39] See, eg, Thomas Carson T, *Prescription and Custom: six lectures* (Sweet and Maxwell 1907); *Persistence* 183; Lobban n 41, 257-33.

[40] Amanda Perreau- Saussine and James Bernard, The character of customary law: an introduction' in Perreau-Saussine A &. Murphy JB (eds), *The Nature of Customary Law*: *Legal, Historical and Philosophical Perspectives* (Cambridge 2007) 2.

[41] Michael J Lobban 'Custom, common law reasoning and the law of nations in the nineteenth century' in Perreau-Saussine A &. Murphy JB (eds), *The Nature of Customary Law*: *Legal, Historical and Philosophical Perspectives* (Cambridge 2007) 256.

The genesis of the submitted works in the 1990s was the work of historians, not lawyers. As detailed below, the submitted works began with the chapter by Edward Thompson in *Customs in Common*. The law of customary rights and its impact on communities was the subject of essays by both Edward Thompson, in English law, and Eric Hobsbawm, in Scots law.[42] Whilst these works, and particularly that of Thompson, discuss statutes, case law and legal doctrine, they are works of social, not legal history. The primary concern of these historians was the impact of custom on the lives of those subject to the law and in particular the poorer members of society. These social historians changed the scholarly focus of the subject of the reception of custom.

Professor Rab Houston, in his article for the social history journal *Past and Present* 'Custom in Context: medieval and Early Modern Scotland and England', brought together legal and historical scholarship in order to explore and compare the role of custom in legal and social relations in England and Scotland in the early modern period. His work explicitly adopted and built upon the historical, socio-legal approach of Thompson and Hobsbawm.[43]

Before the works of these social historians, studies of custom were mainly the exclusive purview of legal scholars in works of jurisprudence and historical jurisprudence. The focus of these works was custom as a source of law in the legal systems of England and Scotland. In this vein of scholarship in England, the medieval doctrine of custom has had recent, historical and jurisprudential treatment by Neil Duxbury[44] and Sir John Baker.[45]

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[42] EJ 'Hobsbawm Scottish Reformers of the Eighteenth Century and Capitalist Agriculture', in E.J. Hobsbawm et al., eds, *Peasants in History: essays in honour of Daniel Thorner* (Oxford University Press, 1980), 1.

[43] Rab Houston, 'Custom in Context: medieval and Early Modern Scotland and England' (2011) 211 *Past and Present* 35-76, 35-8.

[44] Neil Duxbury 'Custom as law in English law' (2017) 76(2) Cambridge Law Journal 337.

The most important work of jurisprudence for scholars of custom, especially in the modern period, is Allen's *Law in the Making*.[46] As is evidenced in the footnotes in *Persistence,* his is the most detailed study of custom as a source of English law. Theodore Plucknett's *A Concise History of the Common Law* was also an important source because of its historical perspective on the development of the doctrine of custom, particularly in the early modern period.[47] As discussed, below, the doctrinal elements of applied by the central courts to recognise local custom were established in the early seventeenth century in the cases *Gateward's Case* and *Tanistry*. Thompson's essay discusses *Gateward's Case* and analyses the application of this precedent to the assertion of customary rights by communities, and especially landless cottagers, in the eighteenth century. Plucknett provides an important legal historical perspective on the early modern delineation of the elements of custom that accords with and can be read alongside, the work of Thompson.[48] Frederick Pollock's *A First Book of Jurisprudence*[49] also provided an historically and jurisprudentially informed survey of custom doctrine.

The submitted works both reflected the state of the literature and scholarly interests at the time they were published and contributed to that literature. The works drew upon works of jurisprudence, social history and contemporary theories of land law to provide a foundation

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[45] John Baker, "Prescriptive Customs in English Law, 1300- 1800" in J.H. Dondorp, D.J. Ibbetson & E.J.H. Schrage (eds), *Prescription and Limitation* (Berlin, forthcoming). The author would like to thank Professor Baker for sharing this work before publication.

[46] Carleton Kemp Allen, *Law in the Making* (1st ed Clarendon Press 1927); see eg, the PhD thesis of Henry E Salt, '*The place of customary rights in English law: with special reference to Jura in re aliena and to freehold*' (Fellowship Thesis, University of Cambridge 1924?).

[47] Theodore FT Plucknett, *A Concise History of the Common Law* (5th edn Butterworth 1956).

[48] *Persistence* 191.

[49] Frederick Pollock, *A First Book of Jurisprudence* (5th edn 1923)

and context for the candidate's own doctrinal and historical work. As discussed below in the section on methodology, the submitted works are firmly rooted in the traditions and methods of legal history. To this extent, they both depart from and broaden the existing literature. The next two sub-sections of this synthesis discuss the submitted works and their contribution to the literature in more detail.

Custom in English Law in the Nineteenth Century

The starting point for the submitted works is the seminal chapter by Edward Thompson in his collection of essays *Customs in Common* entitled "Custom, Law and Common Right",[50] which was published whilst the candidate was studying for her J.D. at Cornell Law School in 1991. For legal historians, Thompson is the most renowned of the first generation of English Marxist social historians because of his engagement with law, most notably in the monograph *Whigs and Hunters*.[51] As one of the triumvirate of English Marxist historians – the others being Christopher Hill and Eric Hobsbawm – Thompson influenced a generation of historians and historiography in the 1970s, 1980s and 1990s.

Thompson begins his chapter,

> "At the interface between law and agrarian practice we find custom. Custom itself is the interface, since it may be considered both as praxis and as law".[52]

This opening line is founded upon the legal theory of custom in English law – that custom is *lex loci*, judicial notice of which is taken by the common law courts so long as it is proved to exist in fact and is determined to be 'good custom' at law. Because the origins of customary rules lay in the praxis of communities, Thompson viewed

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[50] EP Thompson, *Customs in Common* (first published 1991, Penguin Books 1993) 97-184.

[51] EP Thompson, *Whigs and hunters: The origins of the Black Act* (Pantheon Books 1975).

[52] Thompson (n 12) 97.

custom as ‘law from below’, i.e., law, the source of which, was the people themselves.

A key legal element of the recognition of custom at common law is that the custom must be deemed by the court to be ‘reasonable’. Thompson tells us:

> "‘Reasonable’ and ‘unreasonable’ may be ‘legal terms of art’ but on a very brief view of case law they were gates through which a large flock of other considerations might come baaing and grunting onto the fields of the common law."[53]

Thompson’s use of the term ‘legal terms of art’ in opposition to ‘other considerations’ signals that *Customs in Common* continues his polemic against those lawyers and scholars that posit that the meaning of a legal terms of art are both fixed and determined solely with reference to ‘law’, defined as an acontextual and self-referential body of knowledge. Professor Simpson reminds us in his introduction to *Leading Cases* that Thompson called ‘the greatest of all legal fictions’ the lawyer’s belief that ‘the law itself evolves, from case to case, by its own impartial logic, true only to its own integrity, unswayed by expedient considerations’.[54] Thompson argued that no legal terms of art in the black letter lawyer’s sense exist. The submitted works share this perspective that the black letter model of law does not reflect the reality of law, and that legal history, in particular, demonstrates this.

Thompson said that the interface of law and agrarian praxis is custom. The submitted works explore this interface. The thesis of these works is that the interface is not the law of ‘custom’, but rather custom litigation. This is because whilst customary rights or uses are created ‘in fact’ by the praxis of a community, ultimately such rights, once contested, are determined to be law or a legal right by courts. The submitted works explore this interface in order to investigate how the reception of customary rights and uses are mediated by legal

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[53] ibid 129-30.

[54] Thompson (n 13) 250, *quoted in Leading Cases* (n 10) 10.

doctrine and the judiciary, legal process and legal procedure, the community of legal professionals and extra-legal events. The central argument that underlies both the submitted works and the methodology employed to produce them is that the reception of customary rights is a process not an event.

The first submitted work is *Persistence*.[55] This work is in part a response to Thompson's chapter in Customs in Common, as well as a study that builds upon that done by Thompson on custom in the eighteenth century. In the style of US law reviews, before launching into the central subject of the article, the reception of customary rights in English law in the nineteenth century, the article introduces the doctrine of custom. This introduction is based upon treatises, such as St Germain's *Doctor and Student*, *Coke on Littleton* and *Blackstone's Commentaries*. Other secondary sources include twentieth-century jurisprudential texts such as Allen's *Law in the Making* and Plucknett's *A Concise History of the Common Law*. Books written for the profession were also used, for example Thomas Carson's *Prescription and Custom* and Adkin's *Copyhold and Other Land Tenures of England,* both of which were published in the early twentieth century.

These works, together with examples from case law, contributed to the article's description of the doctrine of custom, its elements, how it operated and its historical development. This introduction to the law of custom would become a fixture in the American legal literature because it was published the year of the Oregon Supreme Court's decision in *Stevens v Cannon Beach*.[56] In *Cannon Beach*, the court dismissed the plaintiffs' claim that the public easement over Oregon's dry sand beaches established by custom (in the English doctrinal sense) and found in the case *State ex rel.*

[55] 79 Cornell Law Review 183-218 (1993).

[56] 854 P 2d 449, *cert denied*, 114 S. Ct. 1332 (1994). 462 P 2d 671 (Oregon 1969).

Thornton v Hay[57] constituted a 'taking of property'. The court held that the customary right of the public to the dry sand beach on the coastline of Oregon constituted a 'background principle' of state law. In short, the plaintiffs did not suffer a 'taking' of property because the customary right of the public existed at the time the plaintiffs took ownership of the property.

Persistence examines the jurisprudence of custom in nineteenth-century English courts. It argues that the courts took judicial notice of custom as local common law in so far as the custom claimed was law-like in form in nineteenth-century terms.

The primary focus of the work was the reception of custom by judicial elites. Custom litigation, however, is the interface between the asserted land rights of landowners and communities, and the law or legal process, and so cannot by definition ignore the social and historical context of the rights being asserted, adjudicated and decided. The judiciary was being asked to recognise contemporary community rights over land as 'reasonable'. The study of custom cases carried out in *Persistence* investigated the changing nature of judicial responses to the assertion of land use rights by landowners and communities, which themselves changed over time.

The study of the English doctrine of custom is particularly illuminating in this regard because the legal elements of custom doctrine had remained stable since the early seventeenth century when they were laid down in the twin cases of *Gateward's Case*[58] and *Tanistry*.[59] *Persistence* investigated the judicial reception of customary rights in the nineteenth century under the stable elements of the doctrine of custom in order to assess whether, and in what ways, judicial attitudes to 'custom' as a source of law in the context of the regulation of local land use changed over time.

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[57] 462 P 2d 671 (Oregon 1969).

[58] (1607) 6 Co Rep 59

[59] (1608) Dav 28.

Persistence concludes that there are significant differences between the reception of the custom by the courts in the eighteenth century, at the time of the second enclosure movement, and in the nineteenth century. The article argues that nineteenth-century courts, applying the same doctrinal elements as those used in the eighteenth-century judgments discussed by Thompson, both upheld community assertions of customary rights more often and did so on different judicial policy grounds.

The article demonstrates how the nineteenth-century judiciary, in a turn-about from the attitude of eighteenth-century courts, appears to strive to uphold customs that they find are in the interest of the community alleging them.[60] They used a variety of devices to do so, including taking advantage of procedural rules, employing legal fictions and applying the terms of the Prescription Act 1832 in a manner favourable to those claiming custom.[61]

Another contribution of *Persistence* is to demonstrate how an increasingly positivist judiciary focused upon the good origins of custom rather than the validity of custom as presently exercised. *Persistence* shows that in the nineteenth century, courts looked to the supposed reasonable origins of custom in order to uphold it. In other words, custom was not treated as law resulting from mere praxis of the community. Customs' origins, rather like other forms of modern law, were said to originate either like public law in the lord's court[62] or as in private law in a contract between a lord and his copyholders.[63] In either case, the reasonableness of the customs alleged would depend upon them being customs to which the court believed the homage or copyholders would have consented.[64] Reasonableness

[60] *Persistence* 209.

[61] *Persistence* 205. See, e.g., the comments of Lord Justice Brett in *Earl De La Warr v Miles* [1881] 17 Ch D 535, 595 (CA).

[62] *Persistence* 208; *Arlett v Ellis* [1827] 7 B. & C. 346, 108 Eng. Rep. 752 (KB).

[63] *Persistence* 207; *Salisbury v Gladstone* [1861] 9 HL Cas 692, 11 Eng. Rep. 900.

[64] *Persistence* 208.

meant nothing more than that the custom was genuinely a result of agreement rather than having arisen by either "accident or indulgence". Even the lawful origins of inhabitant custom were required to be shown. Where customs inured to the benefit of the community, their legal origins were viewed by the judiciary to be more probable.[65] In this way, customs that favoured the interests of a lord over the copyholders, community or public at large – customs the nature of which had been upheld in the eighteenth century – were held by courts to be unreasonable.[66]

This focus on the origins of custom, however, when applied through the legal element of certainty, could operate to disallow alleged community customs when the custom did not comport with recognised jurisdictional boundaries. Where customs were not 'properly laid' in a single manor or could not have originated in the grant of a single lord, they were disallowed.[67]

Persistence goes on to argue that positivism was not the only nineteenth-century intellectual concept that is evident through a close reading of the case law. The article posits that the nineteenth-century judiciary upheld custom on the grounds of its utility – that is, good custom served the interests of the many over the few. This is why, it is argued, that unlike the case law of the eighteenth century, nineteenth-century cases evidence a refusal to accept as reasonable customs alleged by individual lords of the manor that operate to the detriment of the wider community. Even where the judge believed that the local custom would deprive the owner of the beneficial use and enjoyment of his land, 'the benefit and advantage accruing to' the inhabitants were held to 'outweigh the injury and disadvantage arising

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[65] *Persistence* 216.

[66] *Cf Bateson v Green* 5 TR 411, 101 Eng Rep 230 (KB 1793) and *Betts v Thompson* 6 LR-Ch App 732 (1871).

[67] *Persistence* 213; *Sowerby v Coleman* 2 LR-Ex 96 (1867).

therefrom to the owner of the land'.[68] Indeed by the early twentieth century, the fact that a custom benefitted the community was held to be proof of its 'lawful commencement'.[69] The article concludes that

> "the paradox of the nineteenth century was that a distinctly modern, positivist judiciary upheld custom on the grounds of its utility".[70]

The contribution of *Persistence* to the literature of custom is to show how the judicial reception of claims of custom by English courts in the nineteenth century differed markedly from that demonstrated in similar cases litigated in the eighteenth century. *Persistence* demonstrated that nineteenth-century courts viewed 'custom' as a form of law that in order to be deemed reasonable should benefit the community – be they inhabitants or copyholders. Alleged customs that benefitted a single fee holder to the detriment of the community would not be upheld in law as reasonable. Custom would only be recognised as *lex loci* to the extent it could be shown to benefit the community. The article argues this reflected a judicial concern for the utility of custom.

The contribution of *Persistence* to the literature is that it provides an account drawn from a close reading of reported English custom cases in the nineteenth century. That account summarises the approaches taken by the central courts to the reception of *lex loci* in the nineteenth century. The article then goes on to relate those findings to nineteenth-century jurisprudence more generally and in particular, the rise of utilitarianism and legal positivism in legal and jurisprudential thought.

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[68] *Hall v Nottingham* [1876] 33 LTR (Ex D) 697, 699; Persistence 203. Carol Rose cites *Hall* in her essay 'The Comedy of the Commons: Custom, Commerce and Inherently Public Property' (1986) 53 U CHI L REV 711 as an archetypal example of a 'comedy of the commons'. It was one of her favourite cases, *see* Robert C Ellickson, 'The Inevitable Trend toward Universally Recognizable Signals of Property Claims: An Essay for Carol Rose' (2011) 19 Wm & Mary Bill Rts. J 1015, 1019.

[69] *Persistence* 204

[70] *Persistence* 206-7.

The Reception of Community Rights Arising by Prescription in Scots Law

Dempster v Cleghorn (1813) reads like an English custom case, complete with commons riot to take back the community's customary rights but was from the wrong jurisdiction to be included in *Persistence.* Scotland, particularly before the wholesale digitisation of resources, as a mixed jurisdiction had significant research advantages for the legal historian compared to England because it is a jurisdiction of written pleadings that are helpfully gathered together in collections of Session Papers held by the Advocates and Signet Library. The Session Papers, together with a wealth of other primary resources available on the case of Dempster, led to the article *The Great Rabbit Massacre – A "Comedy of the Commons"? Custom, community and rights of public access to the links of St Andrews* (hereinafter '*Rabbit Massacre*') and the other submitted works on Scots law

The primary research for *Rabbit Massacre* began with the pleadings held by the NRS and the Session Papers held by the Advocates' Library. These led on to research in local archives, where more pleadings and lawyers' letters were held. The British Golf Museum in St Andrews provided specialist secondary sources, as well as the minute book of the club, which showed that the litigation had galvanised the club into more frequent meetings (if not enough meetings to always meet filing deadlines).

This primary research was carried out in the context of the social history of commons riots[71] and US theoretical literature on commons and common land. *Rabbit Massacre* argued that the litigation to preserve the golf links of St Andrews provided a unique example of Carol Rose's 'Comedy of the Commons' – a town green on which not merely the community but the public at large could play.

[71] D. Hay, "Poaching and Game Laws on Cannock Chase", in ed. D. Hay, P. Linebaugh, J. Rule, E.P. Thompson, and C. Winslow *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England* (Pantheon Books 1975) 225.

The article contributed to the literature by introducing American property law theory to a British audience and by applying American legal theory to a case study from Scots law – one where there was a significant amount of primary historical material available. The application of the theory was made possible by a thorough study of the wealth of available primary and secondary materials in the mode of Professor Brian Simpson's legal archaeology. The exercise in legal archaeology came first, and the application of Carol Rose's legal theory later when the case appeared to be an apposite case study.

The conclusion of the article highlights the role that the local community played in mediating the preservation of the common land and argues that the litigation itself was arguably comedic. The litigation galvanised the golf club to protect the links and to raise money from the international golfing community in order to do so.

The article concludes with a discussion of the highly contested US state decision in *State ex rel. Thornton v Hay*, in which a customary right was declared over dry-sand beach the length of the state coastline so as to prevent the development of such land by private landowners.[72] The article argues that such declarations stretch the English doctrine of custom to its breaking point and are ultimately unnecessary so long as there are affordable procedures to allow communities to testify to their local use rights. Indeed, the conclusion goes further – arguing that the protection of community and public resources requires some form of guardianship in the absence of, or indeed from the predations of, local government and that litigation over local use rights can create the organisations that will perform that role.

The contribution of *Rabbit Massacre* was the application of American legal theory to a Scots law example – one which was arguably more appropriate than Rose's favourite town green example from English law, *Hall v Nottingham*.[73] The article also contributed

[72] n 33.

[73] n 30.

some thoughts on the ongoing controversy regarding the use of custom in American state law. Finally, its argument that commons litigation itself can be 'comedic' contributes a public law perspective regarding litigation as a community building exercise that can lead to the long-term protection of resources to the jurisprudence of common land.

Researching and writing *Great Rabbit Massacre* highlighted the doctrinal work that needed to be conducted on the subject of what Sir John Rankine, Professor of Scots Law at the University of Edinburgh 1888-1922, termed "customary use of municipal lands".[74] As he points out, such rights are discussed in the context of servitudes but in his view

> "In the cases which belong to this category, the Court is engaged not in judging a public right in private property, but in controlling the administration of public officials."

It is precisely this fact – that the vindication of customary rights over municipal lands involved questions of both public and private law – that led to a gap in the literature.[75] Another reason for this gap is that such rights, before being recognised as public law rights, were litigated as servitudes, a category into which the rights did not comfortably fit. From the early nineteenth century in cases such as *Dempster v. Cleghorn* and *Burntisland*[76] judges were querying

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[74] John Rankine, A Treatise on the Rights and Burdens Incident to the Ownership of Lands and Other Heritages in Scotland (W Green 1909).

[75] George L Gretton reviewing Andy Wightman The Poor had no Lawyers: Who owns Scotland and how they got it (2011) Edin L Rev 329, 330, "Reading the present book reminded me that, even for land law, there are dark hollows that would benefit from the flares of academic research. How much do we really know about commonties? About common good land? And so on. There has indeed been some useful recent work. Andrew Ferguson's *Common Good Law* (2006) comes to mind, as does Andrea Loux Jarman's "Customary Rights in Scots Law: Test Cases on Access to Land in the Nineteenth Century" (2007) 28 Journal of Legal History 207. But more is needed. Perhaps one of the hurdles is that some of these areas belong to public as much as, or more than, to private law. For the public lawyers they smack too much of property law, and to the property lawyers they smack too much of public law."

[76] Reported in the Lord Ordinary's Note in *Home v Young* (1846) 9 D. 286, 296.

whether the rights being claimed by burgh inhabitants belonged to the category of servitudes at all.[77] The decision of *Dempster*, itself, never found a servitude to kill rabbits on the golf course – the court found a custom to do so.[78]

The cases that are discussed in and *Customary Rights in Scots Law: Access to Land in the Nineteenth Century* (hereinafter '*Test Cases'*) appear most often in textbooks and treatises as some form of miscellaneous right or servitude.[79] Neither their history nor their doctrine had been explored in detail in the literature. The most important contribution to the literature of these submitted works is the detailed examination of the doctrine of community rights in the context of the community uses they were protecting and the judges who were adjudicating them.

Urban Commons examines cases concerning access to land to bleach linen. The article traces the development of a community right to bleach in Scotland from the early eighteenth century in *Falkland v Carmichael*[80], where a plurality of the judges held that bleaching could not be claimed as a servitude, to the decision in *Eyemouth*,[81] which removed the question of community rights to bleach from the category of servitudes altogether and upheld the community's right to bleach right as a matter of community right, a right in public law.

The contribution of *Urban Commons* is to carefully trace the complex doctrinal development of the right of local inhabitants to bleach linen, whether as a servitude or as a community right. It is not a straightforward tale. The article explored the complexities of doctrinal development by examining varying judicial explanations of

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[77] *Test Cases* 214.

[78] *Dempster* v *Cleghorn* (1813) 2 Dow 40, 45 & 64.

[79] K. Reid., The Law of Property in Scotland (Law Society of Scotland/Butterworths, 1996), para 491.

[80] (1708) M. 1096.

[81] (1846) 9 D 286.

the meaning of cases in the context of the developing doctrine, as well as those of reporters, and contemporary legal commentators such Mark Napier and Baron Hume.[82]

Using the methodological approach of what would become known as legal archaeology that the candidate had first used in *Rabbit Massacre* (discussed below), the legal strategy of the case of *Home* was uncovered, as was the legal advice provided to the judicial factor of the burgh not to bring an action in the context of uncertain facts and law.[83] This context highlighted the nature of *Home* as a test case, a fact that was explored in greater detail in *Test Cases*. The final contribution of *Urban Commons* were the reflections contained in its conclusion on the work of Edward Thompson and Eric Hobsbawm.[84] It argued that custom cases reveal that conducting a simple class analysis in order to understand the judicial decisions fails to illuminate.

The final submitted work is *Test Cases*. This article continues the story of the doctrinal development of community rights in Scots law and focuses on the test case nature of *Home* and the significance of that decision for the test case of *Dyce v Hay.*

Test Cases began with an exploration of Scotland's burghs and the doctrines through which the uses of land by burgh inhabitants could be vindicated through legal action. The article reviews the complex doctrinal developments in the law regarding the recognition of burgh community use rights and argues that the uncertain state of the law made the area one ripe for test cases. One of the most important contributions of this article was its reconstruction of the process by which the doctrine which applied to community use rights

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[82] G. Campbell H. Paton, ed., *Baron David Hume's Lectures, 1786–1822* (vol 3 15 Stair Society 1952); Mark Napier *Commentaries on the Law of Prescription in Scotland* (Edinburgh 1854); *Urban Commons* 327.

[83] ibid 334.

[84] E.J. Hobsbawm, 'Scottish Reformers of the Eighteenth Century and Capitalist Agriculture', in E.J. Hobsbawm et al., eds, *Peasants in History: essays in honour of Daniel Thorner* (Calcutta, 1980), 1–29.

and developed and the historical context in which that development occurred.

The article highlights the highly politicised nature of the rights at issue in community servitude/community rights cases and demonstrates how, in the context of an open-textured doctrine, judges were free to come to decisions that reflected their personal judicial values. The article points to the importance of the Edinburgh Whig lawyers, who as politicians, lawyers and ultimately judges argued for broader rights of access to the countryside. It argues that the decision in *Dyce v Hay* represented a judicial 'conservative backlash' against the expansion of the recognition of community and public rights of access land.

Beyond the elucidation of the doctrinal development of community servitudes/community rights, the most significant contribution of *Test Cases* is to identify the test-case nature of the nineteenth-century litigation and the political context in which those test cases were decided. Ultimately, understanding the context in cases are brought and judicial decisions taken in a complex area of doctrine can assist the contemporary legal academic in the task of attempting to explicate current doctrine, not least by accounting for the confusing and sometimes irreconcilable state of that doctrine.[85]

The method and methodology of the submitted works

The origins of the submitted works lie in the work of the social historian E.P. Thompson and other social histories, but they are works of legal history. The focus of the works is the reception of community uses by the central courts of England and Scotland, and the submitted works explore how custom was mediated by the legal process. As

[85] Douglas J Cusine and Roderick R.M. Paisley, *Servitudes and Rights of Way* (W. Green 1998) para 1.14.

such, they are less studies of customary rights as ‘law from below’ than of custom as mediated by lawyers and judges, ‘above’.[86]

Whilst the source of the law or legal right arising from custom in many cases will be community praxis, the authority to declare custom ‘law’ or a ‘legal right’ lies solely with the court. Thus the study of custom sheds light on the changing nature of the judiciary’s response to assertions of community rights to land. It is the thesis of this synthesis that just as the creation of a custom or community right is an iterative process of community use, so too is the process by which courts recognise that such rights have given rise to legal rights held by the community’s inhabitants. The recognition of custom is not an event, but a process. The submitted works examine that process and how it changes over time, using the sources available to the candidate at the time of writing,

Method and methodology in legal history are to a large extent determined by the available sources. Methodologically, all of the articles involved a detailed, doctrinal analysis of the published court decisions and how those decisions change over time. The study in *Persistence* is, by reason of the circumstances in which it was written (whilst the candidate was at Cornell Law School) almost solely limited to published sources,[87] taken together with both contemporary and more modern secondary legal sources.

The thesis of *Persistence* is founded upon the nature of its sources – that is, that through a close reading of the published case reports, the candidate observed changes over time in the judicial reception of custom. Such a close reading employed the methods of

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[86] With thanks for this insight to Preston King, a fellow historian from Lancaster University, who on my arrival in England made extensive notes on *Persistence*. The most significant of these said that the introduction to the article, which said that custom represented “law from below” was obviated by the thesis and methodology of the article itself.

[87] With the exception of the records held by the House of Lords Record Office concerning the Prescription Act. The candidate consulted them when in England to interview for a post at Lancaster University.

traditional doctrinal analysis to assess the judicial application of the elements of custom doctrine over time.

In English law, the legal elements of the doctrine remained static from the early seventeenth century when they were established in *Gateward's Case* and the companion case of *Tanistry*. Thus by studying the interpretation and application of these static elements over time, both the changing standards of the judiciary charged with recognising legally 'good' custom, and the judiciary's changing attitude towards such claims, could be assessed. In the article *Persistence*, the candidate went further and attempted to link the changing judicial attitude, interpretation and application of doctrine to asserted claims of local customary rights to broader intellectual developments in 19th-century England.

For example, custom's origins are meant to be beyond the memory of man and the reasonableness of custom is meant to be at the time the custom is asserted.[88] In this way, customs that are no longer useful can be disposed of by the courts by failing to recognise them. Absent an Act of Parliament, the point at which a custom is litigated is the only opportunity to end or legally disallow a custom that, whilst beneficial in its inception, has become burdensome or 'actually injurious to the public interests'.[89] As discussed above, once a custom is recognised by the court, it cannot be discharged because there is no juridical person to do so.[90] A close doctrinal reading of custom cases over time, however, demonstrates that by the nineteenth century, the courts look to the origins of customs to recognise them or refuse to do so. The courts even create legal fictions around those origins upon which the judges then rely to demonstrate that a custom was or was not reasonable and could or could not be recognised by the court.

The decisions and reasoning in cases such as *Arlett v Ellis*[91]

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[88] *Persistence* 213-14.

[89] *Mercer v Denne* [19041 2 Ch 534 (Farwell, J), *aff'd* [1905] 2 Ch. 538 (CA).

[90] n 58.

[91] *Arlett v Ellis* [1827] 7 B. & C. 346, 108 Eng. Rep. 752 (KB.

and *Salisbury v Gladstone*[92] highlight not only a change in the interpretation and application of doctrine between the eighteenth and nineteenth centuries but also a change in attitude of the judiciary to the reception of custom. The cases detail the legal reasoning employed by the judges to justify the change in approach. The identification of the doctrinal change using traditional methods of legal analysis enabled the candidate both to identify trends in the case law and hypothesise why those trends existed. In *Persistence*, it is argued that the judiciary's focus on the good origins of custom reflects the growth of positivism in nineteenth-century law.[93]

This hypothesis was supported by carrying out a similar doctrinal exercise tracing the doctrinal element of certainty as applied in published decisions. The certainty of customs became an increasingly important factor in the nineteenth century when courts recognised or refused to recognise customs. The conclusion of *Persistence* was that whatever the lived experience of custom, inhabitant customs that came to be recognised by nineteenth-century courts were those customs that were most law-like.[94]

The method employed to reach the conclusions in *Persistence* was that which Sir John Baker discusses in his chapter, *Reflections on 'doing' legal history*.[95] It is no accident that the method employed by the candidate in central New York in the 1990s is similar to that employed by Professor Baker. Professor David Millon advised the candidate for an essay on custom that ultimately led to the published research. He had attended Professor Baker's lectures at Harvard and spent time at Cambridge University, where he attended Professor

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[92] *Salisbury v Gladstone* [1861] 9 HL Cas 692, 11 Eng. Rep. 900.

[93] *Persistence* 202.

[94] *Persistence* 213.

[95] n 7.

Milsom's seminars and had worked informally with Professor Baker.[96]

In an era before legal history had had its 'methodological moment', legal historical method was transmitted through formal and informal research supervision.[97] Professor Baker's method was no doubt employed by many legal historians and continues to be so today. This is why, perhaps, Sir John's chapter appears at the beginning of *Making Legal History: Approaches and Methodologies*. To begin with, his method not only recognises his pre-eminence in the field of legal history, but also that his method is the starting point, and for many scholars still the end point, of much of the legal history produced today.

The candidate's method for the production of *Persistence* and, to a significant extent, all of the submitted works, was the method that Professor Baker says is closest to his own, which is "to delve into the available sources first and see what kinds of question they raise or might answer".[98] The article, *Persistence*, began with the candidate's vague aim of learning something about custom in English law. Having quickly perused the cases cited by Thompson, which even as first glance evidenced the attitude towards both lords and inhabitants that Thompson detailed in *Customs in Common*, the candidate began by reading everything that could be located about custom in English law – whatever the period. Alongside the secondary literature, which included textbooks, speeches delivered at the Inns of Court and contemporary chapters and journal articles in both law and history, all of the cases found in the digest, *Halsbury's Laws of England*, were read and digested and footnotes were followed to further reported

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[96] Email from Professor David Millon to the author (21 January 2018); email from Professor John Baker to the author (20 January 2018). Professor Baker was Professor Toby Milsom's student.

[97] Markus D Dubber, *Legal History as Legal Scholarship: Doctrinalism, Interdisciplinarity, and Critical Analysis of Law* (Oxford Handbook of Historical Legal Research 2016).

[98] (n 7) 7.

cases. This process required some sifting – copyhold customs from customs in the nature of easements, customs about land use from customs about inheritance and trade usages. From this reading, the candidate was able to identify different categories of custom, which were not always clearly distinguished in sources such as the digests and the emergence of a doctrinal focus to the study of the judicial reception of custom in the nineteenth century.

In the end, Baker tells us:

> "The historian, like the lawyer, has to find something above and beyond the sources – a story, a changing institution, or an evolving idea. . . We must have stored in the backs of our minds numerous questions arising from our reading of the secondary literature, from our knowledge of what went on in other periods and places, and above all from the sources themselves. As we uncover more evidence and try to sift out what is useful, we are simultaneously relating it to our older questions and formulating new ones, until now and again we see enough light to propose some answers. We never produce final answers, but we help to take the general understanding forward. It is a collective exercise."[99]

This was the method proposed by Professor Millon and that was used to write *Persistence*. The method employed in writing the final article was to engage traditional doctrinal analysis, alongside historical and contemporary secondary sources, in order to identify a pattern of a change in the interpretation and application of the stable doctrinal elements of custom over time. Unlike a traditional black letter doctrinal analysis, the study of custom doctrine was carried out in light of the historical and jurisprudential context in which it was interpreted and applied. This background knowledge of context was formed by secondary legal, jurisprudential and historical texts.[100] The candidate is a trained historian and applied historical method to the

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[99] Baker at 16.

[100] Most are cited in the footnotes of *Persistence*, but others, such as Martin Wiener's, *English Culture and the Decline of the Industrial Spirit 1850-1980* (Cambridge University Press 1981) informed the work.

reading of the 'archival sources' of the nineteenth-century published law reports.

In light of the observed changes in the development of the application of custom doctrine, the candidate proffered an explanation for those changes utilising secondary legal and jurisprudential literature and her knowledge of nineteenth-century history. The article argued that the case law concerning custom in the nineteenth century reflects a judicial concern with legal positivism and utilitarianism. This explanation was largely based upon a close reading of the nineteenth-century custom cases, and a parsing of judicial language, in light of these nineteenth-century jurisprudential and philosophical movements.

Legal Archaeology and the Methodology employed in the submitted works on Scots law

Professor Baker says that his method, "may owe something to [his] passing youthful interest in archaeology". This echoes the final paragraph of Brian Simpson's introduction to his book, *Leading Cases in the Common Law.*[101] In that introduction, he tells us that Professor Peter Fitzpatrick,

> "suggested that I should use the expression 'legal archaeology' in the title of this book, aiming boldly to invent or at least to name, a new category of legal scholarship. Although I have not done so, the suggestion was a tempting one. . . [A] reported case does in some ways resemble those traces of past human activity – crop marks, post holes, the footings of walls, pipe stems, pottery shards, kitchen middens, and so forth, from which the archaeologist attempts, by excavation, scientific testing, comparison, and analysis to reconstruct and make sense of the past. Cases need to be treated as what they are, fragments of antiquity, and we need, like archaeologists, gently to free these fragments from the overburden of legal dogmatics, and try, by relating them to other evidence, which has to be sought outside the law library, to make sense of them as events in history and incidents in the evolution of the law."

[101] Simpson (n 11).

From those humble beginnings, an aside in conversation by Professor Fitzpatrick and a mention in Brian Simpson's introduction to *Leading Cases*, legal archaeology is now, arguably, a full-blown methodology. That this is so, owes much to the existence of the internet and the mass scanning of both primary and secondary sources, which allows even law students to produce a deep case study in the course of a single semester.[102]

The method used by Simpson was a natural fit for the candidate to use to produce the article *Rabbit Massacre* once the extensive primary sources of the *Dempster* litigation were uncovered. Not least because Simpson cites the work Marxist historian Edward Thompson, as well as the socialist constitutional lawyer and historian J.A.G. Griffith as examples of 'legal archaeology'.[103] Moreover, the methods of Professor Baker and Professor Simpson have much in common. Their work did not begin with an established methodology or with "some general philosophical theory of judicial decision"; rather their methods begin with the sources.[104] The methods of Professors Baker and Simpson work well in concert, where the sources are available, and a thick study of custom is desired, or, as in the case of studying the development of a complicated doctrine such as that of Scots community rights, the candidate argues, below, are required. As Professor Twining recognised,

> "Simpson's main contribution is to add another perspective and one specific device to the resources of scholars and teachers of law. . . [that] . . . stay quite close to common law traditions of legal scholarship, legal history and legal education. This particular set of

[102] Paul A Lombardo, 'Legal Archaeology: Recovering the Stories behind the Cases' (2008) Race, Pharmaceuticals and Medical Technology 179.

[103] (n 11) 19. Griffith's contribution to public law was much like that of Simpson's history of leading cases; his aim was to provide a "what actually happens" account of the constitution. Martin Loughlin, 'John Griffith, Obituary: Leading public law scholar who spent most of his career at LSE' The Guardian (London, 25 May 2010).

[104] Simpson (n 11) 9; Baker (n 7) 7, "I have come to the conclusion that I have no easily describable method, perhaps no method at all apart from the indulgence of curiosity. My main thesis here is that there may be some merit in this."

> lenses can usefully broaden their practices from within, without threatening or forwarding a revolution."[105]

Another reason *Rabbit Massacre* was written using the method of legal archaeology is that the method lends itself to studies of law and society through 'law and' studies.[106] *Rabbit Massacre* used a case concerning the links of St Andrews to introduce a British audience to the uses of 'custom' in the theoretical debates amongst US property legal academics and as a case study of Carol Rose's theory of the 'comedy of the commons'. Rose argued that some resources constituted 'inherently public property'. Contrary to the theory of the 'tragedy of the commons' posited by Gareth Hardin, where common use ultimately leads to the degradation of resources commonly held, Rose argued that for some kinds of resources, more is 'merrier'.[107]

The St Andrews case study was selected because one of Rose's favourite examples of the comedy of the commons is that of maypole dancers on an English village town green.[108] One of the difficulties for both US courts and American theorists when seeking to apply the law of custom to US property dilemmas is that the English (and indeed Scots law) of custom and customary rights is inherently local. Rose's other examples other than that in *Hall v Nottingham* of 'inherently public property' involve resources used by the public at large.

A town green is not, in legal terms at least, generally available for *public* use. The links of St Andrews were unique because the feu stated that the golf links was to be 'reserved entirely, as it had been in

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[105] William Twining, 'What is the Point of Legal Archaeology?' (2012) 3:2 Transnational Legal Theory 166, 172.

[106] Deborah L. Threedy, 'Legal Archaeology: Excavating Cases, Reconstructing Context', (2006) 80 Tul. L Rev 1197, 1227. Interestingly, economics is absent from her list of 'law and' subjects.

[107] *Cf* G. Hardin, 'The Tragedy of the Commons' (1968) 162 Science 1243 *and* Carol Rose (1986) 'The Comedy of the Commons: Custom, Commerce and Inherently Public Property', 53 University of Chicago Law Review 711, 767-68.

[108] n 25.

times past, for the comfort and amusement of the inhabitants *and others who shall resort thither for that purpose*' (emphasis added). In other words, in *Dempster,* there was an example of a town green that was open to the public at large and therefore was a potential case study of Rose's comedy of the commons.

Legal archaeology often refers to the carrying out of an individual case study or the exploration a leading case in detail – 'legal history on a more modest scale', which 'eschew[s] surveying the sweep of social change over an era in favor of examining a particular case in detail'.[109] This was the methodology adopted in *Rabbit Massacre*, the examination in detail of a particular case, but for an instrumental purpose – the exploration of Carol Rose's theory of inherently public property. As mentioned earlier, the study of the reception of assertions of community customary uses by the Scots courts, methodologically, began as a story – that of *Dempster v Cleghorn* – in search of a doctrine.

The method of legal archaeology, however, need not be limited to a single case. In *Bleaching Greens* and *Test Cases*, the method developed and used for the case study of *Rabbit Massacre* was applied to a line of cases in order to understand the development the doctrine of customary rights in its legal, political, social and economic contexts. The method of legal archaeology for the exploration of the development of doctrine and the test case nature of *Eyemouth* and *Dyce v Hay* in those two articles was driven by four factors: the availability and breadth of primary and contemporary secondary legal and extra-legal sources; the opaque nature of the development of the apposite legal doctrine; the iterative nature of the doctrinal development both from decision to decision and within the litigation record of individual cases; and, finally, the fact that those iterations and ultimate doctrinal development took place in the context of the litigation of test cases.

[109] (n 98) 1230.

As a further explanation of the candidate's interpretation and application of the method of legal archaeology, what follows is an explanation of the archival journey of the candidate that produced *Rabbit Massacre* and was also used to produce *Bleaching Greens* and *Test Cases*. The variety of primary sources are detailed, together with examples of how different types of sources were used in the history and analysis of the submitted works.

The original papers in that case are held by the NRS,[110] and the Session Papers are held by the Advocates' Library. The Session Papers are bound collections of legal papers presented to the Court of Session that were collected by advocates and judges. The series are often named after the families of advocates that collected them. To give an idea of the vast size of this collection, the Advocates Library holds around 4000 volumes of such Session Papers, in 50 distinct series, covering the period 1666-1868.[111] The Session papers, together with their annotations, are in Scotland the best-written record of the process through which community use rights were recognised by the courts as having created a legal right.

One important aspect of seeking to understand the reception of local custom by the central courts is recognising that the legal actors operate within a process that is circumscribed by both by substantive legal rules and conventions and by procedural rules. The reception of custom by the courts is an iterative process – each iteration of which can become dominated by these "institutional boundaries".[112]

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[110] Professor Baker objects to this name change. "The establishment at Kew is often called the National Archives, but this is a solecism. The National Archives is the administrative organisation which oversees the archives, besides its other responsibilities; but the physical repository, the 'office' where records are produced, is still in law the Public Record Office." (n 3) 8. *Cf* the position in Scotland, where the National Archives of Scotland, pursuant to the Scotland Public Records Act 2011, merged with the General Register Office for Scotland to become the NRS.

[111] *See* Angus Stewart 'The Session Papers in the Advocates Library' in Hector L MacQueen (ed), Miscellany IV (Stair Society 2008).

[112] Novkov (n6) 35.

Following the threads of *Dempster*, which is part of a complex set of litigations, highlights these boundaries.

The Session Papers enabled the candidate to read the actual legal arguments that were presented to court by the litigants in the cases explored in the three submitted works on Scots law. They also are sometimes annotated with the views of the Lords of Session. The papers and annotations contain important factual information relevant to the case, as well as references to the case law that is argued.

Some of that case law will not have been reported; so the candidate moved from collection to collection of Session Papers in order to follow up references and establish the relevant doctrine being applied. Even where cases were reported, in the earlier period of the submitted works, in particular, the available decisions sometimes only appear in digest form in *Morison's Dictionary of Decisions*. Morison's, together with a later appendix, reported cases between 1801 and 1808. It reproduced both existing published law reports as well as publishing previously unreported decisions. The cases are organised by topic area and the reports are often very brief.[113]

Whilst the presentation of facts by each litigant must be evaluated critically, presented as they are in the context of a particular legal argument; nonetheless, the facts found in the Session Papers were sometimes crucial to understanding the resolution of a case and the development of a doctrine For example, in the case of *Tod and Stodart*, which was referred by some members of the Court of Session when finding title to pursue in *Dempster*, the Session Papers for that case revealed that what was at issue was servitude over a public road, and therefore a public right of way.[114] Absent the complete factual

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[113] Kenneth Reid 'A Note on Law Reporting' in Kenneth Reid and Reinhard Zimmerman (eds), *A History of Private Law in Scotland Vol. 1* (OUP 2000), lvi-lvi.

[114] *Rabbit* Massacre 134. Bill of Advocation, Tod and Stodart v. The Edinburgh Glass-House Co. 45 Blair Collection 43, p. 5. On July 2, 1793 the court "Found that the whole grant in dispute must continue open" (Available at the Advocates' Library).

background, a genuine understanding and an accurate historical reconstruction of the development of doctrine would be impossible.

The Session Papers also contain references to secondary sources, many of which are available in the Advocates' Library itself. Using the Session Papers, the candidate could not only ascertain that advocates had cited the English law of custom in their memorials, but also could consult the book (and in all likelihood the actual copy of the book) that the advocates had relied upon for the summary of the doctrine, and cases cited could be consulted in the library.

The Session Papers enabled the candidate to reconstruct the iterative process of litigation. Iterative processes, which have been explored in the context of judgments, are also central to the litigation of individual cases.[115] This is particularly the case when a doctrine is either nascent or in the process of development. The iterations of rights arising by customary use are recorded in the Session Papers and the resulting decisions of the Court of Session. Advocates in the Session Papers presented legal arguments to be tested, accepted or rejected by the judges of the Court of Session and often as not argued in the alternative; thus, the Session Papers provide a record of the various legal possibilities that were presented to the judiciary for decision. In addition to the published decisions, where they are available, marginal notes and references to cases in the margins of the printed papers record, in real time, how the arguments made by counsel were received and why. The Session Papers also provided a procedural summary of a piece of litigation, which enabled the candidate to follow carefully each iteration and seek out unpublished decisions held by the NRS.

Of course, procedure and procedural rules are an important boundary to the iterations in custom litigation. Beyond the central, and substantive procedural rule of title and interest discussed above, more detailed procedural rules also can determine the course of the

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[115] Lawrence A Cunningham, 'The Common Law as an Iterative Process: A preliminary inquiry' (2006) 81 Notre Dame Law Review 747.

iterations of a legal process. In *Rabbit Massacre* the sources reveal how legal process rules, such as those of pleading, and institutional practices, like the Lords of Session taking it in turn to sit in the Outer House, impacted on the result of the legal action. In *Dempster*, a decision in favour of the golfers was recalled because it was *ultra petita* – the court had found a customary right to kill rabbits on the links of St Andrews that the golfers had not claimed in their petition. This meant that everyone involved knew both the court's view and which Lords of Session agreed with it, even though the decision itself did not stand. This led to the legal advice that the townspeople were free to 'go on killing the rabbits' but not until after July 6, when a Lord of Session whose views aligned with the pursers was sitting on bills in the Outer House and would adjudicate the expected petition by the Dempsters for a suspension and interdict.[116]

The legal advice in *Dempster* highlights another aspect of the method of investigating as a matter of legal history the development of a doctrine: the significance of who sat on the Court of Session and the identity of the Lords of Session in any particular case. The history of community and public litigation over use rights shows us that in the nineteenth century, the significance of the identity of the judge was not merely a matter of the Lords of Session holding different doctrinal views. The triumph of the Whigs and the influence of the Whig judges on the test case of *Eyemouth* serves as an example, as does the case of *Dyce v Hay*, which followed on from it. *Dyce* also highlights the significance of institutional organisation – in this instance the results of the splitting of the Court of Session into two divisions in 1808.[117]

An important aspect of legal and judicial personnel in Scotland is that the bench is appointed from the bar. It is significant that some judges on the bench will have litigated the issues that come before them as advocates. For these judges, the arguments that come before them will have already been well rehearsed. They may have come to

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[116] *Rabbit Massacre* 136.

[117] *Test Cases* 229.

a personal legal view about some issues whilst representing parties as advocates (and for those who act in test cases, they most certainly will have). It is because of their experience as advocates that some judges both know, and can argue with advocates based upon, prior cases, whether reported or not, as well as the contents of the Session Papers. This is indicated by reported cases, Session Paper marginalia and the extant records of oral argument, such as that collected by Henry Cockburn in *Harvie v Rodgers*.[118]

Practising lawyers and socio-legal scholars, alike, remind us that legal processes are both driven and bounded by forces beyond procedural rules, legal doctrine and the structures of legal institutions, such as the courts and bar. Legal actions must be funded. The case of *Dempster* was supported by funds collected from across the Commonwealth.[119] The poor, landless defender in *Eyemouth* was on the poor roll and received free legal advice.[120] In *Harvie v Rodgers*, money was raised by Whig inspired events, including an exhibition at the Glasgow Fair. As these examples demonstrate, the nature of the funding of an action is linked to the nature of the litigants and the litigation, and querying where the money came from to fund an action provides further information for the legal historian.

The lawyers these funds provide are, of course, central to the legal process, and their letters and advice are important sources for analysing the nature and development of legal doctrine, for example, the unsettled nature of community servitudes highlighted in the advice provided in advance of the action filed against Alice Young.[121] A key letter in the *Dempster* litigation indicates that the riot in that case was initiated by the actions of the golfers on the advice of their

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[118] *A Narrative of the Proceedings in the Case of Rodgers and others v Harvie, for the Recovery of the Liberty of the Banks of the Clyde* (Glasgow 1829).

[119] *Rabbit Massacre* 132.

[120] *Test* Cases 222, n 94.

[121] ibid.

advocate.[122] The same letter pointed to the practice of judge-shopping and the importance of judicial personnel, highlighted above. Such sources can serve to confirm the nature of a case as a test case of doctrine or a case of wider political importance. In *Harvie*, memoirs of the initiators of the action detail its organisation as a test case, with the assistance of a local inhabitant and young advocates who were sent out to town and villages surrounding Glasgow in search of the correct category of pursuer.[123]

Sources such as information on litigation funding, letters of advice and other information pertaining to the organisation of litigation discussed in the submitted works are often contained in the burgh records held by local authorities or in estate records. Such records can also provide other key, contextual information on cases. The records of St Andrews and Dysart revealed that the litigation over the inhabitants use rights over land were merely a part of a larger pattern of disputes between the litigants both in court and in the community.[124] Because the disputes involve land, plans involving the town, industry or the feudal superior all can influence the decision to file or persist in litigation. Local authority and estate records can often fill in key elements of the story of the litigation of local rights.

In addition to these primary sources, both contemporary and modern secondary sources assisted the candidate in contextualising the primary sources and telling the story of the development of the recognition of community rights in Scotland. Such sources could be both historical legal secondary sources, such as the work of Hume and that of Patrick Napier, written at or near the time of the litigation under study, as well as contemporary doctrinal commentary. These sources, like contemporary secondary sources today, evidence reliance on court papers that are collected in the Session Papers, as well as the

[122] n 106.

[123] Peter Mackenzie, *Old Reminiscences of Glasgow and the West of Scotland Vol II* (James Forrester 1890).

[124] *Urban Commons* 331.

author's personal and professional knowledge of the cases discussed.[125] Like recorded judgments, some secondary sources can evidence a tone that leads the historian to sources outside the legal world in which the source has been produced. Contemporary legal secondary sources, like the Session Papers themselves, also reveal the iterative nature of the process at arriving at settled legal doctrine and the disputes both within and outwith the legal profession about the meaning of particular cases. The varying interpretations of the case of *Roxburgh* is but one example.[126] Another would be the meaning of *Home v Young*, as litigated in *Dyce v Hay*.

General histories of access to the countryside and the game of golf, i.e., that discuss the subject customs asserted by communities were consulted, as were works of local historians who write about the places which claimed the community uses. Such sources were particularly helpful for the production of *Urban Commons*, which dealt with the history of bleaching and with *Rabbit Massacre*, where general histories of both golf and the St Andrew's links proved helpful.

Ultimately, the method and methodology used in the submitted works were driven by the nature and availability of primary resources. The significance of both the method/methodology and the resources used arguably goes beyond the production of the submitted works. They serve to highlight important and distinctive aspects of Scots legal culture, which in and of themselves are worthy of further investigation. For instance, the significance of the shared legal world of the bar and bench and the implications of appointing experience advocates as judges are likely to have implications beyond those briefly discussed above with regard to the Whig judges. The Session Papers speak to the importance and the significance of written pleading to the development of Scotland's legal culture. An analysis of the implications for the development of the law and legal system of

[125] n 44 and n 47.

[126] *Urban Commons* 327.

the fact that the Session Papers would have been available for circulation at the time they were written and printed and then were destined to sit in the Advocates Library and the Signet Library to be used as sources by future Advocates and Writers would be another fruitful area of research, which would invite interesting comparisons with England as a largely oral legal culture.

Conclusion

This synthesis drew together four works on the reception of the use rights of local communities in Britain in the eighteenth and nineteenth centuries. It explored, in the first instance, the doctrines applicable to the judicial recognition of community use rights over land as *lex loci* in England and as community rights of servitude/community rights in Scotland. Those doctrines were compared and the reasons why English custom doctrine was used both as a source of persuasive authority in advocates' memorials, and was misused by the House of Lords, was discussed, as was its ultimate rejection in the Scots test cases of the mid-nineteenth century.

The synthesis goes on to discuss the methods and methodology that were used to produce the articles. That discussion demonstrated how, as it is argued is appropriate to works of legal history, the methods chosen were driven by the sources available to the candidate when the submitted works were written. For the submitted works on Scots law, which involved a great deal of archival work, the nature of the archival sources and the methods employed to conduct the analysis in the submitted works is discussed. This section begins with an explanation of how the choice of the method of legal archaeology was driven not just by the availability of sources sufficient to conduct a thick descriptive study, but also the nature of doctrinal development and the iterative nature of the litigation of community use rights that contributed to that doctrinal development, which took place in the context of test case litigation.

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