

MRes Historical Research (Environmental History)

Poaching and Game Preservation on the Breadalbane Estates c.1603- 1850

HTRP13 Dissertation

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Abstract

Illegal hunting was a feature of tenant behaviour on the estates of the Campbells of Glenorchy throughout the period from the Union of the Crowns until the Victorian period. Game laws established in the fifteenth and sixteenth centuries established seasons and restricted hunting with firearms. These laws were expanded to create a land qualification for hunting which remained in force alongside developing body of legislation targeting poaching. The Glenorchy and Breadalbane estates applied these laws or alternative bylaws during the early seventeenth century the franchise court. Through the court the Laird controlled the use of natural resources by the tenantry and dealt with a significant volume of poaching cases, which were usually assoilzied or received small fines. Poaching cases are absent from later court records though it can be assumed from other evidence that poaching was likely to have continued, though there may have been a decline in deer population after the Wars of the Three Kingdoms and the so-called 'Little Ice Age'. After 1715 the Disarming acts may have resulted in a reduction in poaching for a time though there is no evidence of adoption of alternative methods. The predominant poaching method remained firearms throughout the period, with relative remoteness reducing fear of detection. Red and Roe Deer were targeted throughout, as were wildfowl, but hares are mentioned only in material from the late eighteenth century. Despite the decline of heritable jurisdictions after 1748, successive lairds continued to hold core influence over the treatment of poaching and are likely to have exercised non-judicial sanctions against all but the most persistent offenders amongst their tenants. Throughout the period there is evidence of significant tolerance of low-level poaching, either because of the difficulty of enforcement or through a desire to maintain an appropriate balance of social control.

Introduction

The men also went hunting the hill for deer and the river for salmon; and so ancient had been their gaming rights that no new laws or restrictions in favour of landlord or lessee could ever convict them in their own minds of poaching.

Neil M Gunn, *Butcher's Broom*¹

It is a popular conception that Highland tradition had little regard for game laws. Neil Gunn's description of the attitudes of common folk on the eve of clearance in the early nineteenth century is a succinct summary of what is perceived by many to be the 'traditional' attitude of the people of the *Gàidhealtachd* to the exploitation of wild animals in their local environment.

Despite, or perhaps because of, the importance of blood sports to rural life in the Highlands today, and popular conceptions of 'traditional' ways of life, social organisation and landscape management, there has been limited research into the history of this important aspect of rural society and economy.² There has been even less research into illegal hunting and fishing activities.

The purpose of this project has been to explore poaching activity on one Highland estate over the period prior to the Victorian explosion of sporting tourism and the establishment of a popular, 'Balmoralised' conception of Highland life and society.³ It spans the period from the relocation of the Scottish royal court to England until the years immediately prior to Prince Albert's purchase of the Balmoral estate in 1852.

¹ Gunn, N M, *Butcher's Broom* (Souvenir Press 1977, originally published 1934), p.66

² Wightman, A, Higgins, P, Jarvie, G, and Nicol, R, 'The Cultural Politics of Hunting: Sporting Estates and Recreational Land Use in the Highlands and Islands of Scotland,' *Culture, Sport, Society* Volume 5, Issue 1, 2002, p53-70

³ Withers, C W J, 'The Historical Creation of the Scottish Highlands', in Donnachie, I and Whatley, C, (eds), *The Manufacture of Scottish History* p152-154

The removal of James I's court to England in 1603 marked a shift in emphasis and practice for Scottish politics. The aristocracy were drawn into a process of 'Anglicization': their political, social and cultural activities were increasingly influenced by the new location of the court and the king's involvement in the affairs of Scotland's bigger, wealthier neighbour.⁴ This occurred alongside attempts by James and his court to draw the Highlands and Islands more fully within the Crown's ambit and to force, persuade or tempt the Highland elite into behaviours more aligned to Lowland practices.⁵

These developments are important for the study of hunting and poaching and the wider issues of estate and land management because the political environment influenced not only how the Highland elite perceived themselves as the leaders of their communities, but also the choices available to them and the ideas that influenced the way they managed their estates. The period is one in which the *fine* (clan elite), developed a more commercial approach and moved away from their role as chiefs, and in which the very basis of the Highland economy changed from a system of social and symbolic values towards one which measured worth in monetary terms.⁶ This is not to say that either system was more or less benign for common people, but a fundamental shift in conceptions about social roles, structures and ways of life commenced.

The Breadalbane estates, which grew out of the lands of the Lairds of Glenorchy, are an ideal case study for these transitions and for their effect on game management. Originating as a cadet branch of the Campbells of Argyll, the Campbell lordship of Glenorchy was founded by Colin Campbell, first lord of Glenorchy, in the fifteenth century. From a base in northern Argyll around Loch Awe and Lorn,

⁴ Brown, K M, 'The Scottish aristocracy, Anglicization and the Court, 1603-38', *The Historical Journal*, 36, 1993, pp. 543-576

⁵ The most often-cited example of these efforts are the Statutes of Iona of 1609. Stevenson observes that James VI's reign came at the end of a prolonged period of weak central government typified by monarchs succeeding the throne as minors (including James). The Union of the Crowns represented an opportunity to tackle the twin Gaelic cultures of Ireland and Scotland. Stevenson, D, *Highland Warrior: Alasdair MacColla and the Civil Wars* (Birlinn 2014) p11-18

⁶ Macinnes, A I, *Clanship, Commerce and the House of Stuart 1603-1788* (Tuckwell, 1996), p233
Dodgshon, R A, *From Chiefs to Landlords: Social and Economic Change in the Western Highlands and Islands: C.1493-1820* (Edinburgh University Press, 1998) p102-115

the family gradually extended their lands eastward and in 1681 Lord Glenorchy also gained the title 'earl of Breadalbane'.⁷ The geographical territory covered by the Breadalbane archive runs from Lorn and Loch Awe in the west to Aberfeldy and Grandtully in the east, and as far as the forest of Rannoch in the north and Loch Earn in the south. These muniments include one of the best preserved records of a Scottish franchise court.

The first earl of Breadalbane (1636 - 1717, created earl 1681), was a major player in the politics of the last years of the Stuart dynasty and in the events leading to the Glencoe massacre, and was associated with Jacobitism in the 1715 rebellion.⁸ It could be said that the fortunes of the Campbells of Glenorchy epitomise the transition of Highland society described by both MacInnes and Dodgshon, and the transformation of their estates. The family administered their lands in the language of Scots and later standard English, even though most of the tenantry were Gaelic speakers. The later earls and the first marquis were enthusiastic improvers and game preservers. It is one of the purposes of this project to examine whether their transition from chiefs to landlords affected the protection of game on Glenorchy land, and in particular the treatment of illegal hunters.

An important aspect of social organisation of clanship is the conflict between ideas of *duthchas* and *oighreachd*. *Duthchas* refers to rights and entitlements understood socially by oral tradition, whereas *oighreachd* refers to rights that are enforceable by documented legal record.⁹ The concepts are most commonly discussed in the context of land ownership and leases but in the context of poaching, Neil Gunn's imaginary tenants, who could not conceive of their poaching as wrong, are referring to (arguably romanticised) notions of *duthchas* over the technical legalities of *oighreachd*. The idea that poaching originally was a 'social crime' - one that was regarded by many as not morally wrong - was not unique to the *Gàidhealtachd*, but the additional prism of the conflict between Gaelic

⁷ *Debrett's Peerage of England, Scotland, and Ireland*, 17th Edition, Volume 2, (Rivington, London 1828)

⁸ MacInnes, *Clanship, Commerce and the House of Stuart*, p138-142 and 166

⁹ MacInnes, *Clanship, Commerce and the House of Stuart*, p233-234
Dodgshon, *From Chiefs to Landlords*, p102-115

tradition and Lowland administration adds an extra dimension to the disjuncture between the letter and the spirit of the law.

The transformation of Highland society also had an impact on law enforcement and local administration, which in turn affected how, and by whom, game was 'protected' from poaching. The Campbells of Glenorchy operated a regular and active franchise court until such institutions were effectively shut down by the Heritable Jurisdictions Act (1746), part of the range of legislation enacted in reaction to the last Jacobite rebellion of 1745-46.¹⁰ After 1748, the laird still exercised a great deal of control over affairs on his land, but had to resort to nationally determined systems of administration if he wanted to take formal legal action.

The post-1748 period saw the development of complex systems of game legislation in both Scotland and England that could, by the early nineteenth century, result in harsh penalties and even transportation. An important question to be addressed, then, is to what extent game laws were enforced, and what game preservation meant for those who hunted illegally.

Until 1748, the prosecution of poaching was part of the administration of local justice and the management of natural resources undertaken by the franchise court. In these records poaching, with other breaches of by-laws relating to timber, farm maintenance and peat cutting, can be argued to have been a relatively minor offence. It seems in the case of the Glenorchy/Breadalbane courts that local bylaws were often enforced rather than more draconian national legislation. After 1748 the formal legal position regarding poaching was derived directly from national legislation rather local practice, but the laird retained power in determining whether, and if so how, poaching offences should be pursued.

¹⁰ Cairns, J, 'Historical Introduction', in Reid K and Zimmermann R (eds), *A History of Private Law in Scotland Volume 1 Introduction and Property* (Oxford UP 2000) p148

The Act removed some heritable courts from the purview of the nobility reduced the power of barony courts and provided for compensation to the holders of jurisdictions, with effect from 1748

Poaching activity also sheds light on a number of other aspects of life on the Breadalbane estates that are important for our understanding of the environmental and social history of the Highlands. The social background of poachers may provide an indication as to their motivations and in the current project a distinction has been made between tenant poachers - 'ordinary' men (and occasionally women) who took game - and higher status poachers who were generally neighbours rather than tenants of the Campbells of Glenorchy.

Poaching by common tenants was largely dealt with within the context of local law enforcement through the franchise court and, later, as a matter of estate management. In contrast, poaching by gentleman neighbours required a different approach and may have been viewed entirely differently, falling as it did into the wider context of inter-clan or inter-family relations and local and national politics. Certainly in two cases from the eighteenth century which reached the House of Lords there was a much wider context to the issue and other factors at play.¹¹ Although the initial research for this project encompassed both tenant poaching and gentlemanly activities, for reasons of space only tenant poaching is covered in depth in this dissertation.

The methods used by poachers can also give indications as to their motivations, fear of detection and their social background. The predominance of the use of firearms by poachers in the Breadalbane records is discussed in the chapter dealing with tenant poachers.

¹¹ Two protracted game disputes involving the Earls of Breadalbane reached the House of Lords in the eighteenth century. The earlier was a dispute with MacDonald of Kenknock and the Laird of Culdares about their tenants' rights to graze cattle on the Royal Forest of Mamlorn in the summer months. 'House of Lords Journal Volume 26: May 1744', *Journal of the House of Lords volume 26: 1741-1746 (1767-1830)*, pp. 383-399 available at <http://www.british-history.ac.uk/report.aspx?compid=114196> accessed 19/2/14. The later dispute involved a Mr Livingston who was found shooting on Breadalbane land and claimed that his ownership of sufficient land under the relevant 1621 Act qualified him to shoot wherever he pleased. 'House of Lords Journal Volume 39: April 1791 11-18', *Journal of the House of Lords volume 39: 1790-1793 (1767-1830)*, pp. 111-125 available at <http://www.british-history.ac.uk/report.aspx?compid=116897> accessed 22/2/14.

The species that were targeted by poachers may also provide important insights into the health of those species' populations, and also into the choices available to poachers and, importantly, the pre-occupations of the Laird in choosing which species to protect by prosecuting poaching.

In the course of the research it became obvious that many aspects of game preservation and estate management for hunting could not be adequately accommodated within a dissertation of this size. Further research will be needed to flesh out issues such as the persecution of vermin - a practice that was undertaken not only to protect farm produce but also specifically to protect game, especially later in the period. It was also not possible to do justice to material available relating to the management of game parks, the role of game in gift-giving, muirburn for grouse management nor to estimations of deer population which might be extrapolated from some later material, especially the reports of one game keeper in western estates.¹²

It was decided, therefore, to focus research on tenant poaching. Because of the extent of the court record, three court books were selected and thoroughly researched, covering the periods 1615-1620, 1722-1734 and 1744-1748.¹³ The books were selected on the basis of their state of preservation, readability and the extent of the records contained within them. The books are fair copies collated from notes made at court and are a summary rather than a verbatim record. Until the later seventeenth century, cases were likely heard mainly on oral evidence which was not usually transcribed.¹⁴ This means that we have a limited record that is vulnerable to errors and omissions of transcription which have been accounted for in the process of extracting relevant data.

Correspondence was also examined and a smaller sample of cases was identified in later letters and notes, in the period 1800-1830. Since there is no readily available discussion of the development of game laws up to and throughout the period this too has been addressed.

¹² Peter Robertson assiduously returned reports from his watch on the Glenorchy area. National Archives of Scotland [NAS] GD112/16/10/4/3-22

¹³ NAS, GD112/17/4, NAS, GD112/17/11, NAS, GD112/17/12

¹⁴ Cameron, J (Ed), *The Justiciary Records of Argyll and the Isles 1164-1705, Vol 1* (Stair Society, Edinburgh 1949), xv

Historiography

Despite the fact that shooting forms a significant part of the upland rural economy today, academic study of hunting in early modern and Georgian Scotland has been extremely limited. Work by both Hart-Davis and Durie has explored nineteenth century shooting, and Orr analysed in detail the transition from farms and sheep walks to deer forests in the north west Highlands which including a limited discussion of poaching.¹⁵ However, these studies focus on the Victorian era. Whilst there have been some studies of earlier deer numbers and general histories of hunting in Great Britain, there has been no in-depth study of the development of hunting in Scotland from the seventeenth century to the nineteenth, nor of game preservation or poaching during this period.¹⁶ This historiography therefore draws on literature which provides a context to the research: studies of hunting and poaching in the medieval period; research on poaching in England; the history of crime and the legal framework of the game laws and finally the cultural and social context.

Research into earlier hunting in Britain has focussed on red deer. Lewis and Fletcher both explore the pursuit of deer from prehistory and confirm that venison was an important food source and significant resources were devoted to driven hunting and the construction of barriers to aid driven deer hunting. Fletcher argues these barriers were precursors to emparkment. The social hierarchy and organisation required for such activities may be the origin of the elitism of hunting.¹⁷ Added to

¹⁵ Durie, A J, 'Game Shooting: An Elite Sport c.1870–1980', *Sport in History*, 28:3, 2008, pp. 431-449

Durie, A J, 'Unconscious benefactors': grouse-shooting in Scotland, 1780–1914', *The International Journal of the History of Sport*, 15:3, 1998, pp. 57-73

Hart-Davis, D, *Monarchs of the Glen: a history of deerstalking in the Scottish Highlands*, (Jonathan Cape, 1978)

Orr, W, *Deer Forests, Landlords and Crofters: the western Highlands in Victorian and Edwardian times* (John Donald, 1982), p55

¹⁶ Smith, J S, 'Changing deer numbers in the Scottish Highlands since 1780' in Smout, T C (ed.), *Scotland since prehistory: natural change and human impact* (Aberdeen: Scottish Cultural Press, 1993), pp 89-97

Watson, A, 'Eighteenth Century Deer Numbers and Pine Regeneration Near Braemar, Scotland', *Biological Conservation* 25, 1983, pp. 289-305

¹⁷ Fletcher, J, *Gardens of Earthly Delight: The History of Deer Parks* (Windgather Press, 2011) p47-63

Lewis, B, *Hunting in Britain from the Ice Age to the Present* (The History Press, 2009) p110-160

this, Lewis argues that the Roman concept of *saltus* or *tractus* - uncultivated land- developed into the concept of 'forest', an important aspect of deer management in Scotland.¹⁸

Deer were managed through parks or forests and Fletcher argues that they could be adequately managed in either without full domestication.¹⁹ In the Scottish context forests predominated, in contrast to England where parks were more common. Rackham estimates there were only around eighty deer parks in medieval Scotland compared with around 3200 in England.²⁰

Gilbert's *Hunting and Hunting Reserves in Medieval Scotland*, the only substantial study of the topic in a Scottish context, focuses on forests and their management up to 1513 and sets out key aspects of hunting and game management that continued in the period of enquiry. Laws were enforced through courts of barony or regality, or through specially constituted forest courts and deer were often protected by foresters, who were also responsible for timber and underwood, or by barony or regality officials.²¹ Gilbert also reports that contrary to popular perception of brutal forest laws, monetary fines were the most common punishment.²²

The four main deer hunting methods used in Scotland were similar to those described by Gaston de Phébus and Edward of Norwich: the deer drive, coursing, par force hunting and stalking.²³ The deer drive, or *tinchel*, a labour-intensive method, continued into the eighteenth century.²⁴ By the time of

¹⁸ Lewis, B, *Hunting in Britain from the Ice Age to the Present*, p112

¹⁹ Fletcher, J, *Gardens of Earthly Delight*, p26. Fletcher also explains the choice of species for enclosure: roe deer are never imparked because they form small groups and are adept escapees. Red deer stags can escape even substantial enclosures, but the convenience of readily available browse and mates provides incentive for stags to remain within the park. Fallow deer were aesthetically appealing and easier to manage than red deer when introduced to parks in the middle ages and continued to be the preferred animal for ornamental parks. On this point, Rackham concurs that the key feature of fallow deer was their suitability for enclosure (Rackham, O, *The History of the Countryside* (Dent, 1986) , p125)

²⁰ Rackham, O, *The History of the Countryside*, p123- 125

²¹ Gilbert, *Hunting and Hunting Reserves*, p195

²² *ibid*, p99

²³ Edward of Norwich: Edward, Second Duke of York, *The Master of Game* (c 1406-1413), edited by W A and F Baillie-Grohman, Chatto and Windus, 1909; Marcel Thomas, François Avril & Wilhelm Schlag (eds.), *The Hunting Book of Gaston Phébus, Manuscript français 616 Paris, Bibliothèque nationale* (London, 1988). Both these medieval writers emphasise the importance of deer, but also describe methods for hare coursing and hawking.

²⁴ A *tinchel* usually involved a large number of men on foot driving deer towards a natural enclosure such as a corrie or towards elricks – fences or walls constructed to contain the deer long enough for gentlemen to

the later Stuart monarchs, the ceremony around the drive was opulent and ritualised and Cummins describes the precise language and ritual attached to all stages of a hunt.²⁵ This kind of ritualised conspicuous consumption is also cited by Dodgshon as an integral part of pre-Improvement Highland chieftainship.²⁶ There was probably less social distance between nobility and commoners in Scottish hunting activities than elsewhere in Europe but the gap may have widened in the sixteenth century.²⁷ Gilbert also supposes that commoners would use snares, nets and traps, either while poaching or when trapping deer for their lord's table.²⁸

Hawking for wildfowl was also regarded as a noble activity and considerable resources were devoted to the keeping of hawks, and wild populations were protected,²⁹ in stark contrast to the persecution of raptors as vermin by gamekeepers in the modern period.³⁰ While there is some evidence for falconry, Sprott has identified a lack evidence about fowling by commoners. Fowlers were employed by the crown to capture hawks and falcons for use in hawking, and we can assume that capturing winged game was also an important source of protein for common people. There is some evidence of trade in wildfowl prior to a 1621 Act which effectively outlawed the practice.³¹

despatch them with bows, guns, spears, swords and dogs. Gilbert cites Gaelic poetry which mentions drives involving 3,000 men. Whilst this is almost certainly an exaggeration, drives were clearly highly organised and resource intensive. Gilbert, *J Hunting and Hunting Reserves in Medieval Scotland*, p55. The Ear of Mar used a hunting gathering as a front for the raising of the Jacobite standard in 1715 (Macinnes, A I, *Clanship, Commerce and the House of Stuart 1603-1788*, p23)

²⁵ Gilbert, *J Hunting and Hunting Reserves in Medieval Scotland*, p47

Cummins, J, *The Hound and the Hawk; the Art of Medieval Hunting* (Weidenfeld and Nicholson, 1988)

²⁶ Dodgshon, R A, *From Chiefs to Landlords*, p102-110

²⁷ Gilbert, *J Hunting and Hunting Reserves in Medieval Scotland* p74

²⁸ *ibid*, p57

²⁹ *ibid*, p68-69

³⁰ Smout, T C, *Nature Contested: Environmental History in Scotland and Northern England since 1600* (Edinburgh University Press, 2000), p134-136

³¹ Sprott, G, 'From fowling to poaching', in Cheape, H (ed.), *Tools and traditions : studies in European ethnology presented to Alexander Fenton* (Edinburgh: National Museums of Scotland, 1993) , pp125-130 p125
James VI Act XXX restricted the buying and selling of fowl and Act XXXI introduced the property qualification for hunting and hawking, 1621/6/42 and 1621/6/43 both accessed at <http://www.rps.ac.uk/>

Gilbert also identifies the association of hunting activity with militarism. As an armed activity requiring a great degree of skill, organisation and bravery, hunting was regarded as a noble pursuit which prepared young men for military activity and kept them occupied in times of peace.³²

Gilbert touches on but does not discuss poaching. Birrell, however, made a study of poaching offences in the thirteenth century English midlands and Manning undertook an in-depth study of illegal hunting in early modern England.³³ Both identified features which recur in studies of later English poaching: corrupt officials, a network of supply to urban areas, a wide spread of social backgrounds for poachers, an association with militarism and resentful farmers objecting to damage by game. Manning also placed gentlemanly poaching in the context of inter-family conflict and identified poaching as a “social crime” which is emphasised by writers on later periods, and also identifies the early association of hunting rights with basic liberties.³⁴

The literature on medieval hunting and poaching establishes some key themes which inform our approach to the later period, foremost is the emphasis on deer as the most prestigious quarry species. Although hawking for fowl and coursing ground game feature to a small degree, research has clearly focussed on the management, hunting and poaching of deer, led by a similar emphasis in the sources.³⁵

The association of deer hunting with aristocracy probably reached its peak in the later middle ages with highly ritualised hunting practices perhaps reaching Scotland in the sixteenth century.³⁶ This

³² Gilbert, J *Hunting and Hunting Reserves in Medieval Scotland*, p72-73

³³ Birrell, J, ‘Who poached the king’s deer? A study in thirteenth century crime’, *Midland History Vol 7*, 1982, pp9 – 23, p11

Manning, R B, *Hunters and Poachers: A Social and Cultural History of Unlawful Hunting in England 1485- 1640* (Oxford University Press, 1993)

³⁴ For example, Wat Tyler demanded freedom to hunt during the Great Revolt of 1381

Manning, R B, *Hunters and Poachers*, p17

³⁵ Edward of Norwich: Edward, Second Duke of York, *The Master of Game*

Marcel Thomas, François Avril & Wilhelm Schlag (eds.), *The Hunting Book of Gaston Phébus*, Manuscript français 616 Paris, Bibliothèque nationale (London, 1988).

³⁶ Cummins, J, *The Hound and the Hawk; the Art of Medieval Hunting*

Cartmill, M, *A View to a Death in the Morning: Hunting and Nature through History* (Harvard University Press, 1993), p65-70

exclusivity is central to later developments, especially the formalisation of game laws. It is also clear that poaching was an activity embedded in the rural social fabric and practised not only by the poor.

Griffin produced a somewhat anglocentric longitudinal study of hunting in Britain. She explains the shift in hunting focus from deer to winged game in England culminating in the 1671 Game Act as a result of the disruption of the Wars of the Three Kingdoms, when the nobility were unable to protect and manage their deer parks. After the Restoration, the emphasis shifted to shooting birds, partly in response to the decline in deer.³⁷ It is debatable whether this argument applies in Scotland since most deer were free to roam, though areas of heavy conflict may have seen deer persecuted, such as in Argyll and Breadalbane in 1644-46.³⁸

Griffin also ignores whether the so-called Little Ice Age (c.1650-1715) was a contributory factor to a decline in deer. Dodgshon suggests that increased storminess adversely affected agriculture in Scotland during the Maunder Minimum, resulting in abandonment of land.³⁹ Lamb reports specific years of famine and heavy loss of sheep and Campbell and McAndrews have argued that, in the US, there was a shift in the balance of tree species within forests.⁴⁰ These effects suggest conditions in which deer numbers would suffer either through direct climatic influence or indirectly through altered human behaviour. Other ecological factors may also have contributed: changing patterns of woodland cover, more intensive use of available agricultural land or even disease. It is also not clear how universal the decline in deer numbers was, and whether there was regional variation.

Smith suggests that seventeenth century woodland clearance contributed to the decline, and both he and Watson correlate the poaching activities of a rising human population with poor recovery of

Knoll, M, 'Hunting in the Eighteenth Century. An Environmental History Perspective' *Historical Social Research*, Vol. 29, 2004 No. 3, pp. 9-36

³⁷ Griffin, E, *Blood Sport: Hunting in Britain Since 1066* (Yale University Press, 2007), p110

³⁸ Stevenson, D, *Highland Warrior: Alasdair MacColla and the Civil Wars (Birlinn 2014)*, p212 and p304-314

³⁹ Dodgshon, R A, 'The little ice age in the Scottish Highlands and Islands: Documenting its human impact', *Scottish Geographical Journal*, 121:4, 2005, pp321-337

⁴⁰ Lamb, H H, *Climate History and the Modern World*, Methuen, 1982, p209-214

Campbell, ID and McAndrews, JH, 1993, 'Forest disequilibrium caused by rapid Little Ice Age cooling', *Nature*, Vol 336, 25 November, 1993, p336-338

deer numbers.⁴¹ Watson's study shows how the earl of Fife's concerted anti-poaching efforts led to a deer population recovery in Braemar. He also refers to Scrope's accounts of widespread poaching of deer by local people, including shepherds.⁴² Deer were often in competition with sheep, a point noted by both Smith and Watson and explored more fully by Orr.⁴³ It may be that when a laird's priority was sheep farming, poaching was tolerated.

Orr argues that deer forests gradually came to be regarded as fully private property and suggests that there was a period following the abolition of heritable jurisdictions when means of enforcing game laws and the structures of prosecution were lacking.⁴⁴ This might have led some landlords to resort to other sanctions against poaching tenants, such as eviction. Some landlords were also more concerned with sheep farming projects than with small scale poaching by tenants. Orr also explains the economic imperatives which persuaded many landowners to switch to deer forests, which by this stage were commonly rented to 'outsiders'. These developments largely fall outside our period, but where lairds had given land over to deer early, Watson and Smith note the potential for a rapid increase in deer numbers through active pursuit of poachers and management of land.⁴⁵

Hart-Davis describes deer hunting from the eighteenth century to the twentieth.⁴⁶ His work relies heavily on memoirs by nineteenth century enthusiasts such as Scrope and St John.⁴⁷ He asserts that depleted deer numbers in the early eighteenth century alongside social changes saw the beginnings

⁴¹ Smith, J S, 'Changing deer numbers in the Scottish Highlands since 1780' pp 89-97

Watson, A, 'Eighteenth Century Deer Numbers and Pine Regeneration Near Braemar, Scotland', p301-303

⁴² Watson, A, 'Eighteenth Century Deer Numbers and Pine Regeneration Near Braemar, Scotland', p300
Scrope, W, *The Art of Deer Stalking* (London 1839)

⁴³ Orr, W, *Deer Forests, Landlords and Crofters*, p12-27

Smith, J S, 'Changing deer numbers in the Scottish Highlands since 1780', p92

Watson, A, 'Eighteenth Century Deer Numbers and Pine Regeneration Near Braemar, Scotland', p300

⁴⁴ until the Militia Act (1797) and the Night Poaching Act (1828) and Day Trespass Act (1832)

⁴⁵ Smith, J S, 'Changing deer numbers in the Scottish Highlands since 1780', p93

Watson, A, 'Eighteenth Century Deer Numbers and Pine Regeneration Near Braemar, Scotland' p304-305

⁴⁶ Hart-Davis, D, *Monarchs of the Glen*

⁴⁷ Scrope, W, *The Art of Deer Stalking*

St John, C, *Short sketches of the wild sports and natural history of the Highlands* (London 1846)

of stalking, undertaken initially by local aristocrats rather than tourists and later taken up by royalty.⁴⁸

His account of the 'free foresters' illustrates the developing romanticisation of the Highlands. His account continues a notion promoted in literature such as McCombie Smith's *The Romance of Poaching in the Highlands*.⁴⁹ McCombie Smith's tales and St John's account of Ronald, a 'bonnie lad' with 'limbs somewhat between those of a Hercules and an Apollo'⁵⁰ fed an image of the free Gaels within a discourse that positioned the Highlands as a sublime wilderness.⁵¹ As Grenier has observed, however, it was a wilderness that was subdued by progress and modernity in which the local noble savages knew their place and functioned as enablers of the manly pursuits of the visiting elite.⁵²

While Hart-Davis provides a useful overview of the development of stalking, he offers no analysis of the social or ecological context of the activity. Although deer were important to Highland hunting, winged game was equally valuable from the later eighteenth century onwards. This has attracted little study, despite evidence that grouse represented a significant proportion of the game pursued in Scotland.⁵³

When Colonel Thornton embarked on his tours of Scotland, he delighted in rough shooting of fowl, but he had limited encounters with deer. They either held no attraction, were scarcely encountered or the Colonel was unable to obtain permission to shoot them.⁵⁴ Durie believes that Thornton's account is an amalgamation of several visits, and that it shows that southern interest in Highland

⁴⁸ Hart-Davis, D, *Monarchs of the Glen*, p51

⁴⁹ McCombie Smith, *The Romance of Poaching in the Highlands* (Originally published 1904, reprinted by Sunprint, Stirling)

⁵⁰ St John, C, *Short sketches of the wild sports and natural history of the Highlands*, p43

⁵¹ And may in turn have fed the conceptions behind Neil Gunn's depiction quoted at the start of this dissertation.

⁵² Grenier, K H, *Tourism and Identity in Scotland 1770-1914: creating Caledonia* (Ashgate 2005), p115

Devine has questioned quite how passive the Gaelic speaking population were in the face of Improvement: Devine, T M, 'A Conservative People? Scottish Gaeldom in the Age of Improvement' in Devine T M and Young J R (eds) *Eighteenth Century Scotland: New Perspectives* (Tuckwell, 1999), pp225-236

⁵³ Durie, A J, "Unconscious benefactors': grouse-shooting in Scotland, 1780-1914', p58

⁵⁴ Thornton, Col T, *A sporting tour through the northern parts of England and great part of the Highlands of Scotland*

field sports started well before the Victorian period. Durie argues that despite the social status afforded to deer stalking, grouse shooting was far more important economically by the Victorian period. The industry emerged alongside the development of breech loading guns, the extension of the rail network and the 'discovery' of Scotland, which all contributed to a thriving shooting economy with bags which reached grotesque levels of slaughter in the later nineteenth century. On poaching, sadly, he is silent.⁵⁵

Red grouse were not the only winged target of hunters. Stevenson used reports of poaching to discern the incidence of capercaillie and concludes that human hunting (legal and illegal) was a contributory factor to extinction. His focus is not on hunting but he does suggest that the Marquis of Breadalbane intended to prosecute poachers under the Disarming Act rather than game laws.⁵⁶

The literature on hunting in Scotland in the period presents a mixed picture. Deer numbers seem to have been depressed in the earlier part of the period but where forests were managed and poachers prosecuted, their numbers increased. The period saw the end of deer drives and the emergence of stalking. Winged game became increasingly important towards the end of our period when the Highlands opened up to sporting tourism.

The commercialisation of hunting was a key development. The interest of wealthy southerners combined with a flexible approach to the letting of land and hunting rights created a market for the sale and rental of estates which is the precursor of the present-day 'sporting estate' model.⁵⁷ Despite

⁵⁵ Durie, A J, 'Game Shooting: An Elite Sport c.1870–1980'

Durie, A J, 'Unconscious benefactors': grouse-shooting in Scotland, 1780–1914'

⁵⁶ Stevenson, G B, *An historical account of the social and ecological causes of Capercaillie Tetrao urogallus extinction and reintroduction in Scotland*, unpublished PhD Thesis (University of Stirling, 2007), p212

⁵⁷ The 1832 Day Trespass Act facilitated, with some imaginative application, the letting of hunting rights to 'sporting tenants'. The Act emphasised the role of the landowner in challenging those trespassing in pursuit of game and, by implication, it was inferred that the landowner could also grant permission, thus restricting shooting to those with leave from the freeholder (Wm IV Cap 68, *An Act for the more effectual Prevention of Trespasses upon Property by Persons in pursuit of Game in that Part of Great Britain called Scotland*, 17th July 1832, reproduced in Forbes Irvine, A, *A Treatise on the Game Laws of Scotland: with an appendix containing the principal statutes and forms* (T & T Clark, Edinburgh, 1850), p123-131

Wightman, A and Higgins, P, 'Sporting estates and the recreational economy in the Highlands and islands of Scotland', *Scottish Affairs*, no.31, spring 2000, pp. 18-36

some economic analysis by Durie, we have a limited picture of how these developments affected poaching or game populations except in very general terms.

In the eighteenth century local people poached deer and this may have been tolerated by some landowners, but attitudes were harder where landowners hunted the animals, and tolerance declined as deer forests became more widespread. The literature has little to say on the poaching of ground and winged game and we have little indication of the methods or extent of poaching of grouse. Thomas Johnson, in his *Gamekeeper's Directory*, gives a detailed account of a netting method used in Yorkshire which might have been applied in Scotland,⁵⁸ and in more remote areas, poachers may have felt able to shoot with impunity. As for a market in game, an 1823 Parliamentary commission heard evidence from a poulterer in London who claimed to have received grouse from unspecified Scottish sources, suggesting far-reaching networks of supply, and possibly the connivance of estate management.⁵⁹

The social background of poachers is unresearched. Watson assumes that deer were poached by local people.⁶⁰ Orr, however, found at least one reference to poaching gangs in the West Highlands, possibly from Glasgow, but this is likely to be in the nineteenth century, when transport had improved.⁶¹ Hopkins refers to illegal hunting by the English upper classes as game 'bagged with the silver gun'.⁶² It is probable that early in the period deer poaching was part of wider low-level hostilities between rivals, akin to the feuding described by Manning. Later, neighbours encroached. In the late eighteenth century, the earl of Breadalbane engaged in a protracted lawsuit against fellow landowner Livingstone.⁶³

⁵⁸ Johnson, T B, *The Gamekeeper's Directory* (London 1851) , p139

⁵⁹ Parliamentary Papers 1823 (260), p9

⁶⁰ Watson, A, 'Eighteenth Century Deer Numbers and Pine Regeneration Near Braemar, Scotland', p298-299

⁶¹ Orr, W, *Deer Forests, Landlords and Crofters*, p54

⁶² Hopkins, H, *The Long Affray: the Poaching Wars in Britain* (Papermac, 1986), p82-95

⁶³ Orr, W, *Deer Forests, Landlords and Crofters*: p52. The legal implications of this case are discussed in the section below on legal frameworks.

Research into poaching in England has largely posited poaching as a 'social crime' which was class-based, and has focussed on the latter part of the period covered by this dissertation. What is clear from the English material is that game law enforcement was bound up in the minutiae of village and estate politics. Landowners could and often did indulge favoured social inferiors by permitting them to hunt. As shooting became more organised, and game preservers invested considerable funds in developing coverts and rearing semi-wild birds, such indulgences became rarer.⁶⁴

Most commentators agree that the game laws were generally resented in England, especially by farmers.⁶⁵ This resentment did not always result in support for poachers, however. Archer found that in nineteenth century Lancashire farmers were ready to assist game preservers in policing their preserves against urban poaching gangs.⁶⁶

Widespread resentment did find voice through radicals such as William Cobbett.⁶⁷ Poaching had been associated with radicalism from at least the early eighteenth century when the activities of groups like the 'Waltham Blacks' resulted in the draconian 'Black Act' of 1723.⁶⁸ Later in the period Archer has associated poaching with politically motivated animal maiming and incendiarism.⁶⁹ The elite associated poaching with revolutionary ideologies, especially after 1789.⁷⁰ The battle for control of England's game became symbolic of the gentry's attempt to keep a grip on English society and game preservers also argued that rigorous game laws were necessary to preserve stocks. This

⁶⁴ Munsche, P B, *Gentlemen and Poachers: the English game laws 1671-1831* (Cambridge University Press, 1981).p49-50

⁶⁵ *ibid*, p121

Hopkins, H, *The Long Affray*, p62-81

⁶⁶ Archer, J E, 'Poaching gangs and violence: the urban-rural divide in nineteenth century Lancashire', *British Journal Of Criminology*, Vol 39 No 1 Special Issue, 1999, p27

⁶⁷ Hopkins, H, *The Long Affray* p145-147

Munsche, P B, *Gentlemen and Poachers*,p134, 142

⁶⁸ Broad, J, 'Whigs and Deer-Stealers in Other Guises: A Return to the Origins of the Black Act', *Past & Present*, No. 119 (May, 1988), 1988, pp. 56-72

Cruickshanks, E and Erskine-Hill, H, 1985, 'The Waltham Black Act and Jacobitism', in *Journal of British Studies*, Vol. 24, No. 3, Jul 1985, pp. 358-365

Thompson, E P, *Whigs and Hunters: the origin of the Black Act* (Pantheon, 1975)

⁶⁹ Archer, J E, 'Poachers Abroad' in Mingay, G E (ed) *The Unquiet Countryside* (Routledge, 1989) p60-63

Archer, J E, *'By a flash and a scare': Arson, Animal Maiming and Poaching in East Anglia 1815-1870* (Oxford University Press, 1990)

⁷⁰ Hopkins, H, *The Long Affray*, p76-77

Munsche, P B, *Gentlemen and Poachers*, p125

narrative of conservation was prevalent within game associations in the late eighteenth century and can be detected even today in discourse about countryside stewardship.

From the late eighteenth century onwards English landowners devoted immense resources to developing and maintaining artificially high populations of game. Osborne and Winstanley have commented:

'The capital required to develop and exploit game estates, the employment of gamekeepers, the methods of production and the growth of suppliers offering specialist equipment and feedstuffs meant that game itself took on the form of an industry... it was increasingly difficult for both offenders [against the game laws] and the wider community to claim that these birds were wild and consequently fair game'⁷¹

Gamekeepers feature heavily in events in England, and the profession grew significantly to serve this increasingly organised industry. Munsche has observed, however, that keepers held an almost pariah status and that the line between poacher and gamekeeper was a fine one.⁷²

Poachers' motivations varied, and though Hopkins argues that nutrition was an important factor, many others emphasise the thrill of the chase and financial gain as primary motivators.⁷³ Poaching by stealth was a skilled activity and although there was wide sympathy for poachers, the illegality of the activity did result in an element of organised crime in the supply networks, higglers⁷⁴ and dealers.⁷⁵ Later in our period there were frequent violent altercations with game keepers.⁷⁶ For their part, the gentry formed game associations to prosecute poachers and to put pressure on poultry dealers.⁷⁷

⁷¹ Osborne, H and Winstanley, M, 'Rural and Urban Poaching in Victorian England', *Rural History*, 2006, 17, 2, (pp. 187–212), p207

⁷² Gamekeepers were excluded from the society of their elite employers, and kept a necessary distance from the rural working classes. Munsche, P B 'The Gamekeeper and English Rural Society 1660-1830', *Journal of British Studies*, Vol. 20, No. 2, 1981, pp. 82-105

⁷³ Archer, J E, 'Poachers Abroad' in Mingay, G E (ed) *The Unquiet Countryside* p57-59

Jones, D J V, 'The poacher: a study in Victorian crime and protest', *The Historical Journal*, 22, 4, 1979 pp. 825-860

⁷⁴ Higglers were criminal agents that transported game covertly, often utilising stagecoach networks.

⁷⁵ Munsche, P B, *Gentlemen and Poachers*, p59-62

⁷⁶ Archer, J E, 'Poachers Abroad' in Mingay, G E (ed) *The Unquiet Countryside*, p57-59

Hopkins, H, *The Long Affray* p8-10, 171, 228-229, 276

Munsche, P B, *Gentlemen and Poachers*, p69-72

⁷⁷ *ibid*, p56-62

Game associations also emerged in Scotland, though there seems to have been fewer altercations with keepers. The earl of Breadalbane's case against Livingstone was supported by the Perthshire game association.⁷⁸

Osborne's study of the seasonality of English poaching adds a final and important environmental dimension. Other studies have associated the seasonality of poaching with the availability of agricultural work and the lean winter months. Osborne, however, observes that there are very sound environmental reasons why poaching should follow the legitimate game seasons: the maturity of animals, the clearing of crops to expose ground feeding birds, and the migratory patterns of salmon.⁷⁹

From the English material themes emerge which can inform a study of Highland poaching. Most important is the place of poaching within a rural community and a network of social relationships. Heritable jurisdictions meant that Scottish landlords held even more sway over prosecutions than did English squires, and they may have had to use eviction and other indirect methods after their barony courts declined. The remoteness of some communities and the upland nature of the land might also mean that both poaching and gamekeeping took different forms and certainly the Breadalbane evidence suggests an absence of stealth tactics.

Tolerance may have existed for poachers but could have depended on the identity of the poacher and the nature and context of the poaching. As demonstrated in the Lancashire example, reactions to 'criminal' outsiders might be more hostile than to local poachers.⁸⁰

Scotland does not appear to have had an extensive game supply network and the evidence from the Highlands indicates generally a more localised activity that early in the period may also have played a role in inter-clan relations and acted also as a barometer of the population's respect for their

⁷⁸ NAS, GD112/16/12/1

⁷⁹ Osborne, H, 'The seasonality of nineteenth-century poaching', *The Agricultural History Review* Vol. 48, No. 1, 2000, pp. 27-41

⁸⁰ Archer, J E, 'Poaching gangs and violence: the urban-rural divide in nineteenth century Lancashire', *British Journal Of Criminology*, p30

landlord. There are very few references to radicalism in connection with Scottish poaching during the period, although the 'Cumnock Poaching Riot' of 1833 featured support for a poaching gang and references to revolutionary ideas.⁸¹ Recent work has suggested that Lowland Scotland was capable of radical organisation and Devine has questioned the passivity of Gaeldom in the face of social and economic change and later social movements such as the raid on Park deer forest on Lewis recognised the association of game with privilege.⁸²

Little has been written about poaching techniques and equipment.⁸³ The emphasis is on leistering for salmon and the material identified with ground and winged game tends to date from after our period. However, some insight is provided into methods, such as netting hedges for rabbits and hares. Nineteenth century gamekeeper's manuals also have examples of poaching practice.⁸⁴ There is very little in the literature on techniques employed in the Highlands and the evidence from the Breadalbane material suggests that guns were the preferred method.

The history of poaching has been approached to date under the wider umbrella of a history of crime. Jones' examination of Victorian poaching in England is essentially a criminological study and the works of Munsche and Manning have sought to put the crime in a social, political and cultural context.⁸⁵ Much of the work on English poaching has focussed on issues of class and the connection between poaching and radicalism.⁸⁶ This is understandable given the inherent anti-authoritarian

⁸¹ Close, R, 2001, 'The Cumnock Poaching Riot of 1833' www.ayrshirehistory.org.uk/Poaching/poaching.htm

⁸² Devine, T M, *Clanship to Crofter's War: The Social Transformation of the Scottish Highlands* (Manchester University Press, 1994) p235

Devine, T M, 'A Conservative People? Scottish Gaeldom in the Age of Improvement' pp.225-236

Wallace, V, 'Presbyterian Moral Economy: The Covenanting Tradition and Popular Protest in Lowland Scotland, 1707–c.1746' in *The Scottish Historical Review*, Vol LXXXIX, 1: No. 227, April 2010, pp. 54–72

⁸³ Hendry, C, *Scottish poaching equipment: an illustrated guide to the poaching collection in the National Museum of Antiquities of Scotland, Edinburgh* (HMSO, 1982)

⁸⁴ For example, Stevenson refers extensively to H A MacPherson's *A History of Fowling: Being an Account of the many Curious Devices by which Wild Birds are or have been Captured in Different Parts of the World* (1897) and Johnson's *Gamekeeper's Directory* (1851) contains material on poaching methods for grouse

⁸⁵ Jones, D J V, 'The poacher: a study in Victorian crime and protest', *The Historical Journal*, 22, 4, pp825-860

Munsche, P B, *Gentlemen and Poachers*, p123-127,

⁸⁶ Archer, J E, 'Poachers Abroad' p60 -63

Hopkins, H, *The Long Affray* p177-194

Jones, D J V, 'The poacher: a study in Victorian crime and protest', *The Historical Journal*, 22, 4, p 829

aspect of poaching and follows a broader trend in the history of crime, heavily influenced by a Marxist approach and exemplified by the work of Rude and Thompson.⁸⁷

Study of crime in Scotland, however, has been minimal, a fact noted by Donnachie in 1995 and still lamented by Kilday in 2012.⁸⁸ Devine, Wallace and Whatley have all contributed to our understanding of popular protest, but their focus has been on popular disorder rather than on individual crime.⁸⁹ Knox and McKinlay surveyed nineteenth century crime, focussing on the urban, and drew connections with wider unrest, observing that it was only from the mid-nineteenth century that a clear socio-legal distinction was drawn between the law-abiding working classes and a distinct criminal class.⁹⁰ This suggests that within the period of study, especially in the context of poaching, relatively small monetary fines may indicate an administrative rather than a punitive or moralistic approach to some offenders. Other than generalised observations, however, poaching in Scotland receives scant attention, perhaps due to the general dearth of research but also because of the difficulty in identifying sources of evidence. It may also be attributable to the difficulty in identifying a 'social crime' like poaching and the incomplete nature of evidence which Jones has noted in the English context.⁹¹

Nineteenth century sources do, however, give an overview of the Scottish game laws, though they too have received no recent research. Alexander Forbes Irvine provided a succinct summary with his

⁸⁷ Rudé, G, 'Protest and Punishment in Nineteenth-Century Britain', *Albion: A Quarterly Journal Concerned with British Studies*, Vol. 5, No. 1, Violence and Social Control, Spring 1973, pp. 1-23

Thompson, E P, *The History of the English Working Class* (Gollancz, 1963)

⁸⁸ Donnachie, L, "The darker side : a speculative survey on Scottish crime during the first half of the nineteenth century", *Scottish Economic and Social History*, Vol 15, 1995, p5-24

Kilday, A-M, 'The barbarous North? Criminality in Early Modern Scotland' in Devine, T M and Wormald, J (eds) *The Oxford Handbook of Modern Scottish History* (Oxford University Press, 2012) pp 386-401

⁸⁹ Devine, T M, *Clanship to Crofter's War*

Wallace, V, 'Presbyterian Moral Economy: The Covenanting Tradition and Popular Protest in Lowland Scotland, 1707–c.1746' in *The Scottish Historical Review*, Vol LXXXIX, 1: No. 227, April 2010, 54–72

Whatley, C A, 'How tame were the Scottish Lowlanders during the Eighteenth Century', in Devine, TM (ed) *Conflict and stability in Scottish society, 1700-1850: proceedings of the Scottish Historical Studies Seminar, University of Strathclyde, 1988-89* (John Donald, 1990) pp1-30

⁹⁰ Knox, W J and McKinlay, A, 'Crime, Protest and Policing in Nineteenth Century Scotland' in Griffiths, T and Morton, G (eds) *A History of Everyday Life In Scotland 1800 to 1900* (Edinburgh University Press, 2010) , p201

⁹¹ Jones, D J V, 'The poacher: a study in Victorian crime and protest', p829

1850 treatise.⁹² Because of the longevity of much of the legislation, his commentary about the situation in 1850 serves to cover most of the period and will be discussed in the chapter on legal frameworks.

This study relies heavily on the records of a franchise court. Despite their importance to local justice until 1748, heritable jurisdictions in Scotland have received scant attention except for a short discussion dating from the late Victorian period, a brief discussion in a wider history of Scottish justice, and an excellent introduction to the records of the Argyll Justiciary Court.⁹³ Therefore the chapters on sources and methods and the legal framework of game protection discuss this aspect in more detail.

Highland Scotland underwent radical social and economic change in the period. Until relatively recently, pre-enlightenment Highland society was characterised as ‘feudal’, ‘traditional’ or even ‘tribal’. Popular historians such as John Prebble reinforced this view.⁹⁴ In 1969, even the great social and environmental historian T C Smout described the clan system thus:

“The Highlands were tribal, in the exact sense that nineteenth century Africa was tribal”⁹⁵

Our understanding has shifted significantly since this generalisation. Macinnes and Dodgshon have both made studies of the transformation of the Highlands from a society in which real or imagined kinship formed the basis of social relations to one which more closely resembled the landlord-tenant model which prevailed throughout the rest of the British Isles.⁹⁶ Macinnes observes, however, that

⁹² Forbes Irvine, A, *A Treatise on the Game Laws of Scotland: with an appendix containing the principal statutes and forms* (T & T Clark, Edinburgh, 1850)

⁹³ Dickson, W K, ‘Heritable Jurisdictions’, *Juridical Review* 9, 1897, pp. 428-444.

Cairns, J, 'Historical Introduction', in Reid K and Zimmermann R (eds), *A History of Private Law in Scotland Volume 1 Introduction and Property*

Cameron, J (Ed), *The Justiciary Records of Argyll and the Isles 1164-1705, Vol 1* (Stair Society, Edinburgh 1949)

⁹⁴ Prebble, J, *The Highland Clearances* (London, 1963)

⁹⁵ Smout, T C, *A History of the Scottish People 1560-1830* (Fontana 1985, originally published 1969), p313

⁹⁶ Dodgshon, R A, *From Chiefs to Landlords*

Macinnes, A I, *Clanship, Commerce and the House of Stuart 1603-1788* (Tuckwell, 1996)

Highland chiefs operated *within* the Scottish legal system, rather than the legal system being a colonial adjunct:

‘Political, social and cultural developments within Scottish Gaeldom were not antipathetic to, merely differing in emphasis from, contemporaneous Lowland values where the pace of commercialism was more advanced.’⁹⁷

Over the period, there was a shift from an economy based on the symbolic value of goods – where the consumption of surplus by the clan elite brought status to the clan – to one based on the cash value of produce.⁹⁸ Surplus produce gathered through 'hospitality' (*cuid-oidhche*) was consumed in feasts which demonstrated clan wealth, and 'hosting', often for hunting, demonstrated the chief's ability to call men to his service.⁹⁹ In an environment where open blood feud was in decline (but far from dead), proxy conflicts such as legal disputes and cattle raiding continued to be important in inter-clan relations throughout the seventeenth century.¹⁰⁰ These community-based activities, which functioned in an economy where the triumph of the chief was the triumph of his people, gave way to a more individualised social economy from the eighteenth century onwards.

Key concepts in the Highland social economy could be said to be in conflict. *Cuid-oidhche* (hospitality), was in conflict with a more formalised extraction of rent in cash or kind which became dominant over the period. This shift altered the relationships between clansfolk and chief to those of tenant and landlord and saw the demise of the leisured warrior class and tacksmen.¹⁰¹ The move away from *cuid-oidhche* can be seen in a wider context of commercialisation which also saw the development of the cattle trade and subsidiary industries such as distilling.¹⁰²

⁹⁷ *ibid* p24

⁹⁸ Dodgshon, R A, *From Chiefs to Landlords*, p102-118

⁹⁹ *ibid*, p57

Macinnes, A I, *Clanship, Commerce and the House of Stuart 1603-1788*, p22-23

¹⁰⁰ Dodgshon, R A, *From Chiefs to Landlords*, p87

¹⁰¹ Macinnes, A I, *Clanship, Commerce and the House of Stuart 1603-1788*, p222

Dodgshon, R A, *From Chiefs to Landlords* p 133-134

Devine, T M, *Clanship to Crofter's War*, p28

¹⁰² Dodgshon, R A, *From Chiefs to Landlords* p117

Dodgshon identifies game as an extra resource to supply a chief's conspicuous consumption but he approaches it as a physical resource, and is silent on the symbolism of hunting. The right to and the act of hunting were, in other periods and locations, highly symbolic and reinforced a social hierarchy. The ability to organise a large scale *tinchel* would have great social significance for a pre-Improvement chief. The possession of forestry rights would be a significant element of the *oighreachd* and if particular rights were regarded as belonging to the *duthchas* of one clan but in reality were held by the *oighreachd* of another, there would be potential for conflict.

These two concepts, *duthchas* or 'traditional' rights and *oighreachd* or rights enforceable by legal title, were also in conflict during the period, and as ownership and management moved closer to their Lowland counterparts, *oighreachd* could be said to gain the upper hand.¹⁰³ Clan feuds, caterans¹⁰⁴ and a sense of *duthchas* lingered long after the triumph of *oighreachd* in a formalised, landlord-tenant economy. The sense of traditional rights independent of contractual law that is inherent in the concept of *duthchas* may have influenced attitudes to game and poaching, supporting the idea that despite the letter of the law, people might claim a 'traditional' right to game. In other contexts, especially in England, enlightenment era poachers appealed to the ideas of Thomas Paine.¹⁰⁵ It may be that in the Highlands a lingering sense of *duthchas* played a similar role in poachers' self-justification.

The development of a commercial economy in the Highlands was encouraged by the Crown, punctuated by events such as the signing of the Statutes of Iona in 1609. There is some debate as to the effectiveness of the Statutes and some historians have argued that they may in fact represent an accommodation between the signatory chiefs and the crown, rather than rule by decree. It is also a common misconception that their provisions applied universally rather than only to the

¹⁰³ Dodgshon, R A, *From Chiefs to Landlords*, p34

Macinnes, A I, *Clanship, Commerce and the House of Stuart*.p5-7

¹⁰⁴ bands of men engaged in banditry and cattle rustling, usually having no formal allegiance to a land-owning chief

¹⁰⁵ Hopkins, H, *The Long Affray*, p210

signatories.¹⁰⁶ However they remain an articulation of the aims of the crown in respect of the *Gàidhealtachd* at the start of the period and indicate the desire of the crown to bring the Highlands and Islands into the body politic and are indicative of attitudes towards the wider *Gàidhealtachd*.

The changing basis of the economy is intrinsically connected with growing interest in Improvement and an increasing social distance between landlord and tenant. Dodgshon suggests that older approaches resulted in a kind of 'give and take' economy in which landlords showed flexibility and indulgence of tenants during difficult times.¹⁰⁷ However, this was not an exclusively Highland phenomenon, nor were capitalist landlords incapable of leniency.¹⁰⁸ What may be significant, however, is that pre-Improvement leniency tended to be community-based rather than individual.

What is clear from all commentators is an increasing social distance between principle landowners and tenants, and between tenants and sub-tenants, cottars and labourers. Dodgshon has suggested that the rationalisation of fermtouns was a phenomenon common across Scotland.¹⁰⁹ In the Highlands, this meant the demise of the tacksmen and the emergence of individual rather than collective tenancies. The abolition of the Barony courts also removed an important community focus in which local people participated in the management and adjudication of the estate's affairs.

Increasing social distance between laird and tenant may have resulted on the one hand in a harder line on poaching and on the other greater resentment of the preservation of game, but the literature is silent on this point. The individualisation of relationships may also have increased the propensity for individual tenants to "play off" the laird against a rival tenant.

¹⁰⁶ MacGregor, M, 'The Statutes of Iona: text and context', *The Innes Review*, 57, No 2, p166
Macinnes, A I, *Clanship, Commerce and the House of Stuart*, p65

¹⁰⁷ Dodgshon, R A, *From Chiefs to Landlords*, p95

¹⁰⁸ For example, the factors of the Mains Estate of the Douglas family in New Kilpatrick wrote detailed reports in the 1820s for the guardians of the (then minor) master of the estate recommending rent reductions due to falling prices and bad harvests. GB243/TD102 Mitchell Library Archive, Glasgow

¹⁰⁹ Dodgshon, R A, 'The clearances and the transformation of the Scottish countryside' in Devine, T M and Wormald, J (eds) *The Oxford Handbook of Modern Scottish History* (Oxford University Press, 2012) pp130-158, p131

One issue particularly relevant to Breadalbane because of its location, was the existence of caterans who indulged in cattle raiding mainly on the Lowland periphery. Although these practices were on the wane by the late eighteenth and early nineteenth century, the fact that outlaws' cattle rustling was recorded but their poaching was not raises questions about social context and profitability of both activities, and the seriousness with which they were viewed by landowners.¹¹⁰

As well as the 'rationalisation' of social relations, Improvement also heralded the application of enlightenment thinking to all aspects of the management of natural resources. Both Smout and Whatley have described how this encompassed activities like land drainage, fertilisation, re-routing water courses and the development of timber plantations. In addition there were attempts by individual landowners and bodies such as the Board of Trustees for Fisheries and Manufactures and the Commission for Forfeited and Annexed Estates to design communities around specific industries.¹¹¹

Although pre-1750 Improvement has been described as 'a rich man's non-paying hobby', it did involve a sea-change in attitudes to the land and encouraged pro-active management in an attempt to increase yields and efficiencies.¹¹² The intensity of game management in England in the later eighteenth century should be seen as part of the wider phenomenon of Improvement. Rather than simply exploit an existing wild resource, landlords actively managed their estates to maximise the population of game birds.¹¹³

A significant result of the move to a cash economy and Improvement was the increased indebtedness of Highland landlords to banks, and, ultimately, the sale of estates to 'outsiders' in the nineteenth

¹¹⁰ Macinnes, A I, *Clanship, Commerce and the House of Stuart 1603-1788*, p32-37

¹¹¹Whatley, C A, *Scottish Society, 1707-1830: Beyond Jacobitism, Towards Industrialisation*, (Manchester University Press, 2000), p69

Examples of planned communities include Ullapool, established as a fishing community, and Inveraray, established by the Duke of Argyll in the late eighteenth century with a mixed economy of manufacture and fisheries.

¹¹² Lenman, B P, *Integration and Enlightenment: Scotland 1746-1832* (Arnold, 1981), p4

Whatley, C A, *Scottish Society, 1707-1830*, p52

¹¹³ Munsche, P B, *Gentlemen and Poachers*, p39-45

century. This coincided with an increasing interest in landed estates and titles from an emerging *nouveaux riche*.¹¹⁴ Although these land sales were bound up with the emergency of blood sport tourism, the Breadalbane estates remained intact during the period.

How estates were managed for game has not been the subject of widespread research but Dodgshon and Olsson have examined the management of heather moorland. Heather moor is an entirely cultural landscape maintained through a combination of burning, grazing and timber clearance. Muirburn is a key factor in maintaining heather in the building stage. During our period the moor was primarily maintained for grazing but game birds also benefited, firstly because muirburn was banned during their breeding season (specifically to protect them) and secondly because they fed on new growth promoted by the burn.¹¹⁵

Smout suggests that as the commercial importance of grouse and deer increased, 'the grouse moor and deer forest between them changed a landscape of use ... to a landscape of delight [through recreation], kept empty of people.'¹¹⁶ In this newly emptied landscape heather moor was maintained, but now specifically to encourage the grouse population.

Another important study concerning game management is Stevenson's work on the Capercaillie. Based largely on archive records including those of Breadalbane, Stevenson's research concluded that this large member of the grouse family probably died out in Scotland by the late eighteenth century and that a combination of factors including climate, habitat loss, human hunting, predation and disturbance contributed to its decline, and that the balance of these factors varied within different sub-populations. Its eventual reintroduction by the Marquis of Breadalbane in 1837 is an example of the enthusiasm of Improvers for active management of game.¹¹⁷

¹¹⁴ Devine, T, *Clanship to Crofter's War*, p58-67

¹¹⁵ Dodgshon, R A, and Olsson G A, 'Heather moorland in the Scottish Highlands: the history of a cultural landscape, 1600-1880', *Journal of Historical Geography* 32, 2006, pp. 21-37, p28

¹¹⁶ Smout, T C, *Nature Contested*, p133

¹¹⁷ Stevenson, G B, *An historical account of the social and ecological causes of Capercaillie Tetrao urogallus extinction and reintroduction in Scotland*, p25-27, 163-181

Game management also required the extermination of vermin, and Smout reports eighteenth century records which feature a wide range of species killed and include returns for Breadalbane. For Smout the numbers of raptors slaughtered by gamekeepers is testament to the potential for the uplands to support a dense and diverse bird population, a potential frustrated by the over-management of resources for grouse.¹¹⁸ The fact that vermin returns date from the mid-eighteenth century may indicate that estates were more actively persecuting vermin. In the case of raptors, this may well be the case, as until the seventeenth century, hawk and falcon populations were valued as a source of falconry birds.

Beyond the management of heather moor and control of vermin there is no systematic research in the literature on the management of upland hunting in the period

Kidd and Smout have both examined the challenge presented to Scottish and British identities by the Act of Union of 1707. While many of the Scottish elite subscribed to a 'North British' identity, there were areas of 'resistance', for example the retention of a separate legal system.¹¹⁹ The greatest resistance was in the form of Jacobitism and the aftermath of the 1745-46 rebellion was to radically alter many aspects of Scottish society, not least the administration of justice, the forfeiture of estates and attempts by the Commission for Forfeited Estates to engineer new employment and new social structures in the Highlands.¹²⁰

Union and the end of Jacobitism were also pre-cursors to the opening of the Highlands to tourism.

Grenier has explored the discovery of the Highlands and their Romantic re-invention as a place where the upper and middle classes could experience the sublime. An important element in this experience was the physical challenge (for men) of outdoor pursuits and blood sports in the company

¹¹⁸ Ending in extinction for some species, Smout, T C, *Nature Contested*, p134-137

¹¹⁹ Kidd, C, 'North Britishness and the Nature of Eighteenth-Century British Patriotisms', *The Historical Journal*, Vol 39, No 2, Jun 1996, pp361-382

Smout, T C, 'Problems of Nationalism, Identity and Improvement in later Eighteenth Century Scotland', in T.M. Devine (ed.), *Improvement and Enlightenment: Proceedings of the Scottish Historical Studies Seminar University of Strathclyde, 1987-88* (Edinburgh, 1989) pp1-21

¹²⁰ Smout, T C, 'Problems of Nationalism, Identity and Improvement in later Eighteenth Century Scotland', p6

of a Gaelic servant.¹²¹ Field sports became a key element of the Scottish tourist experience in the later nineteenth century, but Durie reckons 'it seems probable that the flow of southern sportsmen north, after fish and game, was probably already established on some scale in the later eighteenth century, rather earlier than has been allowed.'¹²² The development of Highland tourism coincides with the later stages of the conceptualisation of the 'countryside' in England through cultural practices and later the Romantic movement described by Landry.¹²³ Although more defined in the English context, the 'invention' of the concept of countryside in contrast to town, and the associated cultural trappings and behaviours of country gentfolk- in which shooting and game preservation stood alongside equestrian pursuits - also influenced the anglicized North British aristocrats, exemplified by the establishment of Game Associations with whom the fourth earl of Breadalbane (1762 -1834, succeeded to earldom 1782) was heavily involved.

The end of Jacobitism also led to the development of a new identity for Scotland in which the outdoor life featured heavily. A version of the Highlands developed in popular discourse through their 'discovery' in which they provided an essential ruggedness, romance and distinctiveness to a developing national identity – 'Highlandism.'¹²⁴ The rental of Balmoral by Queen Victoria was an important step in this process. Victoria, Albert and their offspring were directly associated symbolically and physically with Highland scenery, culture and tradition, and field sports- the 'Balmoralisation' of the Highlands. Visual artists such as Landseer (himself a deer stalker) and literary fantasists such as the 'Sobieski Stuart' brothers¹²⁵ are prime examples of cultural practitioners who supplied and reinforced this new identity and its symbolism.¹²⁶

¹²¹ Grenier, K H, *Tourism and Identity in Scotland 1770-1914: creating Caledonia* p106-118

¹²² Durie, A J, *Scotland for the holidays: Tourism in Scotland c1780-1939* (Tuckwell, 2003), p113

¹²³ Landry, D, *The Invention of the Countryside: Hunting, Walking, and Ecology in English Literature, 1671-1831*(Palgrave Macmillan 2001)

¹²⁴ Withers, C W J, 'The Historical Creation of the Scottish Highlands', in Donnachie, I and Whatley, C, (eds), *The Manufacture of Scottish History* (Edinburgh, 1992), p149-152

¹²⁵ Authors of *Lays of the Deer Forest* (1848), and held up by Trevor-Roper as examples par excellence of romanticisers of the Highlands

¹²⁶ Walter Scott had also done a lot of the groundwork for these developments. *The Lady of the Lake* opens with an extended, highly Romanticised pursuit of a hart through the Trossachs (Scott, W, *The Lady of the Lake*

Cartmill, Fletcher and Cummins have all explored the wider symbolic position of deer in Western culture - an almost ethereal presence recognised even by voracious hunters. Stags have been held as totems of virile masculinity but also of purity and are often, in medieval art, associated with Christ, and with royalty. This symbolism continues, and Cartmill artfully draws a line from medieval symbolism to Landseer's *Monarch of the Glen* and ultimately *Bambi*.¹²⁷

Mackenzie and Lorimer both make the connection between hunting and imperialism, Mackenzie in the context of hunting overseas and Lorimer in the role of Highland deer stalking as an essential element of training of the imperial elite in the early twentieth century – a continuation of the role of hunting as a proxy and training ground for military leaders.¹²⁸

Developments in tourism and in the association of field sports with the monarchy clearly enhanced the economic significance of these activities and may have contributed to increased efforts to preserve game, and the cultural symbolism associated with hunting served to reinforce its exclusive nature and by implication the immorality of poaching.

One final element of context for this dissertation is the development of thought about animals and cruelty during the period. Griffin and Thomas both agree that puritan divines in the seventeenth century began to question the morality of blood sports such as bear baiting. Though there was some objection to hunting this tended to be on the grounds that it was a pursuit for the idle rich, rather than that it was inherently cruel or inhumane.¹²⁹

1810). He was also a central organiser of the cultural window-dressing for George IV's visit to Edinburgh in 1822 (Trevor-Roper, H, 'The Invention of Tradition: The Highland tradition of Scotland' in Hobsbawm and Ranger, eds, *The Invention of Tradition (Canto 1992)*, p29-30).

¹²⁷ Cartmill, M, *A View to a Death in the Morning: Hunting and Nature through History* p161-188

Fletcher, J, *Gardens of Earthly Delight*, p120-132

¹²⁸ Lorimer, H, 'Guns, Game and the Grandee: The Cultural Politics of Deerstalking in the Scottish Highlands', *Cultural Geographies*, 7, 2000 , pp. 403-431

Mackenzie, J, *The Empire of Nature* (Manchester University Press, 1988)

¹²⁹ Griffin, E, *Blood Sport*, p91

Thomas, K, *Man and the natural world: changing attitudes in England, 1500-1800* (Penguin, 1984), p160-165

Whilst research into poaching in Scotland in our period has been minimal, a study of literature on related topics, periods and regions allows us to build a picture of both the state of current knowledge and key themes for exploration. Foremost is the social context of poaching. This relates not simply to class distinctions but to a complex network of social relations. Poaching was not only a crime committed by the poor against the rich, but rather an activity involving a wide cross-section of the community. The practice of turning a blind eye, indulgences, or even complicity meant that the distinction between those engaged in legal and illegal activity was not clear. Where class was most directly relevant was in the structure and methods of poaching and also in the likelihood of legal prosecution.

The background social changes provide a useful model of increasing social distance, formalisation of relationships and increasing specialism in professions and trades against which to map the incidence of and attitudes to poaching. If older hunting activities involved collective, communitarian effort then the move away from these activities may indicate a decreasing community investment in game resources, and an attitude of individualised entitlement on the part of landlords. Game may cease to be regarded as 'ours' – an aspect of clan *duthchas* – and be regarded as 'mine' – the preserve of the laird.

Connected to this social context, the literature also emphasises the cultural symbolism of hunting as an activity of the privileged. In the Scottish context, the social significance of the *tinchel* and its conspicuous utilisation of human resources have not been properly researched. It might be tentatively suggested that the seventeenth century formalisation of exclusive hunting rights (through the 1621 Act) and the nineteenth century fashion for Highland field sports are more recent manifestations of the same symbolic associations. Put very crudely, hunting is a reserved activity in which only privileged people may indulge not only because of mundane legalities and practicalities but also for more spiritual and ethereal reasons. This kind of association – of hunting with aristocracy, religion and the ethereal – was reinforced by the development of a Romantic aesthetic

about the Highlands associated with a Scottish aristocratic identity, but was also present implicitly in the reservation of game for the Crown and nobles.¹³⁰

In terms of legal history, we are short of research but nineteenth century works on the game laws and heritable jurisdictions and some references in the limited recent research suggest that that the legal framework within which game was protected and poaching prosecuted was a complex one.

The pursuit of game encapsulates key aspects of human relationships with a natural resource, and the influence of that relationship on social relations within human communities. It therefore requires an exploratory approach which begins to encapsulate all aspects.

¹³⁰ Grenier, K H, *Tourism and Identity in Scotland 1770-1914: creating Caledonia*. p30

Durie, A J, "Unconscious benefactors': grouse-shooting in Scotland, 1780–1914', *The International Journal of the History of Sport*, 15:3, p57-73

The legal framework of Game Preservation and Poaching in Scotland

The legal protection of game in this period was principally concerned with the preservation of species for an elite, establishing 'closed' seasons and restricting specific activities. The basic foundations of the game laws had been set by the start of the seventeenth century. What followed was a refinement and finessing of the provisions of those laws the enforcement of which relied heavily on the will of local landowners. Throughout the period the basic principles on which game laws were based remained unchanged.

The game law system had its origins in the later medieval period. At that time, red and roe deer¹³¹ within designated forests were protected by regimes specific to these reserves. This protection also extended to other game where the provisions of the forest allowed, or separate rights of warren had been extended. Forest laws also regulated the use of dogs and access to timber, grazing and pannage. Royal Forests were theoretically held by and administered on behalf of the Crown, but by the start of the early modern period most aristocratic Foresters regarded the Forests and the deer within them as their own property.¹³² At the start of the period, Campbell of Glenorchy was the King's forester of Mamlorn Forest¹³³ and managed the forest of 'Corrichiba',¹³⁴ although this appears to have been Glenorchy's own possession.

Although forest laws restricted access to and hunting within forests, game animals were generally regarded as *ferae naturae* and *res nullius*.¹³⁵ However, these basic principles which, unmoderated,

¹³¹ Throughout the period the word "deir" or "deer" indicated Red Deer (*Cervus Elaphus*), and "rae" or "roe", Roe Deer (*Capreolus capreolus*)

¹³² Sir James Dalrymple, Viscount Stair, *Institutions of the Law of Scotland* Ed G Brodie, Edinburgh 1826-31, cited in Gilbert, J, *Hunting and Hunting Reserves*, p133

¹³³ Between Glen Lyon and Glen Lochay, centred around Beinn Sheasgarnaich GR NN413383. It incorporated the areas of Findoglenbeg and Findoglenmor and Bendaskerlie.

NAS, GD112/59/2/4

The Forest of Mamlorn, 1732-4, Anon, NAS, RHP960/1

¹³⁴ Coireach a Bà (the Corrie of the Cattle), on the south west edge of Rannoch Moor.

¹³⁵ wild creatures and belonging to no one

would mean anyone could hunt anything, were qualified by attempts to restrict hunting activities.¹³⁶

The principles that defined game as wild animals belonging to no one, however, meant that legislation focused on the regulation of the act of hunting rather than on the possession or theft of game. This principle extends right through the period of research, the only exception was where animals had been enclosed and had become the possessions of the encloser.¹³⁷ The extent to which a landowner could control the hunting of animals he or she did *not* possess by enclosure but which happened to be on his or her land was the central feature of a House of Lords case pursued by the fourth earl of Breadalbane in 1789.¹³⁸

Over the medieval period a small body of legislation grew which created some key seasonal hunting restrictions. Fifteenth century laws included a closed season for certain wildfowl (from Lent to August)¹³⁹ and winter hunting of rabbits and hares was restricted by prohibitions introduced in 1458.¹⁴⁰ Hunting of red and roe deer during storms or snow was declared a point of dittay and liable to a £10 fine in 1474.¹⁴¹ The slaughter of deer in snow was clearly long-regarded as taboo and featured in indignant reports of Mamlorn foresters during Breadalbane's dispute with Menzies of Culdares in the 1730s.¹⁴²

¹³⁶ Gilbert, *Hunting and Hunting Reserves*, p225-234

¹³⁷ 1474 legislation made clear anyone taking such game without permission would be guilty of theft. *Item, that na man sla dere nor rays in tyme of storm or snaw* *The Records of the Parliaments of Scotland to 1707*, K.M. Brown et al eds (St Andrews, 2007-2014), A1474/5/16. Date accessed: 16 November 2014.

¹³⁸ 'House of Lords Journal Volume 39: April 1791 11-18', *Journal of the House of Lords volume 39: 1790-1793 (1767-1830)*, pp. 111-125

¹³⁹ *Item anent pertrikis, pluaris, blak cokis, gra hennys na mur cokis* concerned partridges, plovers, 'blackcocks' (male black grouse), 'grey-hens' (female black grouse), and 'muircocks' (red grouse) *The Records of the Parliaments of Scotland to 1707*, K.M. Brown et al eds (St Andrews, 2007-2014), 1428/3/13. Date accessed: 16 November 2014.

¹⁴⁰ *Item anentis the slaaris of harys in snawe tyme and distrucione of cunnyis*, *The Records of the Parliaments of Scotland to 1707*, K.M. Brown et al eds (St Andrews, 2007-2014), 1458/3/37. Date accessed: 16 November 2014.

Item, that na man sla dere nor rays in tyme of storm or snaw respectively. *The Records of the Parliaments of Scotland to 1707*, K.M. Brown et al eds (St Andrews, 2007-2014), A1474/5/16. Date accessed: 16 November 2014.

¹⁴¹ *Item, that na man sla dere nor rays in tyme of storm or snaw* respectively. *The Records of the Parliaments of Scotland to 1707*, K.M. Brown et al eds (St Andrews, 2007-2014), A1474/5/16. Date accessed: 16 November 2014.

¹⁴² NAS, GD112/59/12/21

There were also steps to restrict specific types of hunting. An act against 'stalkers of deer' (suggesting perhaps those who hunted by stealth - 'poachers') who would be fined 40s and their masters £10, suggesting that servants may often have been sent to hunt in this way on behalf of their noble lords.¹⁴³

So by 1500 some steps had been taken towards introducing hunting seasons, and restrictions on some hunting activities. On several occasions in the mid- 16th century legislation was passed against the shooting of deer and other game with firearms - twice in the reign of Queen Mary and at least twice under James VI, and provided for the death penalty.¹⁴⁴ The reason for these provisions was outlined in the first Act, of 1551:

'quhairthrow the nobill men of the realme can get na pastyme of halking and hunting, lyke as hes bene had in tymes bypast, be ressoun that all sic wylde beistis and wylde foulis ar exilit and banist be occasioun forsaid'¹⁴⁵

The re-enactments of similar provisions again in 1555 and 1563 suggest that enforcement was ineffectual. A further law was passed during James VI's which specified more clearly the animals

'House of Lords Journal Volume 26: May 1744', *Journal of the House of Lords volume 26: 1741-1746 (1767-1830)*, pp. 383-399

¹⁴³ 1425 legislation concerned deer stalkers, presumably armed with a bow or crossbow. *The Records of the Parliaments of Scotland to 1707*, K.M. Brown et al eds (St Andrews, 2007-2014), 1425/3/14. Date accessed: 11 November 2014.

Gilbert suggests that stalking was one of the four hunting methods used for deer in the middle ages.

¹⁴⁴ *Anent thame that schutis with gunnis at deir and wylde foulis, ca. viii, The Records of the Parliaments of Scotland to 1707*, K.M. Brown et al eds (St Andrews, 2007-2014), A1551/5/3. Date accessed: 11 November 2014

Anent the slaying of wylde beistis, wylde foulis, halking and hunting, ca. xxv, The Records of the Parliaments of Scotland to 1707, K.M. Brown et al eds (St Andrews, 2007-2014), A1555/6/26. Date accessed: 16 November 2014.

Item, ... that nane of our soverane ladyis liegis sould schute with half hag, culvering or pistolat at deir, ra and uther wylde beistis. The Records of the Parliaments of Scotland to 1707, K.M. Brown et al eds (St Andrews, 2007-2014), A1563/6/15. Date accessed: 16 November 2014.

Anent slaying of hart, hynde and utheris beistis and foulis with culveringis. The Records of the Parliaments of Scotland to 1707, K.M. Brown et al eds (St Andrews, 2007-2014), A1567/12/16. Date accessed: 16 November 2014.

Aganis slayeris of deir and utheris wyld beastis. The Records of the Parliaments of Scotland to 1707, K.M. Brown et al eds (St Andrews, 2007-2014), 1587/7/53. Date accessed: 11 November 2014

¹⁴⁵ *whereby the noble men of the realm can get no pastime of hawking and hunting, as has been had in times past, by reason that all such wild beasts and wild fowl are exiled and banished by the occasion foresaid Anent thame that schutis with gunnis at deir and wylde foulis, ca. viii, The Records of the Parliaments of Scotland to 1707*, K.M. Brown et al eds (St Andrews, 2007-2014), A1551/5/3. Date accessed: 11 November 2014.

protected and extended the offence to include the use of crossbows and hand bows. The act acknowledged, however that 'na executioun hes followit of befor upon the personis contravenaris of the saidis actis'¹⁴⁶ and the penalty was reduced from death to forfeiture of goods.¹⁴⁷ A later act brought offences in line with theft in view of the ineffectiveness of the legislation.¹⁴⁸

Further legislation at the start of James VI's minority drew an association between game protection and civil order. A 1567 Act restricted the carrying of firearms to those given license by the crown or for specific military purposes, because firearms:

'ar not onlie of the lovabill constitutionis of this realme in slaying of wylde beistis and foulis forbiddin, bot als diveris our soverane lordis liegis ar schamefullie and cruellie murthourit'¹⁴⁹

The penalty was the loss of a hand. This legislation was renewed in 1575 and a provision against the carrying of firearms and shooting at game was included in the Statutes of Iona in 1609.¹⁵⁰

So at the start of the period, general measures were in place to prevent the indiscriminate shooting of game and the hunting of particularly valuable game animals in closed seasons. Bearing firearms for hunting was connected to the wider issue of social order and the militarisation of society through the widespread ownership and use of handheld gunpowder weapons.

It is perhaps no surprise that James VI, a keen hunter, presided over further game legislation, including a further act in 1597 regarding the slaying of game and adding powers for local law

¹⁴⁶ *no execution has followed of before upon the persons contraveners of the said acts*

¹⁴⁷ *Anent slaying of hart, hynde and utheris beistis and foulis with culveringis, The Records of the Parliaments of Scotland to 1707*, K.M. Brown et al eds (St Andrews, 2007-2014), A1567/12/16. Date accessed: 11 November 2014.

¹⁴⁸ *Aganis slayeris of deir and utheris wyld beastis, The Records of the Parliaments of Scotland to 1707*, K.M. Brown et al eds (St Andrews, 2007-2014), 1587/7/53. Date accessed: 11 November 2014

¹⁴⁹ *'are not only by the loveable constitutions of this realm in slaying of wild beasts and fowls forbidden, but also diverse our sovereign lord's lieges are shamefully and cruelly murdered'* *The Records of the Parliaments of Scotland to 1707*, K.M. Brown et al eds (St Andrews, 2007-2014), A1567/12/22. Date accessed: 16 November 2014.

¹⁵⁰ *The Records of the Parliaments of Scotland to 1707*, K.M. Brown et al eds (St Andrews, 2007-2014), A1575/3/2. Date accessed: 16 November 2014.

Article VII of the Statutes of Iona reproduced in Donaldson, G (Ed), *Scottish Historical Documents* (Neil Wilson Publishing, 1997) p174

enforcers against unauthorised fowling and two in 1599 and 1600 to prohibit the trading of wildfowl in order to protect stocks for gentlemen hawkers.¹⁵¹ The latter two suggested that only those who could afford 'be thair revenewis'¹⁵² to keep hawks, horses and hounds should be permitted to hunt. This position was clarified in the most important piece of Scottish game legislation of the seventeenth century, the 1621 Act 'Anent Hounting and Haulking',¹⁵³ which introduced a property qualification that only those who had a 'pleughe of land in heretage'¹⁵⁴ could hunt or hawk. This effectively outlawed all hunting by tenants, smallholders and lessors. 'A plough' of land is taken to mean the area of land that can be ploughed by an eight oxen in a year, sometimes reckoned to be 104 Scots acres.¹⁵⁵ The term was clearly intended to exclude all but significant landowners from hunting activities. This one piece of legislation only seventy three words in length remained in force until the end of the period. It was supplemented by a 1685 act which introduced a property qualification of rental income of £1000 Scots and made specific reference to hunting with fowling pieces. According to the Victorian Advocate Alexander Forbes Irvine, the 1685 act fell into disuse after the Union of 1707 (so had effect for 22 years) but the original 1621 Act subsisted and was enforceable when he was writing in 1850.¹⁵⁶

It is not clear what motivated the 1621 Act. It may have played a role in ensuring continued support for Royal policy from the Scottish nobility, an important consideration with the King far removed from day to day Scottish politics. What it did achieve was to extend the prohibition on hunting beyond the fowling and shooters. After 1621, none but the very wealthy, landed elite could hunt legally. Although some attempts may have been made to argue that 'hounting and haulking' did not

¹⁵¹ *The Records of the Parliaments of Scotland to 1707*, K.M. Brown et al eds (St Andrews, 2007-2014), 1597/11/44. Date accessed: 16 November 2014.

The Records of the Parliaments of Scotland to 1707, K.M. Brown et al eds (St Andrews, 2007-2014), 1599/5/1. Date accessed: 16 November 2014.

The Records of the Parliaments of Scotland to 1707, K.M. Brown et al eds (St Andrews, 2007-2014), 1600/11/47. Date accessed: 16 November 2014.

¹⁵² *by their revenues*

¹⁵³ *regarding hunting and hawking*

¹⁵⁴ *one plough of land in heretage* (in other words held by a deed that could be passed to successors)

¹⁵⁵ Robinson, M, *The Concise Scots Dictionary* (AUP 1985) p504.

¹⁵⁶ Forbes Irvine, A, *A Treatise on the Game Laws of Scotland*, p30

include shooting, it was generally accepted that the 1621 prohibition applied to all pursuit of game.¹⁵⁷ The 1621 Act ensured that 'poaching' became a social crime of which a large proportion of the population might be guilty, whether practiced with guns, nets or dogs.

The only other significant game legislation prior to the Union was a brace of acts under Queen Anne which clarified closed seasons for grouse and partridge and prohibiting 'common fowlers' from taking birds without permission under pain of being 'sent abroad as recruits.'¹⁵⁸ This latter act is significant in that it suggests not only that landowners could permit hunting on their land (and by extension could prohibit it), but that 'common fowlers' who had effectively been outlawed in 1600 continued their activities more than a century after that enactment. The mismatch between legislation and the practicalities of enforcement are again suggested by this observation: not only was fowling a continuing problem but control of poaching lay with landowners who granted or denied permission for fowling on their land, presumably to people not qualified under the 1621 Act.

Before moving on to look at the development of game laws in the later eighteenth and nineteenth centuries, when game preservation had become a significant pre-occupation for the landed aristocracy, two key issues should be considered. First, what might have motivated the development of game legislation and second, how the protection of game worked in practice in the lands of Glenorchy and Breadalbane.

The primary motivation for the development of games laws is clear from the justifications provided within the laws themselves: the preservation of game for the enjoyment of an elite, especially those pursuing traditional hunting methods using hawk, hound and horse. The repeated attempts to outlaw the use of firearms to shoot game had a three-fold function. There was an effort to preserve the game for those who used traditional methods. This effectively put game out of the reach of the

¹⁵⁷ Forbes Irvine, A, *A Treatise on the Game Laws of Scotland*, p35-36

¹⁵⁸ *The Records of the Parliaments of Scotland to 1707*, K.M. Brown et al eds (St Andrews, 2007-2014), A1705/6/11. Date accessed: 16 November 2014.

The closed seasons were 1 March - 20 June for Grouse and 1 March - 20 August for Partridges Act 1707 Cap 13 quoted in Forbes Irvine, *A Treatise on Game Laws*, p54-55.

lower orders as keeping animals for hunting -especially hawks- was an expensive activity. Secondly, there was a perception that the use of firearms reduced game populations at an unacceptable rate. Thirdly, shooting at game was an excuse to carry arms which might be used for other purposes. In the highly volatile political climate, especially within the *Gàidhealtachd*, the crown sought to limit the militarisation of the general populace and this is clearly the focus of Article VII of the Statutes of Iona which, although including reference to game, explains that the firearms ban is motivated by 'the monstrous deidlie feidis heirtofoir intertenyit within the saidis Yllis'.¹⁵⁹ Manning's description of the role of poaching in inter-family feuding in Tudor England comes to mind.¹⁶⁰ Hunting might well be both a proxy for more violent conflict and an excuse to carry firearms.

The prohibitions on shooting and fowling effectively excluded most people from hunting even before the 1621 Act. Munsche's analysis of the English property qualification of 1671 suggests that in that case the landed gentry wanted to reassert their social position following the upheavals of Cromwell's Commonwealth.¹⁶¹ Given that the Scottish legislation predates the English by some fifty years, motivations may have been different: rather than resisting the emergence and power of 'new money', the Scottish law might be seen as a direct attempt to preserve the elite's game stocks which were at the mercy of commoners with guns.

The establishment of closed seasons was an effort to maintain game populations for the enjoyment of the gentry rather than for wider conservationist reasons. Such notions were not prevalent in late medieval and early modern Europe¹⁶² and it seems more likely that decimating game populations through hunting in hard winters was seen as depriving gentlemen of their summer and autumn sport. The identification of a closed period does however indicate a degree of understanding of the

¹⁵⁹ *the monstrous deadly feuds heretofore entertained within the said Isles* reproduced in Donaldson, G (Ed), *Scottish Historical Documents* p174

¹⁶⁰ Manning, R B, *Hunters and Poachers: A Social and Cultural History of Unlawful Hunting in England 1485-1640* (Oxford University Press, 1993), cap 7

¹⁶¹ Munsche, P B, *Gentlemen and Poachers*, p15

¹⁶² Thomas, K, *Man and the natural world*, p143-150

husbandry of game which is to be expected in a society in which the cycles of animal reproduction would be well known and understood.

Within the context of Glenorchy and Breadalbane, national statutes were enforced through the franchise Bailiary Court. In addition to enforcing Crown statutes, the court also established bylaws, many of which dealt with land management, agriculture and woods. A recurrent bylaw in the seventeenth century was a provision that not only prohibited tenants from shooting at deer, roe and black cocks and from slaying black fish¹⁶³, but that

'na maner of persone... [within the Laird's lands should] ...gif meat drink housrowme nor na uther kynd of beild to ony maner of man that shootes at deir or rae'¹⁶⁴

Not only should the tenants refrain from taking game, but they should give no help to outsiders who do. This may have been intended to circumvent a problem of enforcement. Glenorchy had the power to try his own tenants but other landlords could demand the *replegiation* of their tenants - their return for trial by their own laird.¹⁶⁵ In cases where a laird had sent his men to hunt on Glenorchy land, they were unlikely to face a penalty from their master, but Glenorchy could at least deter or punish any of his own tenants who assisted them.

Other bylaws included provisions for the persecution of crows and wolves (both species regarded as 'vermin'). No tenant was to suffer no 'ruck hoddit crow nor pyatis'¹⁶⁶ to 'beg or clek'¹⁶⁷ in their home or land.¹⁶⁸ Tenants were also required to make four 'crosstatts' for the slaying of wolves.¹⁶⁹ So tenants were prevented from hunting game, but positively encouraged to hunt 'vermin'.

¹⁶³ Salmon moving downstream after spawning: unlike the Pacific Salmon, most Atlantic Salmon survive spawning and return to rivers again. After spawning they are referred to as 'black fish'.

¹⁶⁴ No manner of person ... Give meat drink houserom nor any other manner of assistance to any manner of man that shoots at deer or roes

¹⁶⁵ Dickson, W K, 'Heritable Jurisdictions', p435

¹⁶⁶ Rook, Hooded Crow nor Magpie

¹⁶⁷ Stay or nest

¹⁶⁸ Corbids will take eggs and young nestlings from game birds such as grouse. Cocker, M and Mabey, R, *Birds Britannica* (Random House 2005), p419

The court normally exacted fines for wood and game offences, but could also appoint cautioners as guarantors of future good behaviour. In September 1618, for example, Ewin McGillechonil became cautioner for roes slain by Duncan Bane in Catnish, Glenorchy¹⁷⁰ and in 1620 Duncan Oig McDonchie was bound to an act of caution not to shoot deer or roe for five years under pain of £200, with a number of his friends acting as cautioners.¹⁷¹

The local court enacted statutes that addressed specific local concerns, but could also prosecute under national legislation and in some cases may have had a choice as to which provisions (and penalties) should apply. At national level repeated enactments regarding shooting at game suggests a failure of enforcement and a continuing problem. At a local level standards of evidence would not have been particularly rigorous. Given the array of provisions under which poaching and other offences against game could be prosecuted it might be expected that this gave the court ample tools to secure prosecutions. The evidence from tenant cases discussed below suggests that prosecutions were relatively low in comparison to accusations, so this raises the question as to the motivation and enthusiasm of the local court for prosecuting game offences. A reluctance to engage in rigorous enforcement on the part of local courts might contribute to a failure of national legislation which required repeated enactments.

The years of the later eighteenth and early nineteenth century saw the development of more detailed game laws on the foundation of the 1621 Act. By this time the aristocracy of Scotland had to some extent adopted the role of "North Britons" and attitudes to game preservation more closely resembled those in England.¹⁷² Despite the Union of the parliaments in 1707, most Scottish game legislation was separate to that for England, though it followed a similar pattern of increasing

¹⁶⁹ The translation of 'crosstatti' is unknown, presumably a form of weapon or trap. These statutes appear in NAS, GD112/17/4 (2) and are repeated in NAS, GD112/17/5 and NAS, GD112/17/6

¹⁷⁰ NAS, GD112/17/4 (169)

¹⁷¹ NAS, GD112/17/1/3/2

¹⁷² Kidd, C, 'North Britishness and the Nature of Eighteenth-Century British Patriotisms', *The Historical Journal*, Vol 39, No 2, Jun 1996, pp361-382

severity despite little evidence in Scotland of the radicalism which became associated with poaching in England.¹⁷³

A range of statutes clarified the seasons for game, including an Act under George III that fixed the seasons for Red Grouse and Pheasant at the dates still followed today, and clearly linked muirburn and its regulation to the preservation of winged game.¹⁷⁴ Further legislation under the same monarch introduced game certificates - a system whereby those qualified to hunt by the 1621 Act were required to obtain a certificate, and certificates for their staff such as gamekeepers.¹⁷⁵

Late in the period multiple acts were introduced to address the issue of night poaching. The legislation was driven by frequent violent encounters in England between poachers, often in gangs, and gamekeepers. Heavy sentences were possible for those found at night with guns, dogs and other equipment.¹⁷⁶ The 1828 Night Poaching Act eventually stabilised these provisions with hard labour and even transportation for repeat offenders, and harsh sentences for group poaching or where violence was offered.¹⁷⁷ Although much of the political interest in these laws focussed on rural England, the Scottish High Court certainly received cases, handing down sentences of up to 12 months with hard labour though more usually 2-4 months.¹⁷⁸ An 1832 act made trespassing in pursuit of game an offence in day-time (subject to a fine of £5) but made an exception for qualified hunters who strayed onto another's land when following game "started" elsewhere.¹⁷⁹

As well as the day to day business of preserving game from tenants and other commoners, landowners had to contend with neighbours hunting on their land. Disputes between members of

¹⁷³ Hopkins, H, *The Long Affray*, p177-194

¹⁷⁴ 13 Geo III c54, 1772. It set the season for Grouse as 12 Aug to 10 Dec and Pheasant 1 Oct to 1 Feb.

¹⁷⁵ 24 Geo III c43, 1784 followed by 52 Geo III c93 - the Assessed Taxes Act which brought the revenue from game certificates within the remit of tax commissioners.

¹⁷⁶ Munsche, PB, *Gentlemen and Poachers* p101-105

¹⁷⁷ 9 Geo VI, 1828.

¹⁷⁸ Initial research of the metadata held by the National Archives of Scotland identified over 200 individuals who were prosecuted under the night poaching legislation and related instruments 1817-1850. No cases have been identified yet that clearly relate to the Breadalbane estates.

¹⁷⁹ Wm IV Cap 68, *An Act for the more effectual Prevention of Trespasses upon Property by Persons in pursuit of Game in that Part of Great Britain called Scotland* (1832)

the upper classes, though they may invoke the same game laws that applied to commoners, were likely to be handled very differently. Breadalbane was involved in one such case against Livingstone of Parkhall which was finally resolved in the House of Lords.¹⁸⁰

Despite the development of a complex system of game laws, their fundamental objectives did not change. They were still intended to prevent commoners from hunting, and to protect species at vulnerable times in their breeding cycle. One key development, which was not reflected in a particular piece of legislation but appears to have been adopted by default, was the acceptance of shooting as a legitimate method of hunting. At the start of our period, shooting game is generally outlawed. By the time of the Livingstone case at the end of the eighteenth century, the 1621 provisions regarding hunting and hawking are taken to apply equally to shooting, even though the ban on shooting game introduced in the sixteenth century was never specifically repealed.

At no time was possession of a wild animal in and of itself an offence – it was the means by which a person obtained the animal which could lead to prosecution. The highly complex developments of the later eighteenth and nineteenth centuries can be seen as attempts to sharpen definitions and attempts to improve both enforcement and deterrence, especially by imposing draconian sentences, for night poaching.

Throughout the latter part of the period the status of game as wild animals and the restriction of access to this resource aroused fierce debate. It was hard for game preservers to present a coherent argument against the liberalisation of hunting except in conservation terms. It was observed in 1828:

‘All lawyers agree, that the right of killing game is enjoyed by every class of men equally. The limitations and restraints that have at different times been introduced do not call this right into question. They were imposed for the protection of property, and to prevent the total destruction of the breed of game’¹⁸¹

¹⁸⁰ Forbes Irvine, A, *A treatise on the game laws of Scotland*, p41

¹⁸¹ Watson, J, *A practical view of the statute law of Scotland from the year 1424 to the close of the session of parliament 1827* (Edinburgh 1828)

Thus those qualified under the 1621 Act to hunt could present themselves as conservationists: hunting must be restricted to a privileged few to prevent the extinction of game species.

It is not clear from extant research how game laws were enforced after 1748. We know that by the early- to mid-nineteenth century it had fallen under the remit of Justices of the Peace,¹⁸² and as noted above night poaching was prosecuted in the High Court.¹⁸³ Sheriff courts had a role in issuing game certificates and it is to be expected that some cases would be heard there. A poaching case might engage any one of a number of game laws of varying severity and might also involve other offences such as theft and assault. Watson discovered that the earl of Fife used eviction as a lever against poaching tenants and Stevenson suggests that the Disarming Act might have been used to prosecute those in possession of firearms.¹⁸⁴ This is supported by a note from Breadalbane to be published in the press in the summer of 1767 which, explaining that permission could not be granted to gentlemen wishing to shoot on his grounds that year, directed readers to note:

' the grounds abovemention'd being in a part of the country disarm'd by law, every person carrying a gun there, unless specially qualified for so doing, is liable to the penalties entailed by that law'.¹⁸⁵

This not only indicates that the Disarming Act was an issue for those shooting game, but that it was normally expected that Breadalbane would give permission to other gentlemen to hunt on his land. Whether or not that permission was required when the hunter was themselves qualified under the 1621 Act was central to the Livingston case. Breadalbane clearly regarded it as within his gift to give or withhold permission for hunting on his land.

¹⁸² Blair, William, *The Scottish justices' manual: being an alphabetical compendium of the powers and duties of justices of the peace within Scotland, and of those points of law which they are most frequently called upon to decide* (Clark, Edinburgh, 1834)

¹⁸³ Forbes Irvine, A, *A Treatise on the Game Laws of Scotland*

Tait, George, *A summary of the powers and duties of a justice of the peace in Scotland* (Edinburgh 1815)

¹⁸⁴ Stevenson, G B *An historical account of the social and ecological causes of Capercaillie Tetrao urogallus extinction and reintroduction in Scotland*. The Disarming Act could have been used to prosecute for possession of weapons. Watson, A, 'Eighteenth Century Deer Numbers and Pine Regeneration Near Braemar, Scotland',, p299

¹⁸⁵ NAS, GD112/16/12/1/2

Far from a straightforward linkage between poaching offences and legal action, local landowners may have had an array of responses available to them in protecting their game depending on the political and financial considerations of the case and most importantly the social status of the poacher and game preserver. Munsche observes that even at the height of the game law debate in England:

'The discretionary power of the country gentlemen, indeed, pervaded the entire operation of the game laws'¹⁸⁶

Although Scottish landowners were operating in a different legal and social environment and a very different physical landscape, it seems likely that the Laird's discretion, as in England, would largely determine the fate of poachers, whether tenant or gentleman. The Breadalbane evidence post-1748 does not give a clear indication of whether or how poachers were to be prosecuted, though the fourth earl did seek advice on how to proceed against poachers encroaching in Glenorchy from Glen Coe in 1830. In that case, the poachers were not Breadalbane's tenants, and had been seen carrying guns but there was no direct evidence of deer having been killed. It was also raised that witnesses were limited to the foresters who had confronted the poachers. Advice was sought relating to interdicts, and the likelihood of successful prosecution and, importantly, whether one offender could be used as a witness against the other.¹⁸⁷

It may well be that the threat of eviction and other social sanctions meant that prosecution was only considered in severe cases or where the offenders were not tenants. There is certainly plenty of correspondence about the issue of poaching, but much less about its prosecution. The period from 1748 to the establishment of High Court jurisdiction over Night Poaching in 1817 is one of uncertainty, and it seems likely that direct prosecutions for poaching, certainly in Breadalbane, were rare, so we must assume that either blind eyes were turned or other sanctions engaged.

¹⁸⁶ Munsche, *Gentlemen and Poachers*, p27

¹⁸⁷ NAS, GD112/16/11/5/36

In the case of gentlemen hunters/poachers, two surviving notes to the press, the 1767 note quoted above and an earlier one from 1758 indicate that the third earl of Breadalbane was in the habit of giving permission to visitors to hunt on his land but in both these years he felt compelled to warn that in order to preserve game stocks, permission would not be forthcoming and prosecution might follow:

'The Game upon the Earl of Breadalbane's Estates in Perth and Argyllshire being much diminished of late years his L[or]ds[hi]p has resolv'd strictly to preserve the game on all his grounds and muirs this season, and to prosecute transgressors according to law, hoping no gentleman will take it amiss that he's refused a warrant to hunt till the game recovers'.¹⁸⁸

The final legal issue which requires a brief discussion is the matter of vermin. A large variety of animals were regarded as vermin. As noted above, corbids and wolves were persecuted but a great many other predatory and scavenging animals such as raptors, polecats, wildcats, badgers, weasels and otters were regarded as pests. Very little legislation was enacted regarding vermin other than those referred to above in the local court and an old statute from 1458 requiring regular wolf hunts. Because vermin were not protected by law (and indeed their persecution would normally be encouraged), they could provide sport for those otherwise unqualified to hunt. Griffin argues that this is what lies behind the emergence of fox-hunting as a sport for the lesser gentry and tenant farmers of England.¹⁸⁹ Colonel Thornton met two fox hunters near Ben Lomond on his celebrated "tour". He was unimpressed by their shabby appearance in comparison to English fox-hunters. It could be reasonably assumed that they did not own a plough of land between them and so were unqualified to hunt game.¹⁹⁰

The game laws over the period, then, developed into a complex and somewhat incoherent set of legal instruments that related to many aspects of hunting and associated matters but centred around

¹⁸⁸ NAS, GD112/16/12/1/1

¹⁸⁹ Griffin, E, *Blood Sport*, p124-125

¹⁹⁰ Thornton, Col T, *A Sporting Tour Through Northern Parts of England and Great Part of the Highlands of Scotland* (London 1804), p48

a core objective to preserve game for the enjoyment of a social elite. However, the key issue was how this complex set of statutes was enforced in practice. Even after the loss of hereditary judicial powers, local lairds retained a high degree of control over the way laws were enforced and the general tenor and approach to hunting issues on their lands. Since many local people were tenants and may have been entirely dependent on the Laird economically, fear of eviction or other sanctions such as withdrawal of trade or removal of estate support in selling produce might exert control without the need for prosecution in the courts. Despite changes in tenancy and settlement structures through Improvement and more gradual social change, the fear of lairdly reprisals would probably have been as significant at the end of the period as at the start. Before 1748, that fear would have been partly based on the Laird's status as head of the local court, and as landlord and clan superior. After 1748, the Laird would no longer preside over a local court but would still dictate the severity of response to poaching and other game offences- as landowner he would decide whether to pursue a prosecution and might have the option to pursue other redress against an offender such as eviction or removal of other rights and privileges.

The response to fellow gentlemen who hunted without permission required a different approach which took account of political and social implications of action. The Livingston case suggests that legal action might be met with a robust response, and a lord would consider carefully how to approach a dispute with a social equal.

Tenant poachers: the petitioner 'did not exceed therein more than what others did'¹⁹¹

Throughout the period the lairds of Glenorchy/Breadalbane dealt with poaching by their own tenants. Until 1748 these matters were usually dealt with by the Baillie Court and are recorded in the surviving court books.¹⁹² Post-1748 the muniments contain numerous items of correspondence and notes that refer to specific accusations and incidents of poaching. For the purposes of the current project, three court books were examined in detail.

Within the pre-1748 material, a significant number of cases were reported to the court, especially in the seventeenth century. The sampled court books covered the years 1615-1620, 1722-1734 and 1744-1748.¹⁹³ The first of these yielded enough cases for some rudimentary statistical analysis to be conducted while references to game offences were minimal in the other two court books. From the post-1748 material, there are several documents that include reports made by game herds or keepers relating to incidents of poaching, and correspondence relating to alleged poaching. From these sources it has been possible to develop an overview of the methods favoured by poachers, the quarry species targeted and specific offences accused or prosecuted. What emerges is a mixed pattern of continuity and change.

Before analysing the material extracted from the court book it is important to understand the context in which these cases were recorded. The Baillie court heard a variety of cases and poaching fell within the category of 'woddis' (woods). Accusations are often listed alongside other offences

¹⁹¹ NAS, GD112/11/7/4/16 Petition by Alpan McAlpan to the Earl of Breadalbane in protest at accusations of poaching.

¹⁹² After 1748 heritable jurisdictions were abolished, or in some cases had their powers so severely restricted that they fell into disuse.

¹⁹³ NAS, GD112/17/4, GD112/17/11, GD112/17/12

such as casting peat with torskens,¹⁹⁴ failure to plant trees or maintain head dykes, and damage to timber.

There was a tendency for the same set of offences to be prosecuted for several groups of tenants during one sitting of the court. The tenants from a number of townships were often all accused of the same or similar offences. For example on 13 July 1620, a number of tenants from Letterbane were accused at Glenorchy of a wide range of offences including muirburn, 'gwning' and slaying muirfowl and black fish, and the destruction of trees. Specific tenants from another nineteen different townships are then listed under the same court record for 'woddis'. The scribe has neglected to list the accusations for each township but rather simply records the convictions. It is clear however from the context that each set of tenants faced a similar charge list.¹⁹⁵ This is the biggest single example within the court book of a mass accusation and for that reason some of the charts which follow show data both including and excluding this particular court sitting.

We can draw two tentative conclusions from the court record. Firstly, the inclusion of poaching offences with agricultural and environmental offences indicates that these offences were normally prosecuted under the bylaws of the court, and regarded as similar in nature to the offences with which they were listed. These are mainly offences of omission (failure to plant trees, failure to maintain head dykes) or offences related to the (mis)use of natural resources (cutting trees, muirburn), but these are clearly not in the same category as assault, theft or robbery and generally attracted relatively small fines. Secondly, the grouping of similar accusations against a number of tenants from different townships suggests that the court was either responding to specific local problems or was engaged in a periodic crackdown.

It is notable from these records that a significant proportion of tenants accused of poaching offences were assolizied and faced no fines for them. In many cases, too, no specific verdict was recorded for

¹⁹⁴ An implement for cutting peat - the laird required his tenants to cast peat with 'Lowland spades'.

¹⁹⁵ NAS, GD112/17/4 (228)

a poaching offence but rather by its omission we can surmise that the verdict was to assoilzie on the specific count but to convict on other offences such as timber or muirburn.

Fig 1 shows the outcome of cases involving game recorded in the early court book. Of eighty cases, nineteen resulted in conviction, although the proportion of cases convicted rises significantly if the mass accusations of the court held at Glenorchy in July 1620 are excluded from the count (fig 1a). A significant proportion of cases resulted in acquittal for game but convictions for other 'woddis' offences such as damage to timber.

Without more thoroughgoing research into conviction rates for other offences - an exercise outside the scope of the current research project - it is not possible to draw an accurate, statistically supported conclusion about whether game offences were more or less likely to result in a conviction than other matters. It is worth reflecting, however, that the positioning of game offences alongside other environmental and agricultural matters and the frequency of their mention in the court record suggests that tenants were often in the habit of taking a pot shot at game, particularly deer. Despite the potentially dramatic consequences envisioned in national legislation such as forfeiture of goods,¹⁹⁶ shooting at deer appears to have been regarded relatively lightly in the Glenorchy lands. Where convictions were secured and fines have been recorded, they involved a maximum of £20 Scots for cases involving deer or salmon and a smaller fine of £5 for wild fowl.

In some cases where a reason for acquittal is recorded, tenants are 'absolved be thair aiths' - they have given their word that they are not guilty. Gathering evidence of offences committed in rural areas, possibly with limited co-operation from other tenants, must have had its challenges. Where convictions are recorded, they do tend to be specific, giving particulars as to number and type of game killed. Similarly, timber offences sometimes list specific species of trees and the number an offender has cut. This suggests that convictions tended to occur where specific witness testimony -

¹⁹⁶ *Anent thame that schutis with gunnis at deir and wylde foulis, ca. viii, A1551/5/3*

from other tenants, tacksmen, court officials or ground officers- or other evidence was available. In the absence of such evidence tenants would have been unlikely to confess their own guilt and face a fine.

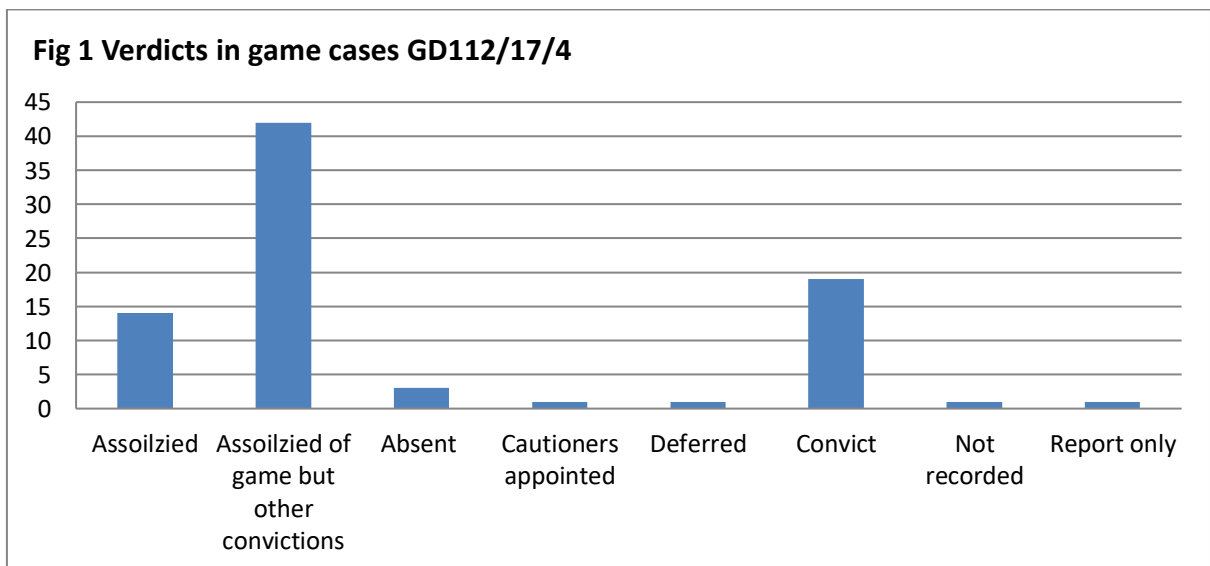
It may be that court hearings that bundled several environmental offences together but convicted on only some counts nevertheless achieved important outcomes for the laird. To be seen to dispense justice in an even-handed way encouraged co-operation with the court. By securing some convictions and collecting fines for them, a steady flow of income was secured. It would not be in the laird's interest, however, to bankrupt or imprison large numbers of tenants so a balance would be needed. Excessive behaviour had to be punished and overall the laird's will and court's statutes respected, and this could be secured through pursuing convictions based on physical evidence or testimony from witnesses and court officers. However, to pursue every possible breach might result in both resentment and penury for tenants, and ultimately a reduction in the productive capacity of the land if tenants were unable to farm effectively for want of funds. Perhaps to be summoned and accused served as sufficient warning not to overstep the unwritten bounds of tolerance.

In a great many cases, the poaching accusation follows a set form of words, either 'gwning', 'slaying of deir, rae, black fische and black cökkis' or 'slaying of blackfische and wyldfowle'. This does raise the question as to whether in each case the accusation relates to all the species listed, or whether the standard form of words simply refers to the category of offence.

Because of the large proportion of cases that did not result in conviction and the use of standard forms of words, we can draw only tentative conclusions about the cases recorded in the court book, since we cannot know how many cases involved actual incidents of poaching or exactly which species. Bearing in mind these limitations, however, it is possible to gain an insight into the overall

concerns of the laird and his estate in these matters and by focussing on the cases resulting in conviction, to draw some narrower conclusions.

Fig 2 provides a summary of the species mentioned in all game cases in the court book, and fig 2a those mentioned in cases resulting in conviction. The commonest species listed in accusations is salmon, occurring thirty-seven times, but only three cases resulted in a conviction. From the data, roe are the species most likely to be associated with conviction, with "wildfowl" a close second. It is notable that the more unusual species such as heron, ducks and capercaillie are only mentioned in cases resulting in a conviction. This suggests that these additional species were mentioned because there was a clear accusation and evidence for a specific incident. For example, in April 1615 the court at Benderloch assoilzied Duncan Maclauchlane of damaging oaks but convicted him for the very specific offences of slaying 'twa roes ane capercailzie and ane blak cok he slew to Jon his br[other] at Jon his com[m]and'.¹⁹⁷ In March 1618 three residents of Finlarig and Morinch (Morenish) were accused of slaying the Laird's ducks, drakes and herons. Two were convicted but no fine is recorded.¹⁹⁸



¹⁹⁷ NAS, GD112/17/4 (11)

¹⁹⁸ NAS, GD112/17/4 (147)

**Fig 1a Verdicts in game cases GD112/17/4 - excluding Glenorchy court
July 1620**

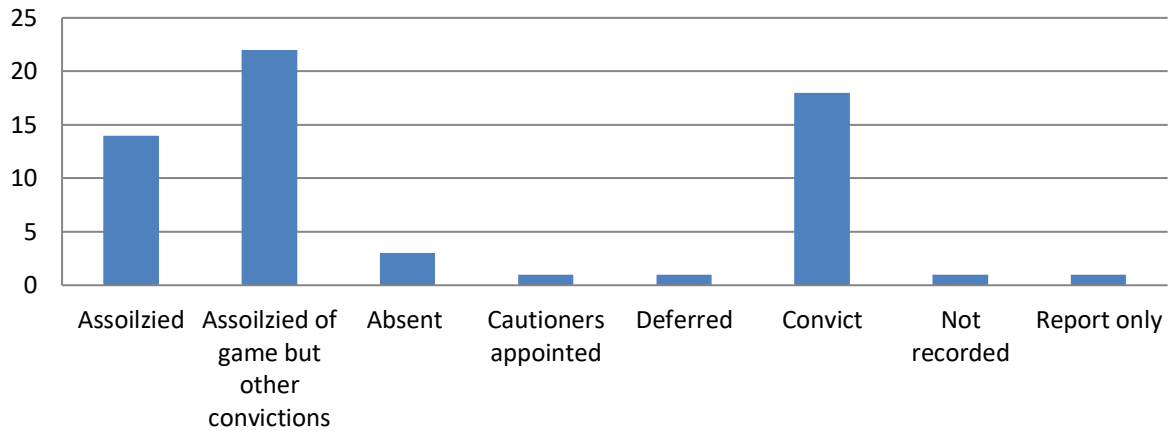


Fig 2 Species named in all game cases, GD112/17/4

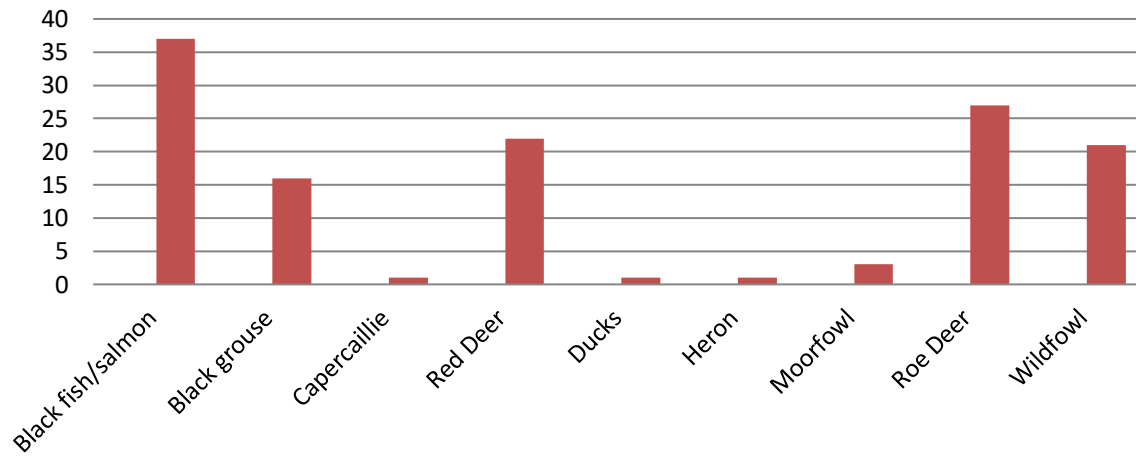
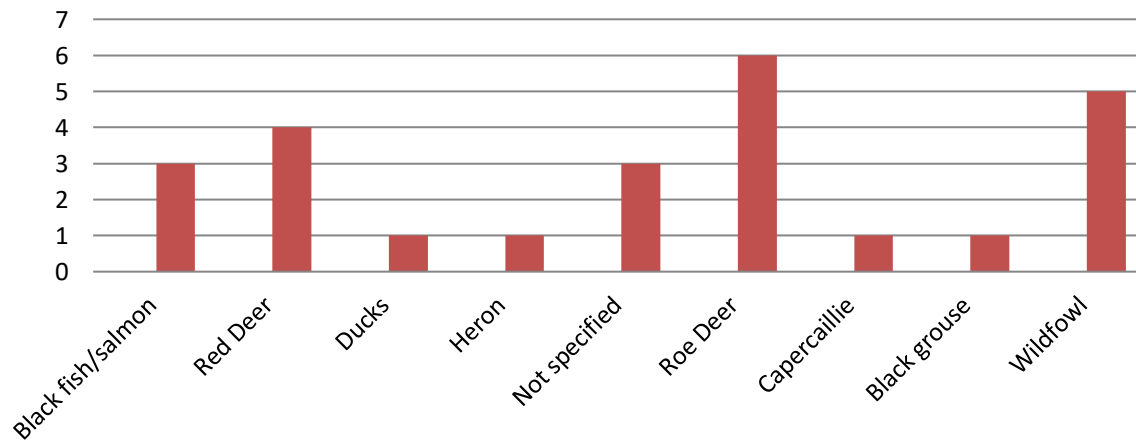


Fig 2a Species mentioned in game cases resulting in a conviction, GD112/17/4



What is perhaps more revealing than the spread of species in the court book cases is the range of offences. By far the most common accusations made were of 'gunning' and of 'slaying' or 'slaughter' of game, a reference to the court's own statutes against shooting game and also national legislation. In comparing accusations to prosecutions, we do need to exercise some caution since the recording of proceedings was by no means thorough. For example, a scribal shortcut might easily result in several offences being conflated in one conviction recorded as one offence.

It is clear, though, from both the accusations displayed in fig 3 and the convictions in fig 4 that the general offence of 'slaying' game was most likely to be recorded in a conviction. Where 'gunning' is mentioned, it is usually in combination with 'slaying'. It may therefore be surmised that most tenants used firearms to poach and that the conviction is listed as 'slaying'. It is possible of course that other methods were used, but apart from a reference in reports from Mamlorn Forest about a game herd who had shot deer with a bow,¹⁹⁹ there is little material in the muniments to suggest other methods were widely practiced. This is significant for a number of reasons. It indicates that tenants owned or had access to firearms, probably muzzle loading smooth bore weapons. Although rifled barrels had been invented in the early sixteenth century it seems unlikely that Highland peasants would have access to such expensive and specialist weapons. The court book gives no indication whether single ball or shot were used: it is likely that shooters of deer and roe would use a single ball but those slaying black cocks or wildfowl would use smaller shot. Firearms were noisy and in this period also generated a lot of smoke. This would mean that poachers tackling a herd of deer would have only one shot before they scattered their target. Referring again to reports from Mamlorn, in June 1629, John MacConill of Stathfillan 'rencontringe ... ane companie of deir he schote at thame and sleue ane hynd with calf ane [and] with the said schote he skarrit ane hundrith deir out of the forrest'.²⁰⁰

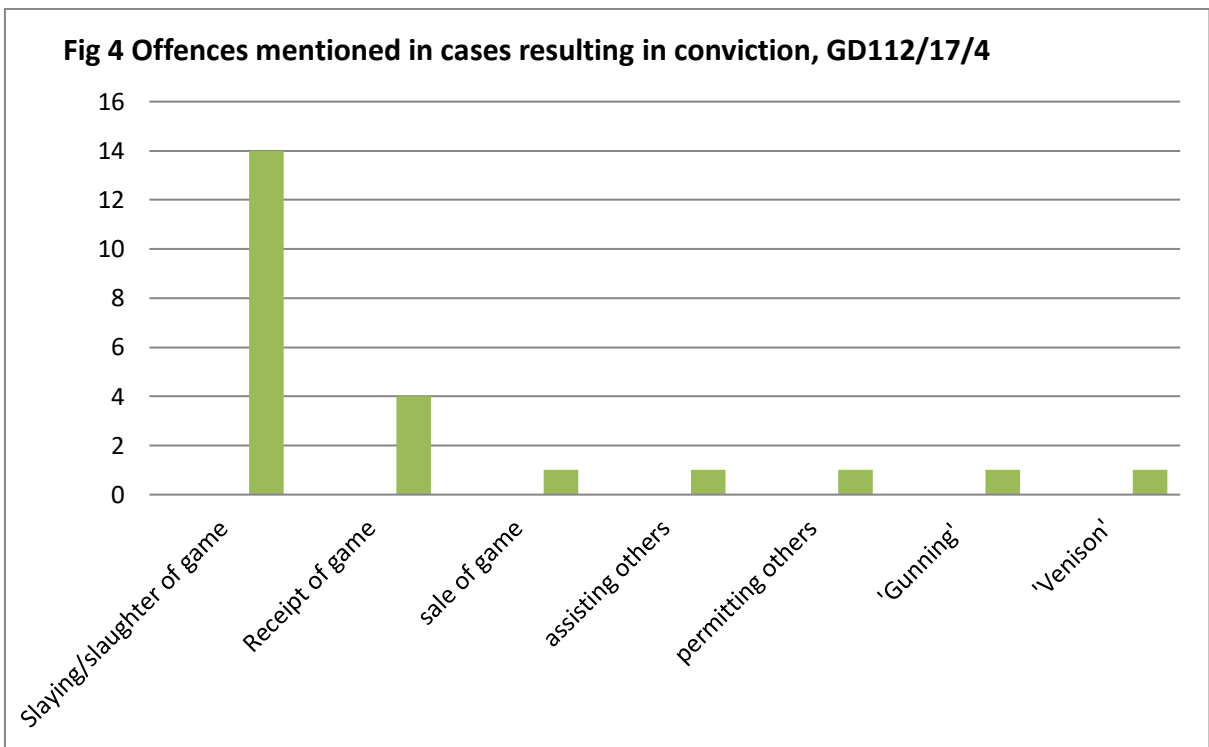
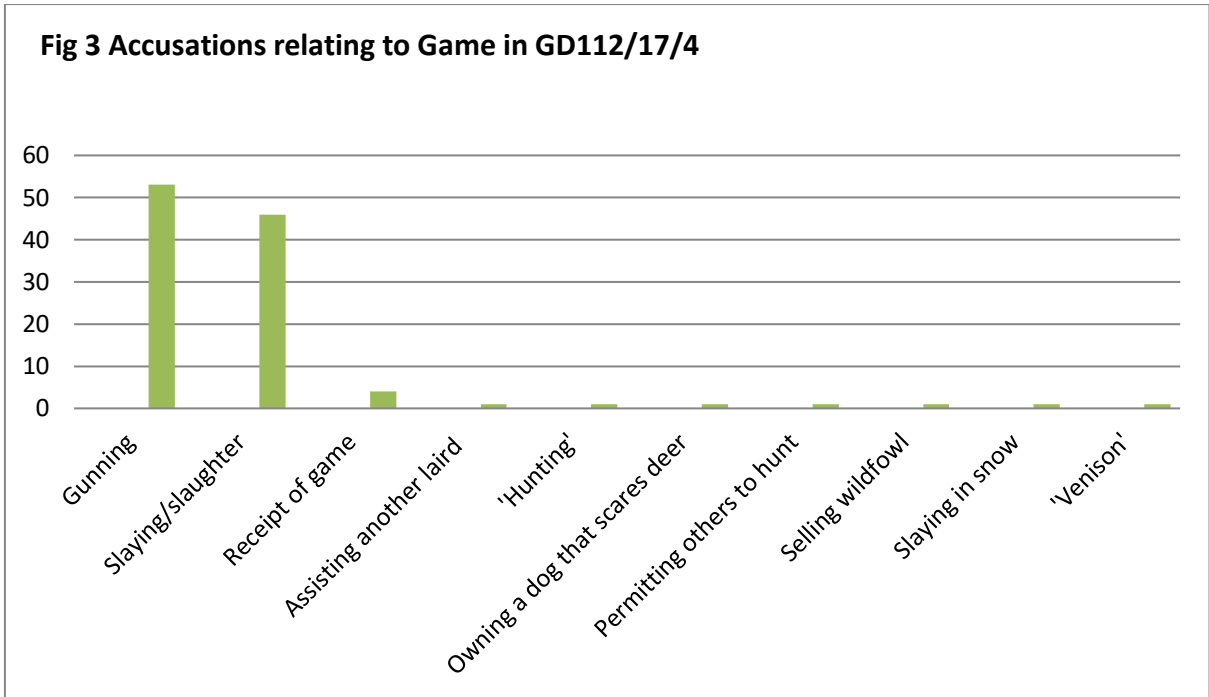
¹⁹⁹ NAS, GD112/59/4/7 (1)

²⁰⁰ 'encountering a company of deer he shot at them and slew a hind with calf and with the said shot he scared a hundred deer out of the forest'. NAS, GD112/59/4/12

Use of a noisy, smoky firearm also suggests that there was limited fear of detection. There is no specific mention in the court book or other muniment material of stealth methods such as nets and snares. This may partly be explained by the geography of the Glenorchy lands. Reports from a gun in a relatively remote corrie or woods would be unlikely to attract attention quickly enough for witnesses to identify the shooter. Evidence from later in the period, discussed below, also suggests that local tenants were unlikely to inform on their neighbours unless there was an incentive to do so.

The proposition that 'gunning' and 'slaying' of game were standard accusations covering a generality of offences is also supported by the observation that other, more specific accusations more often resulted in a conviction, particularly four cases involving receipt or sale of game and assisting others in hunting without permission. These offences were often conflated with other crimes against game and sometimes fell quite close to the Laird's own household. At the court in Benderloch in July 1620, Duncan Mcean confessed to receipt of deer and roe, but revealed that the animals in question were ones 'q[uhi]lk donald the Lairdis sone brought in to him'.²⁰¹ Despite casting some responsibility on the Laird's household, Duncan was fined £13 6s 5d.

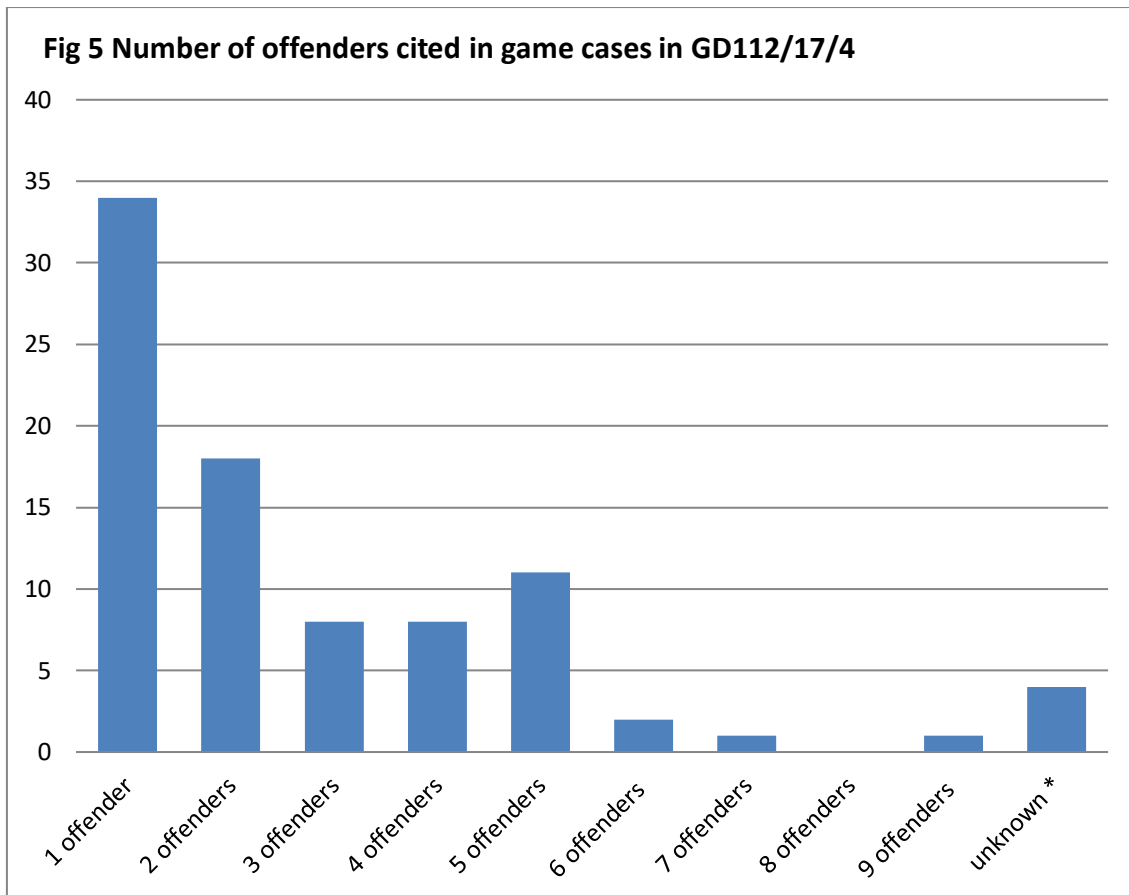
²⁰¹ NAS, GD112/17/4 (238)



The data from the early court book also gives an indication of whether poaching was an organised, group activity or not. Offenders are usually named in the court book entry against their township or *baile* and from the names listed it is possible to see how many were involved in the offence accused. This data is presented in fig 5. Again, some caution is needed in approaching these figures. The court

may neglect to record people assisting a tenant: in some cases cottars are listed but children may not be. Therefore a single tenant facing an accusation may have had assistance from others not noted by the court. Conversely, it is not clear from the accusations whether they refer to a specific incident (though in some of the cases resulting in conviction this is clearer), so where multiple tenants are listed this may refer to separate incidents committed by tenants of the same township. In four cases the court accused 'the hail tennentis' of a township. This was usually in combination with a series of other offences, such as the accusation made against the tenants and cottars of Connach in 1617 that they were guilty not only of gunning and slaying wildfowl, black cocks and black fish, but also muirburn, neglect of head dykes, damaging timber and casting peat with torskens.²⁰² This case is illustrative as none of the tenants was convicted of a game offence, and only a handful of tenants were guilty of other offences. This suggests that, where the 'hail tennentis and cott[ar]is' are accused it is an indication that a problem has been identified in the area of the township but that no specific culprits have been identified ahead of the court's sitting. This then puts pressure on the tenants to identify culprits themselves.

²⁰² NAS, GD112/17/4 (129)

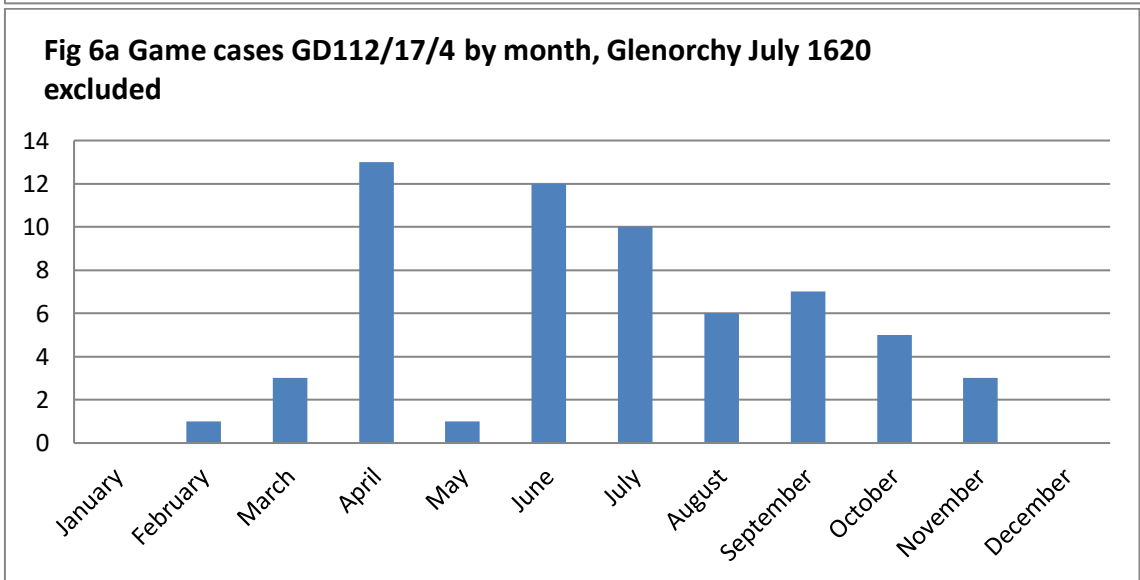
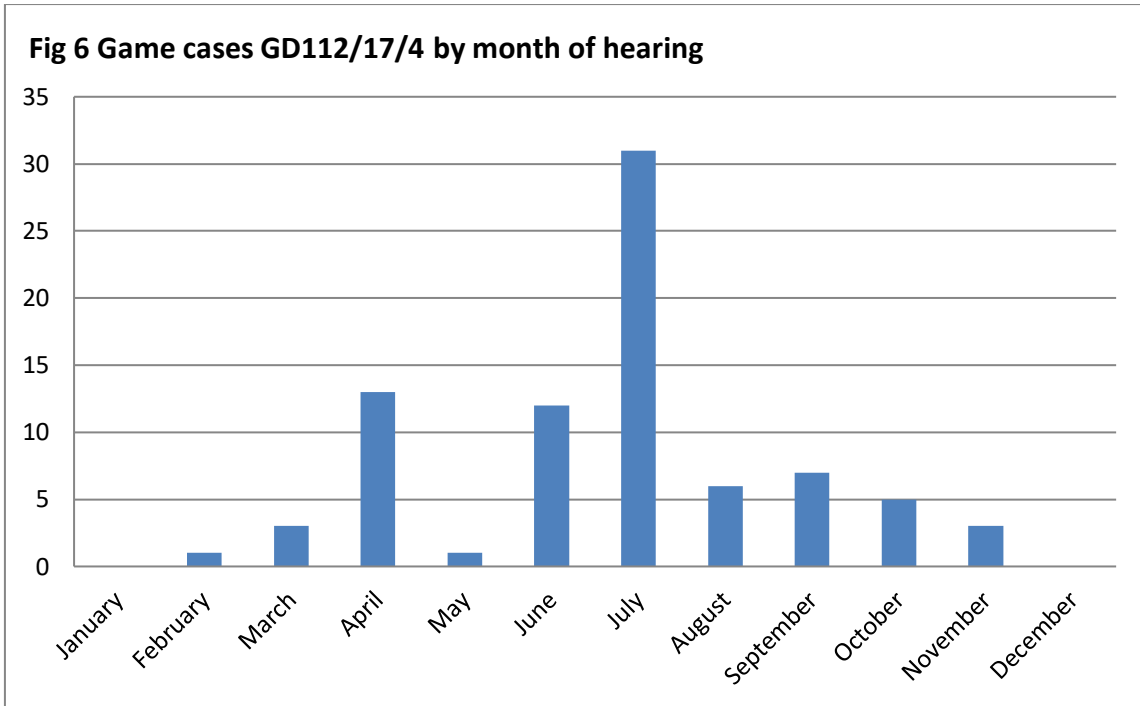


*unknown = entries that list the 'hail tennentis', all the tenants of the *baile*.

In those cases where tenants and cottars are named, the overwhelming majority are men, with three exceptions. Catherine NcGillechrist of Letterbane appeared before the court three times (in 1617, 1619 and 1620) accused with others for a variety of offences but none were convicted for game. Catherine McFindlay was accused twice (in 1619 and 1620) alongside John Oig McFindlay, presumably her husband or, from 'oig' (young/younger), her son. On both occasions John was fined for other offences but not for game. Finally a third Catherine, Ncachroyme, was accused with four others for a range of offences that included gunning and slaying game. They were all fined for 'common wode' but absolved of other offences. Thus poaching at this time was an overwhelmingly male pursuit. It is not clear in these cases involving women whether they are named because they are heads of households (possibly widows) and whether their offences included the gunning and slaying game or whether they were included for other crimes listed such as damage to timber.

Overall the impression garnered from the court book record is that although poaching may have been a group activity, often involving a family, the only indication of any systematic organised criminality is given by the small number of cases involving receipt or sale of game. By and large the activities accused seem to indicate local people taking shots at game, perhaps regarding this as being as natural as cutting timber for basic needs (another offence which commonly resulted in fines).

The timing of poaching activity is difficult to ascertain from the court book record. Although the court sat throughout the year, game cases tended to be heard over spring and summer, and a few into autumn, as shown in fig 6 and fig 6a. However, there are few indications from the record of when the offences are alleged to have occurred. There may have been a delay between an offence being reported or suspected and the court hearing evidence so it cannot be assumed conclusively that offences heard at court occurred in the month or so before the court sat. All that can be tentatively concluded is that the court heard more cases over the spring and summer months, suggesting that poaching tended to occur in the slightly better weather when there was more daylight, but there is no strong correlation with a particular season or, important, period in the lifecycle of deer, fish or wildfowl.



The project involved a sampling of three court books. Thus far the discussion has referred to one court book. The later court books sampled show a marked difference in approach. Most obvious is the absence of game cases from the day to day cases heard by the court. Despite covering a total of sixteen years (1722-1734 and 1744-1748) these books contain only two cases relating to game. In 1728 John McCombich was fined £40 for cutting timber and killing blackfish in forbidden time (venison was also mentioned but it is not clear from the record whether he was convicted on this

count). He was to be remanded in prison until the fine was paid. In 1747 Patrick McNab and his servant Alexander McNab were pursued for killing red fish (salmon moving upriver to spawn) and salmon smolts but were absolved on their oaths. One further case appears in the muniments for 1736 - falling in a period not covered by the existing court books. A note of criminal libel accused a Duncan McInnes as an 'impudent offender' against numerous acts of parliament relating to the shooting of deer. The offences apparently took place within the bounds of Mamlorn Forest, and the procurator recommends the full force of the law to the assize, the record of which is now lost.²⁰³

The absence of game cases in these later court books demands explanation. The early court books follow a format in which each sitting of the court first lists cases related to 'woddis' (woods), covering the matters discussed earlier in this chapter, and then lists actions - criminal cases and civil matters such as the pursuit of debts.²⁰⁴ This format changed in the eighteenth century, with the latest court books focussing much more clearly on private civil cases, predominantly involving unpaid debts.²⁰⁵ The courts did still hear criminal cases and (as the two examples cited above demonstrate) game cases, but there is no longer a catalogue of 'woddis' offences and fines. The fact that the court books still include rates of fine for timber offences suggests that these matters were still considered by the court, but it may be surmised that either the court saw far fewer of such cases (hence only two game cases in sixteen years) or that they were recorded separately and not transferred by the scribe to the 'good copy' court book. It may be that more serious cases were still recorded in the court book, but not minor accusations or straightforward matters. If the explanation is that the court saw few such cases, it must be surmised further that either cases were going undetected, or offences were not committed. In exploring this point further we might look to the wider environmental and political context.

²⁰³ NAS, GD112/27/59

²⁰⁴ The court books NAS, GD112/17/2 and 4 - 9 all to some extent follow this format, covering the period 1573-1721. The records which follow the pattern most clearly are the earliest books – NAS, GD112/17/2, 4, 5.

²⁰⁵ NAS, GD112/17/11 and 12

There does appear to have been a downturn in deer population in the seventeenth century, attributable possibly to woodland clearance, and possibly a lack of management by landlords preoccupied with the Wars of the Three Kingdoms.²⁰⁶ Campbell territory, including Breadalbane lands, had suffered in particular during the campaigns of the Marquis of Montrose and Alasdair MacColla.²⁰⁷ Cromwell's General Monck had also adopted burn and plunder tactics to deny supplies to royalists in the southern Highlands.²⁰⁸ These activities may have had direct or indirect impacts on deer numbers. The 'Little Ice Age' seems likely to have affected deer numbers directly or indirectly, especially during the years of severe weather in the 1690s.²⁰⁹

Watson has also identified that deer numbers in Braemar remained low until the earl of Fife took direct action against poachers.²¹⁰ So lower deer numbers might result in fewer poaching cases but we know from the dispute with Culdres that there was still a significant deer population in the forest at Mamlorn in the 1730s. Had the earl of Breadalbane followed the earl of Fife's example in vigorous pursuit of poachers, we would expect to see an increase rather than a decrease in poaching cases appearing in the baillie court. It seems, therefore, that an absence of cases may not necessarily indicate an absence of animals. It may be the case that Breadalbane tolerated a certain level of poaching in the lean years of the 1690s or other times of shortage as a relief of hunger.

The conclusion therefore must be either that the court recorded such cases differently, or no longer pursued them. It may be that the second earl (succeeded 1717, died 1752) took less of an interest in poaching by his own tenants and was more concerned with large scale encroachments by neighbours

²⁰⁶ Smith, J S, 'Changing deer numbers in the Scottish Highlands since 1780' , p91

Griffin, E, *Blood Sport: Hunting in Britain Since 1066* (Yale University Press, 2007), p110. Griffin argues in the English context relating mainly to emparked deer.

²⁰⁷ Stevenson, D, *Highland Warrior*, p212

²⁰⁸ Roberts, J L, *Clan, King and Covenant: history of the Highland clans from the civil war to the Glencoe massacre* (EUP 2000), p125

²⁰⁹ Dodgshon, R A, 'The little ice age in the Scottish Highlands and Islands: Documenting its human impact', *Scottish Geographical Journal*, 121:4 , 2005, pp321-337

Lamb, H H, *Climate History and the Modern World*, Methuen, 1982. p 209-214

²¹⁰ Watson, A, 'Eighteenth Century Deer Numbers and Pine Regeneration Near Braemar, Scotland' p304-305

as in the Mamlorn case. Alternatively, minor poaching cases may not have warranted inclusion in the court book. In either case, the evidence identified in this project has been insufficient to conclusively explain why there is a dramatic downturn in poaching cases at the court but we can consider the tentative explanations outlined above.

After 1748 we must look elsewhere for evidence of poaching. We do know that the third earl (succeeded 1752, died 1782) took steps to restrict hunting by neighbours on his land,²¹¹ but few records survive of cases that arose during his peerage. It is perhaps significant that there are no records of tenant poaching in the mid-late eighteenth century. This coincides with the period following the demise of heritable jurisdictions and prior to the establishment of the Night Poaching acts from 1817. It seems likely that lack of a clear legal route for dealing with routine poaching meant that only high profile issues like the Livingstone case got legal attention and low level poaching was either ignored or dealt with through other sanctions such as eviction or withholding paid work. However, the absence of records might suggest that such sanctions were rare.

It may also be the case that from 1715 onwards, restrictions on military activity in the Highlands – principally successive Disarming Acts – may have discouraged the possession, or at least the open carrying, of guns.²¹² This would explain at least in part both the downturn in cases record in the eighteenth century court books and also the dearth of poaching reports prior to 1800.

The fourth earl did engage in litigation, notably the Livingstone case discussed in the next chapter. His staff also recorded numerous incidents of alleged poaching from the turn of the century onwards. These were mainly notes provided by game-herds and gamekeepers such as a report submitted by Duncan Kippen in 1805 which listed four residents of the Loch Tay area who were suspected of killing game and listed their supposed target species as roe, hare, grouse and deer.

²¹¹ He posted notices in newspapers in 1758 and 1767 warning gentlemen that permission would not be granted for hunting on his lands: NAS, GD112/16/12/1/1-2

²¹² Macinnes, *Clanship, Commerce and the House of Stuart*, p170, 214

Fig 7 Offences mentioned in poaching reports, 1800-1832

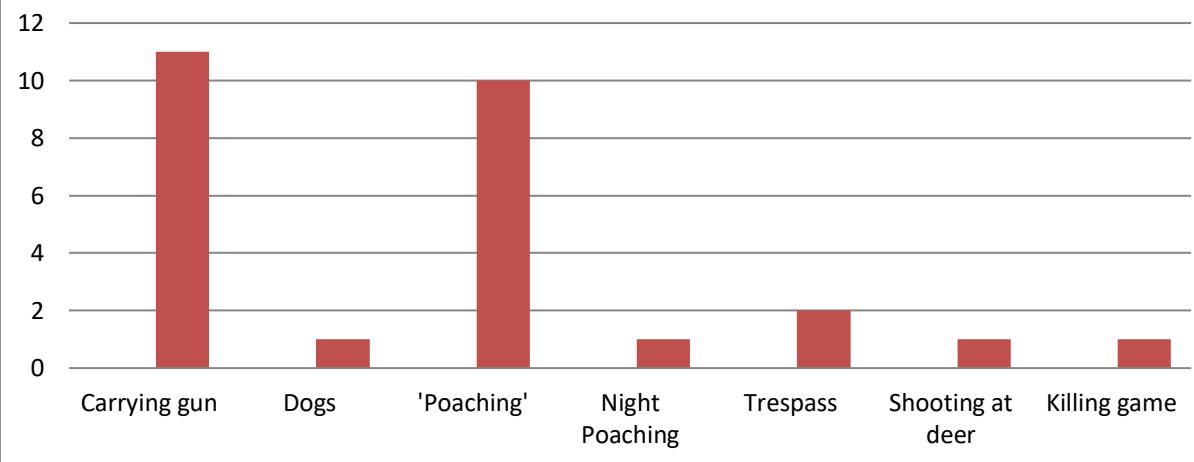
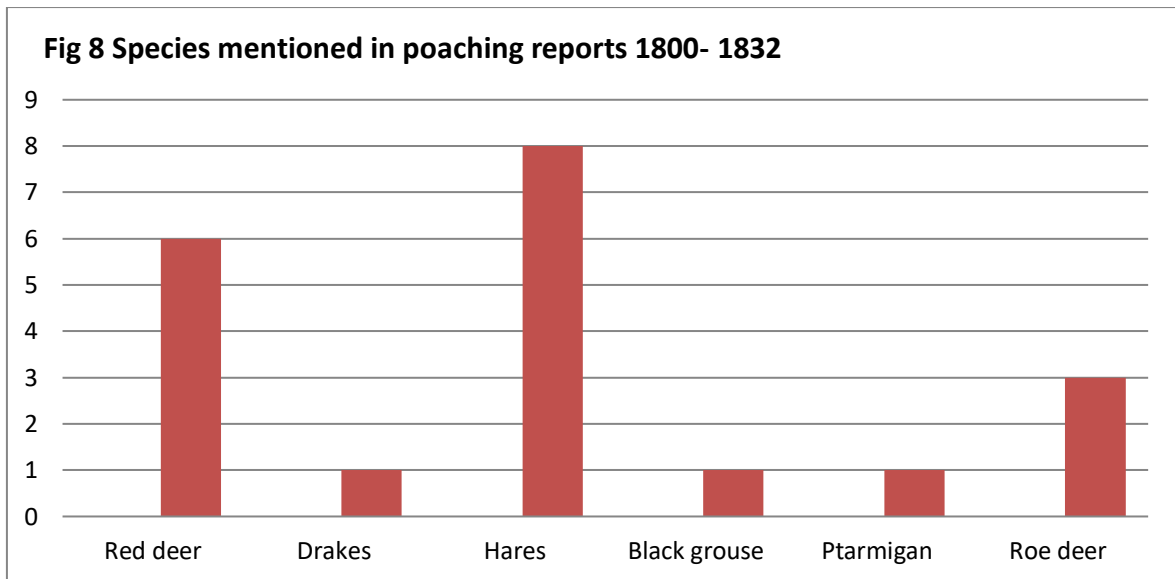


Fig 7 shows the offences alleged in reports made by Breadalbane staff in the period 1800 to 1832 where specific offences or offenders have been named (general reports and comments that do not name suspects have been excluded) and fig 8 shows the species named in those reports. 'Carrying a gun' is the most common alleged offence, suggesting that the earlier tendency for tenants to poach with firearms continued in the nineteenth century. One additional piece of evidence, however, suggests that at least some poachers were working more systematically to bag game. Duncan Menzies of Laggan reported to the earl (secretly, and possibly with an eye to being employed as a keeper) that someone was leaving 'sheaves of unthreshened corn' for deer and roe on Dummond Hill for the purpose of ensnaring them. This is the only direct reference to snaring, and may in fact suggest the laying of 'bait' but the means of killing may still have been the gun.



Although most of the species mentioned in fig 8 are familiar from earlier material, hares are a conspicuous addition to the list of target species. The appearance of hares in the evidence may indicate that they had become a species of more concern to the estate. Hares had been protected since the middle ages²¹³ but were not specifically mentioned in the local statutes of the Glenorchy/Breadalbane court under which most prosecutions were made so if poachers had targeted hares, the species would not be recorded in these earlier cases.²¹⁴ By the nineteenth century all game - 'greater game' such as deer and roe, winged game and 'lesser game' (mainly hares) were the subject of greater 'preservation' across the whole of Great Britain and the appearance of hares may be an indication of estate interest in a wider range of game species.

It is clear from some of the nineteenth century material that some poaching was tolerated, or perhaps not even regarded as 'poaching'. When Alpan McAlpan was accused in 1801 he pleaded to the earl that the accusation of Duncan Fletcher, a Killin gamekeeper, was false and groundless, but, after an impassioned plea of innocence:

²¹³ By a 1458 statute protecting them in time of snow 1458/3/37

²¹⁴ Cases usually invoked the provisions against slaying or shooting specific species: deer, roe, wildfowl, black grouse and salmon.

'indeed owns that he was killing some drakes and hares upon the hillside of Lochtay, but did not exceed therein more than what the others did in the country that were never complained upon by Duncan Fletcher.'²¹⁵

This petition to the earl reveals an important aspect of attitudes to game and poaching. McAlpan is effectively saying that despite killing game he should not be regarded as a poacher as he only did so to the same degree as others. The fact that McAlpan was willing to put this in writing to his landlord, a powerful aristocrat and enthusiastic game preserver, indicates that either he was very naive or that he felt this was a perfectly reasonable statement to make, reflecting a general social attitude with which he expected the earl to sympathise.

The idea that poaching was relatively common and, if maintained at a low level, tolerated, is further supported by Duncan Kippen's report submitted in 1805 which lists four offenders in the Taymouth area, two of whom are reported as being seen often carrying guns. One John McNaughton, a wright at Milltown of Taymouth, was reported to have roe skins 'about his shop' and to have been seen often in the company of John Crerar, fowler, and the pair being seen to return home with a 'burthen' suspected of being a sack of moor fowls. Crerar himself had permission to shoot fowl from the earl and sent muirfowls to his 'wellwishers' but:

'as the muirfowl so sent by him per carriers amounted at times to boxes full it is presumed that he had exceeded any liberty given him.'²¹⁶

Whether Crerar's 'wellwishers' were paying customers or friends is not clear but the implication is that some of this game was changing hands for money, payment in kind or to curry favour. Here are two offenders, one who exceeds the bounds of permission granted by the earl and another who has drawn attention to himself by openly displaying the fruits of his crime. It is noteworthy that Crerar is described as a 'fowler', an activity that had previously been outlawed. He presumably acted with the laird's license to catch birds for table. Duncan Kippen's report was submitted either on his own

²¹⁵ NAS, GD112/11/7/4/16

²¹⁶ NAS, GD112/16/10/5/19

initiative or in response to a request from the earl for reports of poaching. Three of the four offenders he identified were described as repeat or habitual poachers: he refers not to individual incidents in their cases, but to their general practice of poaching. It might be inferred from this approach that one off incidents would go unremarked, but excessive poaching would attract negative attention.

Kippen's apparent tolerance contrasts with the claims made by John Campbell of Glenlochay at the other end of Loch Tay who in 1803 requested payment for the execution of gamekeeping duties over the past two years and claimed that

'since he began this office that they are kept so much under fear of being reported and of paying heavy fines that their [sic] is very few of wood transgressors or poachers of game of any kind' ²¹⁷

Since Campbell was pursuing payment for two years' duties it is likely that he overstated his own effectiveness as a game keeper. His reference to fines suggests perhaps that keepers would extract a fine on the spot rather than prosecute.

Gamekeepers themselves sometimes expected to be permitted some shooting. In 1821, John McKean, having taken over from the previous keeper at Brae of Taymouth, petitioned the earl that he should be entitled to half the outlying deer (i.e. those outside the parks) shot in the season in his area, as the old keeper had been.

Clearly the earl did grant permission for limited hunting to unqualified commoners, such as the fowler Crerar. It was also common practice throughout Britain (and permitted by legislation) that gamekeepers could hunt - though often for the purpose of providing game for the table rather than for themselves. The combination of granting permission and, on the other hand, threatening a prosecution or eviction, meant that despite the demise of the Baillie Court, the earl still retained a

²¹⁷ NAS, GD112/16/10/5/16

great degree of power over the way in which game was protected and poachers prosecuted or tolerated on his land.

If poaching was indeed widespread it may well have been a matter of necessity to only pursue offenders who had clearly overstepped the unspoken bounds of tolerance. Another reason for not pursuing all cases was the difficulty of gathering evidence or even identifying a perpetrator.

Presumably in response to an ongoing issue, Alexander Campbell interviewed under oath a number of residents of the Glenorchy area in April 1832. Almost universally the locals testified that they had heard shots from a distance at various points over the previous year, mainly in the area of Catnish, but were at a loss to identify who might be responsible - one did testify to having seen someone pursuing ptarmigans and hares, but could not identify them. Suspicion focussed on John McDonald, a shepherd, who refused to give testimony as to his own guilt but did offer to testify that he knew of no others who were guilty. Donald McIntyre, a workman in the area did declare that he had seen the said John McDonald with a gun, but that McDonald had claimed he was using it to kill dogs that were worrying his employer's sheep. Given the uniform vagueness of the other testimonies it may be that McIntyre was breaking ranks with his fellow residents when he also confirmed that the kind of shot he saw McDonald carrying was not suitable for dogs.²¹⁸

This document outlines the difficulty of identifying poachers in the Highland environment. Someone pursuing ptarmigans would be doing so at high altitude, far removed from dwellings and difficult to identify. If there was some local sympathy for the poacher (who may have shared game with supporters and neighbours), a combination of reticence and remoteness could quite easily prevent an identification. McDonald's own evasive response – that he would testify to get his neighbours off

²¹⁸ NAS, GD112/16/10/5/34

the hook, but not to incriminate himself – suggests that there was a collective effort to protect McDonald and that McIntyre was out of step with his fellow tenants.

Suspects might also offer excuses, however implausible. Shepherd Archibald Clark, who was stopped carrying a gun by gamekeeper Peter Robertson, claimed that he kept the gun for the purpose of striking fire at home, and had taken it with the intention of shooting otters (regarded as vermin) that he had seen playing at a pool. Alas we do not have Peter Robertson's interpretation of the case.²¹⁹

The difficulty of gathering conclusive evidence is further illustrated by a much more serious case from 1843 in which a game herd, another John Crerar, was possibly murdered. After making a report to a Justice of the Peace at Ardvorlich about poaching by a notorious poacher and reprobate John McKinley and two McGregor men, Crerar ran into the same men at Lix Toll. There followed a rather confused series of events involving late night drinking and a wedding celebration which resulted in Crerar going missing and being found dead in the River Dochart. Sheriff Barclay made extensive notes and interviewed a number of witnesses and possible suspects but appears to have been unconvinced of McKinley's guilt in the matter.²²⁰

Unfortunately it is beyond the scope of the current research project to follow up these reports in the relevant Sheriff Court records to check whether any cases were taken to trial but it does appear significant that no notes are appended to indicate that legal action was taken and, if so, the outcome. One set of instructions to gamekeepers does however give an indication of the kind of on-the-spot approach keepers might adopt when policing the actions of gentlemen who may be shooting with the earl's permission. A keeper named Peter Simpson (who later pursued the earl for unpaid wages) was instructed to charge a guinea to 'any sportsperson whatever that kills a female deer in the Buck

²¹⁹ NAS, GD112/16/10/5/35

²²⁰ NAS, GD112/16/10/5/37-45

season' and to kill any dogs found trespassing in woods or plantations.²²¹ It may be that in the case of common poachers, similar summary action was taken or, in severe cases, an eviction was sought. One record of proceedings has survived in which a tenant of the third earl was threatened with eviction for timber offences. It is therefore possible that similar actions were taken against poachers.²²²

Over the period there was a change in emphasis to some extent that saw a move away from dealing with poaching cases at the baillie court and the, following the court's demise, in dealing directly with poachers through on the spot action, eviction or legal action in court. Unfortunately, however, the evidence while identifying suspected poachers does not confirm action taken against them or outcomes of that action. There does however appear to have been a high degree of tolerance for relatively low level poaching, possibly driven by a desire on the one hand not to drive too many tenants into complete poverty and also due to the problematic nature of collecting sufficient evidence for a conviction.

Conclusion

The exploratory nature of the project has meant that a wide chronological range has been covered, and without pre-existing research to provide a framework of findings upon which to build, it has been necessary to allow the sources to speak for themselves and to influence the direction of the research. In allowing this process to unfold, a number of themes have emerged.

The first is one of tolerance and localism. Across the period, there seems no doubt that poaching went on. The frequency of its appearance in the early court book, and the detail of some of the successful prosecutions, suggests that shooting at deer and other game was a common activity. Post-1748 reports, especially in the early nineteenth century, also confirm that poaching was an issue.

²²¹ NAS, GD112/16/10/3/26

²²² NAS, GD112/11/3/3/52, 53

Throughout the period, control rested mainly or wholly in the hands of the Laird. This is clear in the period to 1748 when the local franchise court was empowered to hear poaching cases, and indeed did so, especially in the early part of the period. Despite a range of national legislation with potentially draconian implications for poachers, the laird tended to rely on the local bylaws. After 1748, one might expect that control of poaching would move away from the estate and into the hands of sheriff courts and justices of the peace. However, there is very sparse evidence for cases being referred to a JP or the Sherriff court, save the examples late in the period of advice sought over incursions by men from Glencoe and the fact that John Crerar made a report about poaching to a Justice shortly before his death in 1843.²²³

The period between 1748 and the introduction of Night Poaching legislation in 1817 seems to be one in which there was no clear route for prosecuting poachers except the 1621 act, a piece of legislation which had been enacted when the law in much if not most of Scotland was administered through franchise courts. Despite a number of poaching cases that appear in estate notes and letters, there are no corresponding letters of legal advice nor papers collated in preparation for court. This leads to a tentative conclusion that action against tenants who indulged in small scale poaching would most likely have been taken locally, if at all. Such action may have been eviction in more extreme cases, but again, we have no surviving records. It seems likely, therefore, that action took the form of smaller scale social or economic sanctions except in the most extreme cases. Comments made and the extent to which some tenants appear to have poached before being detected suggests there was also a high degree of tolerance for poaching and that it was only when poaching reached too high a level to ignore that action was taken. Even then, it is notable that the laird of Breadalbane

²²³ NAS, GD112/16/11/5/36
NAS, GD112/16/10/5/37-45

does not appear to feature in any of the surviving Night Poaching cases heard at the High Court after 1817.²²⁴

The evidence suggests that most poaching was quite open, and involved firearms rather than stealthier methods. This in itself is significant because it confirms the availability of firearms to commoners, and perhaps the downturn in poaching activity during the anti-Jacobite backlash in the eighteenth century is related to the intensive efforts at demilitarisation following successive rebellions, resulting in firearms being taken out of circulation, or concealed, and in a reduction in available black powder.²²⁵

Extensive use of firearms in poaching suggests that detection or prosecution was not a serious concern, and may indicate that both the landscape – mountainous and extensive- and prevailing social attitudes both contributed to this position. It does seem clear that on occasions tenants were ready to show some solidarity (as in the case of McDonald in 1832) and the laird some indulgence, as hinted by Alpan McAlpan. The use of guns also indicates that tenants were skilled in their use. Even moderate success in shooting wild animals requires a degree of skill and practice, as well as access to powder and shot.

Poaching does appear to have focussed on key species, with roe and red deer attracting attention throughout the period, though we must be cautious since the phrasing of early bylaws that listed specific species may have influenced the way poaching was recorded in the court books. In a social and physical environment that was conducive to shooting rather than snaring, one deer might represent a very significant gain for a poacher, either for sale or for the pot. The appearance of hares in the record later in the period does perhaps indicate a growing concern with ground game, and the evidence from the later period is not extensive enough to build a comprehensive picture of the

²²⁴ A search of National Archives metadata revealed both location of offence and in some cases the identity of the complainant. An examination of these two pieces of data for the period 1817-1850 has not revealed any cases in which Breadalbane is named as complainant and no cases that appear to have occurred in Breadalbane estate land.

²²⁵ Macinnes, *Clanship, Commerce and the House of Stuart*, p214

relative numbers of different species poached. Notes sent by Peter Robertson from Glenorchy in the 1830s might form the basis of further research into deer numbers in the latter part of the period.

Despite the clear association of hunting, especially of deer, with nobility, militarism and social superiority, there appears to have been what was at times significant tolerance for poaching by commoners. This may have been the result of benevolence in straightened times – for example in the lean years of the Maunder Minimum – combined with practical difficulties in enforcing strict game laws in a large and varied estate with some remote and mountainous areas. There may also have been a more nuanced consideration of achieving a balance between asserting authority and permitting minor rule-breaking within unwritten parameters. These approaches did not undermine the social position or authority of the laird, but rather may have reinforced it by contributing, especially early in the period, to his position as a paternalistic figurehead and chief as well as landowner.

This project could only be an exploratory exercise. It has, however, identified areas for further exploration. These include the need to compare the Breadalbane record with other estates, and sheriff and other court records to fill out the data available about poaching in the period. Space has not permitted a full exploration of gentlemanly poaching and deer raids which would add another dimension to our understanding of the topic. There is also potential for further research on estate management for game, particularly relating to the control of vermin (and its potential effect on biodiversity), the management of parks and forests later in the period and potential extrapolations of deer populations for estate reports. Finally, the position of game and its status in pre- and post-Improvement society in the Highlands may prove a lucrative field for further study.

What has been confirmed is the laird's central role, and tolerance, in controlling poaching in Breadalbane and, equally important, the wealth of material potentially available on these topic areas within the better-preserved estate records of Scotland.

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Item it is ordanit at the justice clerk sal inquire of stalcaris at slais der 1425/3/14

Item anent pertrikis, pluvaris, blak cokis, gra hennys na mur cokis, 1428/3/13.

Item anentis the slaaris of harys in snawe tyme and distruccion of cunnyis, 1458/3/37

Item, that na man sla dere nor rays in tyme of storm or snaw A1474/5/16

Anent thame that schutis with gunnis at deir and wylde foulis, ca. viii, A1551/5/3

Anent the slaying of wylde beistis, wylde foulis, halking and hunting, ca. xxv, A1555/6/26

Item, ... that nane of our soverane ladyis liegis sould schute with half hag, culvering or pistolat at deir, ra and uther wylde beistis. A1563/6/15

Anent slaying of hart, hynde and utheris beistis and foulis with culveringis.), A1567/12/16

Anent schuiting and beiring of culveringis and daggis A1567/12/22

Anent schuitting and bering of culveringis and daggis A1575/3/2

Aganis slayeris of deir and utheris wyld beastis. 1587/7/53

It is not lesum to slay deir, rais, hares, wylde foules or dowes 1597/11/44

[no title] 1599/5/1

Act aganis slauchter of wyld foullis 1600/11/47

Anent Hounting and Haulking 1621/6/43

Act for preserving the game A1705/6/11

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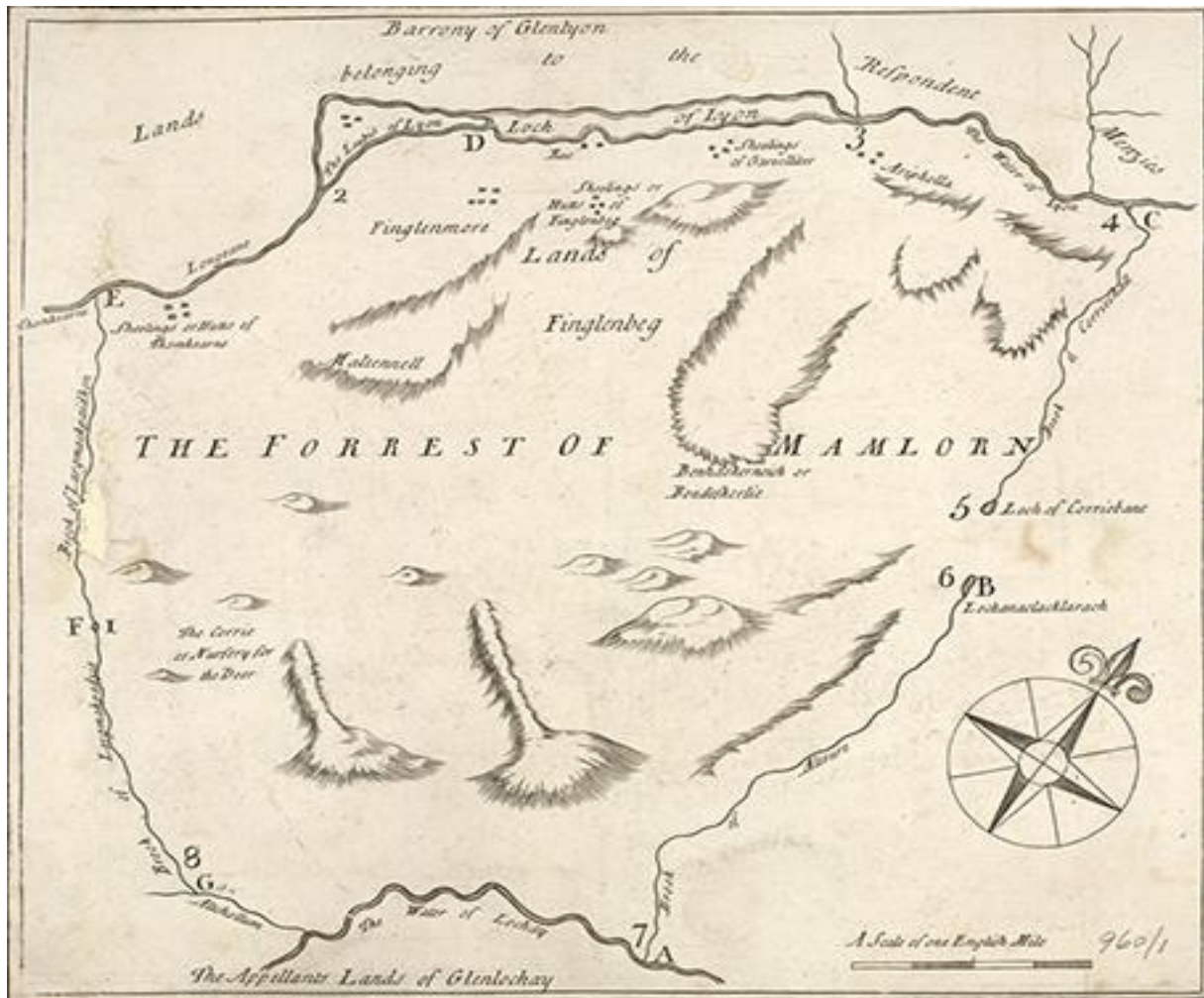
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Appendix 1 Map



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