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PUNISHMENT AS APPLIED BY THE ORDINARY CRIMINAL COURTS.

From 1400 to 1747.

1. In time the study covers what might be called the first period of Scottish legal history (the second period being from 1747 to the present day). 1747 formed a watershed in Scottish social, political and legal attitudes in the same way as 1945 was a watershed in British attitudes, and this study is an attempt to ascertain the scope, range and application of punishment as applied by the Scottish courts in the first period.
2. The principal types of Court have been studied and the sentencing patterns have been noted and related to the overall picture. While there are many published court records and also a number of works on punishment, it is considered that the court records are largely self-contained and not particularly directed to a study of sentencing. The works on punishment deal with the principles of law and exceptional cases rather than the ordinary punishments actually inflicted by the courts.
3. Procedural and political influences have been noted briefly to ascertain how far they affected the basic sentencing pattern.
4. The punishments divide into (1) death (2) personal (3) monetary (4) property and (5) restriction of freedom.
 - (1) DEATH) The most general form was hanging but there were clear differences - beheading was standard for slaughter, and strangling (and burying the body) for unnatural crimes. Depending on the degree of outrage, corresponding degrees of personal punishments could be added to the death sentence.
 - (2) PERSONAL There was a considerable range of personal punishments and in the calendar of sentences personal punishments rank after death sentences in severity. Some forms (e.g. mutilation) could be applied before or after death and there was a definite graduated scale of combinations of death and//

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and personal punishments, according to the severity or dishonour of the crime.

- (3) MONETARY punishments were common - fines, assythment cautionary obligations - as a general rule, the other penalties were avoidable by paying either a fine or compensation or both.
 - (4) PROPERTY punishments were usually incidental to death or personal punishments (e.g. escheats, forfeitures) but in a special class were loss of burgh freedom and outlawry which, although not directly property punishments, had a severe property effect as their principal indirect result.
 - (5) RESTRICTION OF FREEDOM extended to imprisonment and banishment. In both a definite course of development is seen - from a custodial to a punitive aspect in imprisonment, and from expulsion from Scotland to a direct order to go a definite place, in banishment.
5. The principal aim of punishment was deterrent, but, especially in the earlier period, there was a strong element of retribution present

PUNISHMENT AS APPLIED BY THE
ORDINARY CRIMINAL COURTS
FROM 1400 TO 1747.

ROBERT ALASDAIR MACTAGGART.

A Thesis submitted to the Faculty of Law of The
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The writer would like to acknowledge the considerable assistance he has received from Mrs. Caroline McKellar, Largs, in typing this work.

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INTRODUCTION.

1. AIM OF THE STUDY.

There is a considerable amount of published work on the substantive criminal law of Scotland from the 14th century onwards, but there is little information available on the actual penalties (as opposed to the possible penalties contained in the statutes) imposed by the principal courts. There are a number of court records published, but each record tends to be self-contained and in the various introductions no attempt is made to note in detail either the actual sentences of that particular court or to enquire if there was a sentencing pattern, or alternatively to relate that court's sentence to the sentences of other courts, the writers being more concerned with procedure and jurisdiction.

Other writers (e.g. Maclaurin and particularly Arnot) do cover sentences but they are concerned with exceptional cases and sentences, rather than the normal or every-day sentences.

This study is an attempt to answer the following questions (1) what was the usual penalty for a particular crime in a particular court at a particular time (2) what range of punishments was used by the various courts (3) what was the aim of punishment at any given time.

Certain subsidiary questions arise - (a) did the form of procedure have any bearing on the penalties (b) were women, minors, insane persons, or elderly men treated differently in sentencing than men of full age (c) to what extent did political considerations affect sentences.

INTRODUCTION.

2. METHOD.

(a) After consideration of various methods of pursuit, it was decided to note (1) how each crime was punished in each court and (2) how each punishment was used by each court.

Although this might result in a certain amount of repetition - the one case would be reviewed twice - once from the aspect of the crime and again from the aspect of the sentence, it was thought that this course would give the most comprehensive cover of the subject.

(b) For easy reference, each court record was allotted a letter of the alphabet followed by the page. In some cases, the year has been added. In the case of the Argyll Justiciar Records Vol. II Mr. John Imrie very kindly gave the writer notes on the punishments inflicted by the court in the period 1705-1742, prior to publication of the work by the Stair Society. In this the writer adopted references based on the month and year of the case, i.e. a case decided in August, 1710, is referred to as "8/1710" as the pages were not settled when the court was noted by the writer. Where there is a sequence of page references from the same book, the letter has not been repeated with each page and the nearest preceding letter applies.

3. GENERAL.

(a) All references to money are in Scots currency unless otherwise stated - the very few references to pounds sterling have "Stg." added. It is outwith the scope of this study to relate the value of the fines and cautionary obligations to the purchasing power of the money at any period, although this information would have been useful to give a complete picture of the force of the monetary sentences. An excerpt taken from Pinkerton's "Essay on Medals" is given in an attempt to relate the values.

(b) //

INTRODUCTION.

3. GENERAL (Contd.)

(b) The Burgh courts have been omitted from the Procedure notes as the Burgh court records do not show such detail regarding procedure as do the other courts.

(c) The Admiralty court records (in their published form) show only one theft case whose sentence was the standard hanging and while this has been noted, it was considered unnecessary to make any other reference. The Bailliary and Stewartry Courts, the Commonwealth courts or committees and the Church courts are excluded from this study.

(d) In the conclusions, reference is made to the early, middle and later periods. The division is certainly not rigid and is purely for convenience to describe trends in general terms. The early period can be taken to cover from 1400 to 1550, the middle period from 1550 to 1650 and the later period from 1660 to 1747.

(e) The conclusions are given at the end of each crime and punishment.

RELATIVE VALUE OF SCOTS AND ENGLISH POUND.

(From Pinkerton's "Essay on Medals" Vol. 1. p.444. London.1808)

Till 1355	equal.				
About 1390		1	English was value for	2	Scots.
" 1451		1	" "	2½	"
" 1456		1	" "	3	"
" 1467		1	" "	3½	"
" 1475		1	" "	4	" (gold)
" 1544		1	" "	4	" (whole coinage)
" 1560		1	" "	5	"
" 1565		1	" "	6	"
" 1579		1	" "	8	"
" 1597		1	" "	10	"
" 1601		1	" "	12	"

SCOTS CURRENCY.

Abolished at Union, 1707.

Scots currency was one-twelfth the value of English for quite a hundred years before the separate coinage for Scotland was abolished; thus £100 Scots was only equal to £8: 6: 8d. sterling or £1 Scots to 1/8d. sterling, or 1s. Scots to one penny sterling. The following table gives the Scots currency:-

2 pennies	=	1 bodle	=	one-sixth ld. sterling.
4 pennies or 2 bodles	=	1 plack	=	one-third ld. "
6 pennies or 3 bodles	=	1 bawbee	=	one-halfpenny. "
12 pennies or 6 bodles or 2 bawbees	=	1 shilling	=	one penny. "
13 shillings and 4 pence	=	1 merk	=	1s. 1½d. sterling.
20 shillings	=	1 pound	=	1s. 8d. "

The bawbee or babie was first coined in the reign of James V. of the value of 6d. Scots; and when its equivalent in value, the English halfpenny, came into use, and the bawbee had ceased to be coined, the name stuck to the equivalent coin.

ORKNEY AND SHETLAND CURRENCY.

Angel	=	£5: 6: 8 Scots.
Dolour (dollar)-	=	£2:15: 0 Scots.
Guidling) Gulyeoun) Gulden.)	=	£1: 4: 0 Scots.
Ure	=	nominal value.
Yopindale	=	2 gulden.

SOURCES.

I. COURT RECORDS.

1. JUSTICIARY COURT.

PART 1.

- A. Pitcairn : Ancient Criminal Trials in Scotland: Maitland Club.
Vol. I. Pt. 1. 1488-1542.
- Aa. -do- : Vol. I. Pt. 2. 1542-1568 (acc. of Jas VI)
- B. -do- : Bannatyne Club Pt. 1. 1568-1596.
- C. -do- : -do- Pt. 2. 1596-1609.
- D. -do- : Maitland Club. Vol. III. Pt. 1. 1609-1615.
- Dd. -do- : -do- Pt. 2. 1615-1624.
- E. Selected
Justiciary
Cases. : Stair Society No. 16. Vol. 1. 1624-1650.

PART 2.

- F. : Records of the proceedings of the Justiciary
Court, Edinburgh.
The Scottish History Society, Vol. I.
1661-1669.
- G. : -do- Vol. II. 1669-1678.
- H. : Arguments and Decisions - Maclaurin 1670-1747.

2. ARGYLL JUSTICIARY COURT.

- I. : Argyll Justiciary Records. Vol. I. 1664-1705
Stair Society No. 12 (1949)
- J. : Argyll Justiciary Records, Vol. II. 1705-1742
Stair Society No. 25 (1968).

3. SHERIFF COURTS.

- Ka. : Sheriff Court Book of Fife (1515-1522) ed.
Dickinson. SHS 1928.
- Kb. : Selections from the Judicial Records of
Renfrewshire.
1670-1800. Wm. Hector, Sheriff Clerk. 1876.
- Kc. : 1670-1800 -do- (second series) 1878.

4. ORKNEY & SHETLAND COURTS.

- L. : Court Book of Shetland 1602-1604: Gordon
Donaldson, Scottish Record Society 1954.
- M. : Court Book of Orkney & Shetland: 1612-1613.
Robert I. Barclay: Kirkwall Press 1962.

SOURCES. 2.

I. COURT RECORDS (Contd.)

5. REGALITY COURTS. Melrose Regality Records - Scottish History Society.

- Na. : Vol. 1. 1605-1661. : 1914.
Nb. : Vol. 2. 1662-1676. : 1915.
Nc. : Vol. 3. 1547-1706. : 1917.

6. BARON COURTS. 1523-1747.

- O. : Carnwath: Court Book of the Barony of Carnwath 1523-42. Scottish History Society 1937.
P. : Urie : Court Book of the Barony of Urie, 1604-1747. Scottish History Society 1892.
Q. : Stitchill: Records of the Baron Court of Stitchill 1655-1807. Scottish History Society 1905.
Ra. : Forbes: Forbes Baron Court Book: Scottish History Society. Miscellany, Vol. III.
Rc. : Skene) Extracts from the Court Books of the
Rd. : Leys) Barony of Skene, Leys and
Re. : Whitehaugh } Whitehaugh 1613-1687. Miscellany
(Vol. V.) Spalding Club 1852.
S. : Corshill: Arch. and Hist. Collections (Ayr & Wigtown) Vol. IV. 1884.

7. BURGH COURTS.

- T. : Ancient laws and customs of the Burghs of Scotland 1124-1424.
Scottish Burgh Records Society Vol. I. 1868.
U. : -do- Vol. II.
V. : Early Records of the Burgh of Aberdeen. 1317, 1398-1407.
Scot. Hist. Soc. (3rd ser.) Vol. xlix. 1957.
W. : Court Book of the Burgh of Kirkintilloch 1688-1694.
Scot. Hist. Soc. (1963).
X. : Extracts from the records of the Burgh of Peebles. Vol. I. 1165-1710 (1872)
Y. : -do- Vol. II. 1652-1714 (1910)
Z. : Extracts from the Records of the Royal Burgh of Stirling, 1519-1666: Scottish Burgh Records Society 1887.

8. ADMIRALTY COURT: Stair Society No. 2. 1937.

SOURCES. 3.

II. COMMENTARIES.

- Arnot : Celebrated Criminal Trials 1536-1784.
- Balfour : Balfour's Practicks Vols. I & II: Stair Society
Nos. 21 & 22.
- Hope : Hope's Major Practicks Vols. I & II: Stair Society
Nos. 3 & 4.
- Hume : David Hume. Commentaries on the Law of Scotland
respecting Crimes. 2 Vols. 1819.
- Innes : Cosmo Innes, Lectures on Scotch Legal Antiquities. 1872
- Intro SLH : Introduction to Scottish Legal History: Stair
Society No. 20.
- Mackenzie : Sir George Mackenzie: Law and Customs of Scotland.
In Matters Criminal. 1678.
- Murray : David Murray. Early Burgh Organisation in Scotland,
1924. Vols. I & II.
- RM : Regiam Majestatem: Stair Society No. 11.
- Willock : Ian Willock: The Jury in Scotland: Stair Society No. 21

JURISDICTION.

It is considered unnecessary to note the jurisdiction of the courts in detail as there are a number of published works which cover the ground in depth, but it is advisable to note (1) certain points which are made in some modern works which in the writer's opinion are not borne out by the texts and (2) details of the jurisdiction of the Orkney and Shetland Courts.

1. Points of disagreement.

(a) Baron Court powers.

It is maintained by one learned writer that in criminal actions (i.e. murder and theft) the entries are so brief that no information can be gleaned as to procedure - "the reason was twofold - in the first place the penalty was death - if the accused was found guilty he was hanged, and in the second place the procedure itself was so summary that no fuller entry could be given". This text is noted in some detail below,² but it must be stated that the records do not support the observation that death was (a) inevitable or (b) imposed by the baron courts, even at the time of the Carnwath record, whatever may have been the position earlier.

(b) Burgh Court powers.

The texts and commentaries conflict to a certain extent on the question of jurisdiction and the conflict arises partly because individual towns obtained jurisdictional rights over and above the basic burghal power - e.g. some town magistrates were equated with sheriffs³ and in other cases the town received rights of justiciary, all of which are reflected in the nature of the crimes and their punishments shown in the court records

1. Carnwath: Intro. ciii.
2. See Theft p. 231
3. Hope. I. 5. 7.

JURISDICTION (Contd.)

(b) Burgh Court powers (Contd.)

However, in legal theory the basic and earliest form of burgh jurisdiction (1) excluded the pleas of the Crown (and of course treason) which if they occurred in the town were to be held until the justiciar arrived (2) could include power to punish murderers and thieves capitally if given in the burgh's charter - being the traditional powers of pit and gallows, and infangthief and outfangthief.¹

This is taken to mean, not general powers of killing murderers and thieves, but only those taken redhanded or with the articles still in their possession.²

The Burgh could kill such criminals, but murderers and thieves not taken redhanded had to be kept until a competent (king's) judge arrived - usually the sheriff,³ but sometimes the justiciar.

However, while the foregoing is the accepted legal analysis, the court records in fact make little or no reference to a redhanded capture and where they passed death sentences, the accused was hanged simply on the strength of being a thief or murderer, irrespective of "the fang".

How far a burgh court with basic burghal powers could impose a death sentence where the element of redhand is absent is a debated point.

Murray states that "there are many examples in the burgh records of death sentences passed by the magistrates".⁴ This is true, but each court must be examined separately, because it is found frequently that where the court did pass a death //

1. Balfour. 53, 58.

Hope. I. 5. 7.

R.M. 62/3. repeated Balfour 503.

2. LQB. LXXIV. 36/7 and FC LI.185, but contra, at least at first sight. FC XXXIX p. 180.

3. Hope VIII. App. B.5.

4. II. 508.

JURISDICTION (Contd.)

(b) Burgh Court powers (Contd.)

death sentence (again irrespective of "fang") the court's powers were supported by an express commission of justiciary or alternatively the court claimed regality powers in addition to its basic burghal power.²

If all such courts or instances are discounted, then not one of the records noted shows death sentences passed by a basic burgh court, whether redhanded or not. The statement in Scottish Legal history (p. 387) that "thieves and adulterers were hanged and witches burnt" is not borne out by the records of basic burgh courts. Such sentences only occurred in towns whose basic powers were supplemented in some way.

In the actual record of the Aberdeen Burgh Court, no mention is made of capital sentences. Professor Croft Dickinson considered that death sentences were passed but stated that capital sentences (e.g. for murder, theft etc.) would not be entered in the court records because the records were more concerned with (1) noting the financial return from fines and escheats and (2) keeping a record of persons banished in case they returned before the sentence expired. Capital sentences were of less interest as once implemented no further entries would be necessary. But it is submitted with respect that this is too sweeping, as

- (1) capital sentences in the other courts were frequently followed by escheat of moveables and so some entry, if only for escheats, might be expected, and
- (2) other Court (including Burgh Court) records, make no secret of the capital sentences when they were imposed.

It //

1. e.g. Ayr & Stirling.

2. e.g. Glasgow or Sheriff powers, e.g. Edinburgh SLH.387.

JURISDICTION (Contd.)

(b) Burgh Court powers (Contd.)

It is submitted that capital sentences were not omitted deliberately in Aberdeen, and their absence is explained on the grounds that they were not imposed.

It is suggested, therefore, that the basic burgh court had no power to pass death sentences (except again in legal theory where the person was taken with the fang) and in the larger towns the obvious need to pass death sentences had to be supplemented by express grants of justiciary or regality powers.

If the texts are studied, the Stirling burgh record clearly shows the special grant of justiciary power.

Curia justiciarie supreme domine nostre Regine, tenta in pretorio burgi de Striveling per prepositum et ballivos eiusdem, justiciaros in hac parte conjunctim et divisim, specialiter constitutos.'

Queen Mary appointed the provost and bailies of Stirlingas her justices to punish Gilbert Colterar taken redhanded in the theft of a mare, and to hold a justice court for the purpose.²

The references to the town executioner require consideration as Stirling had its own executioner and that at a later date than the justiciary cases and so at first sight it might appear that the Burgh Court had power of death apart from the special mandate, but the records of this period and later do not show that the powers were used.

1. Z.42. 1546, also
Curia justiciare burgi de Striveling, tenta in pretorio dicti burgi per Alexander Forester vicecomitatum dicti burgi - Z.24. 1525.
(other entries were headed - Curia burgi de Striveling tenta in pretorio dicti burgi per prepositum et ballivos eiusdem) - Z.24. 1525, also
Z.50. 1547/8, Z. 53. 1548
2. Z.71. 1556/7 - Ayr received a similar grant of justiciary rights. Murray II. 504.

JURISDICTION (Contd.)

(b) Burgh Court powers (Contd.)

Two late acts refer to executioners:-

Thomas Grant was appointed executioner of the town and he could not leave the town without the consent of the magistrates, under pain of death.¹

John McMorran undertook to act as hangman within the burgh for the rest of his life. In return, the town would give him a peck of meal weekly, a suit of clothes yearly and free house.²

A possible explanation of the office is that the executioner was responsible for "executing the sentences of the court" which need not have been capital sentences. He was responsible for scourging, branding, mutilating etc. and for carrying out the other personal punishments - indignities etc. In the later records, actual death sentences are not mentioned but the threat of death is given periodically - to support decree of banishment.

In a theft conviction, the accused was sentenced to public indignity and banished, under pain of death.³

But no case is noted of its enforcement in the burgh courts.

(c) Classification of Crimes.

It is noted that in their discussions of jurisdiction of lower courts some modern writers divide the cases before the court into civil, criminal and quasi criminal and they consider only murder and theft as properly criminal.⁴

They treat other crimes (where mentioned, as they tend to refer only to assaults and deforcements) as quasi criminal and even on certain occasions, as civil.⁵

It is submitted that the limitation of criminal causes to murder //

1. Z.170. 1633, also Z.205/6. 1652 - a reference stated that the executioner had to go to Culross to attend a justice court.
2. Y.161. 1699.
3. Y.54/5. 1662, also Y.90. 1674. Y.91. 1675.
4. Aberdeen burgh court: Intro. cxvii, cxxvii. Carnwath: Intro. civ. Intro SLH. p.353, 354, 376, 387.
5. Intro. SLH p. 354, 387.

JURISDICTION (Contd.)

(c) Classification of Crimes (Contd.)

murder and theft is too sweeping - not only does it exclude all the vast range of statutory and administrative contraventions but also common law crimes, e.g. assault, troubleance, deforcement and breach of the peace, all of which were punished by the criminal courts.

A study of the punishments imposed in such cases shows that they were certainly regarded as criminal, and while they did not carry a capital sentence (which seems to be the criterion by which the writers classify their criminal acts) the offenders of the "quasi criminal" cases were punished by other forms of sentence in their bodies, goods, freedom and standing.

The classification is not found in any of the institutional writers nor in the sources of law, and further the quasi criminal acts are included in the criminal headings of, among others, Regiam Majestatem, Balfour, Hope and Mackenzie.

It is true to say that a distinction was not always made between acts of a criminal nature and acts of a delictal nature (for which damages or assythment might be given) and that a statute or court might penalise with the force of the criminal law, acts (e.g. insulting) which today would be satisfied by a civil action of damages.

(2) Notes on Orkney & Shetland Courts.

The Court Books of Orkney & Shetland show the sentences at an interesting time. The Shetland Book covers the period 1602-1604 and gives a different picture from the Orkney & Shetland Book of 1612-1613.

1. e.g. defamation and certain assaults.

JURISDICTION (Contd.)

(2) Notes on Orkney & Shetland Courts (Contd.)

Following the political upheavals caused by the first and second Earls of Orkney and the re-assertion of control on behalf of the Crown by James, Bishop of Orkney, the Privy Council ordered the Court in 1611 to apply Scottish Law and to refrain from applying their existing Law which was a mixture of Scottish and Norse law.

The Court Book of 1602-1604 shows a clear picture of the old law with a very strict pattern of penalties in assaults and defamations, and also to a lesser extent in thefts. There was a definite scale of monetary penalties for the basic crime and its aggravations. This rigidity in sentence stem from the early mediaeval system seen in Regiam Majestatem, and ultimately from the fixed penalties of the custom law of the Celtic and Teutonic tribes.

The 1612-13 Book shows that the Privy Council's order was obeyed and the sentences were quite different from the earlier period - the sentences corresponded generally speaking to the sentences of similar mainland courts.

So far as jurisdiction is concerned, the two Books give details of the judge's power. In the 1602-04 Book, the Earl of Orkney is described as the justice general and sheriff principal of Orkney & Shetland and the bailie principal of the regalities thereof, while the Court book of 1612-13 is a collection of the proceedings before the Bishop of Orkney in his capacity as Crown "Commissioner, Sheriff and justice for Orkney & Shetland".

The powers exercised were basically those of a sheriff.

PROCEDURE.

There is considerable published information on court procedure, the most recent being Professor Willock's study of the assize, and it is therefore unnecessary to note in detail the processes observed in the various courts. However, it is thought that a brief note on procedure would be relevant, particularly to enquire how far procedure affected punishment, e.g. was one form of process more likely to result in a conviction or a particular sentence than another form, and also how far the different forms of prosecution affected the decisions at any one time during the period under review.

PROCEDURE. (Contd.)

1. JUSTICIARY COURT.

PART 1. 1488-1650.

(a) Prosecution:

The entries during the earliest period - the reigns of James IV and James V do not give any information about prosecution. The entries state simply that A. was convicted of a particular crime.¹ Whether he was accused by private persons or by the king's authority is not stated.

The record begins to give details of prosecution from and after 1558 and at this period the prosecution was undertaken privately by the injured or by the friends or relatives of the slain person.² They instructed advocates or persons of influence to appear for them.

The first appearance in the court records of the Crown advocate is on 6th June, 1564,³ and thereafter reference is made to official prosecution on occasions,⁴ sometimes combined with private prosecution in the one action.⁵

However, it is clear that until c.1560 official prosecution was limited to actions in which the crown was involved directly and normally the prosecutor was the injured person (i.e. injured in body or purse) or his representatives.⁶

Joint prosecution by the crown and the injured was less frequent and sole prosecution by the crown was infrequent.

The record becomes progressively more detailed and in the period from 1568 to 1596 it is seen that crown prosecution by itself and prosecution by the crown and the individual jointly had become almost equally standard. Private prosecution also occurs, but it was much less frequent.

1. A.60 etc.
2. Aa.442, 476 etc.
3. Aa.442.
4. Aa.462 etc.
5. Aa.472/3, 473/4 etc.
6. Aa.414, 425/6, 441 etc.

PROCEDURE. (Contd.)1. JUSTICIARY COURT.PART 1. 1488-1650. (Contd.)(a) Prosecution (Contd.)

Prosecution by the King's Advocate covered the whole range of crimes, but in treason cases his prosecution was exclusive. Witchcraft cases were normally taken by the Crown, but occasional instances occur of joint Crown and private prosecution.

In certain cases, reference is made to the fact that the prosecution was made at the special demand of the king or the secret council.¹ It is noticeable that acquittals do occur in such cases even in the face of threat of proceedings for wilful error if the assize acquitted the accused.²

Private prosecution at this time applied to a much narrower sphere and was almost exclusively limited to crimes against the person - murder, slaughter, assault etc. It is noted that the highest percentage of acquittals occurs in this group.

The subsequent periods show a similar pattern, but Crown prosecution becomes the normal and most frequent form.

Joint prosecution certainly occurs, but it was less frequent and private prosecution remained limited to personal crimes although even here it was less frequent than Crown and joint prosecution.

Forgery, perjury and witchcraft were taken exclusively by the King's Advocate in addition to treason and sedition. The other crimes (including personal crimes) were prosecuted more or less equally by the Crown and by joint action.

1. B.17, 87, 108 etc.
2. B.87, 108, 392 etc.

PROCEDURE (Contd.)

1. JUSTICIARY COURT.

PART 1. 1488-1650 (Contd.)

(a) Prosecution (Contd.)

It must be stated that in many cases in all periods except the last (1624-1640) no prosecution is given, and it is impossible to say whether such cases were prosecuted by the Crown or privately, or both.

The variations in the form of prosecution did not affect the sentence in any way and the sentence patterns are apparent irrespective of the method of prosecution. But while acquittals are frequent in all forms of prosecution, they are noticeably higher in private prosecutions.

(b) Hearing.

(1) Assize.

The normal form of hearing was before a justice or justices and assize.

During James VI's reign and after, the record shows that the assize decided almost every case which reached a final decision.

The terms of guilt and innocence are interesting -

The usual description of guilt was that the assize found the accused "fylit and culpable". "Fylit" implied a sense of moral stain - defiled by guilt and in one case James VI ordered the prosecution to ascertain if the accused were foul or clean of the crime. These are the same terms used in a case relating to disease - a ship was quarantined until the secret council knew if the crew and passengers were foul or clean of the pest.

PROCEDURE (Contd.)

1. JUSTICIARY COURT.

PART 1: 1488-1650 (Contd.)

(b) Hearing (Contd.)

(i) Assize (Contd.)

The same concept is seen in the descriptions of acquittal - the accused was found to be clangeit (cleansed) innocent and acquit.¹

Acquittals occurred quite frequently in all periods, but they are particularly noticeable during the first part of James VI's reign - 1568-1596.

In this connection the operation of threats of wilful error is interesting. In theory, this threat was necessary to counteract the real or alleged partiality of the assize, and the prosecutor could threaten the assize with proceedings against them for wilful error if they acquit the accused.

Actual wilful error proceedings were most frequent in the earlier period (1488-1542) and the standard penalty was imprisonment for a year and a day and further, during the king's pleasure.²

During the reign of James VI, however, threats of proceedings were made usually when the Crown advocates were pursuing. It is interesting to note that during the first period of his reign (1568 - 1596) in spite of the threats, there was a substantial number of acquittals in such cases - just under a fourth of threat cases were acquittals - including some where the accused had confessed.

One of the actions for wilful error in acquitting a witch was heard before the king and the secret council - the assize placed themselves in the king's mercy and pleaded that they had acted in ignorance. The king acted mercifully and absolved them publicly from all penalties³

1. B.90,92,153 etc. C.45 etc.

2. A.148, 165, 203, 219.

3. B.244.

PROCEDURE (Contd.)

1. JUSTICIARY COURT.

PART 1. 1488-1650 (Contd.)

(b) Hearing (Contd.)

(i) Assize (Contd.)

It is plain that the threat was used as a matter of expediency by the Crown office and usually followed a previous confession by the accused. The threat could also be made in an exceptionally serious case irrespective of confession or if the facts appeared (to the prosecutor) to be beyond doubt.

It is noted that while the threats of proceedings for wilful error are made frequently, actual proceedings in the middle and later periods are rare and of those which are noted, not one assizer accused of wilful error in acquitting the accused was ever sentenced to a punishment.

The accused or prosecutor could challenge any member of the assize on the grounds of partial counsel, i.e. if it was thought that the assizer would not give an impartial verdict on the evidence. The usual grounds were variations on the themes of relationship to the accused or pursuer or else deadly feud borne by the assizer to the accused.

In one case the assizer objected to serving on an assize in a slaughter action because his conscience would not permit him to condemn another person to death, which he would have to do if he found the accused guilty.

Certain cases occur of Parliament acting as a Court, but in practice the Court of Parliament only heard some treason cases - it is noteworthy that there were considerably fewer acquittals in the Parliament treason cases than //

PROCEDURE (Contd.)

1. JUSTICIARY COURT.

PART 1. 1488-1650 (Contd.)

(b) Hearing (Contd.)

(i) Assize (Contd.)

than in treason cases heard by the justiciary court (where the rate of acquittals in treason was relatively high).

The king's Advocate produced the summons which was read before the king and the Lords of the Articles who were asked if they found the summons relevant or not, and on their declaring that they did so, the Advocate led proof before the Lords of the Articles who gave their findings and finally the summons, proof and depositions were considered by the king and the whole of the three estates, who declared the guilt or innocence of the accused and the whole Court of Parliament gave the sentence. In these cases the doom pronounced by the dempster was standard - forfeiture of life, lands and goods. The principle of the assize giving not merely the verdict but also the sentence was a relic of the old system and is also seen in the early records of the lower courts.

(ii) Non-assize.

Some cases make no reference to assize - implying that the justice dealt with the hearing either on his own, or with assessors. But nothing can be stated definitely and the absence of a reference to the assize could stem from differences in reporting rather than procedure.

However, in cases where the accused confessed, the justice could sentence without any further enquiry, although normally in such cases the accused was tried by an assize, notwithstanding his confession.

PROCEDURE (Contd.)

1. JUSTICIARY COURT.

PART 1. 1488-1650 (Contd.)

(b) Hearing (Contd.)

(ii) Non-assize (Contd.)

Again, some could be acquitted without a trial, if the defence was clear - e.g. slaughter of an outlaw or letters of remission from the king.

In some cases the accused was asked if he would submit to the king's will or abide the trial of an assize. In almost every case the accused chose the king's will.

The accused could confess voluntarily and place himself in will and in one case the accused placed himself in will, subject to the provision that his life would not be in danger.¹

In the will cases the standard penalty imposed by the king was banishment, and it is fair to assume that the person who placed himself in will knew this and took his chances accordingly - which would be preferable to the death sentence he might well receive if he went to an assize.

The question of the burden of proof of innocence is interesting - in one case it was maintained that, according to normal practice, if the accused was not cleansed of guilt by certain knowledge, he would be presumed guilty.² Such references are few, but another similar reference occurs in the Burgh Court records,³ and it would appear that the presumption that a person was innocent until he was proved guilty did not apply. These references point to the application of a quite opposite principle but it is not possible to maintain a definite stand on this view, for the present at least.

1. C.400.

2. B.271.

3. Y.158.1697.

PROCEDURE (Contd.)

1. JUSTICIARY COURT.

PART 2. 1661-1747.

(a) Prosecution.

The pattern of Crown, joint Crown and private, and solely private prosecution was maintained, but while Crown and joint Crown and private prosecution occurred in approximately equal numbers in most crimes, private prosecution was much less frequent except in the early period where in slaughters and assaults it was the standard form of prosecution.

Again Crown prosecution was exclusive in treason, sedition, forgery and witchcraft.

The informer could join the action as co-prosecutor with the Lord Advocate.

Many cases in this period show the principal abuse which the prosecution system of the time had created. After the pursuers had raised their summonses, they could have the accused imprisoned and then nothing further was done by the pursuers.

Janet Richmond, Prisoner in the Tolbooth since April, 1659 for the alleged murder of a child, there being no pursuer and evidence brought against her, she was set free by warrant - this was now 5th July, 1661.

(b) Hearing.

(i) Assize.

The uses and functions of the assize were similar to those seen in the earlier periods.

The prosecution stated their charge and the relevancy was debated by both sides. If the justice considered that the charge //

1. F. 3, 5, 11, 22 etc.

PROCEDURE (Contd.)

1. JUSTICIARY COURT.

PART 2. 1661-1747 (Contd.)

(b) Hearing.

(i) Assize (Contd.)

charge was relevant, he ordered the charge to pass to an assize. Evidence was lead by both sides before the assize and the witnesses examined. Thereafter the assize were enclosed to consider their verdict, and when this was agreed, by a majority if necessary, they returned and gave their decision by their Chancellor.

David Simpson was convicted by one vote of the assize for deforcement and he complained to the Privy Council. The Council ordered the Court to delay until they had considered the position²- this is noted to be extraordinary.

The acquittal rate is high - particularly in slaughters - where the prosecution was private.² It is noted that in treason cases during this period there was a very low rate of acquittals and that an acquittal was exceptional.

(ii) Non-Assize.

If a person came in will, or confessed, the justice normally sentenced without referring the case to the assize.

1. F. 13/19, 37, 119/0 etc.

2. F.33.

3. Murder - slightly under half the prosecutions resulted in acquittals.

Slaughter- over half " " "

Assaults- slightly under " " "

Theft - " " "

Treason- no acquittals - all convictions, with one "not proven".

The other crimes had an acquittal rate of approximately one-third of prosecutions.

PROCEDURE (Contd.)

2. ARGYLL JUSTICIARY COURT. 1664-1742.

(a) Prosecution.

Prosecution in this record was either taken by the procurator fiscal solely or jointly with the injured -- very few cases disclose purely private prosecution.

Joint prosecution was only slightly less frequent than sole prosecution by the procurator fiscal.

The procurator fiscal was a writer in Inveraray and it is stated he acted "in the king's interest".

While the majority of accused persons were male, this record shows a considerable number of female accused. There was no difference in procedure or sentence.

(b) Hearing.

(i) Assize.

Most hearings make reference to the assize and the functions of the assize in this court are the same as seen in other courts.

Particular reference is made in this court, however, to confessions by the accused -- in almost every case the record states that the accused confessed (made judicial confession) to the libel. There is no mention of torture, but it seems hard to believe that every accused willingly confessed to his accusers. In some cases the accused, in spite of his confession, was acquitted by the assize.

The assize gave a considerable number of acquittals -- in murder the acquittals almost equalled the convictions (in spite of official and joint prosecution) and in the theft cases about a third were acquittals.

The description of the acquittals varied:

"Quit //

PROCEDURE (Contd.)

2. ARGYLL JUSTICIARY COURT. 1664-1742 (Contd.)

(b) Hearing. (Contd.)

(i) Assize (Contd.)

"Quit free and cleansed of the crime", "quit and free because not proven" or "assoilzied because not proven" were given. The reference to "not proven" does not seem to be an exercise of modern choices of guilty, not guilty and not proven, but rather the assize's way of saying "not guilty". In most, if not all references to "not proven", "not proven" is coupled to "acquit", "free and quit" and "assoilzied", all of which are equivalent to "not guilty". In one case of adultery, the assize convicted the couple but by a majority assoilzied the accused from the punishment contained in the statutes. The justice said that their observations on the penalty were irrelevant.

In this case the assize were harking back to an older system which is seen in the early records of the lower courts.

In some cases the accused was acquitted by the assize in spite of confessions to the libels:

In a case of theft of deer by shooting, the accused was acquitted by the assize but fined by the Justice £40 for the judicial confession.¹

In a case of murder and adultery, the girl was acquitted of murder in spite of her confession and witnesses. The procurator fiscal protested for wilful error, but no action for wilful error is noted.²

In another theft case, the accused was found by the assize to be acquit and free from theft, but found him fyled culpable and convict of common bruit and open fame of being a thief and of great and pregnant presumptions of theft. For this he was scourged and imprisoned until he found caution to leave the shire.⁴

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1. I.17.
 2. I.109/0.
 3. I.110/2 - wilful error, also I.121.
 4. I.122/3.

PROCEDURE (Contd.)

2. ARGYLL JUSTICIARY COURT. 1664-1742 (Contd.)

(b) Hearing (Contd.)

(ii) Non-assize.

In certain cases, the justice acted on his own without the assize, but the punishment was always fining.

Such cases tended to be administrative defaults, e.g. absent assizes and witnesses, but minor crimes were also dealt with by the justice.¹

He could hear witnesses on his own and act on their evidence without an assize.²

In one case the justice was asked to hear a plaint from a poor woman.³

-
1. I.131 - witness - £40.
I.107/8 - £10.
Also
Assault - £50.
 £12 assythment. 149.
Theft - £10. 121.
Killing kipper fish - £20. 14, 15.
 £10. 14, 15, 91, 95.
Blackcock - £20. 14, 15.
Salmon. - £10. 14.
Roe deer. - £100. 14.
 2. I. 149.
 3. I. 126.

PROCEDURE (Contd.)

3. SHERIFF COURT. 1515-1747.

(a) Prosecution.

Public prosecution or prosecution at the instance of a court prosecutor is very rare in the early record. The standard prosecution was by private action - some actions could be instigated by royal letters, but the actual action was at the instance of the private parties.

The position changed completely in the later records where the prosecution was almost entirely at the instance of the procurator fiscal. Joint action is noted but it was infrequent and private prosecution was rare.

(b) Hearing.

(i) Assize.

The procedure of enquiry by assize is similar to the other courts, in the early period.

If the accused denied the charge the assize left the court and heard the witnesses themselves out of court and having been "sworn and ripely and well advised, delivered and entered the court again" giving their verdict by the chancellor.

The assize heard all the theft, assault and slaughter cases and they also heard many civil cases - it is noted that they left the court in such cases also, to hear and consider the evidence.

The later periods show normal procedure with hearings before the Sheriff-depute and assize. Acquittals occur, but infrequently.

(ii) Non-Assize.

But not all cases were heard by the assize - some were heard by //

PROCEDURE (Contd.)

3. SHERIFF COURT, 1515-1747 (Contd.)

(b) Hearing (Contd.)

(ii) Non-Assize (Contd.)

by the Sheriff on his own -- this was used quite frequently in civil actions and in some criminal actions.

"The Sheriff received the witnesses, who being sworn and examined in judgment on the points and articles in the summons, deponed....."

The Sheriff also availed himself of assessors in certain civil and criminal actions.

One assault case was heard by the Sheriff and the charge proven by witnesses, but this case was exceptional in that it was combined with a spuilzie action. In this case, the Sheriff sent the depositions of the witnesses to the Sheriff principal "for his sight and that he might give his decree" but this was unusual and the Sheriff-depute normally sentenced.

It is impossible to say whether there was any ^{difference in penalty} between assize hearings and solely witness hearings as details of punishment are seldom given in either case.

(iii) Continuations.

Continuations are noted on occasions - actions were continued in hope of concord between the parties, without prejudice to a legal decision in the event of an amicable settlement not being reached.

(iv) Arbitration.

Settlement by arbitration is noted - in a bond of caution the parties agreed to find surety for the fines which may be imposed by the court or by the arbitration "to which arbitration the said parties are compromised" but there are no references to such decisions in practice.

PROCEDURE (Contd.)

3. SHERIFF COURT. 1515-1747 (Contd.)

(b) Hearing (Contd.)

(v) Royal letters.

Reference is made frequently to letters from "our sovereign lord". These letters were instructions to the Sheriff and his deutes on many different subjects and were available to any petitioner who considered that his cause was not receiving proper consideration.

They were in name of the king and issued by the lords of council and session, and they applied in both civil and criminal cases.

the Sheriff was ordered to continue the head court to another date, the continuation having the same effect as if the next court was actually the head court.

an action was instigated by the royal letter concerning the wrongful seizure of incidents of a benefice.

A. was ordered by royal letters to find caution in an action of mutilation.

Actions by and against Lady Sinclair were stayed for a period as she had gone to Orkney and Shetland on royal business.

two gentlemen were excused formal meetings on account of the corpulence of their persons.

an obligation to find caution to appear was reduced in amount, because of the poverty of the persons.

Some letters were directed against the Sheriff.

A false and partial judgment given by the Sheriff was reduced at the king's order. No penalty was imposed on the Sheriff for his deliberately false decision.

A. offered to prove that the Sheriff-depute was an enemy to him.

On one occasion two separate obligations to appear in court for the one crime were in force and the king ordered one of the obligations to be reduced.

A. appealed to the king for a new judge in a land dispute as the Sheriff's son had lately killed the petitioner's brother-in-law.

PROCEDURE (Contd.)

4(a) SHEPHERD COURT. 1602-04.

(a) Prosecution.

The reports of the vast majority of criminal cases show the cause of the action, the names of the parties and the determination, but no details of prosecution, and it is impossible to say whether the prosecution was taken publicly or privately. References to private prosecution do occur, but they are very infrequent.

(b) Hearing.

(i) Assize.

The assize appear to have been present at all court hearings although in some cases the verdict and sentence are given by the judge himself. However, frequently in criminal cases, the assize heard the evidence, gave a verdict and also a sentence. In such cases the judge's functions were limited to observing that the proper procedure was carried out.

e.g. The assize taking consideration (of the evidence) and trying Simon Nicolson to be a notorious thief therefore, all with one voice, decerns the said Simon's goods, gear and lands to be escheat and the accused to be banished within a month, or at the first passage, and if he is apprehended for the theft of an ure (nominal sum) he is to be taken and hanged by the neck till he dies, to the example of others.'

A similar exercise of functions by the assize is seen in a defamation case - 4 witnesses proved the slander before the assize who imposed a penalty of 4 merks payable to the king and 4 merks payable to the person slandered.²

The assize could even impose the death penalty -

William Johnson confessed to stealing three sheep at various times, and the assize ordered that his possessions should be escheat to the king and that the accused should be taken to the gallows and hanged by the neck until dead, to the example of others.

and give sentence in murder cases -

in one case, escheat of goods, because the murderers had fled the country, and in the second case - escheat and banishment, with the threat that the accused would be beheaded if he was found within the jurisdiction of the court.

1. L.2.

2. L.3.

PROCEDURE (Contd.)

4(a) SHETLAND COURT. 1602-04 (Contd.)

(b) Hearing (Contd.)

(i) Assize (Contd.)

The accused could ask for an assize "agreeable to his blood and rank" but the accusers could also ask for an assize, irrespective of rank, chosen from those who lived where the crime was committed.

It is not possible to say what circumstances applied when the assize acted on its own as in the cases mentioned above, or when the judge and assize acted together, or even when the judge acted alone.

The assize is referred to in all forms of criminal cases - e.g. blood, deforcement, withcraft, theft, and in many civil cases. It is noted, however, that in the cases where the assize gives the punishment, the penalty is standard for the particular crime - e.g. for serious theft - death or escheat and banishment. In the cases where the accused confessed and passed himself into the judge's will (and so did not go to an assize) the penalties varied between fining and the standard sentence. It is possible that the assize were bound to give the standard punishment and did not have power to modify, whereas the judge could give a punishment at his discretion. Acquittals occur in the assize hearings, but they are infrequent.

(ii) Reference to Oath.

This form of enquiry was very frequent, but the procedure was more complicated than in the other records which show reference to oath. There are strong traces of Norse and Udal law in the procedure observed by this court.

PROCEDURE (Contd.)

4(a) SHEPHERD COURT. 1602-04 (Contd.)

(b) Hearing (Contd.)

(ii) Reference to Oath (Contd.)

Sinnie Magnusdochter, was decerned to quit herself by the "laricht aithe" of the charge of bleeding Marion Magnusdochter.

According to the introduction of the court record,² this meant that the accused swore that she was innocent, and that this oath was supported by the oath of a person chosen by the accused and the oath of another person chosen by the judge. If the oaths could not be satisfied, the accused was found guilty and sentenced. If at a later date the accused was again charged with the same crime, he or she had to be acquitted by the saxter aith or six fold oath - his own oath and the oaths of three persons chosen by him and three by the judge. Again if this also failed, and the accused was charged another time, he would have to clear himself by the twalter aith - twelve fold oath, being his own oath and the oaths of six persons chosen by him and six by the judge.³

The sixfold and twelve fold oaths could on occasions be used for first offences, if they were serious, but this was unusual. This process was applied to most crimes, including thefts and failure to pass the twelve fold could result in banishment, or threatened death.

1.L11.

2. pp.Liv-v.

3.L87.

PROCEDURE (Contd.)

4(b) COURT BOOK OF ORKNEY & SHETLAND. 1612-13.

(a) Prosecution.

The procedure in this court was very similar to that of the Baron Courts.

The crimes of murder, theft and assault were indicted at the instance of the procurator-fiscal.

Private prosecution was competent, but this was less frequent.

The procurator fiscal could also consent to certain actions for his interest. Such cases are almost exclusively breaches of cautionary obligations.

(b) Hearing.

It is interesting to see that this record makes no reference to the forms of oaths used in the earlier Shetland record and that the procedure was the same as that noted in the mainland courts.

For cases of assault and theft, enquiry by assize was the standard procedure. The assize were appointed and left the court, together with the witnesses. The assize conducted the enquiry and after deliberation, returned to the court. Their chancellor gave his verdict to the judge, who sentenced. The assize did not sentence in this court.

The assize could hear the case in the absence of the accused

PROCEDURE (Contd.)

5. REGALITY COURT. 1547-1706.

(a) Prosecution.

In the earlier period (1605-1609) the entries are brief and little information is available. There was a court officer but the prosecution in the majority of criminal cases during this period was private.

Criminal cases were not numerous and the entries are short - there was no set practice of official prosecution as there was later.

No information can be drawn as to whether private or public prosecution had different effects on the penalty as no details of the penalties are given in the actual cases of this period.

In the middle periods (1657-1676) there was a more settled course of official prosecution. The procurator fiscal acted jointly with the injured in the first part of the period - the cases where he acted alone are infrequent and likewise solely private prosecution was rare.

But in the later period, there was a change and the record shows the procurator fiscal acting on his own in most criminal cases.

In certain cases the procurator fiscal was supported by court officers who acted as subordinate prosecutors, but these cases usually contain a deforcement of the actual officer, and so such an officer is placed in the same position as a private individual who has been affected by another's illegal act.

The pattern is continued into the final period where exceptions are even fewer. The final period shows great activity on the part of the court officers and indeed a more severe attitude is taken overall by the court.

PROCEDURE (Contd.)

5. REGALTY COURT. 1547-1706 (Contd.)

(a) Prosecution (Contd.)

The entries show a predominantly male element among the defenders, although occasional references to female defenders do occur.

A husband was liable for his wife's criminal acts.

The penalty was certainly affected by age - where a minor was found guilty of a blood assault he was sentenced to remain in "the jogs" for half an hour.

(b) Hearing.

The record shows a discernible change in the forms of hearing. The principal forms of hearing or enquiry in criminal cases were by -

- (i) Inquest or Assize.
- (ii) Judge and Witnesses.
- (iii) Reference to Oath.
- (iv) Arbitration.

There were developments during the overall period and while enquiry by judge and witnesses, and reference to oath occur throughout, changes are noted in the way in which the inquest and assize were used. Arbitration was used in the earliest period for criminal cases, but this was not continued.

(i) Inquest (Assize).

In the earliest period, the entries relating to inquests are frequent, but little information is obtainable as the entries are short.

It is seen, however, that enquiry by inquest was used for both civil and criminal cases.

In the criminal cases, i.e. - assaults and deforcements - the inquest acted as an investigating body, which called and examined//

PROCEDURE (Contd.)

5. REGALITY COURT. 1547-1706 (Contd.)

(b) Hearing (Contd.)

(i) Inquest (Assize) (Contd.)

examined both the accused and the witnesses. The functions of the judge were limited to sentencing, but even here the impression is given in certain cases that the inquest may also have sentenced, but this is inconclusive. The usual entry states that "the inquest fyles A. in a brawl" (blood etc). This is taken to mean that A. is found guilty (defiled) of the blood, but it is also apparent from the context that "fyled" also means fined. If the inquest stated that the accused was to be fined, it is likely that the inquest also fixed the amount, but this is not supported directly from the text. The inquest could also act as an appeal tribunal from a previous decision given by the bailie. It is apparent from the record that enquiry by assize was the standard form in assault, and indeed in all criminal cases. The instances of assault which are reported without any mention of an inquest are few.

The inquest could also dispense with an actual sentence -- in one case the dispute was ordained to be settled within the next 15 days, otherwise the parties would be condemned in the blood.

This is indicative that the inquest had power to sentence and did not merely give a verdict.

The inquest was discontinued at some point prior to 1657. There is a gap in the record from 1609 to 1657 and the last reference is in 1608. After 1657 the standard form of enquiry was by judge and witnesses, but in the period from 1662 references to enquiry by assize occur. This assize was not the same as the old inquest and there are discernible differences in its functions.

PROCEDURE (Contd.)

5. REGALTY COURT. 1547-1706 (Contd.)

(b) Hearing (Contd.)

(i) Assize (Contd.)

Most criminal cases in the period 1662 to 1676 were heard before an assize whose functions were very similar to those of a modern jury -- they heard evidence, deliberated and gave their verdict. There is no trace of an investigation being undertaken by the assize as an independent body nor of any sentencing functions, as in the earlier period.

In the latest period there is no reference to the assize at all -- this is consistent with the different aspect of the last entries which show a much more forceful and severe system than the previous periods. Here the prosecution is almost entirely official and the bulk of the cases are concerned with questions of religious orthodoxy -- crushing the covenanters.

Acquittals occur in the earlier period -- certainly they were less frequent than convictions, the rate being under a quarter of the prosecutions. However, they became much less frequent in the later period -- it is noted that the frequency of absolutions in references to oath was much higher than acquittals by assize throughout the whole period.

PROCEDURE (Contd.)

5. REGALTY COURT. 1547-1706 (Contd.)

(b) Hearing (Contd.)

(ii) Judge and Witnesses.

The case could be heard before the bailie without an assize the evidence being led either by witnesses or by reference to oath.

In the earlier period, this method of enquiry is not common in criminal actions, but it was used frequently in civil cases.

There are a number of assault cases which make reference to witnesses without inquest, but it is not possible to say whether the inquest heard these cases or not. In a very few cases it can be stated, however, that the bailie heard the witnesses himself.

After the inquest became obsolete, this method became the standard form in most criminal cases. In the middle period it was used very frequently for all crimes, including some assaults (most of the assaults being heard before the assize, whose functions were limited to assault cases with few exceptions.)

In the final period enquiry by judge and witnesses was the normal practice.

(iii) Reference to Oath.

This form of procedure is common throughout the whole record in both civil and criminal cases. In criminal cases it was used normally where there were no witnesses, but no matter the reason, the pursuer or accuser could refer the charge to the defender's oath, to admit or deny.

If the defender admitted, he was held as confessed or if he denied, he was acquitted.

PROCEDURE (Contd.)

5. REGALITY COURT. 1547-1706 (Contd.)

(b) Hearing (Contd.)

(iii) Reference to Oath (Contd.)

If the defender refused to depone, he was held to be guilty but for further confirmation the charge could be referred to the oath of the injured.

Alternatively the defender could refer the charge back to the pursuer who swore that the charge was true or else refused to swear, which meant absolution for the defender.

It was possible for the matter to be referred to the pursuer's oath in the first instance, but this is rare. It could happen where the defender failed to appear.

It is noticeable in the last half of the first period that many assault cases were referred to the oath of the defender and in the majority of cases the defender denied the claim and so was absolved. In view of the frequency of the absolutions, it is hard to avoid the conclusion that a cynical disregard of the ethical considerations involved in this form of enquiry was developing.

The proportion of absolutions in the middle period was also high.

(iv) Arbitration.

While this form was frequently used throughout the whole period for civil disputes, it was also used in the earliest period in some blood assaults.

Both parties and their dependents agree to accept the decision of two arbiters for each side and an oversman. Definite periods are stated for the decisions, with a further period for the oversman's decision.

No information is given about the outcome of these cases.

PROCEDURE (Contd.)

5. REGALTY COURT. 1547-1706 (Contd.)

(c) Confession.

The defender could, of course, confess the charge without any form of enquiry.

If the defender was absent he was held as confessed although in that case, the charge could be referred to the oath of the injured party.

The hearings in the first and middle periods do seem to be fair - the number of acquittals and absolutions is high and a definite standard of proof is required - a standard which was not always reached with the corresponding result of "not proven" (which meant not guilty).

In the latest period, however, especially under the influence of religious intolerance, the impression is obtained that the accepted principles were less scrupulously observed - unpleasant phrases occur like "A. asked to speak to the bailie after the court" - "A. was ordered to remain in prison till he deponed what he knew" - "A. maintained that he was fined in his baron court - this was not accepted and he was fined again".

It is admitted that these references relate to religious disputes and there is no evidence that such repressive principles were present in the disposal of the non-religious cases before the court.

PROCEDURE (Contd.)

6. BARON COURT. 1523-1747.

The Baron court records give rather more detailed information than the other courts, and so clearer patterns are seen.

(a) Prosecution.

The earliest record, Carnwath, shows that the Baron exercised a tight control over his vassals, and prosecution by the Baron and his officer was very frequent. The sphere of official prosecution was wide and covered assaults, thefts and deforcements, and those matters which were prejudicial to order - troubling the court, using unreasonable language, administrative matters - destroying timber, breaking arrests, spreading plague, and breaches of court statutes.

Private prosecution in assault cases in Carnwath is the exception rather than the rule, and occurs very rarely.

Possible explanations for the infrequency of private prosecutions at a time when private prosecution was standard in other courts are (1) the likelihood of the pursuer being fined for bloodwite (the liability for bloodwite is studied in detail below, but for a person who had been assaulted to endeavour to obtain redress by a court action in which he himself may be fined, appeared a poor bargain) and even if bloodwite did not apply, the ordinary fine for blood was claimed by the Baron, assythment being rare in the Carnwath record; and (2) the procedure for summons at least for criminal causes, was in the hands of the Baron's officer.

There was thus little tangible benefit to be obtained by the assaulted if he instituted a private prosecution, there was only personal satisfaction in seeing the assailant fined.

It is significant that in the Forbes record, where there is little bloodwite and frequent assythment, private prosecution is the normal practice and official prosecution very rare.

PROCEDURE (Contd.)

6. BARON COURT. 1523-1747 (Contd.)

(a) Prosecution (Contd.)

In the records of Corshill, Urie and Stitchill, the prosecution is again predominantly in the hands of the Baron or his representative. The Urie record shows that there was official prosecution in a number of general crimes during the earlier period, e.g. contravention of the baronial statutes, deforcing, theft, poaching and other cases where the Baron had an interest. In the later period, i.e. after the Restoration, 1667 to 1747, with occasional exceptions, all assault cases were prosecuted by the procurator fiscal. While there is no mention of bloodwyte in this record, assythment is also infrequent, although it is mentioned, and the inference is that there was again little benefit for the assaulted if he pursued privately.

The Stitchill and Corshill records show a similar position - the sphere of official prosecution included assaults, deforcing, theft, defamation and enforcement of notional and baronial acts. The consent of the procurator fiscal was taken to some defamation and assault actions, but purely private assault prosecutions are very infrequent.

Thus prosecution in assault and other criminal cases was predominantly a matter for the Baron and his representative, and it is only in the Forbes record that official prosecution in assaults falls - this record is remarkable in that alone of the Baron Courts, official prosecution in assaults is the exception and private prosecution is the normal practice. Prosecution for other offences in Forbes is public and follows the same pattern as in the other records unlawful grazing, poaching, theft, cutting timber and non-observance of services. The only factor which is notable in //

PROCEDURE (Contd.)

6. BARON COURT. 1523-1747 (Contd.)

(a) Prosecution (Contd):

in the Forbes record is the high frequency of assythment awards, and this might well have a connection with the frequency of private prosecutions.

(b) Defence.

The defenders throughout the records are predominantly male, but there are a number of cases in which female defenders appear. There was no difference in procedure on the grounds of sex, but there may have been a difference in penalty, although no direct evidence is available for this point.

The Baron court records give quite detailed information on various types of defenders -

(a) husband and wife: No set practice appears to have been followed, even in the one record, as to whether a husband was liable for an assault committed by his wife on a third party. Carnwath shows that a married woman was usually liable herself, and fined for blood or bloodwyte, but there is one case in this record which states that the husband was summoned for his wife's assault, and in Forbes both individual liability on the wife and vicarious liability on the part of the husband for her assault, are mentioned. Also in Stitchill, both forms are present: in this record one case states -

"Margaret Black, spouse to Patrick Millar, and Patrick Millar for his interest, are fined for an assault committed by Margaret Black".

(b) father and son: While there may be an element of expediency in the prosecution and liability of spouses, it is seen that a father was liable for his son's assault.

(c) minors: //

PROCEDURE (Contd.)

6. BARON COURT. 1523-1747 (Contd.)

(b) Defence (Contd.)

(c) minors: Where a minor was prosecuted on his own, no difference was observed in procedure, but the age of the defender was taken into account in sentencing - the joughs were frequently imposed on minors.

(d) master and servant: Vicarious liability on the part of a master for his servants was recognised, principally in Urie and Stitchill. In Urie this liability extended to breaches of statutes, theft and breaches of lawburrows. In the bonds of lawburrows the obligation covered the principal parties "and their tenants and servants, that they nor any of them" shall do or not do something (In Urie principally not to cut timber). Also in Urie in a prosecution for unlawfully cutting turf, it was alleged that the defender or his servants had cut peats and it was irrelevant for the defender to plead that it was done by his servants, not by himself. The same situation is seen in Stitchill where lawburrows were used frequently after an assault case and again the obligation was that the respective principal parties "their wives, children, servants and families shall not trouble or molest" each other.

(e) Liability by accession, or art and part, was recognised in all records and there are many cases of a plurality of defenders. The procedure appeared to be fluid, however, and the practice adopted seemed to have been to summon all involved in the question at issue, no matter how remotely. The lengths to which the court was prepared to go is seen in a Stitchill case where Edward Stevenson was summoned for an assault on John Donaldson; the subsequent enquiry showed that //

PROCEDURE (Contd.)

6. BARON COURT. 1523-1747 (Contd.)

(b) Defence (Contd.)

(e) (Contd.)

that John Stevenson, the defender's brother, who had not been cited, was the person responsible for the assault. The court then imposed a fine of £50 on John and fined Edward, who was involved to a certain extent, £5. Procedure was not permitted to stand in the way of justice.

(c) Summons.

The machinery for citation to the court is clearly seen in the Carnwath record and the same procedure with modification was followed in the later courts.

If the action was one in which the Baron had an interest and was thus prosecuting, a precept was given to his officer, whose duty it was to serve the precept on the defender. The precept contained details of the place at which the court was to be held, the facts of the action and details of the punishment demanded.

Witnesses and those who owed suit to the court were also "arrestit" (informed) by precept.

If the parties or witnesses did not appear, the officer had to prove in court that he had implemented the terms of the precept, and obtain a new precept. A person cited as a principal was given four opportunities to appear and if he did not appear at the fourth court, the case was proceeded to judgment. This continuation of process is seen in Carnwath frequently, the final court being described as the "feird Court" or "Court peremptour" but in the later courts the procedure is modified, and the case was disposed usually at the first calling if the parties did not appear.

For //

PROCEDURE (Contd.)

6. BARON COURT. 1523-1747 (Contd.)

(c) Summons (Contd.)

For a private prosecution, no details are given in Carnwath, but it would appear that a similar procedure for citation of the defender and witnesses was followed. The question arises as to whether a private individual could use the Baron's officer for the first intimation or whether the individual himself was responsible for intimating the action to the defender. The latter course is the more likely though if the defender failed to appear, the subsequent intimations could be effected by the officer as the question was one of contumacy on the part of the defender to the court.

(d) Hearing.

Throughout the course of the records, there is a noticeable development and change in the procedure adopted for hearing the disputes.

(i) Assize.

In the earliest record, it is seen that the inquest in Carnwath was the normal machinery of enquiry for all cases, both civil and criminal, although occasional cases show that the Baron or his bailie and assessors could act instead of the inquest.

The inquest was a body of persons who owed suit to the Baron Court and who were appointed and chosen by the Baron and of "whose fidelity and qualification the Baron has assurance to pass voice upon inquest or jury in all matters questionable within the Barony". The actual numbers varied in Carnwath, but were usually in the region of fifteen.

After //

PROCEDURE (Contd.)

6, BARON COURT. 1523-1747 (Contd.)

(d) Hearing (Contd.)

(1) Assize (Contd.)

After the parties stated their plea of admitting or denying the charge, the defender could, with leave of the court, ask friends to speak for him - "forspeakers". The defender or his friends could also challenge, and make any competent or specific objection against the judge, bailies, inquest or any other members of the court. After these points had been settled, the bailie read out the names of the inquest and asked the defender if he wished any of the inquest set aside on showing lawful cause. In one case this was taken advantage of and the defender challenged a member of the inquest whom he suspected of "partial counsel".

Before the inquest withdrew, some of the entries giving details of blood actions, state that the inquest heard the pursuer's allegations, rights and reasons, but this would appear to refer to the procedure detailed above.

The inquest withdrew from the full court and went apart to call and hear the witnesses. The witnesses, before giving their evidence to the inquest, were sworn in the open court ("in Judgement") and thereafter were brought individually before the inquest. The witnesses depbnd before the inquest "on their great oaths" as to the facts and the inquest "being ripely advised, came into the Court again, having God before their eyes and all in one voice" delivered their verdict. The phrase "all in one voice" is used in each entry where details of procedure are given and there does not appear to be any evidence of a majority decision, although this was perfectly competent. The verdict was given by the chancellor of the inquest and acting //

PROCEDURE (Contd.)

6. BARON COURT. 1523-1747 (Contd.)

(d) Hearing (Contd.)

(i) Assize (Contd.)

acting on the inquest's decision, the bailie gave sentence ("doom") by mouth of the dempster of the court.

It is clear from the text that in its original form the inquest were not merely a jury in the modern sense, they were judges and heard and considered the evidence with a view to a final pronouncement of guilt or innocence. The bailie was responsible for ensuring correct procedure and for sentencing when he received the inquest's verdict.

The bailie's sentencing powers are worthy of comment - in the Carnwath record it is clear that he did sentence in criminal cases, but there are two cases where the report states that the inquest decided on the punishment. In all the civil cases which are determined by the inquest, the inquest gives the final determination of the case, and of the two cases mentioned above - one could be classed as civil - it stems from allegations of negligence and the other is a breach of arrestment which carried a standard punishment.

In the later records the inquest (sometimes called the assize) still appears, but it is less frequent - no longer are civil cases referred to the inquest and even for criminal cases its use is reduced. The functions of the Urie and Stitchill inquests were the same as the Carnwath inquest - they were investigating agencies, and they did not merely declare guilt or innocence.

The inquest was also used in Forbes, but in a different way. It was limited to blood assaults (there is only one exception - one case of theft is tried by inquest) and there was a preliminary investigation before the case is referred to the //

1. 0.69 - arrestment.
- 0.102 - negligence and damage.

PROCEDURE (Contd.)

6. BARON COURT. 1523-1747 (Contd.)

(d) Hearing (Contd.)

(i) Assize (Contd.)

the inquest, whose functions were similar to a modern jury. Witnesses were called before the matter was referred to the assize and they confirmed that some kind of assault had taken place and in particular that blood had been shed. The purpose of this preliminary evidence given by witnesses appears to have been to ascertain whether blood had been spilled or not. The bailie, having heard the evidence of these witnesses, and having considered that the case merited a detailed enquiry, ordained both parties to suffer the verdict of an assize, who heard the depositions of the witnesses and "after examination and deliberation" the chancellor announced the verdict of the assize to the bailie (convictis and mackis guiltie -- or absolvis and fries). Once the verdict had been reached the bailie sentenced, although in one case the assize not only found A. guilty of blooding B. and B. guilty of striking A., but also fined A. £50 and B. £20.¹ The inquest was acting in this case as a sentencing body, but this was unusual.

In Forbes, the assize did not leave the court as they did in Carnwath - "the witnesses, sworn, did depone in presence of the bailie and assize".² The assize could make recommendations to the bailie in their verdict - in the same case the assize wished the fact that the accused was provoked brought to the bailie's notice and requested a modification of the penalty on the ground of self defence.

Not every case gives a full report that there was preliminary evidence by the witnesses, after which the assize then heard more evidence - the assize being in court for the preliminary //

1. Ra.293.

2. Ra.249/0.

PROCEDURE (Contd.)

6. BARON COURT. 1523--1747 (Contd.)

(d) Hearing (Contd.)

(i) Assize (Contd.)

preliminary evidence could accept this and found their verdict on the one set of evidence.

The preliminary evidence of witnesses might also be dispensed with if other proofs of blood-spilling were produced, e.g. where the injured person produced a cloth with blood stains, no witnesses were called for the preliminary investigation - the matter was proved by the cloth to relate to an action of blood and was referred then to the assize.

The position in Corshill is very similar to Forbes. The inquest was used exclusively for assaults - both blood and non-blood, and its functions are the same as those of the Forbes Assize. In each case, the witnesses give their evidence in open court and "the whole matter being heard and considered by the judge, and finding the same dubious, refers it to an Inquest". The inquest was sworn and having considered the matter "by cognition and trial" delivered their verdict to the judge who sentenced.

This procedure fell into desuetude - the last entry in Corshill for an inquest is dated 30th April, 1669, and it is interesting that all the records which cover this period show that enquiry by inquest ceased more or less simultaneously - Stitchill, 14th September, 1667; Urie 7th December, 1667; Corshill 30th April, 1669; and Forbes 23rd December, 1676.

It is difficult to see a definite connection between the different forms of assize and the punishments imposed. There were patterns in the punishments which are noted in detail //

PROCEDURE (Contd.)

6. BARON COURT. 1523-1747 (Contd.)

(d) Hearing (Contd.)

(i) Assize (Contd.)

detail below, but the patterns had nothing to do with the procedure - no particular punishment was related to a particular procedure. It is noted, however, that while acquittals occurred, although not frequently, in the Carnwath record, assize acquittals in the later records were very rare - in Urie no assize acquittals at all are seen and in Stithill and Corshill they are very infrequent.

(ii) Witnesses.

The method of enquiry which had supplanted the inquest was the assumption by the bailie of the investigating functions formerly performed by the inquest. The two methods of enquiry existed concurrently for some time, but after 1670 when the assize fell away, the only form of investigation used in the Baron Courts was investigation by the bailie and witnesses.

This was not a new form of enquiry which had suddenly appeared - there are traces in Carnwath of this procedure, principally in connection with breaches of arrestment - the witnesses were sworn in court and examined by the Baron or the bailie and "the bailie, being advised by the depositions of the witnesses and assessors in the court, decreed....." But this procedure was not common and only occurs six times - five instances relating to breach of arrestment, and once in a case of deforcement.

The other records also show enquiry by witnesses concurrently with enquiry by assize. The complaint was given by the procurator fiscal and the accused was "examined and interrogated //

PROCEDURE (Contd.)

6. BARON COURT. 1523-1747 (Contd.)

(d) Hearing (Contd.)

(ii) Witnesses (Contd.)

interrogated anent the points of the indictment" and both sides called their witnesses. The text also gives details of the procedure necessary to ensure that the evidence given is truthful - the witness must be "cited, solemnly sworn, purged of partial counsel, and examined" and he may then depone to the facts. The bailie having heard and considered the indictment, the confession of the defender and the depositions of the witnesses, and being ripely advised, fined the accused in the sum of £-----

In the later records where both enquiry by inquest and enquiry by witnesses were used, no rule can be laid down as to when one procedure was used and when the other. In the Forbes record, it is apparent that the inquest heard the more serious assault cases, as the fine is invariably £50 after an inquest (with one exception where there were special circumstances) and in Stitchill and Corshill so long as the inquest was used, a similar rule appears to have held, though not so absolutely. In Urie, the inquest is only referred to three times, and no mean can be stated. In a few cases of enquiry by witnesses (before this form had supplanted the assize) the accused had already confessed and the prosecutor was proving his case by witnesses, notwithstanding the confession, but this did not apply in the majority of the instances.

(iii) Reference to Oath.

This determination, where the question at issue was referred to the oath of the person interested in denying, is seen throughout the course of all the records.

In //

PROCEDURE (Contd.)

6. BARON COURT. 1523--1747 (Contd.)

(d) Hearing (Contd.)

(iii) Reference to Oath (Contd.)

In Carnwath it was very common in civil cases, but it was used also in a few criminal actions, e.g. unlawful cutting of timber and in assaults.

The form of the reference is uniform throughout - the charge is referred to the defender and he must reply on oath, either that the facts are true and so admit the charge, or else that the facts are false; if he is silent, he is held to have confessed. He may refer the oath back to the fiscal/prosecutor and the onus is then on the fiscal or prosecutor to confirm on oath that the alleged facts are true. The later records make mention of this procedure frequently - although it is usually in relation to civil actions, e.g. debt. In criminal cases, however, it appears as an alternative to both inquest and when that form became less used, to enquiry by witnesses. It is seen in the Forbes record that reference to oath was used in criminal cases when there were no witnesses available.

It is noted that the rate of acquittals in this form of enquiry was much higher than in enquiry by assize.

(e) Continuation.

The Carnwath record shows that continuation of cases was very frequent and even if the principal parties appeared, the case might not be determined at that juncture. The most common continuation was to "arrest" witnesses and to obtain further proof, but in two cases reported in Carnwath, there is continuation in "the hope of concord to please my Lord betwixt this and the next Court". A similar continuation occurs in Corshill.²

1. Carn. 74, 112.
2. Cors. 78.

PROCEDURE (Contd.)

6: BARON COURT: 1523-1747 (Contd.)

(f) Confession:

Apart from determination by judicial enquiry, the cases could be determined by the confession of a defender -- this form is very frequent in all the texts. This normally concluded the matter, but in a few cases throughout the middle period, the charge could be referred to the judge and witnesses, notwithstanding the confession.

(g) Arbitration:

Reference to arbitration is frequent, but it relates to civil cases rather than criminal. Occasional assaults were referred to arbitration, but the decisions are not included in the court records and it is impossible to say how they compared with the court decisions.

CONCLUSIONS:

PROCEDURE:

1. Prosecution: The pattern of prosecution in the Justiciary court is clear - private prosecution was normal during the earliest period for most crimes - the only exceptions being treason and crimes in which the Crown had a direct interest. From c.1560 references to Crown prosecution increase, as do references to joint prosecution by the Crown and the individual concerned, until by 1650 Crown prosecution was normal in most crimes, the only exceptions being slaughter and assault which were the last sphere of private prosecution, although even there Crown prosecution and joint Crown and individual prosecutions are noted.

The pattern is continued into the later period with private and even joint activity becoming steadily less.

It is most noticeable that the rate of acquittals is much higher in private prosecutions than in the other forms.

The other courts (with the exception of the Baron courts) show the same pattern.

Argyll Justiciary court shows official and joint prosecution almost equally, but private prosecution is rare, but the Sheriff and Regality Courts show the progression through private to joint to official prosecution.

The Baron Courts are noteworthy in that, with the exception of Forbes, the prosecution from the earliest times was and remained official with some joint actions and very few private.

The reasons could be (1) the procedure of summons (2) the chances that the injured pursuer (in assaults, which was the most frequent crime) could be fined for bloodwytte and (3) that the crimes heard by the court were those left by the superior courts //

CONCLUSIONS:

PROCEDURE (Contd.)

1. Prosecution (Contd.)

courts and were by and large such that only the Baron had any interest to enforce.

It is seen that Forbes, which was the only Baron court noted which had numerous private prosecutions in assault (but was otherwise official in prosecution) was also the only Baron court which awarded assythment with any regularity and so the injured pursuer received something for his pains.

2. Defence. As one would expect, the vast majority of defenders were male, but there are periodic references to female defenders - it is seen that there was no difference in procedure, nor indeed in sentence.

It is also seen that while a wife was liable for her crime personally and solely in the justiciary and middle courts (sheriff and regality) her husband could be made liable in the Baron and Burgh courts for minor assaults, insults etc. A father could be responsible for his minor son's crimes, but while there was no difference in procedure in trying minors, there was a difference in sentence - minors usually received a spell in the joughs.

Death sentences could be imposed in exceptional cases, e.g. some boys with the McGregor gangs were hanged.

3. Hearing.

(a) Assize: Trial by assize was by far the most frequent form in the justiciary courts throughout the whole period. Acquittals are relatively frequent, approximately one fourth of all cases tried resulted in acquittals, and the rate was higher during the first years of James VI's reign. Actual proceedings //

CONCLUSIONS:

PROCEDURE (Contd.)

3. Hearing (Contd.)

(a) Assize (Contd.)

proceedings for wilful error occur in the earliest periods with the standard punishment of imprisonment for a year and a day, but in the middle and later records proceedings are rare although the threat was made frequently - but even there the acquittal rate was only slightly less than normal - just under a quarter.

In the Argyll court assize acquittals were frequent - the rate was between one third and one half of prosecutions.

However, in the lower courts - Sheriff, Regality and Baron courts, the acquittal rate was much lower and in the later period acquittals were exceptional. Whether the record did not note acquittals, or whether acquittals were not given, cannot be said, although the latter is more likely.

The sentencing powers of assizes are noteworthy. There are periodic references, particularly in the earlier records, to the assize sentencing - i.e. the assize not only examined the witnesses and gave its findings of guilt or innocence, but also actually sentenced the accused. This is clearly a relic of a much earlier system, but in the period under review this is seen in the proceedings of the Court of Parliament (in treason) in the earlier Shetland court, in one case in Argyll, and occasionally in the Baron Courts.

The actual sentences given by the assize were always the standard penalty for the particular crime - no variation is noted as in the judge-given sentences.

The functions of the assize changed over the period in the lower courts. In the earlier records, the assize withdrew from //

CONCLUSIONS:

PROCEDURE (Contd.)

3. Hearing (Contd.)

(a) Assize (Contd.)

from the court and examined the witnesses, returning to give their verdict. In the later records, the assize remained in court and heard the evidence in the manner of a modern jury.

(b) Non-assize.

(i) Judge and witnesses: In the lower courts this process supplanted assize hearings from c.1670 onwards although it had existed from the earliest period.

In some cases in the justiciary courts, the judge sentenced immediately if the accused confessed, but this was not automatic -- on many occasions the case was referred to an assize notwithstanding the confession. Of a similar type were the cases where the accused placed himself in the justice's will -- without reference to assize. In the middle and later periods the standard sentence was banishment.

It is difficult to say when a case was referred to assize and when it was heard by the judge and witnesses. Certainly gravity was considered and possibly also the appropriate sentence although sentencing details of judge and witness cases in the earlier records are very sparse. In the later records during the period when judge and witness procedure existed concurrently with judge and assize, the sentence in the former cases tended to be fining.

(ii) Reference to oath: This is noted in the lower courts and while it was common in civil cases, it was apparently only used in criminal cases when there were no witnesses. The acquittal rate was very high.

The earlier Shetland record is noteworthy in this connection as it shows a very highly developed and complicated //

CONCLUSIONS:

PROCEDURE (Contd.)

3. Hearing (Contd.)

(b) Non-assize (Contd.)

complicated oath system totally different from the normal mainland reference to oath and which certainly resulted in convictions. The Shetland system did not survive the Privy Council's edict in 1611 however and the later record shows the mainland process.

(iii) Arbitration is mentioned throughout all the early records particularly in assault cases to agree assythment, but the decisions are not given in the court records, and it is impossible to say how they compared with the court-decided amounts.

4. Onus of proof. Occasional references in the middle period imply that the accused was presumed guilty until he proved his innocence. The modern concept of the prosecution proving beyond reasonable doubt did not apply. In so far as the situation was analysed at all, it appeared that the accused's presence in court per se sparked off the presumption that he might well be guilty and the obligation rested on him to disprove it.

I. MURDER.

1. JUSTICIARY COURT.

PART 1. 1488-1650.

Throughout the period, a difference in penalty is noted between slaughter and murder. In practice, the normal penalty for murder was hanging and for slaughter beheading, but the two crimes were also different in substance -- the assize could acquit a person of murder and convict him of slaughter.¹

However, the differences are obscured at the beginning and at the end of the period. In the earliest period, the murder actions in common with almost every other crime were settled by payment of damages -- assythment -- and by the granting of a remission by the heirs of the person slain.²

Cases certainly occur where a penalty, either beheading or hanging, is imposed, but compared with the later periods when hanging was standard, the early period is distinguished by its preference in the ordinary cases for compounding between the parties and remission, with death as a second alternative, if cash was not forthcoming. Death might also be imposed, irrespective of money, if the facts showed an exceptionally serious or dishonourable murder,³ but such cases are rare. In the last period (from 1624 to 1640) many slaughter and some murder cases are noted, but the most striking feature is the very small number of cases which show a punishment. The entries show many continuations //

1. e.g. B. 158/9.

2. A 17, 205, see p.478 and p.483 for a more detailed review of remissions.

3. The honour aspect in punishment was an important consideration -- Death was much less important than the manner of death. So also in the manner of crime.

I. MURDER (Contd.)

1. JUSTICIARY COURT (Contd.)

PART 1. 1488-1650 (Contd.)

continuations, acquittals and also interruptions by the Privy Council, but the numbers of cases for which a penalty is stated are very few. The distinction between slaughter and murder is maintained in the prosecutions, but in practice the difference is not seen in the punishment, as no punishment is shown in the slaughter cases.

As examples of the more exceptional penalty of beheading for murder, the following cases from the earliest period may be noted -

William Tod was convicted of the murder of his wife and was beheaded.¹

In the later period, beheading was imposed rarely in murder but occasional cases are noted.

Alexander Spens was convicted of the cruel murder of John Donald and he was sentenced to be beheaded and his moveables escheat.²

However, the standard penalty in the main period was hanging, and as examples, the following may be noted -

James Watson and James Hichelwood were convicted of murdering George Tweedie as he slept, and were sentenced to be hanged and their moveables escheat.³

Patrick Deans was hanged on the spot where he had murdered his pregnant wife by kicking her. His moveables were escheat.⁴

The frequency of cases of child murder is most noticeable throughout the whole period studied. Hanging was the standard penalty.

Isobel Pratt was convicted of murdering her illegitimate child //

1. Aa 355, 474/5, also A 81/2.
2. 076, also C18, 484 - escheat of lands and moveables (two murders under trust) 542.
3. 0540/1.
4. 0517, also C 504/6.

I. MURDER (Contd.)

1. JUSTICIARY COURT (Contd.)

PART 1. 1488-1650 (Contd.)

child by strangulation. She was hanged.¹

Crown Advocates -v- Janet McCraith: She was accused of killing four children who were born to her secretly over a period of five or six years. She was condemned to be hanged on the gallows on the Castlehill of Edinburgh and her moveable goods escheat to the Crown.²

IA -v- Patrick Robieson and Marion Kempt; The parties admitted adultery and Marion Kempt admitted drinking a potion to kill her unborn child. The case was referred to the Lords of Secret Council for their decision. Both were sentenced to be hanged and moveables escheat.²

Aggravations are noted in certain cases³ and the State's displeasure was shown by mutilation and/or indignities usually after death, but if the aggravation was severe then the mutilation could be imposed both before and after death.

John Fisher was convicted of the murder and slaughter of Janet Symons and sentenced to be hanged. After death his head was to be placed on a town gate. His moveables were escheat.⁴

Killing a Crown official merited severe displeasure.

Thomas Armstrong was convicted of murdering Sir John Carmichael, Warden of the West Marches and was sentenced to have his right hand to be struck off, to be hanged and after his death his body was to be hung in chains. His moveables were escheat.⁵

The most serious form of aggravation was murder under trust which although equated with treason, did not always carry a treason sentence; some cases show normal aggravation sentences (hanging, mutilation and/or indignities after death and escheat)

For //

-
1. B371, C402, 540, D269/O, Dd430, 482, 484/5, 565.
 2. E47, (2 a) 81, but Dd472 beheaded.
 3. C37 - under silence of night.
 4. A174.
 5. C363/4.

1. MURDER (Contd.)
1. JUSTICIARY COURT (Contd.)
- PART 1. 1488-1650 (Contd.)

For killing merchants travelling with them and taking their goods, the thieves were convicted of murder under trust and piracy and sentenced to be hanged in irons and their heads cut off and moveables escheat.¹

However, treason sentences could certainly be imposed (the treason sentence including forfeiture, not merely escheat).

D.A. & Others -v- Andrew Rowan. Rowan was accused of two separate instances of adultery and also murdering his wife by strangulation. He was hanged, his lands and moveables forfeited, and his head and right hand were to be stuck on iron pikes at the Westgate of Edinburgh "to the example of others to attempt the like".²

Also Robert Weir was sentenced to be broken on a wheel for his part in the murder of the Laird of Warriston. The Laird was murdered at his wife's instigation by Weir who strangled him. Lady Warriston was beheaded - due to the influence of her friends, but Weir was broken on a wheel and his body left on the wheel for 24 hours.³

Certain cases of murder were actually treason, and not merely considered to be the legal equivalent of treason.

John Binning was convicted of the murder of Henry King of Scots (Darnley) while sleeping at the Kirk of Field by raising a fire with a great quantity of powder, the force of which destroyed the house and the occupants. He was hanged and denounced as traitor (i.e. quartered and forfeiture).⁴

A small group of murders were held to be aggravated with such unnatural evilness that the body had to be burnt after the death sentence had been implemented.

John Kello was convicted of murdering his wife by strangling her with a towel. He was sentenced to be hanged and his body to be cast into a fire and burnt to ashes. His goods and gear were escheat.⁵

1. Dd572, also
2. B71 also (D74/6 and 124, murder under trust-beheaded and escheat.)
Dd474 - murder under trust - beheaded and forfeited.
D156 -do- -do- -do-
D230 -do- hanged and forfeited.
3. C445 - breaking on the wheel was extremely rare.
4. B95/6, also B194/6.
5. B14.

I. MURDER (Contd.)

1. JUSTICIARY COURT (Contd.)

PART 1. 1488-1650 (Contd.)

Poisoning came into this category. Although the commentaries say that it was equated with treason, forfeiture was not always imposed, but the main sentence of hanging and burning the body after death was the standard penalty for outraged and horrified community feelings - a similar penalty was imposed in incest and witchcraft cases. The taint of evil was so real that it was a physical disease and the only possible sentence was death and the total destruction of the body and the evil it contained.

Adam Colquhoun was convicted of murdering by poison and also attempted murder. He was hanged and his body burnt after death. His land and moveables were escheat.²

Andrew Glencorse was convicted of poisoning his wife and having committed adultery with her mother. He was sentenced to be burnt.³

Combined crimes: In many cases the murder was linked with another crime.

1. Murder & Theft. The standard penalty was hanging and escheat of moveables, but again in the earliest period, beheading could be imposed. In addition to the death sentence and escheat of moveables, mutilation after death (in the manner of an aggravation) was added frequently.

Beheading. Andrew Adamson was convicted of the murder and slaughter of Thomas Peebles and also theft. He was beheaded and after death his head, hands and feet were cut off and exhibited in prominent places (e.g. town gates).⁴

More usually, hanging was imposed:

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1. Mackenzie: 67.
 2. Aa 419/0 - actually a treason forfeiture.
 3. B.84 - presumably strangled first.
 4. A.84, also Aa.361 - head exposed after death.

I. MURDER (Contd.)

1. JUSTICIARY COURT (Contd.)

PART 1. 1488-1650 (Contd.)

John Pennycook was convicted of murdering John Cowan and assaulting others, and also for stealing three horses. He was hanged and after death his head and right hand were struck off and fixed to the west port (of Edinburgh). His moveables were escheat.

For murdering a packman and stealing his goods, James Cruickshank was hanged and his moveable goods escheat, his head and right hand were struck off after death and placed in prominent places.²

Some murder and theft cases show only hanging without mutilation.³

The records make reference to the outbreaks of brigandage by armed gangs, which frequently included murder and thefts. If the outlaws were captured, the standard sentence was hanging and mutilation. The addition of forfeiture indicated that the crime was treated as treason

Neil McLeod was convicted of fireraising, murder, theft and piracy in the Western Isles and was sentenced to be hanged. After death, his head was to be cut off and lands and moveables forfeited.⁴

L.A. -v- Patrick McGregor, alias Gilroy. McGregor was the leader of a large band of robbers and was eventually captured by Lord Lorne. The list of crimes was considerable - robbery, holding hostages, demanding food and drink and killing beasts and humans. They were found guilty and sentenced to be drawn backwards on a cart to the market cross of Edinburgh and there to be hanged - McGregor's gallows was to be higher than the rest and also the heads and right hands of McGregor and one of his seconds were to be cut off and stuck on the east and west ports of Edinburgh. The justice referred the fate of two youths in the gang who had confessed, to the Privy Council, and they were also hanged.⁵

After the Battle of Glenfruin some of the McGregors were convicted of murder and theft and were sentenced to be hanged and their heads, arms and legs cut off (i.e.

1. B372.

2. C384/5 also 422/3.

3. A162, 206, Aa344. B85/6. C413/4, C415, 436/8.

4. D246/7, also E 25/28 - hanging and escheat - no mutilation.

5. E268 - in another case the sentence was beheading and mutilation C404.

I. MURDER (Contd.)

1. JUSTICIARY COURT (Contd.)

PART 1. 1488-1650 (Contd.)

quartered) and put in public places. Their lands and moveable goods were forfeited. This was a full treason sentence.

2. Murder and Witchcraft. The ordinary witchcraft penalty applied.

Janet Grant was convicted of murdering a number of persons by witchcraft. She was sentenced to be burnt as a witch - i.e. strangled at the stake and her body burnt, also escheat of moveables.⁴

Two women were convicted of child murder and witchcraft. One was punished as a witch, the other was imprisoned.⁷

Acquittals occur, although infrequently.

Thomas Trumble was acquitted of murdering another and blocking the high gate.⁴

John Boyd was acquitted of murdering Janet by poisoning her oatmeal.⁴

Banishment was permitted.

Matthew Stewart placed himself in the King's will for the attempted murder of Sir Thomas Kennedy. He agreed to be banished from Britain during the pleasure of Kennedy. He was also fined 1000 merks to the Crown.⁴

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1. C.433 & C.561/2.
 2. B.206.
 3. B. 186 but in a later case of murder by poison and witchcraft the sentence was beheading and escheat D.264 also D.268/9.
 4. B.77.
 5. B.399.
 6. C.40.

I. MURDER (Contd.)

1. JUSTICIARY COURT (Contd.)

PART 2. 1661-1747.

In the first half of this period, the distinction between murder and slaughter was still observed, both in the prosecution and in the penalty, i.e. hanging for murder and beheading for slaughter, but the murder and slaughter elements overlapped in certain cases and in certain murder cases where one would have expected hanging (e.g. for murder by poisoning) the punishment was beheading.

However, the broad outline of the pattern can be seen.

The cases do not make such frequent mention of escheat of moveables as occurred in the earlier records. Whether escheat was taken for granted and the reporter did not think it necessary to record it or whether it was not actually imposed cannot be said.

During the second half, however, the distinction between slaughter and murder was not observed and the cases were taken under the general heading of murder and the most frequent sentence was hanging.

The standard penalty for murder throughout the whole period was hanging.

The King's Advocate and John Alexander Fleming against Andrew Spalding and others for the slaughter and murder of Andrew Fleming, who was travelling to Edinburgh when he was shot and stabbed to death. The Spaldings were acquitted but one of their servants was convicted and hanged!

1. G.128/132, also G.254, H.64/5. 1720.

I. MURDER (Contd.)

1. JUSTICIARY COURT (Contd.)

PART 2. 1661-1747.(Contd.)

As in the early period of the Justiciary records, prosecutions for child murder were frequent:-

Bessie Brebner was accused of suffocating her illegitimate child and burying it after death. She confessed, was convicted by the assize and was to be punished "in terror and example of others" by hanging.

In some cases of child murder, the accusation was murder and adultery.

Marion Smith, servant to Alexander Swinton, confessed to adultery with him and the murder of their child - she was hanged.²

This period shows occasional sentences which seem lenient compared with the sentences given in the early part of the Justiciary records for similar crimes.

Margaret Hamilton was beheaded for murdering her husband by poison, strangulation and blows, and for adultery with her lodger.³

This would have merited hanging and mutilation a hundred years earlier.

In a few cases of murder in the latest period, scourging and banishment are noted, generally in cases where death may not have been intended, but one exceptional case shows scourging and banishment where murder by poisoning was charged.

William Bisset and Jean Currier were convicted of poisoning Bisset's wife and Bisset was scourged, pilloried and banished to the East or West Indies. Currier was banished to the East OF West Indies also and was detained in the correction house till a ship

1. F.64, also F.27,81, H.71/2.1724.
2. F.123.
3. F.125/6 - also F.90/3 - husband beheaded for murdering his wife, and adultery.

I. MURDER (Contd.)

1. JUSTICIARY COURT (Contd.)

PART 2. 1661-1747 (Contd.)

was available.

Occasionally in less serious cases the only sentence was banishment:-

James Edmonston was convicted of being an accessory to the murder of the Master of Rollo and was sentenced to be banished from the Kingdom for life. He was warded till he found security not to return under pain of 1000 merks.²

Cases in the latest period are noted of murder by insane persons and it is seen that basically the person was to be locked away but he did not escape the financial consequences of his crime - assythment was still due.

Robert Spence was convicted of murder but was proved to be insane. He was imprisoned for life but the magistrates were ordered to deliver him to whoever would find caution to keep him in sure and safe custody. Until caution was found, the magistrates were responsible for him.³

Instances of combined charges of murder and theft are seen but no particular instances of aggravation are noted in this period and the ordinary instances do not show the mutilation sentences of the past:

Paul Clark was sentenced to be hanged for the murder of his brother and also for robbery.⁴

However, indignities and mutilation are noted in the cases of murder and theft committed by the armed gangs of outlaws and in the ravages committed by the clans.

The King's Advocate against William Bruce and Alistair Bain, both prisoners in the Tolbooth for theft, robberies, depredations, taking blackmail, sornings, slaughters //

1. H.19.1705 - also for beating an old man to death - scourged and banished the shire: H.55/6.1713. also for wounding to death - scourged H.56/7.1714.
2. H.10.1695 - or transportation H.72.1724 & H.85/6.1739.
3. H.98/9.1747 - also H.99.1704 - Imprisoned until certified he was well and until he paid 300 merks to the reprs. of the person he killed and 10 merks to the sick.
H.85/6.1739 - murder - insane - transported.
4. F.319 also F.314.

I. MURDER (Contd.)

1. JUSTICIARY COURT (Contd.)

PART 2. 1661-1747 (Contd.)

slaughters and murders. They were found guilty by assize "upon a clear and liquid probation by witnesses". They were sentenced to be hanged at the Gallowlee, between Edinburgh and Leith until they were dead. Bruce's body was to be hung in chains till it rotted away, but Bain was to be buried.'

Patrick Roy McGregor and Patrick Drummond were accused of murder, theft, robbery, stouthrief, taking blackmail, fireraising, taking hostages etc. and were convicted by assize. They were sentenced to have their right hands cut off, then hanged in chains until death and their whole goods escheat. McGregor was tortured in the Boot prior to being hanged.

One method of dealing with the problem was to grant Commissions of Fire and Sword to anyone who had the power to stand up to the robbers:

Advocatus and Sir James Macdonald of Selate against the Macdonalds of Caipoeh for the murder of two Macdonalds. Sir James Macdonald received a commission of Fire and Sword against the murderers and after a fight he returned with their heads, which were presented to the Privy Council for exposure.³

Acquittals are noted,⁴ but in two cases where the person was acquitted, the judges inflicted a sentence nonetheless as they thought a crime had been committed even if it was not the crime for which the accused had been indicted:

Margaret Ramsay was accused of the murder of her child by throwing it into the North Loch of Edinburgh and the assize cleansed her. However, notwithstanding the acquittal, the Court thought that she had been guilty of some crime, and she was punished for concealing the birth, as she had confessed she had been with child. She was to be scourged through the high street of Edinburgh and then banished from Edinburgh.⁵

Remissions were still used - one case refers to a remission being produced and being upheld when the person was accused of murder. The operation of remission in this //

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1. G. 15/6.
 2. F.198/200 - also F.260 - right hands cut off, hanged in chains.
 3. F.126 - also see G.263/5 - Commission recalled.
 4. Including the acquittal of two officers who killed the person they were arresting. H.9.
 5. F.28/9, also F.47/49.

I. MURDER (Contd.)

1. JUSTICIARY COURT (Contd.)

PART 2. 1661-1747 (Contd.)

this case was exactly the same as in the very early records and was dependent on the payment of assythment:

Hugh Macneil was accused of murder and produced a remission which was disputed by the relatives of the slain. The remission was upheld provided the accused paid assythment fixed by the Barons of Exchequer.'

1. H.59/0. 1717 - also F.214, G.100/5.

I. MURDER (Contd.)

ARGYLL.

2. JUSTICIARY COURT (1664-1742).

The distinction between murder and slaughter was not observed in this court. The killings are all described as murder, although in some cases the description is murder and manslaughter. However, even in such cases the standard penalty of hanging applied and there is no discernible difference in substance or in penalty between a case described as murder and another described as murder and manslaughter.¹

In the narrative to some murder cases, the reference to murder and manslaughter plainly means the same thing.²

The murder cases were usually introduced by a declaration that "although by the law of God, laws of nature and nations, acts of parliament and constant practice of the kingdom, murder is a most serious and atrocious crime, expressly prohibited and punished capitally and with pain of death, yet the accused, having shaken off all fear of God and obedience to law did"³

As examples, the following may be noted:--

John Malcolm and John McOlchallum were convicted by assize of the murder of Donald McLugas by stabbing and wounding him with knives or dirks, strangling him with a rope and beating him to death. They were sentenced to be taken between twelve and two hours in the afternoon and hanged to death on the ordinary gibbet of Inveraray. Their whole moveable goods and gear were escheat and inbrought to His Majesty's use.⁴

As in the other records, cases of child murder occur frequently and hanging was the basic sentence:--

Mary McLucas was convicted by assize of the murder of her illegitimate child and for giving birth secretly - she was sentenced to be hanged and her moveable goods were escheat.⁵

1. I.33. 131/3, 140, 149/0, 158, 169, 180.
2. I.141, 150, 170, 180/1.
3. I.11/2 etc.
4. I.102/4, also I.115/7, 131/3, 149/52, 174/6, 180/1.
J.4/1718, 1/1732.
5. I.146/8, also 195/8. J.12/1710.

I. MURDER (Contd.)

ARGYLL (Contd.)

2. JUSTICIARY COURT (1664-1742) Contd.

Aggravations are noted and as in the principal Justiciary records mutilation was added:-

Donald McKenzie, Effie McKenzie and Katharin McIndughlassie were convicted of the murder of Moira McIlchenich, a widow in Islay, whom they thought had large sums of money in her house. They strangled her while she slept in her house and threw her body into the sea. They were sentenced to be hanged between two and three in the afternoon and their right hands cut off after death and exposed till they rotted. Their moveables were escheat.¹

If the aggravation was held to be especially severe, the mutilation could be imposed both while alive and also after death.

For adultery, murder and poisoning, a woman was sentenced to be hanged - but before hanging, her right hand was cut off. After hanging, her left hand was to be cut off and exposed on a pole in the Parish church. Her body was to be buried at the foot of the gibbet.²

Combined charges of murder and theft could again attract an aggravation sentence.

Neil McCauish was convicted of the murder of Thomas McFarlan - he shot McFarlan in the back and robbed him of his money, hiding the body. He was sentenced to be hanged between two and three in the afternoon and thereafter his right hand was to be cut off at the elbow and affixed to an iron pyke on the gallows and left there till it should vanish away. His moveables were escheat.³

Or as a mark of special displeasure, the accused could be hanged in irons on a gallows erected on the place of the crime.

John McIlmichell, John McAulay and Fingal McDowgall were accused of the murder of Patrick Reid. McIlmichell met Reid on the highway and being moved by "precogitat malice and forethought felony, most cruelly, wickedly and unmercifully murdered, slew and killed Patrick Reid to //

1. I.178/0.
2. J.11/1720, also J5/1742.
3. I.166/8, 176/8.

I. MURDER (Contd.)

ARCYLL (Contd.)

2. JUSTICIARY COURT (1664--1742) Contd.

to the death by stabbing him through the body and left him near a dyke side wallowing in his blood". McIlmichell obtained the services of McAulay and McDowgall to strip the body of everything of value and then hide the body. They were sentenced to be hanged. McIlmichell was hanged on the spot where the murder was committed and his body was to remain in irons until it rotted away. The other two were hanged on the ordinary gibbet at Inveraray.

But an aggravation sentence in a combined charge was by no means inevitable and the majority of such combined murder and theft cases show simply hanging.² It is clear that the murder and theft had to be especially serious before the aggravation sentence (mutilation) was added.

Occasionally a capital sentence was not imposed for murder and instead a severe personal punishment was given:

Convicted of murder and manslaughter, the accused was scourged, nailed by his right ear to the gibbet for two hours, was branded on his right hand and then banished from Great Britain.³

In many cases, acquittals are noted - frequently in the terms of "not proven therefore assoilzied", "quit and free in respect of nothing proven" and "cleansed and acquit because nothing proven".⁴

Some of the acquittals seem surprising - the reports of the facts are clear, but it is impossible to say how far the assize were influenced in their decisions, if at all.

e.g. Thomas Carswall was accused of apprehending Margaret McWen and tying her up in an outhouse without fire or food. She escaped, but he saw her and set his dog, a large mastiff, at her. To escape the dog, she fled into the sea and was drowned. He was assoilzied because the libel was not proven.⁵

1. I.33/6.

2. I.158/61, 174/6, 182/3, J2/1741.

3. J.6/1708.

4. I.27, 96/7, 103, 121, 124, 133/5, 143.

5. I.96/7. also I.27 - shepherd killing his master.

1.124- killing woman 9 years ago.

I.169/171 - killing beggar woman.

CONCLUSIONS.

I. MURDER.

1. A clear distinction was made between murder and slaughter throughout the early and middle periods. The distinction became blurred after 1660 and finally died out about 1690 by which time slaughter had become absorbed in murder and the murder penalty ruled. No particular reason can be given for the change other than that the distinction was found to be unnecessary and unsuited to the times - particularly with the lapse of beheading as a penalty - beheading was the standard slaughter sentence. The distinction between slaughter and murder was one stemming from mediaeval times and earlier when the value on life was cheaper and the crime was not taking life per se, but taking life dishonourably.

2. Throughout the whole period the standard penalty for murder was hanging and escheat of moveables, and the only variations are seen in the earliest period when (a) compounding and remission were frequent and (b) beheading was imposed in certain cases (usually hanging mitigated to beheading through political influence, as beheading was less dishonourable). But behind these variations hanging was still the basic penalty.

3. Prosecutions for child murder were frequent (a mother killing her illegitimate child) and hanging with escheat of moveables was standard.

4. Aggravations in the main period were penalised by degrees of personal punishment -

(a) the basic form was mutilation after death of the head and or right hand.

(b) in more serious cases mutilation while alive was added, normally cutting off the right hand, with mutilation of the head and other hand after death. On occasions further //

CONCLUSIONS:

I. MURDER (Contd.)

further indignities could be added after death - hanging in chains.

- (c) in the most serious aggravations, either the accusation was (i) murder under trust, which could carry a full treason sentence (although this was not always imposed - usually it was hanging and mutilation) or (ii) treason itself, e.g. killing Darnley.
- (d) a certain group of murders fell into the category of unnatural crimes whose sentence was hanging and burning the body after death - e.g. poisoning, but this was not maintained in the later period when the sentence was hanging without any further indignity, or banishment.
5. Combined crimes, e.g. murder and theft, were considered as aggravations and the normal aggravation sentence (hanging, mutilation, and on occasions indignities) was given in the middle period. In the later period, the full sentence was given only in some cases following clan ravages. Normal cases of murder and theft received only hanging, in the justiciary records. In the Argyll record, however, some non-clan murders and thefts show hanging and mutilation with, in severe cases, mutilation before and after death, but this was exceptional.
- In the case of murder and witchcraft, the witchcraft penalty ruled.
6. In the final period, in both the justiciary records and Argyll, a number of murders received sentences of personal punishment - scourging or branding (or both) and banishment.
7. Also in the final period, instances are seen of murder by an insane person - the insanity was recognised and the accused //

CONCLUSIONS.

I. MURDER (Contd.)

accused was kept in custody either by the State or by his relatives, until he was cured. Assythment was demanded usually.

8. Remissions are noted throughout the whole period, although much less frequently after the earliest period.
9. The only courts in which murder hearings are mentioned are the justiciary courts.

II. SLAUGHTER.

1. JUSTICIARY COURT.

PART 1. 1488-1650.

During the earliest period, the most frequent determination for slaughter in common with all other crimes, including treason, was remission after payment of compensation and also a fine in some cases. Death sentences were certainly imposed, but much less frequently than remission.

James Spottiswode obtained a remission for art and part of the cruel slaughter of Thomas Burn. The Laird of Spottiswood became surety for the satisfying of the parties.¹

If compensation was not paid nor caution found to pay at a later date, the remission could be withheld and a death penalty imposed.

Peter Downe produced a remission for numerous slaughters, theft and fireraising, but because he could not find sufficient security for the assythment, he was to be kept in ward for 40 days and failing satisfaction within that period, he would be hanged.²

Remissions were either granted by the court or by the representatives of the dead person. The remission was granted by the Court when those who had killed had agreed in Court with the representatives of the person who had been killed, the amount of the compensation to be paid and sufficient caution or security had been found to guarantee the payment. Other cases show the accused producing a remission in Court -- in such cases the remission was already granted by the deceased's representatives. The Court accepted this, provided suitable caution was found.

William Clark produced a remission for the slaughter of Robert Hay and others. David Fringle became surety to satisfy the parties.³

In //

1. A.15 etc.
2. Aa.363 etc.
3. A.24, also e.g. A.19, 26.
without caution A.18.

II. SLAUGHTER (Contd.)

I. JUSTICIARY COURT.

PART 1. 1488-1650 (Contd.)

In the same category were those cases in which the accused was allowed to compound with the injured or the representatives of the dead - i.e. agree a monetary compensation. Again the accused had to find caution.

Robert Scott was permitted to compound for the slaughter of Adam Crawford. The Laird of Buckcluche became surety to satisfy the parties.

The record does not show the actual amounts agreed between the parties, but on occasions the Crown took an additional fine, the amount of which is stated. The occasions on which a fine was due are clearly defined and are noted below. If the representatives of the dead person accepted the compensation, no capital sentence, or indeed any further punishment, was passed, except the fines on occasions. It was only in the event of the accused having no means to pay the compensation that a punishment in modern terms was imposed.

Remissions for slaughter occur throughout the course of the later records, although much less frequently.

The standard penalty throughout the main period for slaughter was beheading, and as examples, the following may be noted:-

John Leys was convicted of being one of a band of men who had attacked Wauchton Castle and who had slain //

1. A.21.
2. See p.101 below - Assault.
3. William Guthrie produced respite and was ordered to find caution to satisfy. D.77/8 also D.119/0, 236/7.
 - also - remission produced which was strongly opposed by the Lord Advocate but was accepted as valid. D.115.
 - Letters of slains produced and remission for another slaughter - caution taken to satisfy D.205/6. Also D.234/5, but D.248 - no caution.
 - remission produced, caution to satisfy Dd.536, also possible grant Dd.429/0.James Stewart confessed to slaughter and maintained that as he was only being pursued by the Lord Advocate (and not by the heirs of the slain) he should be permitted to satisfy - but he was beheaded and escheat. Dd.441. Jamieson was accused of the slaughter and murder of John Philp, but produced letter of slains signed by relatives of Philp discharging their claim in consideration of 580 merks including assythment and also produced remission by James VI pardoning the crime. E.84. Also E.239, 306.

III. SLAUGHTER (Contd.)

I. JUSTICIARY COURT.

PART I. 1488-1650 (Contd.)

slain and wounded the occupiers. He was convicted of slaughter and sentenced to be taken to the Castlehill of Edinburgh and his head to be struck from his body and further his moveable goods were to be escheat.¹

Neil Angusson MacLeod was convicted of leading a band of men to destroy Dornoch and also slaughtering various persons - he was beheaded.²

Andrew Rule was convicted of the slaughter of his son, a child of 12. He had struck the child a blow with his sword, meaning to chastise the boy. Rule was sentenced to be beheaded and his moveable goods escheat.³

Patrick Stewart was accused of the barbarous slaughter of a former servant, Angus Dow McEvir who had seduced Stewart's daughter. McEvir was bound head and foot and Stewart broke the captive's leg with an axe, mutilated his private parts and inserted hot ashes and fire embers. He was sentenced to be beheaded and his moveable goods escheat.⁴

Robert Auchmowtie was convicted of the slaughter of James Wauchop in a duel and suffered the standard penalty of beheading and escheat of moveables.⁵

Aggravations are noted, and as in murder aggravations, mutilation before or after death could be added as a penalty for the aggravation.

Thomas Bonkle was convicted of the slaughter of Peter Heriot by way of hamesucken as he killed him with a sword at his (Heriot's)house. He was sentenced to have his head and right arm struck off and his moveable goods were to be escheat.⁶

Ninian and Wm. Elliot were convicted of treasonable slaughter. They shot one of the King's guards when they were being arrested. They were sentenced to have their right hands cut off and thereafter to be hanged. Their moveables were escheat.⁷

Combined Crimes:

(1) The most frequent combination was slaughter and theft and the sentence varied between beheading and hanging. //

1. B.8/9, also A.15, 27, 62, 63, 81, 87, 92, 134, 149, 151, 159/60, 164, 165, 203, 204, 219, 220.
Aa.350, 363, 366, 368, 374, 374/5, 388, 396, 404, 408, 425, 456.
B.10, 85, 95, 386/8. C.377,384,402,417/8,520,532/5,540
D.58, 222, 237/40, 247, 329, 358, 360.
Dd.362, 416, 437, 471/2, 484, 492, 500.
2. B.68/9.
3. C.21.
4. C.393/4.
5. C.124.
6. B.158.
7. C.559/0.

II. SLAUGHTER (Contd.)

1. JUSTICIARY COURT.

PART 1. 1488-1650 (Contd.)

hanging.

There are a number of slaughter and theft cases relating to the Battle of Glenfruin or Lennox, but no mean can be stated the penalties range from beheading to full treason sentences. However, a case of slaughter and theft not connected with Glenfruin was punished by beheading and escheat of moveables² and an earlier case was similar:

John Leys was convicted of slaughter and theft - sentenced to be beheaded and moveables escheat.³

But no pattern can be seen as on other occasions the accused were hanged and their moveables escheat.⁴

It is noted, however, that the addition of mutilation was rare in slaughter and theft cases:

William Douglas was convicted of various slaughters and thefts and sentenced to have his right hand cut off and thereafter he was hanged and forfeited.⁵

(2) Slaughter & Fireraising:

David Armstrong was hanged for slaughter and fireraising.⁶

(3) Slaughter & Witchcraft.

The Witchcraft penalty ruled.

Christina Stewart was convicted of the slaughter of Patrick Ruthven by witchcraft. She was sentenced to be burnt.⁷

In common with certain other crimes, the accused in slaughter cases sometimes placed himself in the King's will and as was normal in will decisions, banishment was given - however, occasional cases show the King imposing a state of free ward on the parties.⁸

1. Hanged and escheat. C.418/9, 424, 438, 438/9.
Treason sentences . C.433.
Beheaded and escheat. C.419.

2. C.425/6.

3. B.8/9.

4. C.443/4, 529 - also forfeited.

5. D.95.

6. C.441.

7. B.399/0.

8. For free ward see below p. 544

II. SLAUGHTER (Contd.)

1. JUSTICIARY COURT.

PART 1. 1488-1650 (Contd.)

Alexander, Lord of Spynie and others came into the King's will for slaughter. They were ordained to find caution for £5,000 and to remain within Edinburgh. The King later declared that Spynie had to pay a fine of £5,000 and remain to the West of Linlithgow and the Master of Ogilvy had to remain to the East of Haddington.

Similarly:

Robert Semple came into the Queen's will for the slaughter of Lord Crichton and she pardoned him. However he was placed in free ward, under pain of 20,000 merks.²

Banishment:

William Chirnside and another were convicted of the cruel slaughter of Richard Hepburn and also wounding another to the effusion of his blood - banished from Scotland.³

Also:

The accused petitioned the court from prison, stating that he would agree to banishment "furth of his majesty's dominions and to remain abroad and not return without the King's consent". The court accepted this.⁴

Acquittals are noted in all periods.

Allison Jollie was acquitted of slaughtering Isobel Hepburn by witchcraft. The accused was stated to have consulted a notorious witch with the purpose of killing Isobel Hepburn, but while Isobel Hepburn certainly died, Allison Jollie was acquitted.⁵

George Trumbill was acquitted of slaughter as he killed in self-defence, but he was convicted of carrying and shooting pistols, for which his right hand was cut off.⁶

In a duelling case, Captain John Rig was accused of the slaughter of Thomas Strathauchin - both were Archers in the King of France's bodyguard and the duel had taken place in France. Accordingly, the Court were instructed by the King not to proceed.⁷

1. C.135 and 145/6.

2. Aa.354/5.

3. Aa. 366, also Aa.396,
Dd.459, following assythment.

4. E. 140/2.

5. B.397/9.

6. C.421.

7. C.382 - also Dd.502,
but C.124: victor in duel beheaded.

II. SLAUGHTER (Contd.)

1. JUSTICIARY COURT.

PART 1. 1488-1650 (Contd.)

George Tweedie was acquitted of slaughter having killed a thief.

Walter Jamieson was accused of slaughter, but he produced (1) letters of slains signed by the deceased's kin and friends acknowledging that he had paid assythment (2) a remission by James VI discharging the crime and (3) a statement from his minister stating that he had made public repentance of the crime and in the face of this formidable force of evidence, the justice absolved the accused.²

William and Robert Hangetsyde were accused of the slaughter of Thomas Chatto who had been killed by a golf ball struck by one of the defenders. However, the accuser dropped the proceedings.³

Andrew Smeaton and his wife, Katherine Walker, were accused of the slaughter of George Shaw. It was stated that after the corpse was found, the corpse was touched by many people, in an effort to find the person responsible, as it was believed that when the person who had killed Shaw touched the corpse, the body would bleed. Smeaton when asked to touch the corpse, not merely touched, but also offered to embrace the corpse, and even lie in the grave with the body. No fresh blood flowed from the body and Smeaton was acquitted.⁴

James Hoppringill and Walter Borthwick were acquitted as Hoppringill produced a remission from the King for the slaughter and Borthwick had been tried and acquitted in the Edinburgh Burgh Court, in spite of a threat of proceedings for wilful error if they acquitted (he also threatened wilful error if they convicted him).⁵

Certain cases occur during the period of "putting to death" i.e. a person was killed while in the power of another, but no penalties are noted, presumably because of political considerations.

Duncan Campbell of Glenlyon was accused of murdering and slaying John McNeill of Barra while in Glenlyon's private prison. The Secret Council had the case continued, and then the Council stated that Campbell and the McNeills had agreed to an arbitration and ordered the diet to be deserted.⁶

1. A.72: also A.54 acquit for killing outlaws.
2. E.84/6, 86/90, 153/4, 305/6.
3. E.204/6, also 208/210.
4. E.264/6 - for the corpse bleeding see also D.127.182.
5. E.306/311 - also wilful error and acquit E.201/4.
6. E.148/150, also E.45/6.

II. SLAUGHTER (Contd.)

1. JUSTICIARY COURT.

PART 1. 1488-1650 (Contd.)

In the latest period, continuations occurred very frequently and the following may be noted.

Robert Buchanan and others were accused of the slaughter of three McGregors, but it was stated that one of the McGregors had been captured two days after the day of his alleged death, leading a gang at the burning of houses and the killing of cattle and stock in Glenairnay and he had been hanged at Doune for the burnings and thefts. The other two had been declared outlaws. The case against Buchanan was continued to let the justice look into the matter.¹

Adam Cunningham accused of slaughter had his case continued, because a sufficient number of the assize had not appeared, owing to a great storm which had made travel hazardous to their lives.²

The case could be continued to let the justice refer the penalty to the Secret Council or the King.

Charles Goldman confessed to slaughter and was tried by an assize. He placed himself in will, and the case was continued pending the King's decision.³

During this period, the Privy Council frequently intervened:

James Scrymgeour and others were accused of the slaughter of John Barnes, but when the case called, the defenders produced a warrant from the Lords of the Secret Council, which narrated that the King was satisfied that Barnes had been killed having been declared outlaw because he and his associates had raped James Scrymgeour's daughter, a widow, under cloud and silence of night. In view of the warrant, the Court suspended proceedings.⁴

In another case, Laurence Bruce petitioned the Secret Council from exile and requested that the kin of the deceased accept assythment, as the King had offered him a remission if satisfaction could be agreed. The other side had refused to accept any of his offers and he asked the Council to help. The Court was ordered by the Council to continue the diet to have the matter considered.⁵

For non-appearance, the standard decree of outlawry was passed.⁶

1. E. 54/58, also E.34, 37.

2. E.61.

3. E.65, also E.77.

4. E.42, also F.C. ordered the diet deserted: E.45, 148.
F.C. ordered hanging: murder and adultery
E.81/2.
murder and thefts. E.268/274.

5. E.239/0.

6. e.g. E43/4, 126/8 - cautioner fined 1000 merks.

II. SLAUGHTER. (Contd.)

1. JUSTICIARY COURT.

PART 2. 1661-1747.

Slaughter cases are noted - and the basic penalty was again beheading:

William McKay was accused by the widow of James Murray for the slaughter of James Murray. McKay provoked Murray into a duel after a quarrel and killed him in a sword fight. The assize convicted him and he was sentenced to be beheaded at the Mercat Cross of Edinburgh.

But the pattern is not so clear-cut as in the earlier period, and some slaughter cases show hanging as the sentence:-

Nicholas French, Thomas Gaites and Edward Bates, soldiers in the Citadel of Leith, were convicted of the slaughter of John Burd, another soldier - French was hanged.²

Remissions reappear more frequently than in the period immediately preceding (1600-1650):-

Hugh Crawford was accused of the slaughter of George Wyllie but the Exchequer wished to check if a remission had been correctly granted to Crawford for the slaughter - the Court held that the remission was correct. It was questioned again and the Court again confirmed that it was in order, but this time he was ordered to pay assythment and find caution therefor.³

Walter Drummond was accused of the slaughter of David Crawford and imprisoned, but he obtained his release by stating that he had purchased a remission and had assythed the parties.⁴

The reasons for one remission are noteworthy:-

Archibald Beith, Minister in Arran, and Donald McGibbon, were accused of slaughter. A small barque was driven into Lochlash and stayed there sheltering. Beith gave hospitality to the crew but later went out to the ship and shot and killed two members of the crew. The assize convicted the accused and they were sentenced to be beheaded and their moveables escheat, but Beith obtained a remission - because he was a churchman - and the Church thought it unseemly that he should be punished capitally.⁵

1. G. 18/23 - also F.45,48, 68/9, 71/2, 157/8, 214, 245/6.
G.1/7, 85/98, 165/8, 247/253.
H.15. 1697, 21/4.1709.
2. F.23, also F.155, also H.11.1695, 66.1722.
3. F.70,91.
4. F.109, also F.84, 305.
5. G.85/98.

II. SLAUGHTER (Contd.)

1. JUSTICIARY COURT.

PART 2. 1661-1747 (Contd.)

On occasions, banishment was imposed:

Carmichael, a schoolmaster, beat one of his pupils so severely that the boy died. He was convicted of manslaughter and was sentenced to be scourged - six stripes in the Lawn market, six at the Cross and five at the Fountain well. He was imprisoned till he gave security to leave the country never to return, under pain of death.¹

A number of cases show that a serious assault could become a slaughter action - the injured person died because of the lack of skilled medical attention available to him. But the Court exercised its discretion in such cases and took the length of time between the assault and the death into account and could absolve the accused of slaughter.

Sir Godfrey McCulloch was convicted of shooting William Gordon, the shot breaking his leg, from which he died. The accused was sentenced to be beheaded and his moveables escheat.²

The King's Advocate and Thomas McMeth as informer against William Sommerville for the slaughter of Bessie Renton, his mother, by giving her a blow on the head and blows on her body with a cudgel, to the great effusion of her blood, and causing her death thereby. The assize convicted and he was sentenced to be beheaded at the Mercat Cross of Edinburgh. However, there is a footnote that he obtained a remission - there was a long delay between the blows and the death - 12 weeks.³

Archibald Burnet and Cornet James Loudon were convicted of assaulting David Redpath and beating and blooding him that he died thereafter. Burnett was fined £100 Stg. and Loudon £50 and were imprisoned till paid.⁴

Malcolm Brown was accused by William Stark of the slaughter of Stark's son by giving him a blow on the ear. The blow was given, causing deafness, but the boy lived for six weeks afterwards. Malcolm Brown was acquitted, as no connection was proved between the blow and death.⁵

Acquittals //

1. H.16/7.1699 - in the later period this was transportation. H.79.1733.
2. H.15.1697, also H.21/4.1709.
3. G.1/7.
4. H.33/4.1711 - also F.35/6 - accused of murder but the person lived for 8 weeks afterwards, convicted of assault
5. F.99, also G.287/294.

II. SLAUGHTER (Contd.)

1. JUSTICIARY COURT.

PART 2. 1661-1747.(Contd.)

Acquittals are noted:

As in the earlier period, the Privy Council could interfere:

Christopher Ballantyne was accused of the slaughter of John Coltherd, but the Council ordered the Justices to stop the proceedings.

-
1. F.146/7 - alibi.
F.156, 262, 304/5.
F.270/6 - self defence also G.305, but to pay assythment.
G.287/294.
 2. F.53.

II. SLAUGHTER (Contd.)

2. SHERIFF COURT (1515-1747).

While reference to slaughter occurs quite frequently in the early record (Fife) a final determination is seen only in a few cases.

The penalty was beheading:-

Ninian Forster was indicted and accused of the slaughter of John Low by forethought felony - he struck him with a staff on the head, causing Low's brains to burst out and then Ninian Forster drew a knife and slew him. The assize found that they could not acquit him and he was sentenced to be taken to the Heading hill and there his head was to be struck from his body.¹

The most frequent references to slaughter occur in the undertakings to make the accused appear in court - it is noted that the Sheriff Court was used to enforce appearance at the Justiciary Court:

The Sheriff of Fife took A as surety that B and C, accused of being art and part in the slaughter of D would appear before the King's Justice.²

The standard penalty of outlawry and escheat of moveables applied if the accused did not appear or find caution to appear.³

The record makes frequent reference to royal warrants to the Sheriff about particular cases of slaughter.

The widow, children, relations and friends of Alexander Eleston petitioned the king to punish a group of persons who came on Eleston in his own maling and cruelly slew him at harvest time. The king ordered the sheriff to seek out those responsible. Those named as being responsible were ordered to find caution to appear which was fixed at £100 for each landed gentleman, 100 merks for each unlanded gentleman and £40 for each yeoman under the threat of outlawry.⁴

Those accused of the slaughter in turn petitioned the king stating that they were poor labourers and that they could not find the required sums of caution. They stated also that they were all innocent of the slaughter, which was committed by two persons who had fled and who, by their flight, had taken the blame on themselves. The king //

1. Ka.215, also 266/7, acquittals are noted - Ka.83.

2. Ka.148, 223/4.

3. Ka.179, 215/6.

4. Ka.274/5 - also 281/2 - to appear before justiciar.

II. SLAUGHTER (Contd.)

2. SHERIFF COURT (1515-1747).

king ordered) each to find caution for each other and declared rebel those who had fled. No further determination is mentioned.

It is interesting to see that the letters quoted above were dated 2nd January, 1522, and 21st February, 1522 respectively. There is a further reference to this case a year before - on 28th January, 1521 - when the sheriff depute announced the declaration of rebellion against the two who had fled. Over a year elapsed from the time of murder - harvest time 1520, until the letters from the king - January, 1522.²

-
1. Ka.275/6, also 243/4.
 2. Ka.245 - also 233/4, 279/0.

II. SLAUGHTER (Contd.)

3(a) SHETLAND COURT. 1602-04.

The record gives details of one slaughter case, but while one of those involved was sentenced to banishment, the principal parties escaped. It is impossible to say if the court would have passed a death sentence against them. Death sentences were rare in this record.

The accusation stated that Matthew Sinclair of Ness had been cruelly and mercilessly slaughtered and that certain of the accused had fled. The assize found that those who had fled had taken the guilt on themselves and declared their goods to be escheat, as an example to others. Adam Sinclair was tried by the assize for being art and part of the slaughter and it was found that he had quarrelled with the murdered man the night previous to the murder, and had enabled Francis Sinclair, the actual murderer, to escape, together with some others. Accordingly the assize decreed that Adam Sinclair should be banished and his goods, gear and lands escheat and if he was found within the country after the next fifteen days, he was to be beheaded.

One case gives details of an accidental killing:

A threw a stone at an ox and the stone glancing off the ox's horn struck B, a young boy, killing him. A passed into the judge's will and the Court agreed a composition of £10.²

1. L.38, 42/3.

2. L.35, 63.

II. SLAUGHTER (Contd.)

3(b) ORKNEY & SHETLAND COURT. 1612-13.

Only one slaughter case is noted in this record, and it is the only instance of a death penalty - drowning was imposed on a woman found guilty of slaughter.

The facts are given fully:

A dispute had arisen among a family of tinkers which resulted in one man being killed. A number were indicted for the slaughter and there was a subsidiary charge of indiscriminate incest and adultery among the tribe, and also for theft, fortune telling and the sale of charms. In spite of an ingenious defence by her counsel, the assize found one of the women (who was the wife of the murdered man and lover of another) guilty of the slaughter. The judge inflicted a punishment as dramatic as the crime - she was "to be tane to the Bulwark and cassen over the same in the sea to be drownit to the death".

The interests of justice appear to have been satisfied by the drowning of the woman as the other persons were quit of the remaining charges.

II. SLAUGHTER (Contd.)

4. REGALTY COURT. 1547-1706.

A few isolated references occur, but no sentences are given:

In an early case, a monk appeared before the court and explained how he had killed one Bane within the Abbey. This monk was prepared to go to Cisteaux and if necessary also to Rome to obtain relief of his conscience and absolution and he declared that his brother who was accused of being art and part of the killing, had nothing to do with the matter!

In a later case concerning the escape of a prisoner from prison, there is an indirect reference to slaughter.

The escaped prisoner was stated to have "most unnaturally struck and beat Alison Bouston, his spouse, with his hands and feet upon 7th July, 1673, by which strokes she died immediately wheroby he had transgressed the Law of God (Thou shalt not kill)." ²

In the first case special considerations must be admitted in respect of the priesthood, but in the second case, it is impossible to say whether the period of imprisonment was imposed as a punishment or whether the prisoner was waiting for a further hearing or punishment. The slaughter took place on 7th July, 1673, and shortly before 4th October, 1673, the prisoner escaped and the circumstances of the escape show that his prison life was by no means hard or onerous.³ It is interesting to note that the crime was stated to have been committed against divine law, not against the law of the country.

1. No.163/4. 10 Feb. 1558.

2. Nb.346 - also Nb.407/8 - arson but acquitted.

3. See details under Imprisonment.

II. SLAUGHTER (Contd.)

5. BURGH COURTS. 1398-1714.

The Burgh Court records do not show any sentences for slaughter, but in the 16th century the Peebles record is punctuated by references to a feud between the town and the family of Gledstanis concerning the ownership of the lands of Cademuir which was claimed for grazing by both sides.

The dispute resulted in the killing of at least two townspeople, and the feud illustrates the background to the justiciary court entries, if not the burgh court.

The burgh of Peebles complained to the king (James V) that their enjoyment of the lands of Cademuir was interrupted by John Gledstanis who sent his servants to attack the townspeople on the ground.

The king ordered that those responsible should appear before the next justiciary court in Peebles and that they should meanwhile find caution. Gledstanis had to find 300 merks of lawburrows, other landed gentlemen 200 merks, unlanded gentlemen 100 merks and each yeoman £50 "all that the bailies, council and community and their servants should be harmless and skaithless, without fraud or guile as law will". If they refused, they were to be given six days and then put to the horn and rebellion. However, they agreed to the terms and also found caution of £10 to underlie the law, and although there is no further reference to that case, there appears to have been peace for some time.²

But nearly forty years later, Adam Peblis was cruelly blooded and hurt in a fight at Cademuir, and the council and community decided to apply to the justiciar and lords of council for justice,³ but nothing was done and there was another fight on Cademuir when William Bell was slain by the Gledstanis and one of the bailies and three or four burgesses were ordered to go to Edinburgh and raise a summons against the Gledstanis for the slaughter of William Bell.⁴ There seemed to be some legal delay in Edinburgh, no doubt due to influence exerted by the Gledstanis, and the council ordered more men to go to the Queen and complain about the Gledstanis. This was effective because Gledstanis took notice and John Gledstanis and his servants, the persons responsible offered assythment of £100 for each of the two men who had been killed. The town wanted 2000 merks for each but the Gledstanis would not agree.⁶

1. X.46/7. 1518.
2. X.47/9.
3. X.232/3.1556, also 238/9.1557.
4. X.273.1561.
5. X.288.1562.
6. X.299/0.1562.

11. SLAUGHTER (Contd.)

5. BURGH COURTS. 1398-1714 (Contd.)

The Council again considered the offer and they said they owned the ground, but there were no further references to the matter, and the feud apparently died out.

Murray gives details of a slaughter case heard before the Ayr Burgh Court, but the point in dispute was not the penalty for slaughter, but the amount of compensation payable. The record noted the agreement of the parties to the amount offered.

1. II.505/6. 1559 - 100 merks for kinbot.

CONCLUSIONS.

II. SLAUGHTER.

1. The standard sentence for slaughter throughout the whole period, during which slaughter was recognised as a separate crime from murder, was beheading and escheat of moveables.
2. Beheading could be avoided by compounding and remission, and while this course was very frequent in the earliest period until c.1550, and while it never completely died out, the references in the middle and later periods were much less frequent, although there was a revival in its use between 1661-1690.
3. In the middle of the later period (1670-1690) a number of slaughters were punished by hanging, foreshadowing the absorption of slaughter into murder.
4. Aggravations were punished by the addition of personal punishment -
 - (a) the basic form was again mutilation of the right hand after death and exposure of the head and hand.
 - (b) in more serious cases the right hand could be cut off before death and exposure of the head and hand could be made after death.
5. The penalties in combined slaughter and other crimes varied. As a general rule, the penalty for the more serious crime ruled, i.e. slaughter and theft received hanging, and slaughter and withcraft received strangling and burning, but in some cases of slaughter and theft, the penalty was beheading, and in others (clan wars) a treason sentence was imposed.
6. Throughout the middle and later periods, banishment and later transportation were given quite frequently. In the middle period and in the first half of the later period, the //

CONCLUSIONS.

II. SLAUGHTER (Contd.)

the accused could place himself in the king's will and banishment followed almost automatically (c.1600 free ward was common) provided assythment had been paid. While this applied to all crimes, such a determination was very frequent in slaughter cases. In the final period, transportation supplanted banishment, and it was given as a sentence rather than the rather more voluntary banishment following a reference to will.

In the Shetland court, banishment from Shetland was given as a definite sentence.

7. No slaughter cases at all are seen in the Argyll record where killings were treated as murder. Admittedly the period of the Argyll record corresponds to the period in the main justiciary courts when slaughter was dying out, but it is remarkable that no instances are noted. The Argyll record also makes no reference to beheading as a penalty.
8. In the latest period fining (£100 Stg, £50) is given in slaughters where the person died not so much from a direct intention to kill, but rather from wounds (serious and others) which were not cured properly. Such cases are in the nature of very serious assaults rather than slaughter.

III. ASSAULT.

1. JUSTICIARY COURT.

PART I. 1488-1650.

Throughout all records, the most noticeable feature in assault cases is the division into assaults in which blood was shed and those in which only blows were exchanged. In the blood assaults, the emphasis is on the hurting and wounding of A. to the effusion of his blood.¹

If a limb was actually cut off, the charge was described a mutilation.² Wounding (bleeding) and mutilation were separate charges - in certain cases the assize convicted on the wounding and continued or acquitted the mutilation.³

It is seen however that so far as the Justiciary Court was concerned, only blood assaults are noted - the non blood assaults, by their very nature, were heard by the lower courts and did not reach the Justiciary Court.

In the earliest part of the record, it is seen that in assault, as in the other crimes, the Court was prepared to accept the composition reached by the parties and that punishment (fining) was imposed only on certain occasions. Compounding was the most frequent entry - it was stated that the accused was permitted to compound with the injured - i.e. to agree the amount to be paid in compensation and normally the accused had to find caution to guarantee the payment.⁴ Once the sum was agreed, the accused could obtain a remission from the court or the other parties in respect of the incident, although again if payment was not made in court, caution could be require to guarantee the future payment.⁵

1. Aa.328, 328/9, 369, 374, 385, 412 etc.
B. 3, 4, 7/8, 58/9, 61/2, 98/9, 100, 187, 371, 371/2 etc
2. B.4, 7/8, 17, 34, 371 etc.
3. Aa.469, B.4/5, 7/8, D.59/0.
4. A.24/5, 32, 32/3, 54, 58, 74 etc.
5. A.53 - with caution 53, 59, 92, 176 etc.

III. ASSAULT.

1. JUSTICIARY COURT.

PART 1. 1488-1650.

Nicholas Learmonth and others having obtained respites, found caution to satisfy the parties for scourging Sibella Corsby and James Gray and for cruelly wounding and hurting others.¹

The Court was prepared to accept an agreement reached by the parties without any further penalty, but the Court imposed a fine in two clearly defined situations.

1. If the parties were unable to agree by the time they appeared in Court, the accused could be fined if found guilty and also ordered to compensate the injured. He also had to find caution to guarantee the payments both to the king and the injured.²
2. The accused could place himself in the king's will but again he was fined and also could be obliged to pay assythment.³

The amounts of the fines varied greatly and details are given in the early part of the record (c.1509)⁴

The amount of caution is rarely stated.⁵

Because of the high degree of personal agreement in compounding assault cases, they were referred to arbitration for settlement on occasions.

David Sommerville and David Shaw agreed to the decision of the arbiters regarding the hurting and mutilation of David Sommerville. Each side had to choose three arbiters and provision was made for oversmen to give the final vote. The parties bound themselves to accept the decision under penalty of £1000.⁶

-
1. A.176.
 2. Convicted A.54, 55, 56/7, 57 etc.
 3. Will. A.21, 24, 73, 95, 96, 178 etc.
 4. Fines: convicted A.57 - £5. Will A.73 - £10.
57 - £3. 73 - £ 5.
56/7 - 40/- 73 - 15 merks.
54,55 - 10 merks. 24 - 5 "
54.- 6 "
55 - 5 "
54 - 4 "
 5. Caution - A.54 - £4
To keep the peace - A.164 - 5000 merks.
2000 "
1000 "
 6. A. 167/8 - see also later arbitration cases

III. ASSAULT.

1. JUSTICIARY COURT.

PART I. 1488-1650.

The early period shows that assault tended to be settled by agreement between the parties with the state standing by as an interested spectator, intervening only if the parties could not agree.

The middle and later periods show the state assuming more control to the increased exclusion of personal agreement although strong traces of the agreement aspect remain throughout the whole record (e.g. in assythment and in arbitration). While fining was the basic sentence, some cases show that payment of assythment was sometimes the only penalty and although it was a payment to the injured and not to the state, it could be enforced or compelled by the state process.

Robert Lauder and others came into will for the mutilation of Robert Knowis having cut off his forefinger. The Queen ordered payment of assythment.

John Duncan was convicted of mutilating Robert Davidson, having cut off two of his fingers. He was imprisoned until he paid assythment for the "hurt and skaith" and, until he obtained his discharge by letters of slains, his moveable estate was escheat.

William Now was accused of patricide, but he had in fact only wounded his father-in-law, although plainly intending to murder him. He placed himself in the king's will and he was ordered to find caution of £1000 to satisfy the injured and his wife. He was released and undertook not to hurt his father-in-law or his family.

1. Aa.364 - simil. Aa.475 - ears.
Aa.383 - left arm.
385 - thumb.
412, 469 - fingers.
B. 4/5 - left hand.
- also caution taken for assythment -
Aa.384/5, also Aa.385, 387, 401/2, 402.
2. C.539.
3. C.18/20.

III. ASSAULT.

I. JUSTICIARY COURT.

PART 1. 1488-1650.

LA & Others -v- James Scott. For hurting, wounding and mutilating by breaking the injured's right leg, the assize found the accused guilty and the sentence was assythment of 250 merks and 50 merks for doctor's fees and to find caution for these sums. The injured was to grant a letter of slains.¹

The State could agree to arbitration:-

LA & Others -v- Alexander Forbes. Forbes had mutilated William Ord by cutting off his right thumb. The parties agreed to refer the case to arbitration - one arbiter for each side and an oversman, to agree assythment.²

In the assault cases where a sentence was imposed, it is seen that the normal penalty was fining, but the amounts of the fines are not given in the middle period:

Richard Megot was convicted of hurting and wounding John Parer in his head, above the jugular vein and cutting off his left ear, also wounding him in his arm, to the effusion of his blood in great quantity. The charge of mutilation - cutting off his left ear, was continued and eventually the assize acquitted. He was fined for the assault, but the amount was not stated. (He was later discharged by the Crown).³

While the foregoing cases show assythment and fining as the normal sentences, some assaults resulted in more severe penalties either (1) because the assaults were more serious in themselves or (2) because the assault was aggravated or (3) because it was combined with another more serious crime, whose penalty applied.

(1) Grave Assaults. The sentences varied - one case showed the standard burgh court sentence for breaking the burgh laws:

Nicholas Rynd was convicted of hurting and wounding to the effusion of blood in great quantity. He consented to stand publicly for one hour, bare-headed and ask forgiveness for his crime. He lost his freedom of the

1. E.164.
2. E.44 - arbitration, also E.263.
3. B.4, 7/8, also B.11.

III. ASSAULT.

1. JUSTICIARY COURT.

PART 1. 1488-1650.

burgh and was banished from the burgh.

Another gives a death sentence:-

Two Messengers at Arms were convicted of oppressing John Cathro - imprisoning him and releasing him only if he paid blackmail. They were hanged.²

In a serious case, an acquittal was obtained because the injured person was forced to sign a discharge of her rights.

James Crawford and others were accused of cruelly torturing Margaret Gardner to discover an alleged theft. They cut off one of her fingers in a harrow and burnt her with tongs, but in view of the discharge the assize acquitted the accused in spite of the threat of wilful error by the king's advocate.³

(2) Aggravations. Aggravations are noted particularly with regard to the place where the assault was made.

James Gyb' confessed to shooting James Boyd with a pistol in his foot and also wounding him in the arm with a sword to the effusion of blood. The accused came into the king's will. As the assault had been committed within Holyrood House, the king ordered a death sentence, but the injured person interceded and the actual penalty was banishment and assythment.⁴

The death penalty was justified in that case as the assault took place within the Palace of Holyroodhouse when the king was in residence. In a similar case the death sentence was enforced:

LA -v- John Young. Young drew a dagger within the Royal Palace of Holyrood, during a sitting of the Secret Council and hurt and wounded Walter Bellenden, to the effusion of his blood and peril of his life. During the hearing before the assize, it was learnt that Young had been forcibly enrolled into the Army to fight in the Low Countries and had been put in prison until a group was collected. Young appealed to Privy Council but they //

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1. Aa.399.
 2. Aa.356.
 3. C.44.
 4. B.187.

III. ASSAULT.

1. JUSTICIARY COURT.

PART 1. 1488-1650.

they agreed he should go to the Army and when he was in Holyrood he stabbed Bellenden who had first seized him. The attack was treason and he was sentenced to be drawn to the market cross, hanged and quartered till he was dead. Thereafter his head was to be struck off and set on an iron stake at the nether bow and his hand to be put on a stake at the water gate. His lands and moveables were escheat - a full treason sentence!

Where a minister was assaulted to the effusion of his blood in great quantity by Walter Graham, while the Privy Council were sitting, Graham was sentenced to be scourged through Edinburgh, his right hand to be cut off and to be banished.²

This crime broke two separate Acts - (1) for striking a minister and (2) for striking near the Privy Council, the second being a capital crime.

Another case shows a heavy fine for the aggravation:

John Dundas placed himself in the king's will for striking James Hamilton, while they were within or near the Tolbooth of Edinburgh, when the king and the Lords of Session were sitting. He was fined 1750 merks and released from prison.³

3. Combined Crimes.

(1) Assault & Slaughter.

In a case where the attackers intended to kill the injured person, they were sentenced to be beheaded. They were convicted of mutilation - having cut off three fingers and the thumb on his right hand. It is possible that the capital sentence was imposed because they stole from the injured person.⁴

(2) Assault & Theft.

Alexander Rowan was convicted of theft and for barbarously burning Katherine Huggoun, by holding her on to a red hot girdle. He was hanged and his moveable goods escheat. It would seem that notwithstanding the cruel injury he inflicted, the death penalty was imposed on account of the theft.⁵

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1. E. 74.
 2. C.417.
 3. C.358/9.
 4. Aa.351.
 5. C.391/3.

III. ASSAULT.

1. JUSTICIARY COURT.

PART 1. 1488-1650.

The accused frequently placed himself in the King's will.

William Bikarton was convicted of shooting George Auchinleck to the great effusion of his blood, and was imprisoned pending the King's will.¹

Acquittals are noted:-

Thomas Ewing was accused of hurting and wounding William Brown to the effusion of his blood in great quantity and giving him sixteen wounds by way of murder, under sentence of night, and then throwing him into a river, but the accused was acquitted by assize.²

Continuations occur frequently.³

Bloodwyte is rarely mentioned.

In one case, Walter Scott was accused of hurting, wounding and mutilating Adam Dagleish of three fingers in his left hand. Scott pleaded self defence and stated that Dagleish had already been convicted by an assize of blood and bloodwyte. The diet was deserted and the case submitted to arbitration.⁴

The reference to bloodwyte here shows a similar meaning to that demonstrated by the lower Courts - i.e. that bloodwyte was not merely a fine for blood shedding, but was a further fine payable if there was an element of provocation in the assault.

1. B.98/0. Also B.159, D.70.

2. B.380, also B.17, C.461/3, E.67 etc.

3. B.3, 58/9, 371, 371/2, E.82, 90.

4. Dd.45b/8 - the full significance of bloodwyte is noted in detail in the Baron Courts - see p.140. It is submitted that the traditional meaning of bloodwyte is inaccurate and that it had a specialised and particular meaning.

III. ASSAULT.

1. JUSTICIARY COURT.

PART 2. 1661-1747.

The assault cases heard by the court were blood assaults and again there is the same emphasis on the shedding of blood - wounded to the great effusion of his blood - as has been seen in the earlier periods.

Fining is the standard penalty and in addition to the king's fine, assythment was added frequently and the amounts of the fines and of the assythment are given:

William Ferguson and others were accused of menacing, threatening, assaulting, beating and wounding John Anderson, a bailie of Inverurie. The assize found them guilty of striking and blooding and they were fined £50 to the king and £100 to Anderson. They were imprisoned till payment was made. They were released on 4th August, 1673, having been imprisoned on 31st July, 1673.¹

Donald Whyte pursued McKenzies of Suddie and others for invading him with drawn swords, cutting and wounding him and oppressing him. One of the McKenzies was found guilty and was fined 200 merks to the king and 300 merks to the pursuer for the wounding.²

However, a few cases do not make any mention of the king's fine:

John Rae was convicted of the mutilation of John Cross by biting off his right thumb and was sentenced to pay the injured £200 Stg. for damages and expenses.³

Sir Alexander Forbes was accused of the blooding and wounding of William Innes, having wounded him twice with a sword. Forbes was ordered to pay 400 merks assythment, but with the proviso that if he paid half immediately, the liability to pay the other half would fall.⁴

In another case only the king's fine was imposed:

James //

1. G.177/0.
2. F.64/5, 66. also F. 41/3 - £20 to the sheriff.
£80 assythment.
3. H.91/5.1745,
Also G.41/3 - £100 assythment.
F.190 - £40 assythment,
and F.196, 218, G.52/3.
4. F.93/4.

III. ASSAULT.

1. JUSTICIARY COURT.

PART 2. 1661-1747.

James Dewar pursued Alexander Baxter and others for beating and wounding Dewar and his shearers to the effusion of their blood. Baxter was guilty of the blooding and wounding and fined 100 merks, 2 parts to be paid by him and the other part by another of his associates. They had to find caution, or go to prison till the fine was paid.'

Imprisonment was given as a penalty in one later case:

Ensign William Beaver struck John Henderson a minister and spoke insultingly of the Church of Scotland while drunk. He was convicted and in terms of the 27 Act 10 parl. Ja. VI his moveables were escheat. He was further sentenced to be imprisoned in the Tolbooth of Edinburgh for 10 days.'

Acquittals are noted.'

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1. F.50/2.
 2. H.62/3. 1720.
 3. F.106/7 - cleansed.
F.265, also F.297/8 - not guilty because nothing proven.
G.116/121 - clean and not guilty.
G.139/0.
G.32/51 - assolized because not proven.

III. ASSAULT.

ARGVLL.

2. JUSTICIARY COURT.

Again the distinction between blood and non-blood assaults is drawn and in this court, although a Justiciary court, non-bloods were heard. However, the difference in penalty is not seen so clearly as in the lower courts.

1. Blood Assaults: Fining was the normal penalty and the basic fine was £50. Assythment was added in many cases. As in all other records, the accused could be imprisoned till he paid.

Angus McMillan and others were convicted by the assize for wounding Gilbert McLendrest with swords and dirks to the effusion of his blood and hazard of his life. The principal parties were fined £50 for the riot and were ordered to remain in ward until they paid or found caution. John McMillan, one of the principals, had also to pay £30 assythment and Donald Campbell, another principal, had also to pay £10 assythment.

Aggravations are noted - assaults inflicted on a Sunday, in Church, on the minister or on a magistrate.

Duncan Fisher, procurator fiscal, pursued John McDougall for the abuse and profanation of the Sabbath as he came to the house of John McCallum on a Sunday while drunk and struck McCallum on the head most cruelly to the effusion of his blood in great quantity and to the hazard of his life. It was alleged that he also stole a silver cup - but this was assoilzied. The assize convicted of the assault and he was fined 100 merks.

It was also an aggravation to assault and abuse a magistrate.

It is noted that the sentence imposed was the same as that imposed in the Burgh Courts - fined, to crave pardon on his knees before the court and also bareheaded at the Mercat Cross and to have his burgess ticket publicly destroyed.

1. I.79 - fined for striking and action reserved for blood
2. I.63/4, also I.139 - £50, I.149 - £50 and £12 for cure.
I.113 - £50 and 40 merks assythment.
I.68/9 - £50 and £4 assythment, 24 hours in ward.
48/-, loss of wages.
40/-, loss of blood.
but 140 - £100 - struck his father-in-law, imprisoned till paid.
I.140/1 - £12 and £6 assythment.
3. I.27/8, also I.65/6 - £100 threatening minister.
I.78 - assault in church - £40.
It was also stated to be an aggravation for a man to strike a woman - I.128 (acquitted)
4. J.2/1710, also J.6/1710 - but only fined and crave pardon in court.

III. ASSAULT.

ARGYLL.

2. JUSTICIARY COURT.

2. Non-Blood Assaults: Fining was also standard for non-blood assaults - £50 was usual, e.g:-

Duncan Fisher was fined £50 for striking Margaret McDougall with a stick and further had to pay 20 merks as assythment and to find lawburrows. He was imprisoned pending satisfaction of the sentence.'

But lesser fines are noted occasionally:-

Ewan McCarn was fined £20 for striking Duncan McVicar and ordered to remain in ward until paid.'

-
1. I.98,
Also I.113 - fined £50 and 40 merks assythment.
 2. I.79,
Also I.140/1 - £6.
Also J.4/1707, 7/1709.

III. ASSAULT.

3. SHERIFF COURT. 1515-1747.

Assaults were the most frequent crime heard by the Sheriff Courts and again they were divided into blood and non-blood.

However, the Fife record does not make any reference to non-blood assaults - the assaults noted are entirely blood assaults.

In the Fife record, the assault actions were divided into

- (1) actions of blood
- (2) actions of blood and distroubillance.
- (3) actions of bloodwyte
- (4) actions of bloodwyte and distroubillance.

(1) Actions of Blood. Final determinations by the court are rare and it is not possible to state the penalties. Fining would be likely but nothing further can be stated.² The cases show a high frequency of absence on the part of the defenders³ and also numerous continuations.⁴

The record shows frequent letters from the king to the Sheriff of Fife and one such letter refers to a serious case of assault, but the letters do not show any final determination - only that the Sheriff had to make the persons responsible find caution to appear before the Justiciar when he arrived.

(2) Actions of Blood and Distroubillance. It is difficult to give an accurate definition of distroubillance, but it is clear that it is similar to perturbacion in the Burgh Courts, i.e. a form of breach of the peace.

As //

-
1. There is one reference to a case of mutilation - but no details are given. Ka.83/4.
 2. Ka.229/0 - fined for absence in blood assault.
 3. Ka.179, 185 etc.
 4. Ka.2, 55, 186 etc.

III. ASSAULT.

3. SHERIFF COURT. 1515-1747.

As in the case of actions of blood, final determinations are seldom noted - continuations and absence were standard.

Only one case shows a conclusion and that was an acquittal

A. appeared having been summoned by B. and C. for hurting, distroubling and blood drawing them. A. denied this and also any wyte, or being aet and part thereof. The case was put to the knowledge of an assize who found A. quit clean and innocent of blooddrawing and distroubling and also of the wyte.¹

(3) Actions of Bloodwyte. The traditional meaning of bloodwyte is a fine for shedding blood, but it is clear from the vast number of cases which refer to bloodwyte that the traditional meaning is inaccurate - actions of blood have been mentioned already, and it is plain that there was a difference between actions of blood and actions of bloodwyte. The point is discussed in detail below.²

Again final determinations are infrequent, but one case shows indirectly that fines were imposed:-

A. became surety to the Sheriff for unlaws for bloodwyte in the action between A. and B.³

(4) Actions of Bloodwyte and Distroubillance. Again fining was the sentence, but no amounts are given:

A. and B. became surety for their respective fines in the action of distroubillance and bloodwyte.⁴

In the action of bloodwyte and distroubillance between A. and B. on the one part and C, D. et alios on the other part the Sheriff called the parties, but only A. and B. appeared, the //

1. Ka.150 - the distinction is noted between blood and wyte

2. See p.140

3. Ka.52, see also Ka.208/9.

4. Ka.56, also 132.

III. ASSAULT.

3. SHERIFF COURT. 1515-1747.

the cause was put to the assize who found A. and B. quit, chargeless and free of the distroubillance, blooddrawing and of the wyte of same.

It is clear from the Tife record that no matter in which classification the assault is placed, the standard penalty in every case is a fine, but no information is available regarding the amounts.

Bloodwyte:

At first sight, the cases appear to support the traditional view that "bloodwyte" is the technical description of all actions of blood and fines for blood shedding, but on a closer study it is seen that this is not so. Actions for blood could exist without bloodwyte, which in fact described only a particular branch of blood actions.²

When the cases are studied in detail, it is seen that there are two concepts involved - the actual assault or blood and the "wyte". The "wyte" meant the cause or reason for the assault, i.e. the provocation. Depending on circumstances, the liability for blood and for wyte might fall on the same person, or they might fall on two separate persons - one was fined for blood, i.e. bloodshedding, while the other person, the person injured, might be fined for the wyte, i.e. provoking the assault by his actions or words.

e.g.

(a) //

-
1. Ka.48.
 2. Bloodwyte is discussed in detail in the Baron Courts - p. 140

III. ASSAULT.

3. SHERIFF COURT. 1515-1747.

- (a) A. was quit clean and innocent of blooddrawing and distroubling and also of the wyte.'
- (b) A. was fined for the wyte of the blood drawn by him on B. and B. was summoned in turn for the actual blood.²
- (c) A. and B. had distroubillit, hurt and drawn blood of others and were both in the wyte thereof and were fined.³
- (d) Action of blood continued and both parties to answer the charges"of blood and the wyte of the same".⁴

A person could be quit of the assault and also of the wyte or again he could be fined for both, depending whether or not he had caused the assault by his actions. In one case A. was fined for wyte of the blood, but B. who actually struck the blow shedding H's blood, did not appear and he was summoned again to answer for the blood.⁵

Not every action need have the element of provocation present, but if the wyte or provocation was charged, the action was described as an action of bloodwyte. Such actions necessarily required the basic concept of a blood assault in the first instance. Actions of blood were assaults which remained at that first stage without any particular degree of provocation present.

(1) Blood assaults.

The later records show the distinction between blood and non-blood assaults more clearly, but again details are given mainly of blood assaults.

Fining was standard but the amounts varied within certain limits - the basic fine was £50;-

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- 1. Ka. 48. 150.
 - 2. Ka. 208/9.
 - 3. Ka. 132.
 - 4. Ka. 186/7.
 - 5. Ka. 208/9.

III. ASSAULT.

3. SHERIFF COURT. 1515-1747.

Robert Pow was fined £50 for assaulting a bailie's wife to the effusion of her blood.¹

Heavier amounts are noted if the assault was more serious:-

James Algie was fined £200 for seriously beating and blooding his wife. He was warded until he found caution to ensure his future good behaviour.²

A few cases show a lesser amount - £10.³

Imprisonment could be added to the fining:-

(a) until the fine was paid.⁴

(b) until caution was found to ensure good behaviour in future.⁵

Payment of assythment was imposed usually in addition to the main fine.⁶ The pursuer claimed assythment in his summons, but the amount he claimed was not always awarded.⁷

(2) Insulting.

It is seen in the lower court records that insulting and defamation cases were treated criminally. Accordingly it is convenient to include such cases in the Assault part of the study as they were considered verbal injury.

In Paisley records, the indictment or summons set out the penalty which the accuser wanted to impose, and in one case of wrongful accusation, the accuser, who had been slanderously //

1. Kb.35/6. 1687, also Kb.38.1685, 82, 1715.
Kc. 81/2.1685, 84.1687.
112.1716, 180.1720.
2. Kb.31/4.1682.
Also 36/8.1684 - also £100. Kb.46/8.1687.
Kc.81.1685, 178.1720.
3. Kb.82, 140/1, 144/7,
Kc.86, 120/1.
4. Kb.46, 144, Kc.81, 178, 180.
5. Kb.31/4, 144. Kc.180.
6. £100 and £10 assyth. Kb.46. Kc.81/2.
£50 and £10 assyth. Kc.81.
£10 and £20 assyth. Kb.144.
£10 and £10 assyth. Kb.140/1.
£10 and £ 5 assyth. Kc.86.
7. Kb. 36/8 claimed £50 assythment but not granted.

III. ASSAULT.

3. SHERIFF COURT. 1515-1747.

slandrously accused of being a thief, demanded that his slanderer should be placed in the jugs, with a paper on his head setting out his crime, that he should confess his crime in court, crave forgiveness saying "False tongue you lied" and pay a fine of £50 and damages of £200.

The sentence was not imposed as the charge was dropped.

However, another case does show a similar penalty which was imposed - some persons made wrongful accusations of witchcraft and they were fined 100 merks and had to crave forgiveness publicly. If they refused to crave forgiveness, they were to be exposed for an hour at the Cross with a paper on their breasts and had to confess their crime.

1. Kb. 129/0.

2. Kb.50/6.

III. ASSAULT.

4(a) SHETLAND COURT. 1602-04.

The distinction between blood assaults and non-blood assaults is clearly seen in this record, but here the assaults are sub-divided even further into (a) blows which caused "bleeding above the end" i.e. above the breath: (b) blows which caused "bleeding below the end": and (c) blows which caused the assaulted to fall to the ground - dounraxtering.

The structure of assaults in this court is reminiscent of that mentioned in Regiam Majestatem IV. Cap. 39 and 40 although the monetary amounts are different. Regiam Majestatem draws the same distinction between above and below the breath - but it is difficult to say where on the body the dividing line is drawn - whether the breath was held to be the mouth, chest or stomach.

(1) Blood Assaults.

The standard penalty was fining, but a definite system of amounts covered the different categories of assault.

(a) For blooding above the end the fine was 40/-:-

It is tryit that A. bled B. above the end, thairfor is decernit to pay xl s. under paine of poynding.³

(b) For blooding beneath the end the fine was 4 merks:-

A. is decernit to pay iiiij merks and quyit himself of the bleiding of B. benethe the end.³

(c) Dounraxtering was worth 1 merk over and above the

basic fine:-

A. has dounraxterit B. and bled him, thairfor is decernit to pay i merk (for dounraxtering) and xl s. (for blooding).⁴

In certain cases the assailant was fined for both shedding blood and for striking, i.e. the analysis was (a) a fine for //

1. Blood drawn below the breath - penalties were less by one-third than for blood above the breath. RMIV.39.
2. L.5. etc.
3. L.2. etc.
4. L.17 etc.

III. ASSAULT.

4(a) SHETLAND COURT. 1602-04.

for bloodshedding and (b) a fine for striking the blows which caused the bloodshedding.

A. bled B. on her eye with a stave and cast her down, hitting her three times - fined 40/- for the blood (being above the end) and 3 merks for the dounraxter and blows.'

Some assaults show a reference to the accused placing himself in the judge's will - but no further details are given and the eventual penalty is not known although fining is almost certain.'

The majority of the blood assault entries are short and do not give details of the actual assault. Only the parties, the fact that it was a blood assault and the punishment are given. But in some cases the details are given and the following illustrate the general aspect of the assaults:

A. was accused of "the cruel and merciless mutilation of B. on his right eye and de-oculing him thereof, whereby he wants the sight of the same and has hurt him on both hands, through which he is unable to win his living". A. admitted and submitted to the judge's will.'

For throwing a stone at B. and bleeding him, A. was fined 40/- for throwing the stone and 40/- for bleeding.

For bleeding B. in the head with a knife, A. was fined 4 merks.'

In one case there is a reference to the blood being shown to a third party as evidence to the same effect as the bloodstained cloth in some baron courts, but this was unusual and there is no other reference.'

(2) Non Blood Assaults, were normally described as striking //

-
1. L.2. etc.
 2. e.g. L.35 etc.
 3. L.35.
 4. L.115.
 5. L.117, also L.122.
 6. L.1.

III. ASSAULT.

4(a) SHELLAND COURT. 1602-04.

(2) Non Blood Assaults (Contd.)

striking, troubling or downraxtering (striking to the ground) or any combination. While there was no difference in penalty between striking and troubling, downraxtering normally incurred an additional fine, over and above the fine for striking.

The majority of cases do not give many details - the usual entry being variations on:-

A. hit B. with a stave and cast her down.

The descriptions of the striking vary - giving a blow, stroke, cuff and nevel.

The standard penalty was a fine of 1 merk for each blow - 1 merk, 2 merks, 3 merks etc. depending on the number of blows. 1 merk was the most frequent.

Other forms of non-blood assaults are noted:

- (a) "troubling" - but no case gives details of what amounted to troubling - the fines varied - 40/- was the normal fine but 4 merks and 2 merks are noted:
- (b) "downraxtering" occurs frequently and justified an additional fine of 1 merk:²
- (c) "cuffing" - the fines for cuffing were heavier than the normal striking fines - each cuff was worth 5 merks:²
- (d) In a few cases the term "leitig" was used - in such cases the fines were much heavier - the details are insufficient to give any reason.⁴

Drawing a sword or pistol in public constituted an assault and there are occasional references to this - fines of 1 merk are noted, with one of 2 merks.⁵

(3) Aggravations. //

-
- 1. L.2.
 - 2. e.g. L.22.
 - 3. L.151 & 66, L.87 - 10 merks.
 - 4. L.115 - 10.
 - 5. 1 merk - L.33, 131, 135.
2 merks- L.88.

III. ASSAULT.

4(a) SHETLAND COURT. 1602-04.

(3) Aggravations.

The numerous aggravations were the same for both blood and non-blood assaults. Each aggravation was worth a fine of 40/--.

1. Aggravations of place:

- (a) Assaulting another in his home.¹
- (b) between the sea and the banks.²
- (c) in frie coupsta (in a market place).³
- (d) on the sea.⁴
- (e) on the King's highway.⁵
- (f) in Church.⁶

2. Aggravations of time:

- (a) under silence of night.⁷
- (b) on Sunday.⁸

3. Aggravations of manner:

- (a) using a weapon or stone.

The different aggravations could be combined and there was a corresponding increase in the penalty, e.g.

bleeding the other at his home on a Sunday received a fine of 120/--, 40/- for the assault, 40/- for the attack on his home and 40/- for the attack on the Sunday.⁹

(4) Bloodwyte.

The references to bloodwyte are infrequent, but they do occur and they show that the fines for bloodwyte are separate from the ordinary blood fines and that bloodwyte was a special fine for provocation:-

It //

-
- 1. L.2. etc.
 - 2. L.5. etc.
 - 3. L.30 etc.
 - 4. L.130 etc.
 - 5. L.122 etc.
 - 6. L.135 etc.
 - 7. L.89 etc.
 - 8. L.2. etc.
 - 9. L.30, 135, 140.

III. ASSAULT.

4(a) SHETLAND COURT. 1602-04.

It is tried and found that A. bled B. above the end on the head with a sword and was decerned to pay 40/-. Because B. provoked A, B. is found to have the bloodwyte and has to pay one-half of 40/-. A. is freed of the expenses of healing B.'

It is clear from the cases that the fine for bloodwyte applied where the assaulted provoked the assault. The Court recognised the provocation by imposing the standard fine of 40/-- and then demanded payment of half from each party - the assaulted (who was also the provoker) paying his share.

(5) Insulting.

The cases follow a standard form - a fine of 4 merks payable to the king and 4 merks to the person insulted.²

If more than one person was insulted, each of the insulted could receive the payment. In one instance, the person said that there was not an honest man in the parish except three and he had to pay 4 merks to the king for everyone insulted and 4 merks to each of the people insulted.³

Some variations are noted - 4 merks to the king with no payment to the defamed⁴ - normally because each insulted the other equally.⁵ In severe or aggravated cases, the fine was increased to 8 merks to the king and 8 to the party defamed.⁶

In one case of a fine of 8 merks, it is stated that the higher fine was imposed because the Court officer was guilty of defaming another, and such conduct was held to be more serious in view of his public position; he also lost his office and had to crave forgiveness in church and in court.⁷ In another, the words were spoken in anger between brothers.⁸

Indignity (craving forgiveness in public) was added in a number of cases:-

The //

1. L.111, also L.125.
2. L.3, 20, 27, 30, 33 etc.
3. L.3.
4. L.12, 13, 14, 18 etc.
5. e.g. L.135, 137, 140.
6. L.3. 19, 31, also 8 merks to the King only - L.3., 27.
7. L.5.
8. L.19

III. ASSAULT.

4(a) SHETLAND COURT. 1602--04.

(5) Insulting (Contd.)

The accused was fined 8 merks and further had to ask the insulted's forgiveness in court and also in the parish church on Sunday before the minister and whole congregation, to the example of others.'

Many defamation cases close with a reference that the defamed obtained a guarantee that no one should repeat the defamation under a monetary penalty - usually £20² or £40² but £10 is noted.⁴ Cases occur of these penalties being enforced.⁵ The actual substance of the defamation is more or less standard - wrongfully accusing the other of being a thief or whore.

1. L.3. simil. 81/2, 86, 113.
2. L.31, 73, 111 etc.
3. L.3, 19, 27, 48 etc.
4. L.14, 134 etc.
5. L.23, 121 etc.

III. ASSAULT.

4(b) ORKNEY & SHETLAND COURT. 1612-13.

(1) Blood Assaults.

The references to assaults are infrequent, but it is seen that the standard penalty was fining. The amounts are not given.

David Sandie was accused of cruelly hurting and wounding Nicol Rendal by striking him with a baton on his head. He was found guilty and fined "ane unlaw of bluid".¹

In a bond of caution to appear, details of a serious assault are noted, and the cautionary obligation was exceptionally high - 1200 merks:-

Malcolm Oback maliciously and cruelly struck and beat Margaret Marwick and kicked her on her womb to the hazard of her life.²

(2) Non-Blood Assaults.

Two cases show that a person could be absolved of blood and yet fined for riot.

Henry Alschunder was accused of hurting and wounding Edward Garsetter on his face with a stick to the effusion of his blood. The assize absolved him of the blood but found that he had struck the other. Alschunder was fined £10 as unlaw for the riot.³

(3) Bloodwyte.

One case refers to a bloodwyte, and again it is seen to be a separate fine from that of blood:-

A. was fined for wounding B. on the face, but B. was found in the wyte of the blood. There was a further provision that A. was to make amends to B. - by way of assythment. This was unusual as assythment was not normally given to a person who was fined for wyte.⁴

(4) Insulting.

A Court statute stated that the penalty was a fine of 53/4 payable to the king and a sum at the judge's discretion to the party offended. The offender had also to ask forgiveness before the minister and the congregation on the following Sunday, but no case is noted.⁵

1. M.59/0, also 35, 91/2.
2. M.92
3. N.61/2, also 91/2.
4. M.35.
5. M.22.

III. ASSAULT.

5. REGALTY COURT. 1547-1706.

Early in the record a Court Statute was passed in an effort to reduce the number of assaults and disturbances and it was stated that "if blood be drawn, double the former fine is to be imposed, viz:- 240: if there be strokes without blood - 120: if one injures another with words, threats or drawing weapons - 120: further, offenders' bodies are to be punished, held in irons or stocks".¹

In the blood assaults, the charge was that A. violently beat, struck and wounded B. to the great effusion of his blood and danger of life² - or less forcibly - struck and blooded - struck and wounded - and variations thereon.³

The basic charge in "non-blood" assaults was beating and striking,⁴ but such cases were described sometimes as tuiizie,⁵ riot⁶ and brawl.⁷

The distinction is also seen in the penalties - which are found to be standard - 350 for a blood assault and 120 for a non-blood assault.

(1) Blood Assault.

The entries in the earliest period do not give much detail. Blood assaults are rare and where they occur the reporting is brief. The normal entry states that "ane bluid was drawn be A. on B. and A. was fyled therefor".⁸

In the Court Statute quoted above, it is stated that the fine //

1. Na.33/4.
2. Nb.10, 35, 64 etc.
3. Na.28, 31, 46, 51/2 etc. Nb.22, 22/3, 30/1 etc.
4. Nb. 14/5 etc.
5. Na.50.
6. Nb.14 - riot also included striking animals Nc.8/9.
7. Na.46 - also Nb.14 - denied blood, admitted striking.
8. Na.28.

III. ASSAULT (Contd.)

5. REGALTY COURT. 1547-1706.

(1) Blood Assault (Contd.)

fine for blood was £40, but no details of the fines are given in the cases of the period and it cannot be said whether the Statute was enforced or not.

In the middle period the position improved slightly but the actual facts of each case are not given in detail.

As an example of the blood cases of this period, the following may be noted:

Action by Procurator Fiscal (and A. for his interest) against B. who violently beat, struck and wounded A. upon several parts of his body to the great effusion of his blood and danger to life.

In this period, the standard penalty was fine of £50.²

In one case, the standard penalty of fining was not imposed. A minor was sentenced to the jugs for half an hour for a blood assault - because of his age.

In the latest period, no mention is made of blood assaults a certain number of assaults are noted, but all seem to fall into the category of non-blood assaults. It is possible that the court no longer observed any distinction between the two - evidence of this view could be deduced from one of the fines imposed - £50 was the normal penalty for a blood assault and a fine for this amount was stated to be the penalty where a person created a disturbance by striking another's horses and preventing passage.³

But it is more likely that the assaults which are mentioned were all non-blood assaults and that the fine of £50 for such an assault was exceptional.

1. Nb.10.
2. Nb.22, 22/3, 30/1, 137, 203/4, 230, 233, 274, 400, 434.
Also Nb.64, 109/0 - £50 fine and £50 wye.
3. Nc.8/9.

III. ASSAULT (Contd.)

5. REGALTY COURT. 1547-1706.

(2) Non-Blood Assaults.

In the earliest period, the non-blood assault references are brief.

The normal entry in this period is that a brawl was made by A. on B. with the further note that A. was found guilty and fined. The amounts are not stated although a court statute gave £10 for non-blood assaults. The same fine could be imposed for threatened assaults. The statute also provided for personal punishment in the stocks.²

Where details of the penalty are given, it is seen that the standard punishment was fining -

Helen Gibson and William Edgar, procurator fiscal, complained that Thomas Mein was wrongfully ploughing a field belonging to Helen Gibson. She tried to stop him, but after insulting her he struck her on the arm for which he was fined £5.³

An early case gives full details.

Bertill Derling came to the Superior of the Monastery and complained of the violence done to him and his mother within their house by William Ormestoun - "quha cam and brak up thair duris the nycht afore at houris of the nycht and strake Bertill with ane grete tre and brak the samyn upone the said Bertill and strake his moder and further drew ane quhynzer and schorit to stryk him" - if Bertill did not pay maill to him. Ormestoun took an ox belonging to Bertill and then took a horse from a neighbour's cart. Such a crude display of powerful might was not right and the court found "that such injuries, violence and displeasures were done to the great displeasure of God and contempt of the authority of my Lord (commendator) the convent and their bailie and chamberlain", and the accused had to find caution, under penalty of forfeiture, of all that he held of the Monastery, that he would not trouble anyone again in this way.⁴

In the middle period, the assaults follow a standard pattern with fines of £10. Few details are given in most cases and the standard entry simply states that A. is decerned //

1. e.g. Na.46.

2. Na.33/4.

3. Na.158, also Na.148 - £10. Na. 156, 157.

4. No.152/4 - 14 June, 1557.

III. ASSAULT (Contd.)

5. REGALITY COURT. 1547-1706.

(2) Non-Blood Assault (Contd.)

decerned to pay the procurator fiscal £10 for beating and striking B.¹

Of the cases which give details of the assault, the following may be noted -

A. gave B. a switch with a cane - £10.²

A. and B. fought and wrestled with each other - one bit the other's thumb and he pulled the former's hair - £10.³

Aggravations are noted:-

A person struck another under cloud and silence of night and was fined £25.⁴

Only two cases are noted in the latest period, but in both a certain amount of detail is given.

The Court Officer went to the Tolbooth of Helrose in the late evening to visit the prisoners and to make sure that the doors were locked. Two men lay in wait for him and when he went up the stairs they struck him. They endeavoured to release one of the prisoners "under cloud of night". The officer hit them with his staff and ordered them to keep away. They took his staff and broke it and then pinioning the officer they pushed him down from the Tolbooth and through the town, insulting and abusing him. Although the defenders gave a somewhat different account of the episode, they were fined £20 and £30 on account of the aggravations.⁵

(3) Bloodwyte.

Again it is scenth that "wyte" was a separate and distinct fine from the blood fine, and that it was a fine for provocation.

References to bloodwyte are frequent in the middle period and occur also in the earliest period, although to a lesser //

1. Nb. 22/3.

2. Nb. 30/1 also Nb. 15.

3. Nb. 59/0, also Nb. 67, 68/9, 72: also 10 merks Nb. 14.

4. Nb. 71.

5. Rc. 3/4 - also Rc. 8/9 - £50 fine, £10 damages.

III. ASSAULT. (Contd.)

5. REGALTY COURT. 1547-1706.

(3) Bloodwyte (Contd.)

lesser extent.

The difference can be seen most clearly when A. is fined for blood and B. is fined for wyte:

William Mercer was decerned to pay the procurator fiscal £50 as a fine for blooding Robert Mein. Robert Mein was fined £50 for bloodwyte.'

But the difference is also seen where the assailant was fined for blood and was also fined for bloodwyte. There was a double liability and the fines were separate, in theory at least:

Andrew Fisher was found guilty of wounding William Bell and was fined £50. Fisher was also found guilty of the bloodwyte in the assault and was fined a further £50.²

In those cases where the same person was found guilty of blood and wyte, the court frequently imposed one fine of £100. This does not detract in any way from the dual nature of the fines. The standard blood fine or unlaw was £50 and in this court the usual bloodwyte was £50 also.³ Thus where the dual liability was present on one person, one fine was imposed for convenience.

A. was decerned to pay to the procurator fiscal £100 for the blood and bloodwyte committed by him on⁴

Such cases are more properly a fine of £50 for blood and £50 for wyte.

As further evidence of the distinction, a minor was sentenced to be put in the jugs for half an hour for blood and he was absolved of the bloodwyte in respect of his minority.⁵

1. Nb.22.
2. Nb. 203/4, also 230.
3. Nb.22.
4. Nb.64.
5. Nb.10.

III: ASSAULT (Contd.)

5. REGALTY COURT. 1547-1706.

(3) Bloodwyte (Contd.)

In one case where A. was decerned to pay £100 to the procurator fiscal for striking and blooding B. and for the wyte thereof, B. the injured, stated that A. was in the bloodwyte of the assault as B. had not given A. any cause nor provocation.

This case so clearly underlines the true meaning of bloodwyte that the editor of the published Records says of this reference in a footnote -

"This seems a new use of the term, implying not the penalty itself, but the liability thereto". No further use is made of the observation and the reference is dismissed as being exceptional. As has been shown, this reference is not exceptional and is in fact perfectly consistent with the proper meaning of bloodwyte, which occurred frequently throughout the Record.

The bloodwyte was paid to the fiscal along with the main fine.

In the earliest period, references to wyte are infrequent, and those which occur are inconclusive.

One blood case is reported as follows -

"Ane bluid allegeit drawin be Hew Hardie in Blainslie upone Peter Darling, wrycht. Hew Hardie fylit in ane bluid and wrang: Peter fylit in ane bluid".

It is possible that "wrang" here is bloodwyte and the construction of the case is that both parties drew blood on each other, and as Hardie was responsible for the assault in the first place, he was fined for blood and wyte.

In some non-blood assaults in this period, there are similar entries.³

1. Nb.110, also 64, 311.
2. Na.72.
3. Na.52 - A in wycht of tulzie betwix him and B.
Na.52 - A in wrang of tulzie.
Na.74 - A in ane wrang and brall, B in brall.

III. ASSAULT (Contd.)

5. REGALTY COURT. 1547--1706.

(4) Defamation.

A fine of £10 was the usual penalty with either imprisonment until payment, or in the earlier period, caution to guarantee payment added. The amounts of the cautionary obligation are not stated, but 100 merks is noted in one case.

The actual cases could stem from allegations of theft or immorality which were not supported, but uncomplicated cases of the parties insulting each other were frequent.

In an early court statute, the penalty was stated to be 48 hours imprisonment and kirk censures, but the cases do not show the sentence being enforced.

1. Na.164.
Nb.13, 429.
2. Nb.13.
3. Na.16, 150/1, 200.
4. Na.150/1 -- or banishment as the penalty Na.200.
5. Na.164.
Nb.13.429.
6. Na.16, 150/1, 164, 197, 200.
7. Na.33/4.

III. ASSAULT (Contd.)

6. BARON COURT. 1523-1747.

The assault entries in the Baron Court records are given in detail and a definite pattern in sentences can be seen. The distinction between blood and non-blood assault is clearly defined and can be readily seen in (1) the phrasing of the charge (2) the reply to the charge and (3) the sentence imposed.

1. Phrasing of the charge: "Wounding to the effusion of his blood" and "hurting, wounding and blood-drawing" are normal in blood assaults.

"Oppressing, striking, beating"², "riot"³, "battery" etc. are the usual charges in non-blood assaults.

It is true that in some cases the charge is phrased "striking and blooding" which might imply that no difference was recognised, but a more accurate analysis of the position is that, in those cases where the charge is phrased "AB for striking and blooding CD" the Court had to decide which form of assault had been committed.⁴

2. Reply to the charge of blood:

John Jamieson denied the blood, but confessed the striking of William Thomson.⁵

3. Sentence imposed:

The bailie finds both the blooding and beating proven against Alexander Youngson and the beating proven against Robert Cruickshank and therefore fines Alexander Youngson £50 Scots and Robert Cruickshank £10.⁶

In most entries the fines for blood and fines for striking are alternative, i.e. a person is not usually fined £x for blood and £y for striking, the normal rule being that the assault //

1. e.g. P.144/6.

2. Ra.235.

3. Some riot actions include blood P.121/4, Q.48, 192.

4. S.37/8.

5. Ra.273, also Ra.285, 301.

P.162/163.

6. P.155/6, also Q.48/9, 169,
Ra.252, 293, 308.
S.224/5.

III. ASSAULT (Contd.)

6. BARRON COURT. 1523-1747.

3. Sentence imposed: (Contd.)

assault must fall into one class or the other - either he shed blood or he didnot, but in a few cases in Stitichill it is seen that both parties could be fined for Riot and one of them also fined for blood shedding.¹ While this is further evidence of the distinction between the two forms of assault, such a decision is not common and much more frequently it is seen that if both forms of assault were libelled and blood was proved, only a fine for blood was imposed.²

The distinction between blood and non blood assaults is not seen so clearly in the earliest record noted - Carnwath. In this record all the assaults are described as "blood". It is not possible to say whether assault actions were only instituted if blood had been spilt - in all the assault actions in which details are given, blood has been shed but this is inconclusive as very few cases give details of the facts, and the vast majority of the blood entries give no information at all.

(1) BLOOD ASSAULTS.

In Carnwath the usual introduction to an assault action is "the Baron foliot AB and CD for fying his ground with violent blud" and this covers a wide range of assaults in extending/degree from attempted murder to slight blows.

In some cases there is an admission by one or both of the parties that blood was drawn,³ and it is advisable to give a brief note on the significance of this admission as its effect //

1. Q.51 - this is also seen in Shetland, e.g. L.2. etc.
2. Q.96, 124/5, 178.
S.224/5.
3. O.133/4, 139, 142, 181 etc.

III. ASSAULT (Contd.)

6. BARON COURT. 1523-1747.

(1) BLOOD ASSAULTS (Contd.)

effect changed during the period under review. In the early record this was not an admission of liability on the part of the person who admitted that blood had been drawn (as it is in the later records). In the early period it amounted to the legal essential of the crime of blood - that someone's blood was shed and this fact was admitted by the person injured in order to obtain the conviction of the person who drew the blood. The person admitting the blood was not necessarily fined, and in fact may be acquitted.

Thus in Carnwath, the admission of blood was the starting point of the action; it was the task of the inquest to proceed from that point and to find out whose blood was drawn and who was responsible.

This form of admission of blood, whereby the Court's attention was directed to the fact that blood was spilt, was not followed in the later records where, if a person admitted that blood was spilt, he was held responsible as the statement amounted to a confession on his part and was fined accordingly, but in the Forbes and Corshill records a special form of proof was observed to the same end as the admission of blood in Carnwath. In some blood actions in Forbes and in one case in Corshill the fact that blood was spilt and that the action related to blood was proved in Court by the production of a cloth by the prosecutor (usually private in Forbes) in which was collected the blood //

1. e.g. O.171, 182, 197.

2. Ra.263, 268, 271, 272 etc.

3. S.224/5.

III. ASSAULT (Contd.)

6. BARON COURTS. 1523-1747.

(1) BLOOD ASSAULT: (Contd.)

blood spilled during the assault at issue. Both Cornhill and Forbes Baron Courts held a preliminary investigation of witnesses before the question of blood was referred to the inquest - and the witnesses spoke to the shedding or non-shedding of the blood. In this preliminary investigation the blood-stained cloth was produced as evidence of the injury received by the prosecutor and on occasions if a cloth was produced witnesses might not be called. It is seen from the cases that if the injured person had any intention of seeking his revenge in court, he collected all the blood possible immediately after the assault.¹

However, so far as Cornwath was concerned, it is seen that the main issue for the inquest to determine was the decision as to who was liable for the bloodyte - or the cause of the bloodshedding, for while the fact that blood had been shed may be admitted, the wyte was admitted seldom, if ever. But as the fine for blood and the fine for bloodyte were quite distinct, the consideration of bloodyte is delayed for the present.²

The penalty for blood was fining, but the amounts were not stated in the early record - as examples of the blood assaults, the following may be noted:-

The Baron pursued James Brown and Robert Hamilton for "tylling his ground with violent blud". Robert admitted the blood, but denied the wyte, and alleged that James had come on him in his (Robert's) house and struck him. James also denied the bloodyte and stated that Robert drew a knife on him and would have stabbed him. The inquest found James in the blood and bloodyte, and quit Robert of the wyte.³

1. No. 262, 301, 303.

2. See below p. 140

3. O.181.

III. ASSAULT (contd.)

6. BARON COURT. 1523-1747.

(1) BLOOD ASSAULTS (Contd.)

The Baron -v- James Hastie and Robert Baxter. Baxter stated that "he had na mynd one nathyng, quhill Hastie tuik him one the heid with ane ax and hert him rycht ill". Hastie was fined for blood.¹

In the later records, the standard fine for blood was £50.

Procurator Fiscal -v- James Wise. James Wise, who was one of the guards of a market, saw two men in argument and in trying to settle the dispute, was assaulted by one of the men. To defend himself, Wise struck his assailant twice with the butt of his musket, wounding the attacker. From the evidence stated, there was no doubt that Wise was attacked first and also warned the person to desist before wounding him, and while it is not surprising that he was fined £50 for blood, having regard to the objective standard applied in blood cases, it is surprising that assythment of £10 should have been awarded to the injured person.²

Procurator Fiscal -v- John Smith. John Smith was provoked and insulted by four others in the house of Cransacre and on leaving to avoid their company, they followed him armed with staves and other weapons, and pursued him for his life. He was compelled to fight in his own defence, and in so doing, wounded one of the four. In this case, Smith was fined £50 for blood shedding, but he was absolved from any liability to assythment, as he acted in his own defence.³

Procurator Fiscal -v- Robert Edward. Robert Edward stated that he had been instructed by his master (the Baron) to apprehend the persons who were responsible for destroying the Baron's corn and grass and when Edward endeavoured to seize the two men responsible, they abused and insulted him and to provoke him, admitted that they were responsible and would do so again. They continued to destroy the corn and Edward tried to stop them. They attacked him and to defend himself, he beat them, causing injury. One of them tried to seize Edward's halberd, and in doing so, cut his hand. Edward was fined £50 for bloodshedding, but was freed from assythment as he acted in his own defence, and the spilling of blood was caused by their own foolish conduct.⁴

Lesser fines are noted on certain occasions -

Thomas Duncan and Alexander Duncan, his son, were convicted by the inquest for hurting, wounding and blooddrawing of Alexander Craigmyll - Thomas Duncan was fined £40 with £5 of assythment.⁵ £10 was by far the most frequent fine after the £50 fines.

1. O.203/4, also O.27.

2. P.121/4.

3. P.144/5.

4. P.147/8, also £50 P.121/4, 144/6/etc.
147
Q.29, 30/1, 39, 48 etc.
Ra.241, 246/7, 260/1 etc.
S.101/2, 107, 143/4 etc.

5. Rd.223, also Ra.269, 267. And £30 - Ra.255/6, 273.

£24 - Q.22, 24. £20 - Ra.252, 268, 271 etc.

£10 - P.30, 163/4 etc, Q.7,12,10 etc,
Ra.235, 249/0 etc, S. 86/7 etc.

III. ASSAULT (Contd.)

6. BARON COURT. 1523-1747.

(1) BLOOD ASSAULTS (Contd.)

It is seen from the foregoing cases, representative of all the Baron Courts studied, that if A. assaulted B. and the force of the assault was such that B. was wounded, A. would be fined for blood shedding -- "unlawed and amerchat for blood".

However, an extremely objective standard was imposed and the cases show that if blood was shed, the assailant was fined for blood even if the blow was accidental:-

Procurator Fiscal -v- Isobel Turnbull for blood committed on Bessie Aitchieson, which matter was referred to the inquest who found Isobel Turnbull guilty of committing the blood accidentally and she was fined £10.'

Liability for blood unlaw arose even if there was no intent to injure and the liability on this basis is entirely dependent on the presence of blood, irrespective of whether it had been shed in anger or not.

The liability was so objective that it was not annulled by a plea of self-defence. This is seen in a number of cases, but principally in *Urie (P.F. -v- James Wise*²; *P.F. -v- John Smith*³ and *P.F. -v- Robert Edward*⁴ - the details of these three cases have already been noted above). In each of these cases, the defender struck and wounded another, but had acted in self defence in varying degrees; however, the plea of self defence was not accepted as a bar to the imposition of an unlaw for blood spilling. Also if the defender had been provoked by the injured person, this provocation did not mitigate the assailant's liability.

1. Q.7. but see in *Carnwath* - two women were accused of blood but they were acquitted as they were playing and not in earnest. O. 108.
2. P.121/4.
3. P.144.
4. P.417, also in *Forbes*. Ra.249.

III. ASSAULT (Contd.)

6. BARON COURT. 1523-1747.

(1) BLOOD ASSAULTS (Contd.)

Provocation, however, was dealt with in another way -- by the imposition of the separate fine of bloodwyte.

Thus if the blood had been shed, no matter what the provocation, nor the degree of self defence under which the defender had inflicted his blow and indeed even if he had struck accidentally, he could expect to be fined for blood.

While absence of intent might give rise to liability to blood unlaw, such absence of intent would not render the person liable to bloodwyte.

(2) NON-BLOOD ASSAULTS.

If the assault simply involved striking which did not draw blood, a fine was imposed for "riot and straiques" as it was called in Stitchill, or in other records "striking and beating" and "battery". Here the fine was exacted for the fighting qua disturbance and was in most cases for a much lesser amount than the blood unlaw.

So far as terminology of non-blood assaults is concerned, it is interesting to note that in the Stitchill record, the term "riot" is strictly used to describe a non-blood assault. Riot, however, is used much more widely in the Urie record (the two records are of the same period) and in Urie, riot describes blood assaults as well as non-blood assaults and indeed covers all breaches of the peace -- //

1. Although two riot charges included blood - P.121/4.147. Q.48, 192 etc.

III. ASSAULT (Contd.)

G. BARON COURT. 1523-1747.

(2) NON-BLOOD ASSAULTS (Contd.)

peace - poaching, wrongfully lifting cut peats, negligently burning heather and negligently destroying corn and grass.

The standard penalty was fining and amounts of £10 and £5 were usual. As illustrations of non-blood assaults, the following may be noted:-

P.S. -v- John Ferguson for whipping James Laurie. Ferguson stated that he saw Laurie with his (Ferguson's) whip and presumed that Laurie had stolen it from him. Ferguson confessed that he gave Laurie several strokes with it, and was fined £10.¹

George Anderson gave in a bill against Patrick Leith for beating and striking George Brebner, herdsman to Anderson. It was alleged that Leith filled Brebner's mouth with sand, held his head under water and threatened to beat and strike every future herdsman whom Anderson may employ and Leith was fined £5.²

All the Baron Courts passed their own statutes to control their subjects, and the records make frequent reference to these statutes, e.g. -

The Laird and his baillie having regard to the shameful, uncivil and unchristian carriage, frequently happening within the Barony and especially in and about the Kirktown in the late drinking "flyting" (tormenting) abusing, cursing, swearing, beating and striking of each other, to the great dishonour of God and shame among Christians, statute decreed and ordained that whoever is found late drinking etc. shall be fined £15 scots.³

Normally, however, the subsequent cases do not refer to the statutes and they appear to be decided on a common law basis but in the Corshill Court, the statute quoted above was referred to frequently in later cases and the penalty of £15 a heavier fine than the customary non-blood fine (£10) exacted. //

1. P.126/7, also 95, 127.

2. Ra.250/1, also £10 - 1.53, 126, 156 etc.

Q.28,48,51 etc.

Ra.255, 252, 273 etc.

S.76/7, 78/9, 79/0, 80 etc.

£5 - Q.22, 31, 36, 79/0 etc.

3. S.86.

III. ASSAULT (Contd.)

6. BARON COURT. 1523-1747.

(2) NON-BLOOD ASSAULTS (Contd.)

exacted. The bulk of the cases under the statute are concerned with "insulting and abusing" and not striking, but some of the cases include a reference to "beating":-

The Laird -v- William Walker and John Hendry for transgressing the act recently made in respect of fighting and striking. Hendry stated that Walker had pushed him into a fire and had pulled his hair. As the matter could not be proved blood or battery, the judge referred it to the inquest, who found that both parties had broken the recent act. Walker was fined the statutory penalty of £15 and Hendry £10.'

Reference to the act is omitted in some later non-blood assault cases which appear to be treated on a common law basis.²

Aggravations are noted, e.g. striking one of the parties in the open court² or in a public place (on market day)⁶ and also committing the assault on a Sunday.⁵ It is seen that the usual fine in such cases was £20.

Combined Crimes:

Assault & Defamation.

Richard Taylor was fined £10 for riot on Thomas Wood and Wood was further fined £3 for defamation, and for provoking the riot by unjustly calling Taylor a thief.⁶

The question of threatened violence was dealt with by the Baron Courts under the heading of non-blood assault.

Threatened violence is close to assault in practice and while there is a difference in result between an actual and threatened assault, threatened assault was treated severely by the courts and was equated in penalty at least to a non-blood assault, e.g.

Thomas //

1. S.87/8, also S.100 (aggravated).
2. S.116/7, 224/5.
3. Q.135 - £10.
4. S.239/0 - £20.
5. S.100, F.117/8 - £20.
6. Q.57.

III. ASSAULT (Contd.)

6. BARON COURT. 1523-1747.

Assault & Defamation (Contd.)

Thomas Galbraith was fined £5 for riot in that he threatened to kill any who poynded his goods.¹

Robert Hogarth was fined £10 for breaking Andrew Wilson's door under the cloud and silence of night, and assaulting and invading Wilson, threatening to kill him in his own house.²

Patrick Millar was fined £10 for threatening to fell Barbara Wilson and also to break her back. He invaded her house, threatening to burn the house with Barbara Wilson inside, declaring that she was a witch.³

(3) BLOODWYTE.

Reference to bloodwyte has already been made on certain occasions and it was stated that bloodwyte was a fine imposed for provocation. The Baron Courts show the operation of bloodwyte particularly clearly and it is appropriate therefore to study bloodwyte in some detail at this point.

According to many writers and sources, bloodwyte is stated to be a fine imposed for shedding blood,⁴ but this explanation is inadequate and gives a false impression. In each of the records studied, the evidence shows beyond doubt that the definition and operation of bloodwyte was not simply a fine for shedding blood. If the word is reduced to its elements - blood and wyte - the latter phrase undeniably meaning fine, one can understand why the traditional definition has found such acceptance, but from the Court records at least it is seen that the traditional definition is not complete and to say that bloodwyte is a fine for shedding blood is a superficial observation.

it //

1. Q.90, also Q.57 - 10/-, Ra.263.

2. Q.111, also Q.187.

3. Q.111.

4. Carnwath - Intro p. civ, cv.

Stitchill- Glossary 219.

Forbes - Glossary 223.

Intro. 207.

Urie - Intro. vii.

III. ASSAULT (Contd.)

6. BARON COURT. 1523 - 1747.

(3) BLOODWYTE (Contd.)

It has been shown already that if A. injured B. to such an extent that B's blood was shed, A. would be fined for blood and on the basis of the meanings given in the various Glossaries, the previous writers would classify this fine as a bloodwyte. But this fine was described in the records not as a bloodwyte, but as a blood unlaw, i.e. a principal fine, and it will be shown that bloodwyte is a secondary fine which is not necessarily present in every blood assault, whereas the blood unlaw is the basic penalty in all blood cases.

However, it must be shown first that there is a difference between the ordinary or principal fine for blood, i.e. a blood unlaw, and a bloodwyte.

The distinction between the two fines is not seen so clearly in Carnwath as in the later records, but as Carnwath is the earliest record and as it is advisable to study this question on the lines of development and growth, Carnwath will be noted first.

The basic verdict in Carnwath is that "the inquest finds A. in the blood and quits B. of any blood" and from this it is logical to understand that A. was fined for blood, i.e. by blood unlaw, but while that is the basic situation, the actual range of decisions is much wider, falling into the following groups:-

- I. (a) A.B. quit and C.D. found in blood.¹
(b) A.B. quit and C.D. found in blood and bloodwyte.²
(c) A.B. quit and C.D. found in bloodwyte.³
(d) A.B. and C.D. in blood and bloodwyte.⁴
(e) A.B. and C.D. in blood.⁵
- II. (a) A.B. granted that there was blood and C.D. found in the blood.⁶
(b) A.B. granted that there was Blood and C.D. found in the blood and bloodwyte.⁷

1. O. 22, 25, 47, 48 etc.
2. O. 28, 33, 108, 151/2 etc.
3. O. 34, 100, 130, 144 etc.
4. O. 126, 130, 137.
5. O. 33, 60.
6. O. 27, 74.
7. O. 24, 171/3, 181.

III. ASSAULT (Contd.)

6. BARON COURT. 1523-1747.

(3) BLOODWYTE (Contd.)

II. (c) A.B. granted that there was blood and C.D. found in the wyte.¹

III. A.B. granted that there was blood and A.B. found in wyt²

IV. (a) Blood was admitted and C.D. found in blood.³

(b) Blood was admitted and C.D. found in wyte.⁴

(c) Blood was admitted and C.D. found in blood and wyte⁵

(d) Blood was admitted and A.B. and C.D. found in blood

(e) Blood was admitted and A.B. and C.D. found in blood and bloodwyte.⁷

(f) Blood was admitted and A.B. and C.D. found in bloodwyte. ⁸

While the Carnwath record by itself is inconclusive, these verdicts correspond to later verdicts given in other courts where the details show beyond doubt that the blood fine and the wyte fine were separate. The position is complicated by the admission of blood on the part of the injured - as stated above this had procedural importance and it should not be understood that the admission of blood was an admission of liability, as it was in the later records.

However, if I. (b) and (d), II (b), III. and IV. (c) and (e) are noted, it is seen that the blood and wyte attach to the same person, and if the liability was the same in both cases, i.e. that there was only one fine for shedding blood - a bloodwyte - why is it necessary for the reporter to make so many references to blood unlaw and bloodwyte - especially in these cases where the two attach to the same person? If they are the same fines, why are there references in some cases to blood, in others to blood and wyte, and in yet others to wyte? Why was a bloodwyte not imposed in every case of blood - if it is "a fine imposed for shedding blood" and if it is a fine for shedding blood only, then what is a blood unlaw?

1. O. 56, 59, 97 etc.
2. O. 49.
3. O. 99.
4. O. 63, 121, 122, 133 etc.
5. O. 29, 137, 148.
6. O. 28, 122.
7. O. 31, 88, 125/6.
8. O. 146.

III. ASSAULT (Contd.)

6. BARON COURT. 1523-1747.

(3) BLOODWYTE (Contd.)

Although the Carnwath record does not show the true meaning of wyte as clearly as the later courts, nonetheless, elements of the legal meaning of wyte as cause or reason for blame can be seen:

The Baron pursued James Marshall and the rest of the tenants of Easter "Gledstanis" for the breaking of his arrestment and the inquest finds the officer (person responsible for making the arrestment) in the "wyte" because he did not follow the proper procedure, and not the men.¹ "Wyte" here means being in the position of liability - the officer's actions were the cause of his liability.

Also:-

The Baron pursued William Brown for drawing violent blood on Symon Snaip and also pursued Symon Snaip for the "wyte" of the causing of the blood. The inquest however found Snaip quit of the wyte and Brown in the blood and wyte.²

These cases indicate that "wyte" was originally a general term denoting liability to pay a fine or other penalty, the liability attaching because the person's actions were the cause of the matter at issue, the cause being important if it attached to a person other than the principal defender - who would be fined or punished in any event because of the strict liability which was observed for shedding blood, e.g. if A. shed B's blood then no matter what the cause of the dispute A. was liable for blood, then it would not be unreasonable that having disposed of the principal fine the inquest would supplement the principal fine and enquire further as to the cause of the blood shedding - had A. been provoked by B. - had B. by his own actions caused A. to strike him? If B. had been the cause then he would be in the //

1. In literature of the period "wyte" means to blame - see Henryson's Testament of Cressid - "O fals cupide is nane to wyte bot thow" - also poem quoted in Pitcairn (D)p.198
2. O.48, also similarly O.102.
3. O.147, also O.203/4.

III. ASSAULT (Contd.)

6. BARON COURT. 1523--1747.

(3) BLOODWYTE (Contd.)

the "wYTE" of the blood. If there was no provocation by B, A. was liable in blood solely. If A's actions had themselves been the cause of the assault, i.e. if A. had provoked and struck B. to the effusion of his blood, then A would be liable to blood and bloodwYTE.

However, to sum up the evidence from the Carnwath record - the cases show repeated references to blood and bloodwYTE in such terms that it is plain that two different items are being considered, admittedly items which frequently coincide. Blood was something one frequently admitted, but wYTE was admitted seldom, if ever. In the cases where a decision of "no blood" is found by the inquest, some of these cases state that not only is there no blood, there is also no bloodwYTE. It was an enquiry on two levels, the liability on each level being separate which could attach on the same person or separate persons depending on circumstances.

It is freely admitted that the reporting of the majority of cases in Carnwath is brief and too little detail is given, but even so, there is no foundation for the view that blood and bloodwYTE are synonymous terms and may be interchanged at will. They are recognised as separate concepts in the later records, and the evidence quoted above shows that they were also separate concepts in Carnwath, although the vast majority of cases are too briefly reported to indicate the true operation of bloodwYTE, and of those that are reported in detail, few show bloodwYTE in a satisfactory light.

Of the later records, the Stitchill record shows the operation and content of bloodwYTE in its developed form, and the following cases may be noted:-

P.F. //

III. ASSAULT (Contd.)

6. BARON COURT. 1523-1747.

(3) BLOODWYTE (Contd.)

P.F. -v- Andrew Hogarth for blood on Alexander Lowry. Hogarth was held to have confessed to the blood. Both parties denied the bloodwyte, which was referred to the inquest. Lowry was found in the bloodwyte because he tried to oust Hogarth from his (Hogarth's) place in a queue. Thus A. is fined £50 for the blood unlaw and B. who caused the dispute, is fined £25 for wyte.'

P.F. -v- Thomas Boyd and Robert Hogg for blood, riot and straickes. Both were fined £50 each for blood and as the cause of the dispute was that Hogg's foal ate Boyd's corn, Hogg refusing to make amends, Hogg was guilty of the "wyte" - he was fined £25 in bloodwyte.'

It is of further interest that in the Stitchill cases the fine for bloodwyte is exactly half the fine imposed for blood. The blood fine was normally £50 and the wyte £25, but a few instances of £24 - £12 and £20 - £10 are noted.

These cases show bloodwyte in its clearest context, and from this evidence, an indication can be made as to a proper definition of bloodwyte. The fine for bloodwyte was imposed on the person whose actions caused the blood to flow. While the cause of the blood flow might appear straightforward in every case - the actual blow - the situation was analysed more deeply. The cause of the blood flow could have been the injured person's own actions if he had provoked the other by word or deed and the other retaliated. The blow undeniably caused the blood but in turn the motivation of the blow was the injured person's conduct. On this basis, while the assaulter was liable for blood, the assaultee was liable for having provoked the blood - and fined for bloodwyte.

1. Q.29.

2. Q.47/8 - the one person had to pay both fines. Also S.143/

3. Q.29, 30/1, 39, 48, 63, 64 etc. (exceptions £50, £50-Q.71).

4. Q.9, 22.

5. Q.18 (exceptions £10-£4. Q.12)

In the other records the wyte fine was not a straight half
£50 - £5. Ra.246/7.

£ 5 - £5. Ra.305.

£50 - £40.S.143/4.

£10 - £10.S.86/7.

In one non blood assault, wyte was imposed £10, £5. S.78/9

III. ASSAULT (Contd.)

6. BARON COURT. 1523-1747.

(3) BLOODWYTE (Contd.)

From this it can be seen that the definition of bloodwyte as "a fine imposed for shedding blood" is insufficient. This definition only described the principal fine - the blood unlaw - which is quite separate and distinct from bloodwyte. While these cases show the simplest operation of bloodwyte, where A. is liable in blood and B. liable in bloodwyte, complications can arise. As "wYTE" has been shown to be the liability for causing the blood, it may well happen that the liability for "wYTE" attaches to the same person who is already liable for blood, e.g.-

James Campbell confessed that he committed blood on Thomas Hogarth and was fined £24 for blood and £12 for wYTE".

It is from cases of this nature, it is submitted, that the traditional definition of bloodwyte arises, for unless the specific amount of both fines is stated, the report may read "A in blood and bloodwYTE"² or simply "A. in bloodwYTE" intending to cover both fines and so the true nature of bloodwYTE is indiscernible.

It might be thought that every case of assault in which blood was shed, must of necessity have a liability for bloodwYTE attaching to one or other of the parties, as someone must have caused the assault and therefore be liable in bloodwYTE. But this is not the case, as there are many blood actions which make no reference to bloodwYTE. Indeed, blood actions which make no reference to bloodwYTE are in the majority in all the later records, and the absence of bloodwYTE in such actions is explained on the grounds that as "wYTE" was provocation of, or responsibility for, the blood //

1. Q.22, 71, 96.
2. Q.96.

III. ASSAULT (Contd.)

6. BARON COURT. 1523-1747.

(3) BLOODWYTE (Contd.)

blood shedding, not every case would have the necessary degree of provocation present, for it would appear that wye covered the situation where the assault was unduly or flagrantly provoked.

However, to revert to those cases in which the assailant is liable for both blood and bloodwye, this dual liability is not anomalous or incompatible. It is plain from the cases noted in the later records that a strict liability for blood was observed - if blood was shed, then no matter the cause, a blood unlaw was imposed on the assaulter. It could easily happen that the assaulter himself provoked the assault and accordingly would also be fined for bloodwye. While two separate fines could be imposed on the same person for blood and wye frequently there was only one cumulative fine imposed.

To sum up the foregoing - it is apparent from the cases quoted in the Baron Court records that there is a difference between the ordinary fine for blood and the fine which has been given the name of bloodwye. It is also apparent that the accepted definition of bloodwye - a fine imposed for shedding blood - is inadequate and in fact the definition only describes the ordinary fine inflicted by the Baron on the person who had drawn blood - the blood unlaw.

The liability of wye attaches to the person whose actions have been the root cause of the matter at issue. It is seen from Carnwath that the term of wye was applied to cases outside assaults although this wide usage is not common in the later records.

1. But see S.78/9 and S.112/3 - non blood assaults which have a separate fine for wye. Also Q.54/57.

III. ASSAULT (Contd.)

6. BARON COURT. 1523-1747.

(3) BLOODWYTE (Contd.)

There is a dual liability in assault cases - the principal fine for the blood spilling and the secondary fine for causing the situation to arise. The principal fine could only be imposed on the assailant, but the secondary fine of bloodwyte was imposed on either the assaulted or on the assailant depending on whose actions or conduct had been the cause of the assault, and had no relation to the direct shedding of blood.

While every assault must have had some form of cause the fine of bloodwyte was only imposed if there was distinct degree of provocation present on the part of one or other of the parties.

The traditional definition of bloodwyte could stem from a failure to distinguish the dual liability when blood and bloodwyte attached to the same person - where bloodwyte could appear as the principal fine imposed for shedding blood - but this is not an accurate construction - the two fines had a separate operation and content.

It is possible that the distinction between blood unlaw and bloodwyte did not become apparent until the later half of the 16th century and that in early law the two fines were not distinguished, but it is plain that for the period which the records cover, this distinction was recognised and the traditional definition must be modified in view of the evidence given in the Court records. Further reference could be made to the definition of "wYTE" in Stubbs'

"Select Charters" - where "wita" is stated to be "a mulct, payment by way of punishment opposed to "bot" - compensation to the injured". As will be seen in Assythment, bloodwyte and assythment are complementary concepts postponed to the main //

III. ASSAULT (Contd.)

6. BARON COURT. 1523-1747.

(3) BLOODWYTE (Contd.)

main blood fine. The Court settled the penalty for blood shedding first by unlaw and then decided the degree of provocation imposing a bloodwyte if appropriate and then considered the extent to which the injured should receive compensation - assythment. Naturally if the provoker was also the injured the awards of assythment are rare in that situation, but in analysis, bloodwyte and assythment are on the same level, secondary to the main fine.

From the definition in Stubbs (Wyte -v- bot) it is seen that this analysis was odd.

It is noted that bloodwyte as the principal fine is not mentioned in Mackenzie's chapter in the Laws and Customs of Scotland on the criminal jurisdiction of Barons. So far as assault is mentioned, it is dealt with as "blood" and "blood unlaw".

(4) INSULTING.

insulting, scolding and blasphemy were recognised as criminal in all the later records, the usual fines being £10 and £5.²

In the Corshill record, defamation and abusing were placed on a statutory basis, and if proceedings were based on the statute, a penalty of £15 could be exacted,³ although this was not invariable.⁴ In two cases a fine of £50 was imposed //

1. Mackenzie. p. 417.

2. e.g. Q.104 etc. Ra 284, 309/0 etc.

3. S.88, 157.

4. S.188.£5.

III. ASSAULT (Contd.)

6. BARON COURT. 1523-1747.

(3) INSULTING (Contd.)

imposed in one case for cursing, swearing and drunkenness,¹
and in the other for slander.²

In Urie the one case of insulting was punished by imposit-
:ion of a period in the stocks.³

Damages could be enforced as well as the fine -- in a Stith
ill case the accused was fined £10 and £3 had to be paid to
the insulted.⁴

1. S.234/5.

2. S.123/4.

3. P.51.

4. Q.156/7.

III. ASSAULT (Contd.)

7. BURGH COURT. 1398-1714.

Assault cases occur very frequently in the Burgh Court records and the Aberdeen record provides detailed information on assault at an early period (1398-1407).

The entries are brief and while certain references to blood are made, the classification of blood and striking is not so noticeable as it is in the later records.

In the Aberdeen record, assaults were divided into verberacion, percussio and general assaults.

(1) VERBERACION.

It is difficult to give an exact definition of verberacion, but is plainly derived from "verberare" - to beat, strike or flog. For the purpose of this record, it can be taken to mean assaulting or striking and the standard penalty was fining. The amounts of the fines are not given.

It is difficult to compare verberacion with percussio. Both included blood shedding, but there must have been a difference in degree in the assault. It is not possible from the sparse details given in the record to say which was the more serious.

Christinus de Clunes placed himself in the will of the bailies for the verberacion of a certain woman, and was fined by the court.

Frequently the accused gave caution to satisfy the injured, i.e. guaranteeing assythment.

1. The record is in Latin.
2. V.24 (very frequently the person struck was a woman)
V.49 - in will for verberacion of servant.
V.45, 54, 130, 147 -do- of woman.
V.54, 128 -do- of a man and perturbacion
of town.
V.66. -do- of woman and fined.
V.57. -do- of woman, caution to
satisfy her.
V.118. -do- caution for 12d. and also
bailies' fine.
V.130. In will for verberacion of woman, striking her
husband and disturbing the town, and found caution to
satisfy the woman for the verberacion and bludwit.
V.49. Fined for verberacion of woman and for being
rebellious to the town officers.
V.79, 111. Fined for verberacion of woman and caution
to satisfy all of the bailies.
V.140. Fined for verberacion of woman, and caution to
satisfy her.

III. ASSAULT (Contd.)

7. BURGH COURT. 1398-1714.

Mattheus lynches became cautioner for Christinus de. Clunes that he would satisfy (by assythment) Mariota, wife of Patricius for the verberacion he gave her and that he would not trouble (perturbabit) the town again under pain of c10.¹

Verberacion included blood assaults as well as striking.

Gilbertus de Kynros, prelocutor of Robertus San accused a certain woman called Mariota that she unlawfully beat (verberavit) a certain boy to the effusion of his blood. Her prelocutor denied the charge and the action was referred to amicabilem compositionem; the person in fault was to be presented to the bailies for fining, caution being found to (1) make the person appear in court and (2) satisfy the sentence.²

(2) PERCUSSION (Striking).

The record gives details of a Court statute governing striking, and which gave fines of 8/- and 4/-

If anyone strikes another within the Burgh with a sword, axe, knife or stick, he will be fined 8 solidi.³

If anyone strikes with his fist, he will be fined 4 solidi.

The cases are frequent, but usually they do not give the amount of the fine:-

Johannis Mungwale placed himself in the will of the bailies for assaulting Willelmus Crusank. Willelmus found caution that he would not trouble Johannis other than by legal process.⁴

But one case gives details of a fine of 8/- and it is seen that percussion included blood shedding:-

Thomas God was fined 8/- for striking (percussione) Andrew Gandy - to the effusion of his blood (usque ad sanguinem et bla).⁵

1. V.24.
2. V.114.
3. V.216.
4. V.44. Also V.130/1 percussione and 142 percussit iniuste
5. V.234, and V.120, 142 and 155 - fined - percussit et vulneravit a servant of the Carmelite Friars.

III. ASSAULT (Contd.)

7. BURGH COURT. 1398-1747.

(3) GENERAL ASSAULT.

Certain miscellaneous instances of assault are noted:

Simon Lamb was accused by the bailies because he had unlawfully imprisoned a certain woman on his own authority - the woman ought to have been presented before the bailies on an action of some kind. He confessed and placed himself in the bailies' will.¹

Again threatened assault was treated as an assault and merited a fine:-

Thomas Blake was fined for threatening to strike Willelmus Blakburn.²

The old laws provided for assault:-

In the Burgh there shall not be heard actions concerning bloodwyte nor striking nor marchot or herieth or anything like that³- but this statute was not observed in Aberdeen where they did hear bloodwyte pleas.⁴

The distinction between blood and non blood assaults was noted in the old laws, but it is difficult to see any practical application of this in the Aberdeen records.⁵

The classification into verberacion, percussion and general assault was not maintained in the later records, and the assaults divide into blood and non-blood.

Fining was the normal sentence, although generally the amounts are not given until the 17th century.

(1) BLOOD ASSAULTS.

Jame Moffat was fined for blood and troubleance of Jande Duncan. Duncan was fined for troubling Moffat. Both found cautioners for the fines.⁶

John Mitchell and William Jackson were accused of blood and riot on each other and both came into the council's will. Mitchell was fined £12 for the blood and riot and Jackson was fined £5 for the riot.⁷

1.V.44/5.

2.V.64.

3.LQB.XVII. p.10.

4.e.g. Y.130, also see LQB LXXIII.

5.SG.VII p.67, also SG.IX. p.68.

6.Z.10.1521, also Z.48, 1547.

7.Y. 8.1653, also Y.58 1664, £3, Y.94 1677 - 8 merks.
and Y.127 1689.

III. ASSAULT (Contd.)

7. BURGH CODEXT. 1396-1747.

(3) GENERAL ASSAULT (Contd.)

(1) BLOOD ASSAULTS (Contd.)

While fining was the normal sentence, some cases particularly in the Stirling record in the middle period show personal punishment (public forgiveness and indignity) being imposed.

Helen Thoir was imprisoned at the provost's will for blood and troubling and thereafter ordered to pass to the place where she committed the fault and crave forgiveness on her knees. If she offended again she would be fined £10 to the town work.¹

The indignity could be added to fining.

Thomas Eduein was convicted of blood and trouble and was fined. He had to ask forgiveness and was warded until he found caution for the fine and bloodwite.²

In addition to fining, a further penalty could be added -

John Murray was fined for drawing blood and was ordered to leave the town or else remain in ward for a year and a day, at the will of the provost and bailies.³

(2) NON-BLOOD ASSAULTS.

Again fining was standard, and the following may be noted -

Thom of Balcaeke and Wyllem Bulle were fined 20/- and 10/- respectively for fighting. Both fines were to be paid towards the building of the tolbooth, and both persons had to find cautioners for their fines and also to find caution that they would not trouble or fight again in the town, under pain of £10 and 40/-d.⁴

Burgh Acts penalising striking are frequent -

If any person fights or brawls in the town, he will pay 10/- unforgiven to the common work.⁵

Whoever is found in the wyt of fighting and troubling the town shall pay 10/- to the causeway being made to the High Kirk and if other parties are found in the wyt also, they will pay 5/-d.⁶

1. Z.55. 1549.
2. Z.78, 1560/1.
3. Z.40. 1545.
4. X.132/3. 1459.
5. A.127.1458.
6. X.146.1462. Also 2/- to the Town Clock X.147.1462.

III. ASSAULT (Contd.)

7. BURGH COURT. 1398-1747.

(3) GENERAL ASSAULT (Contd.)

(2) NON-BLOOD ASSAULTS (Contd.)

Any found fighting will be put in the tolbooth until it is known who is at fault. The person at fault will pay 10/- to the causeway beyond Peebles water, and will find caution for his fine. If he cannot pay his fine of 10/- he will sit 8 days in the stocks and thereafter he will be banished from the town for a year and a day.¹

It is seen that the average penalty in the early period was a fine of 10/-

Many entries did not specify the penalty, but it is reasonable to assume that the punishment was fining:-

The inquest finds Andrew Stewart in the wrong of striking William Louch.²

As in the blood assaults the Stirling record is exceptional in that while fining was imposed, public apology and humiliation was the most frequent sentence in ordinary assault.

Katherine Jak was convicted by assize for assaulting, striking and insulting Elspeth Muckart and was sentenced to go to the market cross at 10 a.m. on Saturday morning with a white wand in her hand and ask forgiveness of Elspeth Muckart.³

In the later records fining was again standard - non-blood assaults were described as riot, and such entries were frequent and appeared to include simple assaults (i.e. striking and punching, kicking etc.) and general breach of the peace - £5 was the normal amount of the fine.

William Jackson was fined £5 for riot.⁴

1. X.164/5.1470.
2. X.214.1555. also X.217.1555 (striking and finds no blood), N.233.1556, 233/4. 1556 etc.
3. Z.40.1545.
4. Y.8.1653, also striking - 20 merks - Y.25, 1654.
10 merks - Y.11.1653, Y.76.166
5 merks - Y.96, 1679, Y.112/3
1684 etc.
1 merk - Y.111.1683.
£10 - Y.63.1665.
£5 - Y.21.1653.
£4 - Y.68.1665.
£3 - Y.11.1653.
£2 - Y.68, 1665, 94.1677,
164.1701.
and miscellaneous fines of 30/-, 24/-, 20/-, 14/- and 12/-

III. ASSAULT (Contd.)

7. BURGH COURT. 1398-1747.

(3) GENERAL ASSAULT (Contd.)

(2) NON-BLOOD ASSAULTS (Contd.)

While the basic penalty was fining, more could be added -- imprisonment till payment was frequent --

John Hope came into will for riot on Robert Edmond and was ordered to pay £4 and to remain in ward till paid.¹

On occasions the imprisonment was not merely until payment but could be for a definite period.

Marion Watson came in will for riot and was imprisoned for 24 hours and also fined 24/-d. She undertook, b_o caution, not to scold or flyte under pain of 10 merks.²

Personal punishment was also imposed occasionally.

Andrew Edmond fired a gun at two people under cloud of night to frighten them and was ordered to be imprisoned for 24 hours and until he found caution not to use firearms again, under pain of £20. He also had to stand in the cuckstools for an hour with the gun around his neck.³

In a severe case, fining was not imposed. The sentence was personal punishment and banishment --

Hew Black was convicted of breaking doors, offering violence to various persons, and cursing and swearing. He was sentenced to the stocks at the cross for an hour with a paper on his face written in great letters stating his crime, and thereafter be banished under pain of death if he returned.⁴

(3) ASSAULT ON OFFICIALS.

To assault an official was more serious and indeed the sentence was so much more severe than the fines of ordinary assaults that it might be considered a different crime than ordinary assault. The sentences ranged through loss of burgess-ship, fining, imprisonment and banishment and various combinations.

-
1. Y.4.1652, also Y.58.1664 -- £20 and warded till paid.
Y.115 -- 20/- and warded till paid.
 2. Y.14. 1653.
 3. Y.160. 1698.
 4. Y.63/4. 1665.

III. ASSAULT (Contd.)

7. BURGH COURT. 1398-1747.

(3) GENERAL ASSAULT (Contd.)

(3) ASSAULT ON OFFICIALS (Contd.)

If anyone (a burgess) draws a knife or other weapon against a bailie or officer, he will forfeit his freedom (i.e. as a burgess, not imprisonment).¹

A non-burgess was banished:--

Thomas Murdo was accused of riot on John Plenderleith, a bailie and others because he abused and insulted them. He was fined £10 and imprisoned until he found caution (1) to pay the fine and (2) to remove from the town under pain of banishment.²

William Hutton struck a town officer and was banished under pain of scourging and if he returned a second time he would be scourged and hanged.³

Imprisonment could be an additional punishment in itself, i.e. not merely until payment but an indefinite sentence during the magistrates' pleasure:--

Patrick Dickison threatened Alexander Williamson a former provost and was fined 10 merks and imprisoned during Williamson's pleasure.⁴

In a severe case a variety of sentences with both definite and indefinite periods of imprisonment could be given.

James Sheill assaulted the provost and was fined £30. He was imprisoned (1) for 8 days (2) until he gave up his burgess ticket, which was to be torn up by an officer at the cross and (3) until he paid the fine.⁵

(4) CRIMES AGAINST PUBLIC ORDER.

(a) PERTURBACION.

Perturbacion is frequently mentioned in the early record and meant disturbing the town - similar to breach of the peace.

The standard penalty was fining.

Willelmus Rykil was fined by the court for perturbacion of the town for striking a boy.⁶

Mauricius Suerdsleper was fined by the court for unlawfully disturbing (perturbacione iniusta) Walterus Rede, seriandus (actually town officer).⁷

1. X.260.1560.
2. Y.7/8. 1653.
3. Z.110.1604.
4. Y.51. 1662.
5. Y.151/2. 1695.
6. V.160, also V.234 -- brandishing knives.
7. V.23, also V.149, V.160 -- town watch.

III. ASSAULT (Contd.)

7. BURGH COURT. 1398-1747.

(4) CRIMES AGAINST PUBLIC ORDER (Contd.)

(a) PERTURBACION (Contd.)

Willelmus de Marr and others were fined for unlawfully entering a house by a ladder without consent and for disturbing the (peace of the) town.¹

Frequently the accusation stated that A. disturbed the town with B.

Thomas, son of Johannis, was fined (1) because he disturbed the town with Robertus de Angus and (2) because he was rebellious and disobedient to the bailies.²

Johannis ledale was accused of perturbacion of the town with Dedryke and it was stated that he was already under caution of £100 not to disturb the town. The obligation was enforced when he came in will.³

The person frequently placed himself in the will of the bailies and again fining was standard.

Willelmus de Poty placed himself in the will of the bailies because he disturbed (perturbavit) the bailies and the town watch and was fined.⁴

In some cases only the reference to will is noted, with no mention of penalty.

Thomas Smyth placed himself in the will of the bailies for perturbacion of the town.⁵

Willelmus Blyndcele, Senior, and others were accused by the bailies that when one of the bailies arrested Henricus Stephanus for disturbing the town, they assaulted the bailie, in contempt, scandal and outrage of the King and the law in deliberate intention. They assaulted (perturbaverunt) the bailie, struck Henricus Stephanus and tried to cut down Henricus Stephanus with axes and knives. They denied the charge, but placed themselves in the bailie's will for disturbing the town.⁶

The accused could be asked to find caution to keep the peace.

Mauricius Suerdsleper had to find caution that he would not trouble the town and the burgesses. However, he did cause trouble and his cautioner was fined 5 marks and further Mauricius was ordered to enter prison until someone found further caution to guarantee the peace of the town and the burgesses.⁷

1. V.53.
2. V.43, also V.26,35,53,136,140,148,156 (no rebellion).
3. V.124.
4. V.26, also V.29,35,119,125,155 - also caution not to be rebellious to the bailies.
5. V.130, also V.127,128,133 etc.
6. V.205.
7. V.22.

III. ASSAULT (Contd.)

7. BURGHI COURT. 1398-1747.

(4) Crimes against Public Order (Contd.)

(a) Perturbacion (Contd.)

The later records show a similar position.

Dic Twno, George Gibson and Nat Balye came in will for troubling the town, each to find caution.¹

Fining was frequent, but no amounts are given:-

Jenne Murra and John Murra were fined for troubling their neighbours under silence of night.²

Loss of burgess-ship could be threatened:-

For troubling a bailie, he was fined £5 and if he³ offended again he would lose his freedom (of the town).

The sentence for a non-burgess was less easy going.

The inquest finds Makkyn in the wrong in troubling the town and because he was a vagabond he was banished.⁴

While fining was normal, in exceptional cases the punishment was public indignity.

Laurence Thomson and others were convicted of troubling the town by mocking burials of persons who died of the plague. Thomson was sentenced to be carried through the town on a sled, barefooted and bareheaded, wearing a white sark, and with a notice on his head stating his crime. The others were to walk barefooted and bareheaded through the town and then to stand at the cross during the bailies' will.⁵

While perturbacion usually applied to the peace of the town, it was also extended to cover the peace of a court.

No particular penalty is given, but it is likely that fining was imposed:

Willelmus Crab placed himself in will for troubling Thomas Spring, but in a later case it was stated that they had caused perturbacion of the court.⁶

The later records show the same position:

The bailies were ordained to punish Robert Murro for arrogant speeches and he was ordered to speak only through his prelocutors under pain of being fastened in irons, and he had to find caution accordingly.⁷

1. X.157.1468, also X.246.1558.
2. Z.18.1523/4, also Z.20.1524, Z.21.1525 etc.
3. Z.88.1598.
4. X.347.1572, also X.348.1572.
5. Z.116.1607.
6. V.76, 77, also 109 - perturbando curiae.
V.109, 119, also 129, 139 - fined.
V.78, 79 - because the prelocutors were unlawful.
7. X.232.1556, also X.309.1569, X.323/4.1570.
X.399.1682 - abuse in courts, imprisoned but no details etc.

III. ASSAULT (Contd.)

7. BURGH COURT. 1398-1747.

(4) Crimes against Public Order (Contd.)

(a) Perturbacion (Contd.)

Perturbacion could also include the peace of a house:-

Johannis Crab placed himself in will for the perturbacion of the house of Andrew Petrus.¹

(b) Rebellion.

Certain cases occur when the accused is stated to have been rebellious and disobedient to the bailies or town officers.

In the early record fining was imposed:

The Court statute provided that if anyone defamed or insulted or disobeyed any town officer in the course of his duty, he would be fined 8 solidi without remission.²

The cases do not give the amounts of the fines:

Thomas Johannis, carnifex in three fines:-

1. because he was rebel to the town officers in the course of their duties.
2. because he was disobedient to the bailies being unwilling to enter prison at their order.
3. because he left prison without their permission.³

Willelmus Dksoun placed himself in will for being rebellious and disobeying the bailies.⁴

In the middle period, the penalty for a burgess varied between loss of freedom and public indignity. Fining was added on occasions. The penalty for a non-burgess was banishment.⁵

Forgiveness:- John Henderson was fined £10 for disobeying the kirk and magistrates. Also he had to make public confession of his fault at the market cross. If he refused, he would be banished for 3 years and if he was found in the town during that period he would be fined £10.⁶

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1. V.54, also 53 - fined (no will).
 2. V.216.
 3. V.134.
 4. V.51, V.68, 130/1, .deniedV119, . fined,V48,49,75,107.
 5. See Court statute X.328.1571.
 6. Z.93/4.1599, also Z.116/7. 1607 - £40 and warded for escaping from ward and disobeying bailie.

III. ASSAULT (Contd.)

7. BURGH COURT. 1398-1747.

(4) Crimes against Public Order (Contd.)

(b) Rebellion (Contd.)

John Bell was found guilty by inquest for disobeying the bailie and troubling the town. He had to ask forgiveness of the bailie and to find caution to obey the officers in the future, under pain of banishment and his body to be punished.

Loss of freedom and banishment:-

Richard Mereleis and others disobeyed a town law which forbade leaving the town at night and they abused the watch. They lost their freedom of the town and were banished under pain of death.

Indignity:

William Johnson and Andrew Ra were put in the links because they passed into the bailies' will on behalf of their wives who troubled the town and disobeyed the bailies. They found caution that there would not be any more trouble.

In the later period, some cases give fining (10 merks) as the basic penalty⁴.

In one case, there appeared to be a riot (in the modern sense).

William Porteous and others were insolent to the council and were imprisoned in the tolbooth. A number of people released them forcibly. Forsyth came in will and found caution under pain of 500 merks to obey the council in future. The others were fined 40/-, £4, £6, £8 and were forbidden to trade until they petitioned the council.⁵

But usually the penalty was heavier, and the normal sentence was revocation of freedom as a burgess, even in the later periods.

Thomas Mosie refused to accept the Magistrates' authority and was discharged of his freedom as a burgess.⁶

With fining and imprisonment:-

James Thrift tore a page out of the court book because an //

1. X.328.1571, also Z.123/ 169 - forgiveness at the cross and if second offence banished and loss of freedom.
2. Z.41. 1545.
3. X.257. 1559.
4. Y.57/8.1663 - in will and fined 10 merks for refusing to accept the council's price for meal.
Y.100.1681 - fined 10 merks.
5. Y.103,1682, Y.104.1682, Y. 105, 1682.
6. Y. 2/3. 1652.

III. ASSAULT (Contd.)

7. BURGH COURT. 1398-1747.

(4) Crimes against Public Order (Contd.)

(b) Rebellion (Contd.)

an entry concerning him had been made. His burgess ticket was reduced, he was fined £50 and imprisoned till he paid, and until he found caution for 400 merks to the provost.¹

Imprisonment could be for a definite period, or during the magistrates' pleasure - not merely pending payment of the fine.

Andrew Haldine was convicted of disobeying a bailie, insulting him and escaping from jail. He was sentenced to have his burgess ticket destroyed, to be imprisoned for 48 hours and to pay a fine of £10.²

John Wylie, deacon of the weavers, refused to obey the council and was warded during the magistrates' pleasure.³

Escaping from prison was considered an act of rebellion.

Alexander Williamson was fined £10 and was imprisoned till he paid and longer during the magistrates' pleasure. He had escaped from prison, returned and then left again because the door had been left open.⁴

(5) Insulting.

The early record describes insulting as malediction, and again the sentence was fining. The court statutes show the amount as 2/- ordinarily and 8/- if aggravated.

If anyone insults (maledicit) another within the Burgh or defames (tangendo) his good name, he will be fined two solidi.⁵

Thomas Strang placed himself in the will of the bailies because he insulted (maledixit) Johannus Lany. Lany was accused likewise and he also came in to will and was fined.⁶

The insulting could be aggravated if the incident took place in court:-

1. Y.128.1689.
2. Y.48.1659, simil. Y:137. 1691 - forfeit his burgess-ship - his ticket was to be torn up at the cross, to the beat of a drum and he was imprisoned during pleasure.
3. Y.48.1659.
4. Y.136/7.1691.
5. V.216.
6. V.24.

III. ASSAULT (Contd.)

7. BURGH COURT. 1398-1747.

(5) Insulting (Contd.)

If anyone insults (maledicit) another in the Court of the Prepositus or in the Bailies' court, he will be fined eight solidi.¹

Thomas Blak was fined because he insulted (dispersionavit) Robertus Colinus before the bailies in open court.²

The middle records (Feebles & Stirling) show a penalty of public indignity. The form of indignity varied - craving public forgiveness, usually in Church, was frequent but the person could also be exposed to public humiliation.

Forgiveness:-

Agnes Henderson insulted Annapill Graheme and as a punishment she had to precede the procession on Sunday wearing a sark and carrying a wax candle to be offered to the Rood light and ask the forgiveness of the woman she insulted.³

William Duchok was fined for troubling (insulting) Marione Aikman and was ordered to crave her pardon on his knees in open court and drink water for the next 24 hours because he had been drunk when he insulted her. If he offended again he would spend 48 hours in the basket.⁴

Humiliation:-

Any woman who scolds or insults shall be taken by the sergeants to the four gates of the town and shall carry two stones on a chain or halter from her shoulders.⁵

Marion Ray was fined for insulting Agnes Henderson and further it was ordered that a joist should be extended from the top of the tolbooth with a pulley, rope and basket and that she should be suspended in the basket during the will of the provost and bailies.⁶

In the latest period fining (10 or 5 merks) was the basic penalty:

The provost of the time and the previous provost were fined 5 merks for their miscarriage before the council and reflecting upon others.⁷

1. V.216.
2. V.43.
3. Z.40/1.1545, also Z.47/8.1547 - but no Candle, also cases quoted by Murray I.347/9.
4. Z.48.1547.
5. X.167.1471 - cuckstools for insulting, X.256.1559 and X.325.1570 - 6 hours in the links, also X.257.1559.
6. Z.48.1547.
7. Y.52.1662, Y.99.1680 - 10 merks. Y.110.1683 - 5 merks, also 114.1684, Y.95. 1678 - 5 merks (insulting in court) Y.91 - Provost had to prove his allegation that he had been insulted.

III. ASSAULT (Contd.)

7. BURGH COURT. 1398-1747.

(5) Insulting (Contd.)

(a) Officials.

Throughout all periods, cases and statutes are noted concerning the insulting of officials. The penalties took the same form as ordinary insulting sentences - forgiveness and humiliation, but the main differences are the prohibition of future office and loss of burgess status and the imposition of heavier fines in the later periods.

The early statutes, however, concentrate on forgiveness and humiliation.

Forgiveness:-

If anyone insults (dispersonat) the Alderman in open Court, he must deny it with his friends orally saying that he lied when he spoke insultingly. He must give caution and pass into the Alderman's will and crave mercy. Afterwards he will swear on the Holy Sacrament that he knew no evil of him. If he again insults the Alderman he will be at his mercy and at the mercy of his neighbours so that he will make amends for his insults.¹

Humiliation:-

It is ordained that if anyone insults the Prepositus, Bailies or any of them of the King's Officers, for the first offence he will have to kiss the cuckold, for the second offence he will be placed on the cuckold, and shall be covered with eggs, dung, mud and such like, and for the third offence he will be banished from the town for a year and a day.²

Loss of office and burgess-ship:-

An act against insulting the council stated the penalty as loss of freedom and incapacity of holding office in the future.³

In the later periods, insulting officials was forbidden under pain of £40.⁴

This became imprisonment of their persons, fining and loss of freedom in the town.

1. L.Q.B. C. p.48/9.

2. V.217.

3. X.314.1565.

4. Z.119/0.1608. 5.Z.133.1613.

III. ASSAULT (Contd.)

7. BURGH COURT. 1398-1747.

(5) Insulting (Contd.)

(a) Officials (Contd.)

The cases show fining and forgiveness as the basic sentence:-

James Stewart and Thomas Hyslop were fined 5 merks - to go to the bridge work for insulting a bailie. Also each had to go with a candle in his hand to ask forgiveness of the bailie before the parish under penalty of not being admitted freemen.'

James Wallace was fined £5 for the wrong he had committed on a bailie and had to make public confession of his fault at the cross. 2

The fines became heavier in the later periods:-

William Donaldson insulted a bailie and escaped from ward. He disobeyed an order to return to prison and threatened the officer with his sword. He was put in irons and was to be kept in fast ward on bread and water during the provost's and bailies' will. Further, he was fined £40 to the common work and had to find caution not to commit the like again under pain of £100 for the first offence and banished for the second. He had also to ask forgiveness of the bailies at the cross. 3

The later period showed a change to fining and imprisonment as the main sentence and the imposition of indignity became much less prominent.

It is seen that the normal fine was £10, but £20 and 20 merks are noted.

Beatrice Haldane was fined £10 for saying that a bailie would not give her justice but would favour his wife's friends. 4

1. X.252/3. 1563, also X.304.1567 - Inquest finds him in the wrong: in bailie's will.
2. Z.94.1599, Z.120.1608 - warded till next Thursday and then to ask forgiveness at the cross on his knees - if again, banished. Z.123.1610 - admonished and if again, no office to be held in the town. Z.123.1609 - forgiveness and caution of £20 not to offend again.
3. Z.116/7.1607, also Z.133.1613 - striking and insulting provost, fined £40, warded during council's will to ask forgiveness - if again £100 and banished and loss of freedom.
4. Y.162.1699, also abusing bailie - £20. Y.106.1682. Insulting provost, 20 merks. Y.50.1662, 111.1683.

III. ASSAULT (Contd.)

7. BURGH COURT. 1398-1747.

(5) Insulting (Contd.)

(a) Officials (Contd.)

The imprisonment was basically pending the payment of the fine but variations are seen:-

Andrew Haldin came in will for insulting the provost and officers - he was fined £10, imprisoned till he paid the fine and also during the magistrates' pleasure and until he found lawburrows.¹

For a definite period:-

George Thomson was imprisoned for 48 hours for insulting a bailie.²

For definite and indefinite periods:-

John Dickson was accused of insulting a former Treasurer and was fined £20 and was imprisoned until he paid and also for three days and nights.³

In addition to fining and imprisonment, a burgess could have his freedom revoked:

William Williamson confessed to defaming the provost and was fined 10 merks, was warded till paid and had his freedom as a burgess suspended at the council's pleasure.⁴

(b) False Accusations.

Cases occur of persons being accused unjustly and maliciously and this was held to be similar to insulting. The accusations tended to allege theft or immorality. As in the case of ordinary insults, public forgiveness and indignity were normal in the middle period:

Janet Blakadir was convicted by the assize for troubling Janet Bell, calling her a thief. She had to stand in irons at the will of the provost and bailies and pass to the place where she said the words and ask forgiveness on her knees. If she offended again, she would be banished.⁵

- also Y.19/0.1653 - 30/- and prison till paid, and
1. Y.73, 1667, /also Y.76.1667 - insulting provost 40 merks and imprisoned during his pleasure, also Y.60.1664.
 2. Y.38.1656.
 3. Y.84.1671, also Y.85, 1671 - 10 merks - 24 hours and until he paid. Y.87.1673 - £4 - 48 hours and until he paid.
 4. Y.60.1664.
 5. Z.39. 1544/5.

III. ASSAULT (Contd.)

7. BURGH COURT. 1398-1747.

(5) Insulting (Contd.)

(b) False Accusations (Contd.)

Marion Ray was convicted of various slanders and the assize ordered her to ask forgiveness on her knees. She was warded until an iron clasp and cavill was made. She was locked in this mask for 24 hours.¹

A person was fined for raising an action unjustly to recover money he alleged was due.²

Again fining (£10) was basic in the later records:

Thomas Smith wrongly searched John Wallace's house and accused him of theft. He was fined 20 merks of which 2 merks were to be paid to Wallace.³

John Jonkison was fined £20 (originally £100) for accusing three persons of drinking King James' health. He was imprisoned until he paid.⁴

Occasional cases in the later period show the old penalty of public exposure:-

Thomas Moses was fined £12 for unjustly accusing Robert Steill of theft. Moses was also imprisoned until the next day when at 11 a.m. he was ordered to stand at the mercat cross with a notice on his head stating his crime, for 2 hours. Thereafter he was to crave the pardon of the person he accused and then be returned to the prison until he paid the fine.⁵

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1. Z.43. 1546, also Z.43.1546 - only forgiveness.
 2. Z.13. 1521/2.
 3. Y.86/7.1672, also Y.111.1683 - 10 merks and crave pardon.
Y.95.1678 - 5 merks, Y.96.1629 - £10.
 4. Y.134. 1690.
 5. Y.10/1.1653.

CONCLUSIONS.

III. ASSAULT.

1. The most striking feature of assault throughout the whole period is the division into those in which blood was shed and those in which only blows were exchanged. The presence or absence of blood determined the sphere into which the assault fell. The distinction is seen in the earliest periods - e.g. in Regiam Majestatem, but it is not seen clearly in the Aberdeen court. Occasional mention is made of blood in the Aberdeen record, but the entries do not make such a definite reference as they do in the other courts.

2. The justiciary courts heard only blood assaults, but Argyll and all the other courts heard blood and non blood.

3. The standard sentence throughout the whole period was fining, with the addition of assythment on many occasions.

4. While a general pattern is seen throughout all the courts the basic pattern breaks into (a) justiciary court (b) Argyll and other courts excepting the burgh courts and (c) the burgh courts.

5. Justiciary court: In the earliest period, compounding and remission was standard, with fines (£5, 10 merks) imposed if the person was convicted or came into will. In the beginning of the middle period (Mary's reign) assythment (with no other penalty) was normal in basic assaults and this became fining and assythment in the middle periods. The amounts are not given. The record gives details of serious and aggravated assaults (e.g. assaults in royal palaces) which at law carried treason sentences (and they were enforced occasionally) but more usually such assaults received banishment and assythment. One case shows a fine of 1750 merks.

In //

CONCLUSIONS.

III. ASSAULT (Contd.)

In the later period the sentence varied between fining, fining and assythment and only assythment. The fines were £50, 200 merks and 100 merks and the assythment £200 Stg., £100, 400 merks and 300 merks. While the accused could be imprisoned until he paid his fine in the middle and later period, it is only in the final period that a definite sentence of imprisonment is given. In the case of combined crimes, the more serious penalty ruled, e.g. in assault and theft, he was hanged.

6. Argyll, Sheriff, Orkney and Shetland, Regality and Baron Courts:

- (a) The basic pattern in the main period was fining -
£50 for blood and £10 for non-blood.
- (b) Argyll: (i) blood - basic £50.
 aggravations £100.
 assythment £30, £10.
 (ii) non-blood - basic £50, £20.
 assythment 40 merks.
- (c) Sheriff: The sentence was fining, but no amounts are given in the early record.
main period: (i) blood - basic £50 (some of £10)
 aggravations £200, £100.
 assythment £10.
 (ii) non-blood - £10.
- (d) Orkney & Shetland: The earlier record shows a rigid system of fixed penalties -
- (i) blood shed "above the end" - 40/-
 blood shed "below the end" - 4 merks.
- (ii) non-blood - 1 merk per blow.
- (iii) aggravations (applied to both blood and non-blood)
 - 40/- per aggravation.
 - 1 merk for casting to the ground.

This system was not used in the later record and although few details of amounts are given in this record it is seen that in non-blood assaults at least the court conformed to the basic pattern of £10.

(e) //

CONCLUSIONS.

III. ASSAULT (Contd.)

(e) Regality:

- (i) blood - the early period does not give the amounts of the fines, but the main period shows fines of £50.
- (ii) non-blood - £10.
aggravated - £25.

(f) Baron:

- (i) blood - the early period does not give the amounts of the fines, but the main period shows standard fines of £50 (with some of £30, £20 and £10). It is noted that the Baron courts observed an extremely objective liability for the blood fines - self defence was not recognised as a bar to a blood fine.
- (ii) non-blood - £10 (with some of £15 and £5).

7. Burgh Court: The earliest record describes the assaults as verberacion, percussion and general assaults, and while it is noted that fines were imposed, the amounts are not given, although one case of percussion shows fines of 8/- and 4/-. It is not possible to say what constituted verberacion or percussion as blood shedding is noted in both.

In the other records, the blood/non-blood distinction is noted, but the fines are not so clear-cut as they are in say the Baron courts.

- (i) blood (early record) £12 (but Stirling imposed public indignity and not fines)
- middle and later records - no amounts given.
- (ii) non-blood (early record) 10/- (Stirling again imposed public indignity)
- middle and later records - £20, £5 (with occasional instances of public indignity).
- (iii) assaults on officials - while such cases were legally no more than aggravations, the sentences were//

CONCLUSIONS.

III. ASSAULT (Contd.)

were considerably heavier - loss of burgess freedom, banishment and imprisonment.

- (iv) two crimes are noted which occur only in the burgh courts (1) perturbacion - which was a form of breach of the peace and was punished in the early records by fining (no amounts given) and in the middle and later records by loss of burgess freedom, banishment, and in exceptional cases, indignity and (2) rebellion (against the authority of the town council). In the early period, rebellion was punished by fining - the cases do not give details, but a statute imposed a fine of 8/-.

In the middle and later periods, the normal sentence for a burgess was loss of his burgess-ship, with indignity added on occasions. Fines of £10 and imprisonment could also be given. For a non-burgess, the sentence was banishment, with indignities added.

8. Threatened assault was treated as non-blood assault in the lower courts and the usual fine was £10.

9. Bloodwite was a distinct and separate fine imposed for provoking the assault and could attach to either the assaulted or the assaulter. Its operation is seen most clearly in the Sheriff, Regality and Baron courts, but passing reference is made in the justiciary courts. It is not mentioned to any extent in the Burgh courts.

The Regality court shows a flat rate of £50, one Baron court shows a bloodwite of exactly half the blood fine, but in the other Baron courts the bloodwite was £10.

10. Insulting was considered a form of assault - verbal injury, and the basic sentence was some form of public indignity //

CONCLUSIONS.

III. ASSAULT (Contd.)

indignity although fining was frequent also. Insulting cases occur with regularity in the lower courts.

(a) Sheriff: (later period) 100 merks: public forgiveness.

(b) Shetland: (early period) 4 merks to king and 4 merks to insulted.
- 8 merks to king and 8 merks to insulted, and public forgiveness.

(c) Regality: £10.

(d) Baron: £10, £5 (exceptionally, the stocks).

(e) Burgh:

(i) insulting - in the earliest record fines of 2/- are noted with 8/- if aggravated.

- middle period - forgiveness and indignity.

- later period -fining of 10 merks or 5 merks.

(ii) insulting officials -

- middle period - forgiveness and indignity, also fining (£5 exceptionally £40) and loss of burgess-freedom.

- later period - fining (£10) imprisonment, loss of freedom.

(iii) false accusations -

- middle period - forgiveness and indignity.

- later period - fining £10 (exceptionally indignity).

It is noted that public indignity as a regular penalty died out after 1660 and was replaced by fining and imprisonment.

IV. HAMESUCKEN.

1. JUSTICIARY COURT.

PART 1. 1488-1650.

The basic form of the crime was assault and the cases show the same pattern as the assaults. The cases do not show any particular penalty which was given specifically for hamesucken.

As in the ordinary assaults of the early period compounding and remission were standard with the proviso that if the parties came into will or were convicted they were fined. If they agreed and compounded before appearing in court, no fine was imposed.

Patrick Mure was permitted to compound for the oppression done to Betoun McKewin and assaulting Richard Akinhede in his chamber. Caution was found to satisfy the injured.¹

Symon Furde and others came into the King's will for hamesucken. Caution was found to satisfy the injured. They were fined 4 merks.²

Cuthbert Robisoun was convicted of the oppression of Arthur Farnlie at his house, striking him and casting his son into a fire. Caution was found for the king and party and he was also fined 5 merks.³

In the middle and later periods, no discernible pattern is noted - banishment was imposed, but that was standard where the accused placed himself in will. However, one case shows a capital sentence, but the circumstances verged on murder.

LA -v- Thomas Crombie. Crombie had been dismissed from the service of the Earl of Traquair for theft and held a grudge against the Earl. When the Earl was absent from his Castle of Dalkeith, Crombie armed with a sword entered the Castle and sought the Countess. She was in the garden with a servant and Crombie attacked her with his sword, but the servant intervened and took the blow. They struggled and the servant was struck twice. Crombie got up and continued his search for the Countess. He met another servant who pleaded with him to stop but this servant was also attacked and wounded. The charge was fox hamesucken //

1. A.91 also A.15, 58, 93.

2. A.15.

3. A.59, also A.172, 204/5 and A.218/9 - warded in Edinburgh Castle.

IV. HAMESUCKEN (Contd.)

1. JUSTICIARY COURT.

PART 1. 1488-1650. (Contd.)

hamesucken and mutilation (for one of the servants lost some fingers). The assize found him guilty (fylyt culpable) and he was sentenced to be takenth to ordinary place of execution in Dalkeith and hanged on gallows with escheat of moveables.¹

Another serious case shows no determination:-

Robert Kent was struck by Marion Semple and later Kent and his master, Gabriel Montgomery, returned to her home and struck her very severely. While Kent struck her, Montgomery stood over them with a pistol ready to shoot her husband if he appeared. Some servants raised the alarm and the two assailants made off. Hugh Montgomery, Marion Semple's husband, followed them to their house where they attacked him, severely wounding him, to the great effusion of his blood and left him lying for dead. The assize acquitted Robert Kent, but the assize were later accused of wilful error. The case was continued and no determination is noted.²

James Chene placed himself in will (provided his life would be safe) for leading a raid on Gilbert Baird's house and assaulting Baird's wife and damaging his property. He was banished, for this and also for adultery.³

Andrew Henderson was convicted of wounding Adam Montgomerie in his brother's house and cutting off three of his fingers. The justice referred the case to the King who banished.⁴

Combined crimes:-

If the other crime was capital, that penalty ruled.

Hamesucken & Murder:-

Patrick Cuninghame was convicted of murder and hamesucken and beheaded.⁵

Hamesucken & Slaughter:-

Thomas Bonkle was convicted by an assize of killing Peter Herriot with a sword, having attacked him at Herriot's house. The charge was slaughter and Bonkle was sentenced to have his head and right arm cut off, and his moveables escheat. The aggravation of hamesucken in this case appears to have warranted the cutting off of his right arm, as the beheading was the normal penalty for slaughter.⁶

1. E.290.

2. B.61 & 67, also B.25/6, 388.

3. C.399/400 - the banishment was standard where one placed oneself in will.

4. D.59/0.

5. C.18.

6. B.158, also B.161.

IV. HAMESUCKEN (Contd.)

1. JUSTICIARY COURT.

PART 1. 1488-1650 (Contd.)

Hamesucken & Theft:-

Thomas Cunningham was convicted of various thefts and for invading the house of Patrick Gemmill, assaulting Gemmill and his wife and taking some of their possessions. He was sentenced to be hanged and his moveable goods escheat.'

IV. HAMESUCKEN (Contd.)

I. JUSTICIARY COURT.

PART 2. 1661-1747.

The cases in this period are infrequent -

The only case which shows a penalty is a combined hamesucken and theft for which hanging was imposed - this conforms to the pattern seen in the earlier period.

George Clepon and John Dick were accused by Marion Shonless and the King's Advocate for hamesucken and theft - they were found guilty and Clepon was sentenced to be hanged. The hanging can be attributed to the theft.

Acquittals are noted -

McNaught of Strowan and Thomas Boyd against Gordon Cardines for hamesucken - the assize cleansed the accused.

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1. F.6, also F.304/5, G.99/104 - guilty but no sentence given.
 2. F.66/7, 41/3, G.104.

IV. HAMESUCKEN (Contd.)

2. JUSTICIARY COURT (1664-1742).
(ARGYLL).

In this record the cases follow the same pattern as assaults, with fining as the normal sentence. Although one case shows the standard blood fine of £50, the fines were usually heavier:-

Duncan McGrigor was fined £50 for hamesucken and riot committed by him against Donald McKerras.'

Ivar Campbell and others were convicted by assize of assaulting Donald McIlvaine - they came to his house armed with guns, dirks and swords and threatened to kill him. He was wounded and beaten by them. They were fined £10 Sterling, £20 Scots was to be paid to the injured, and they were imprisoned till payment. 2

Also:

Archibald McNicol and others "being bodin in fear of war with swords, pistols and other weapons invasive" came to the lodging of Lachlan McLachlan and entered his chamber. They dragged him off towards Glenshira. He was rescued by his friends and taken back to Inveraray. McLachlan restricted the assault to a riot and the assize convicted McNicol. He was fined 500 merks. 2

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1. I.74/5, also I.75 - 100 merks, acquitted. I.128/9.
 2. I.97/8.
 3. I.143/5 - in one case he was charged with theft and hamesucken - hanged I.30/1.

IV. HAMESUCKEN (Contd.)

3. SHERIFF COURT (1515-1747).

The references are infrequent, but in the later records the only case which shows a sentence refers to a fine of £200 and caution to keep the peace in future and lawburrows.

This sentence corresponds to an aggravated assault penalty.

1. Kb. 215.

CONCLUSIONS.

IV. HAMESUCKEN.

1. In the earliest period in the justiciary courts, the standard determination of compounding and remission applied, although no details are given as to the outcome if he was unable to pay. In the middle and later periods, banishment following reference to will is seen, and one serious case shows hanging, but this was exceptional.

No real pattern can be seen as cases of pure hamesucken are rare - much more frequently the cases show a combination with another crime whose penalty, if capital, ruled, and in those cases hamesucken was regarded not so much as a separate crime as an aggravation.

As a result, in a case of hamesucken and slaughter, the capital aggravation sentence of beheading and mutilation applied.

2. Hamesucken is noted only in the justiciary courts and in Argyll and Sheriff Courts, and in the latter, the normal sentence was fining - in the manner of a serious or aggravated assault. In Argyll the fines were 500 merks, 100 merks, £10 Stg. and £50, and in the later Sheriff Court £200 is noted.

3. In the other courts, hamesucken was not treated as a separate crime, but as an aggravation to assault, e.g. in Shetland to attack someone in his house merited the standard aggravation fine of 40/-, and was in exactly the same category as an assault while at sea, or an assault at night.

V. DEFORCING.

1. JUSTICIARY COURT.

PART 1. 1488-1650 (Contd.)

The deforcing cases are infrequent.

In the earliest period, imprisonment for a year and a day with escheat was standard:-

Alison Cuthbert and others were convicted of deforcing a Messenger at Arms and assaulting him. They were sentenced to be imprisoned for a year and a day and their lives to be at the King's will. Their moveable goods were escheat.

In the middle and later periods, no final determinations are noted.

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1. A.71.
Aa.356 - in will for person and moveables.
437/9 - in free ward north of the spey.

V. DEFORCING.

1. JUSTICIARY COURT.

PART 2. 1661-1747.

A clear pattern is seen during this period - the standard sentence was escheat of moveables - half going to the king and the other half going to the creditor or pursuer on whose behalf the messenger was acting. The accused was also imprisoned for a period at the justices' order.

This was a statutory sentence in terms of 150 Act. 12 Parl.

Jas. VI.

Persons guilty of deforcement are to be punished in their persons and their whole moveable goods are to be escheat - one-half to the Crown and one-half to the person at whose instance the original summons was taken.

Alexander Brodie against Harry Gordon for deforcement of Brodie's messenger who was beaten and wounded by Gordon and had his wand of peace and his sword broken. Gordon was convicted by the assize and was sentenced to have his moveable goods escheat, half to the king and half to Brodie. He was imprisoned until the further order of the justices.

1. G.75/83, also 199/205, also F.123/5, 223/4, 230, 306/7.

V. DEFORCEMENT (Contd.)

2. ARGYLL JUSTICIARY COURT (1664-1742).

This record also shows that the statutory penalty of imprisonment and escheat of moveables was enforced.

John Campbell was convicted of deforcement - he and others had armed themselves and forcibly took away pointed goods in the possession of the messenger-at-arms. He was sentenced to pay the principal sum owing and expenses in the original decree which the messenger was enforcing and his whole moveable estate was escheat. He was imprisoned during the justice's pleasure.

But in some deforcements, the charges were described as "riots" (as in assaults) and were dealt with as assaults with a fining penalty, although the fines were heavier than in assaults.

Duncan Campbell and others were accused of riot and deforcement of Charles Daniel, Sergeant, and five Militia soldiers. Duncan Campbell was deficient in his customs return and Daniel and another soldier were sent to be quartered with Campbell till he paid. This incensed Campbell and his friends and they attacked Daniel wounding him with dirks and swords. They were acquitted except for two of the Campbells who were both fined 100 merks.

In occasional cases the fine was the same as an assault fine.

Archibald McVicar was fined £10 and ordered to pay 5 merks to the officers for his seizure of his goats which the officers had pointed.

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1. I. 126/8.
 2. I.46/8, also I.148/9 - 500 merks, I.138/9 - 100 merks and £50.
 3. I.105, also J. 1/1710.

V. DEFORCEMENT (Contd.)

3. SHERIFF COURT (1515-1747).

Fining was standard in the later records:

A mob attacked the revenue officers who had impounded some goods and the ringleaders were fined £5 Stg. and imprisoned until they paid.'

No cases are noted in the earlier periods.

4. SHETLAND COURT (1602-04).

References to deforcing are rare and only one case shows a penalty -

The accused confessed before the assize, who decerned that his goods and lands should be escheat and that he should be banished.

1. Kb.89, also Kc.175/8 - £20.

2. L.111 - also L.32, 130 - in will and no penalty.

V. DEFORCEMENT (Contd.)

5. REGALTY COURT (1547-1706).

In the earlier period, fining was the standard penalty and the penalties were relatively light - fines of 20 merks,¹ £10² and £5³ are noted, with on occasions prison until payment.⁴

Some of the earlier cases are taken with the assault charges, but apart from noting that a fine was imposed, no details are given.⁵

In the middle period, however, the penalties were more severe - fines of £100 are noted,⁶ but the facts given in one of those cases show an armed attack on the Court Officer to recover the animals pinded.⁷ Lesser fines could be imposed - e.g. £50.⁸ A penalty of 20 merks was enforced for breach of a cautionary obligation.⁹

The Act of James VI (Parl. 12, Cap. 150) is mentioned, but although the act was in force for a considerable part of the record, only two cases are noted where the terms are enforced.¹⁰

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1. Na.167.
 2. Na.159/60.
 3. Na.150, 358.
 4. Na.159/0.
 5. Na.46.62. 72.
 6. Nb.41/2, 49, 55.
 7. Nb.41/2.
 8. Nb.116.
 9. Nb. 30.
 10. Nb. 111/2, 339/0 - armed attacks on court officer.

V. DEFORCEMENT (Contd.)

6. BARON COURT (1523-1747).

Deforcement entries are noted in all the records and the normal penalty was fining.

However, in the earliest record (Carnwath) one case showed that those responsible forfeited their tacks and steadings and all their moveable goods within the Barony and their persons to be in prison for a year at the Baron's will. But this punishment was not followed in the other cases, where fines were imposed.

In Urie only one case is noted, and a fine of £10 was exacted, but in Stitchill deforcement is common and a fine of £5 was the normal penalty, with some cases of £10 and one of 10/-d.

None of the records refer to the Act of James VI but in Leys, however, there is a more serious case which shows a fine of £40, stocks for 24 hours and escheat of goods and gear.

-
1. O.138/9 - a penalty similar to the earliest Justiciary sentences.
 2. O.186 - £10.
 3. P.68.
 4. Q.35 etc. the other records were similar.
Ra. 310 - £8.
310/1 - £6.
S.118 - £20.
132 - £10.
 5. Rd. 222, also stocks - S.116, 123.

V. DEFORCEMENT (Contd.)

7. BURGH COURT (1398-1714).

In the Aberdeen record, deforcement was punished by fining, but no amounts are given.

Willelmus de Strade was fined for a deforcement.

Gilbertus de Kynros was accused of a deforcement and after enquiry by assize he placed himself in the bailies' will and was fined.

Fining was imposed in Peebles also.

John Lyllay was accused by the bailies and the community of deforcing the sergeant (who was pointing his father's goods) and also striking the sergeant. Lyllay came into the bailies' and the town's will and was fined 20/-d. He found four cautioners for the fine. He had also to find lawburrows to the sergeant, under pain of 40/- again guaranteed by four cautioners.

-
1. V. 65, also V.198.
 2. V.117, also V.209 - 8/-d. V.198 - such fine as is proper.
 3. X.131/2. 1459.

CONCLUSIONS.

V. DEFORCING.

1. In the earliest period of the justiciary records the standard sentence was imprisonment for a year and a day and also escheat of moveables, but references to deforcement are rare and none at all are given in the middle period. However, in the later period there were a number of cases taken under 150 Act. 12 Parl. Jas VI. whose penalties were escheat of goods, half to the king and half to the creditor whose decree was being enforced, and imprisonment at the order of the justices. The cases show that the statutory penalties were enforced and were the standard sentence.

2. Argyll shows enforcement of the statutory penalties of escheat and imprisonment, but also shows fines (£50, £10, 500 merks, 100 merks).

3. The lower courts show fining as the principal sentence with a few cases of enforcement of the statutory sentence.

(a) Sheriff Court - later period - £5 stg. £20.

(b) Shetland Court - escheat of moveables and banished.

(c) Regality Court - early period - fines of £10, £5, 20 merks.

- middle period - fines of £100, £50 and (very rarely) cases enforcing the statutory penalties.

(d) Baron Court - early period - imprisonment for a year and escheat of moveables (which was very similar to the justiciary cases of that period)

- middle period - £10, £5 (with one exceptional case of £40, stocks and escheat).

(e) Burgh Court - fining (20/-) was standard in the early period but the cases are rare and no deforcements as such are noted in the middle and later periods. However, it could be that deforcement was treated as rebellion and punished with indignities, fining, loss of burgess-ship etc.

VI. ADULTERY.

1. JUSTICIARY COURT.

PART 1. 1488-1650.

The cases are infrequent and the earliest instances do not show a serious penalty.

The standard determination of remission is noted --

James Filmure produced a remission for adultery and slaughter. Caution was found to satisfy the parties.¹

The early adultery cases usually included a reference to theft - the accused used the husband's goods theftuously.²

Patrick Urquhart was convicted of adultery with Janet Davidson, wife of George Hopper, while Hopper was out of Scotland, and theftuously using Hopper's possessions. He was imprisoned, but no details are given as to period or final punishment, if any.³

However, the most frequent sentence throughout the whole record was banishment which varied between national banishment and local banishment. A further penalty could be given in addition to the banishment.

Cuthbert Amullekyne confessed to adultery and he consented to be banished for all time. The precept came from the Secret Council and there was a penalty of 1000 merks not to commit this crime again.⁴

David Gray was convicted of adultery and was banished from Edinburgh. He was further fined £40 to be applied for the use of the Kirk and imprisoned until paid.⁵

Elsbeth Hislop confessed to adultery and was sentenced to be drawn in a cart through the town with her lover, each with a notice on their heads stating their crime and thereafter to be banished from Edinburgh.⁶

William Norwall was convicted of theft and adultery and having placed himself in will, was banished from Scotland. In the following month, he was hanged for fraud.⁷

LA -v- William Lauchlan. Lauchlan deserted his lawful wife and lived with another woman. He had already been convicted by an assize and was in prison. The record does not state, but it is apparent that he petitioned the Privy Council for they gave a warrant to the Court ordering banishment - never to return without leave.⁸

1. A.19, also A.27.
2. A.19, 27, 92.
3. B.11/12, also 13.
4. B.78/0.
5. C.369 - A.92 - banished furth of Wigtownshire.
6. C.401.
7. C.389, also C.399/0, Dd.428.
8. E.164.

VI. ADULTERY (Contd.)

1. JUSTICIARY COURT.

PART 1. 1488-1650 (Contd.)

Adultery was made a capital crime in terms of C.74. 1563, but a capital sentence was rarely imposed for adultery.

John Guthrie was convicted of marrying two wives and keeping a third woman as a mistress. The king observed that this was a crime, so odious and intolerable among Christians that it merited to be most exemplarily punished. Guthrie was accordingly hanged and his moveables escheat.¹

Other cases show a death sentence, but these cases show adultery combined with other crimes which could be capital in any event.

LA -v- George Sinclair. Sinclair confessed to adultery incest and forgery - adultery with a woman and incest (seduction) of girls in his charge as a teacher. He also forged his testimonials - convicted by assize and sentenced to be drowned and escheat of moveables.² (Forgery could be capital).

George Trumbill was convicted of theft and adultery and incest with his nephew's wife. He was hanged and his lands and moveable goods forfeited.³

This case quotes an Act which provides the death penalty for notorious and manifest adulterers and incestuous persons, but the Act was seldom enforced. In this case, it is probable that the death sentence was imposed on account of the theft element.

In the same category are the following cases where a death sentence was imposed, not so much for adultery, but for murder.

Andrew Glencorse was convicted of having poisoned his wife and also committed adultery with his wife's mother. He was burnt, but the penalty was more applicable to the poisoning than the adultery. It is not stated whether he was hanged or strangled before his body was burnt.⁴

However, in incest cases, the guilty person could be burnt and there were elements of incest in this case.

1. Dd.429.

2. E.95 - also E.212 - Adultery & witchcraft - punished

3. C.424/5. / as a witch.

4. B.84

VI. ADULTERY (Contd.)

1. JUSTICIARY COURT.

PART 1. 1488-1650 (Contd.)

LA & Others -v- Andrew Rowan. Rowan was accused of adultery with two women, and also of murder under trust, having strangled his wife. He was hanged and forfeited and his head and right hand were cut off after death and exposed on the west gate of Edinburgh.

LA -v- Patrick Robieson and Marion Kempt. Robieson was accused of adultery and Marion Kempt was also accused of taking a potion to kill her unborn child. They confessed and the case was referred to Privy Council. Both were hanged and their moveables were escheat.²

After the Reformation, Parliament took steps to make fornication a statutory crime with penalties of £40 (or 8 days imprisonment) and two days in the pillory for the first offence - 100 merks, pilloried and his head shaven for the second offence, and £100, ducked in a foul pool and banished for the third. Arnot quotes one case of the penalties for the first offence being imposed.²

1. E.71 -- This was a treason sentence and the hanging and mutilation can be attributed to the murder.
2. E.81.
3. Arnot. 320/1. 1653.

VI. ADULTERY (Contd.)

1. JUSTICIARY COURT.

PART 2. 1661--1747.

The pattern is difficult to establish, but the normal sentence was scourging and banishment.

The narrative of some cases makes reference to a capital sentence for notour adultery, but no capital sentences were imposed. Death sentences are noted on occasions, but in such cases the adultery was linked to another crime which in itself was capital.

As examples of the standard sentence, the following may be noted --

John Reidpath was accused of adultery with Katherine Stevenson. The assize found him guilty following his confession. Reference is made to the statute ordering death for adultery, but the Lord Advocate enquired of the Privy Council if they would mitigate the penalty and he was scourged through the High Street and then banished.¹

Variations occur -- only banishment:

John Murdoch and Janet Douglas were convicted of adultery both being married persons. They came in the King's will and were banished from Scotland for life.²

-- only scourging:

Richard Brown and Helen Geddes, prisoners in the Tolbooth for adultery, were ordered not to remain in each other's company under pain of death, and to be whipped within the prison and then released.³

If adultery was combined with a capital crime, that crime's penalty ruled:--

-- with murder:

Marion Smith, servant to Alex. Swinton, confessed adultery with him and the murder of the child. She was sentenced to be hanged.⁴

1. e.g. G.190/5, 208/11.
2. F.54/5.
3. H.16.1699, also F.292/5, 299.
4. F.3.
5. F.123.

VI. ADULTERY (Contd.)

1. JUSTICIARY COURT.

PART 2. 1661-1747 (Contd.)

Advocatus and kin of Margaret Cuninghame against John Swinton for the murder of his wife, Margaret Cuninghame, and for adultery with Janet Brown. He was found guilty of murder and adultery, but it was simple adultery and not notour adultery - the death penalty could not be given for simple adultery. He was beheaded, but that was for the murder.'

- with incest and bestiality:

Thomas Weir was convicted of adultery with various women, incest with his sister, and bestiality. He was sentenced to be taken to the Gallowlie between Leith and Edinburgh and there between 2 and 4 in the afternoon to be strangled at a stake till he was dead and his body was to be burnt to ashes. The sentence is attributed not so much to the adulteries, but to the incest and bestiality and was the standard sentence for such crimes.'

It is noted from certain cases that during the Commonwealth fining was imposed for adultery.

John Hutcheson and many others were bound to appear before the Court to receive doom and sentence for adulteries. They produced details of sentence before the Commissioners of Justice during the Commonwealth when they were fined and the Court accepted that sentence.'

Calum Macfarlane was accused of adultery, but the action was deserted because he produced evidence that he had been fined £30 Scots by the English.'

Some cases show that remissions could be obtained for adultery:-

John Brown was accused of manifest adultery with Eupham Happpland, but he produced a remission and the charge was dropped.'

Miscellaneous cases are noted:-

Robert Brand was accused of adultery with his servant woman. The action was deserted because the informer was not present nor the Advocate ready to insist. It is stated that the accused had made public repentance.'

1. F.90/3, also F.125/6 -- wife killing husband.
2. G.10/5.
3. G.53/4, also G.54/5, 57/8, 59/0, 61.
4. G.74.
5. F.71, G.128, 295.
6. F.34.

VI. ADULTERY (Contd.)

2. ARGYLL JUSTICIARY COURT (1664-1742).

The penalty for adultery varied between scourging and fining.

Donald McBridan was convicted of adultery and was fined by the Justice £40. He was warded till the fine was paid and had to find caution for his good behaviour.¹

Fingal McCannill was accused of adultery and the murder of her child. She was acquitted of the murder, but found guilty of adultery. She was sentenced to be taken to the Mercat Cross between 2 and 3 in the afternoon and from there to be whipped and scourged by the common executioner. Thereafter, she was imprisoned until she found caution for her good behaviour or until she agreed to leave Argyllshire. Her moveables were escheat.²

In one adultery prosecution, the man was scourged and the woman was put in the jugs, with a paper on her breast stating her crime, until the man was punished.³

Banishment could be given - the man was banished from Great Britain and the woman was transported to Virginia.⁴

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1. I. 125.
 2. I. 124/5, also 111/2.
 3. J. 12/1707, also J. 2/1719 - scourged and jugs.
 4. J. 8/1733.

VI. ADULTERY (Contd.)

3. SHERIFF COURT (1515-1747).

In the later period, fines of £40, £20 and £10 were imposed - £10 being the most common. A case refers to the penalties contained in 38 Act, 1st Parl. Chas. II - £100 fine for gentleman and burgess and £10 for the rest, the fines being doubled for each subsequent offence and were also payable by the woman - but the statutory penalties did not appear to have been enforced.

4. SHETLAND COURT (1602-04).

There are occasional references to adultery, but the details are sparse. In each case the penalty was fining.

The references are simple - A. adulterer with B.

Submission to the judge's will was the normal practice.

A. having passed his life in fornication with B, submitted himself to judge's will.

The fines imposed by the judge varied greatly - 10 angels, 2 angels, 1 angel, £4, 40/-d.

1. Kb. 18/9 - some cases show the man being fined for adultery with his wife "ante nuptially".
2. L.5, 22.
3. L.20, 21, 132.
4. L.22, 58. 5. L.22, 58.
6. L.20, 21, 22, 57, 58.
7. L.22, 58.
8. L.22, 57.

VI. ADULTERY (Contd.)

5. BURGH COURT (1398-1714).

The records are similar in their dealings with adultery.

The council passed various orders against persons held to be in adultery -- they were to marry or else abstain and they had to find caution to obey.¹

Indignities and banishment are noted:

Thomas Thomson was ordered to remove from Janet Foular and to ask forgiveness in the face of the congregation for offences he had inflicted on his wife, Christian Wilkeson. He was to be carted during market day.²

Banishment was given for a second offence:

Alexander Stevinsoun confessed to breaking an order against his associating with Margaret Donaldson and he was banished and lost his freedom. In the previous order, they had been carted through the town.³

1. X.268/9. 1560.
Z.80. 1562 -- undertook not to associate together again.
2. X.269. 1560.
X.273. 1561 -- Act ordered couples to separate under pain of branding on the cheek and banished (also included slanderers).
X.277. 1561 -- Act that adulterers, perjurers, pykers, slanderers, to be punished.
3. Z.155. 1622.

CONCLUSIONS.

VI. ADULTERY.

1. The basic sentence in the main courts throughout the whole period was banishment, but there are variations.

2. Again in the earliest period, the justiciary courts show compounding and remission as the main determination. No details are given as to what happened if the accused could not pay.

In the middle and later period, banishment (local in the beginning, national in the remainder of the period) was imposed. At first, no other penalty was added, except indignities occasionally, but in the later period, scourging was added frequently.

While adultery was in theory a capital crime, only one case is noted of a death sentence (hanged) towards the end of the middle period. However, frequently adultery was combined with a capital crime (murder, theft, forgery, incest) and in those circumstances death could result.

3. Some cases give details of Commonwealth sentences - fines of £30.

4. Remissions are noted in the later period.

5. While Argyll shows the basic sentence of banishment (with scourging) fining was also frequent - £40.

6. The Sheriff and Shetland Courts also imposed fines - Sheriff Court - £10 (also £40, £20)

Shetland Court- 1 angel (also 10 angels, £4, £2).

7. The Burgh Courts again imposed indignities - and /or exposure. Banishment is noted for second offences.

VII. INCEST.

1. JUSTICIARY COURT.

PART I. 1488-1650.

The cases show that incest was punished more severely than adultery and cases of strangling and burning are noted.

In the middle period the only case which gives a final determination shows a sentence of burning and with the adultery case mentioned above, which had an element of incest present, it seems likely that the standard penalty was burning. It should be noted that the sentence was not burning alive, but burning the body after either hanging or strangling.

James Bonar was convicted of incest with his sister and was burnt.²

The later periods show similar details:-

James Stewart was convicted of incest with his wife's sister. He was sentenced to be strangled at the stake and his body burnt and his moveables escheat.³

Beheading was imposed on occasions -

Jeffrey Irving was convicted of incest with his deceased brother's wife - beheaded and moveables escheat.⁴

JA -v- John Weir. Accused of incest with widow of brother of his grandfather - they had been excommunicated and the woman was declared rebel for non-appearance. He placed himself in will and was sentenced to be taken to the market cross and his head struck from his body and his moveables escheat, but the sentence was not carried out and he was banished instead.⁵

Other death sentences are noted, but they included other crimes which were capital in their own right.

George Sinclair was sentenced to be drowned for adultery, incest and forgery. It is noted that the indictment of incest was sustained as he was a teacher and had seduced girls in his charge.⁶

1. Glencorse; B.84.
2. B.22 - adultery with incest element - B.84.
3. D.248/9.
4. Dd.576, also Arnot 306.1630, 306/7.1649.
5. E.121.
6. E.95.

VII. INCEST (Contd.)

1. JUSTICIARY COURT.

PART 1. 1488-1650 (Contd.)

George Trumbill was hanged for theft, adultery and incest with his nephew's wife, and his lands and goods were forfeited.'

PART 2. 1661-1747.

It is seen that hanging was standard for women accused of incest, and as in the previous periods, strangling and burning for men.

Jean Weir was accused of incest with her brother and also sorceries. She confessed and was convicted by the assize. She was sentenced to be hanged at the Grassmarket in Edinburgh. She was acquitted of the sorceries.'

Thomas Weir was accused of adultery with various women, incest with his sister, Jean Weir, and bestiality. He was sentenced to be strangled at a stake till he was dead and his body was to be burnt.'

1. G.424/5.

2. G.11/4, also H.18.1704, Arnot 307/8.1705.

3. G.10/4,
but see H.18. 1704 -- man banished.

VII. INCEST (Contd.)

2. ARGYLL JUSTICIARY COURT (1664-1742).

The record shows an unusual case which was held to rank as incest where an uncle and nephew shared the same mistress.

Mary McThomas was accused of incest with John McKennan, and a child had been born. She was no relation of his, but it was stated that she had committed adultery with him and during the same period she had committed adultery with his uncle, John Campbell. This was held to be incest and she was convicted. She was sentenced to be hanged on the gallows at Rothesay between two and three in the afternoon and her moveables escheat.

CONCLUSIONS.

VII. INCEST.

1. No details are given in the early period of the justiciary records, but in the middle and later periods incest was punished by strangling and burning the body. His moveables were escheat.

Occasionally in the middle period beheading was given and in one case the accused was banished. In the later period a distinction in penalty is seen between male and female accused - men were strangled and women were hanged.

2. The charge of incest in the main period covered a wide range of relationships - far beyond one degree relationships. It included seduction of girls in his charge by a master, the widow of his grandfather's brother, the daughter of his first wife's half-brother, a wife who lay with her husband knowing that he had made love to her sister, and a girl who was the mistress of an uncle and nephew at the same time.

VIII. RAPE.

1. JUSTICIARY COURT.

PART 1. 1488-1650.

The standard penalty in this period was death by hanging.

William Bell was convicted of the rape of Janet Falconer - he was hanged and his moveable goods escheat.

John Steill was hanged for common theft, murder and rape. It is impossible to say what was the actual penalty for rape, as both theft and murder were capital charges.

1. C.475, also C.567.

2. A.126/7.

VIII. RAPE. (Contd.)

1. JUSTICIARY COURT.

PART 2. 1661-1747.

It is seen that while a death sentence could be imposed, it was seldom implemented. Scourging and banishment are noted, but the most striking feature is the frequency with which the sentence was a payment of damages to the woman, followed by a remission in certain instances.

Only one case shows the capital sentence being carried out:-

Two soldiers, Patrick Wallace and Robert Ferres, were convicted of barbarously raping Helen Low - by holding her down alternately. Both were sentenced to be hanged, but only one was hanged - the other received a remission, presumably because he paid damages.¹

Scourging and banishment could also be imposed, in one case with the addition of public punishment.

Matthew Foulden was convicted of the rape of Agnes Donaldson. He was sentenced to be whipped through Jedburgh, where he lived, with a paper on his head stating his crime, and thereafter to be banished from Jedburgh, not to return under pain of further scourging.²

Banishment by itself is noted:

Thomas Dickson was convicted of the rape of Elizabeth Hay and offered to go to the plantations for seven years. This was accepted and he was banished.³

While a sentence was certainly imposed in the other cases it is noticed that the woman received a payment of money which was in the nature of damages or assythment. The actual criminal sentence was light in most instances.

Captain Chas. Douglas and two others were accused of the rape of Christina Davidson. The accusation was not proven as rape, but Douglas was ordered to pay 300 merks, 10 to the king and the rest to the girl.⁴

1. H.98. 1747.
2. H.76/9. 1732.
3. H.89/1. 1744.
4. H.13/5. 1697.

VIII. RAPE (Contd.)

1. JUSTICIARY COURT.

PART 2, 1661-1747 (Contd.)

Col. Francis Charteris was convicted of the rape of Janet Watson and was sentenced to pay £300 Stg. to the woman's husband as damages and expenses and to be imprisoned till it was paid.¹

Nichola Boswell against Michael and Alex. Malcolm for her rape, but they produced a remission and the case was dropped. They had been declared fugitive earlier.²

2. ARGYLL JUSTICIARY COURT.

As in the Justiciary court records of the period, payment of compensation seemed to be sufficient in rape.

John Stirling was convicted of rape and was fined £100. The record also states that he promised to satisfy the girl's father, and it is possible that the matter was settled out of court.³

BURGH COURT, 1398-1714.

Only one case is noted in the records, and the sentence was forgiveness and public indignity.

Robert Bullo⁴ was ordered to appear before the congregation and ask Marion Stenson's forgiveness for ravishing her. If he refused, he was to stand at the market cross for 24 hours with a paper in his hand stating his crime.⁵

1. H.66/0. 1723.

2. F.303. 269.

3. I.145, also J.3/1737.

4. X.274. 1561.

CONCLUSIONS.

VIII. RAPE.

1. The standard penalty in the middle period was hanging and escheat, but the sentence changed considerably in the later period.
2. While hanging was imposed in one case in the later period, scourging and banishment was more frequent and in the final period payments in the nature of assythment were ordered (£300 Stg., £100 (Argyll), 300 merks) and no further sentence was passed.
3. Remissions are noted in the later period.
4. One case is given in the Burgh Court, in the middle period, and the sentence was public forgiveness and for indignity.
5. It is plain that the death sentence of the middle period was held to be unduly severe in the later period when a payment of money to the woman or her husband was more acceptable to both sides.

IX. BESTIALITY.

1. JUSTICIARY COURT.

PART 1. 1488-1650.

The standard sentence was strangling and burning and the animal was killed and burnt also.

John Jack was convicted of bestiality with a mare and he was sentenced to be strangled at a stake and his body burnt. The mare was also ordered to be burnt.¹

PART 2. 1661-1747.

Andrew Love was accused of bestiality with mares and cows. He confessed and was convicted by assize. He was sentenced to be strangled and his body burnt at the Castlehill.²

2. ARGYLL JUSTICIARY COURT (1664-1742).

Duncan McKawis was convicted by assize of bestiality and was sentenced to be strangled to death at the stake and his body burnt to ashes. The mare was also to be killed and burnt.³

1. C.491, also earlier case 1/9/1570.

2. F.34, G.10/4.

3. I.66/8, also H. 1/1708, 11/1711 (both hanged and burnt)

CONCLUSIONS.

IX. BESTIALITY.

1. The standard sentence was strangling and burning, although in the final period two cases are noted where the accused were hanged and burnt. The animal was also killed and burnt in the same fire.

X. ABDUCTION & RAVISHING.

1. JUSTICIARY COURT.

PART 1, 1488-1650.

Such cases are seen only in the first part of the Justiciary records. Girls (particularly heiresses) were seized and abducted and were later forced to marry their captor or a person chosen by him.

The only case in which a sentence is given, shows a fining penalty.

John Kincaid was accused of abducting Isobel Hucheson, a widow, against her will and taking her to his house. The king was hunting when news of this came to him and he sent a party to recover her. Kincaid placed himself in the king's will and he was fined 2500 merks and his brown horse.

There is some doubt as to the validity of the charge in this case and the situation could have been contrived by the king's party.

William Bannatyne was acquitted by an assize of seizing Margaret Hamilton. He had invaded, with a number of other persons, the house where she was living and severely wounded her guardian. She was ten years of age at this time.

1. C.337/9.
2. B.378/9, also continued B.377/8.

CONCLUSIONS.

X. ABDUCTION & RAVISHING.

1. This crime is noted only in the middle period of the justiciary records, and the only case which gives a sentence shows a fine of 2500 marks.

XI. THEFT.

1. JUSTICIARY COURT.

PART 1. 1488-1650.

Throughout the whole record, theft entries occur very frequently, and while in the middle and later periods hanging was the standard punishment, a death penalty was not normally imposed in the earliest period.

In the earliest period the same process of compounding and remission is noted as in the other crimes.

William Cockburn and others were permitted to compound for theft with caution guaranteeing payment.²

The accused could produce a remission in respect of the crime and again cautionary guarantees were usual.³

The accused could place himself in the king's will and cautioners were found to guarantee the payment to the robbed person.⁴ If he did place himself in will he was fined,⁵ as in the other crimes of the period, although in some will cases he could be warded pending final determination.⁶ A few isolated cases in the period show a straight fine, without any reference to compounding or will.

James Hunter and another were convicted of the theft of hay. They were fined £5 and had to find caution for that amount to the robbed person.⁷

If the accused was unable to find caution or if the accused had obtained a remission and then failed to pay or to find caution to pay, he could be hanged.

Robert Oliver and others having refused to find caution, were ordered to be imprisoned for 40 days at the end of which they were to be hanged if there was still no caution.⁸

1. A.15.
2. A.18, 23, 29, 32 etc.
3. A.17, 18, 19, 20, 22 etc.
4. A.15, 17, 18, 21, 25.
5. A.15 - £4. A.17 - 40/-d.
6. A.218/9.
7. A.25. A.92 - £3 - stealing wood (one person remitted because he was a pauper).
8. A.30/1, also A.69, 70.

XI. THEFT. (Contd.)

1. JUSTICIARY COURT.

PART 1. 1488-1650 (Contd.)

While the majority of theft cases in this period show compounding and remission, other cases show capital sentences

Hanging:--

Nicholas Dunweldy was convicted of resetting Adam Corry and hanged.¹

Edward Symson was convicted of stealing money during a festival -- when in the disguise of a mummer and was hanged² It seems that he was not given the chance of compounding owing to the dishonourable circumstances.

Gilbert Thomson was convicted of taking goods from shops when Dumfries was burning and hanged.³

Donald Makalister was hanged for stealing oxen and cows.⁴

Beheading:--

Patrick McLellan was convicted of stealing oxen, under silence of night and beheaded.⁵

Henry Bickerstoune was convicted of the murder of Robert Sym and also of the theft of various goods from him -- he was beheaded.⁶

Adam Scott was convicted of theftuously taking blackmail from various persons and was beheaded.⁷

Banishment is noted, with and without personal punishment:--

Michael Scott was convicted of cattle stealing and was sentenced to be scourged through Edinburgh, thereafter his ears were to be cut off and he was to be banished.⁸

Robert Lofthouse was convicted of concealing money and was sentenced to be banished and to remove himself from Scotland in 40 days.⁹

It is seen that capital sentences could be imposed, but it is not possible to say whether in such cases the accused could not find the necessary caution or compensation, or whether the death sentence was imposed without option.

In //

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1. A.41.
 2. A.50/1, also A.51.
 3. A.39.
 4. A.51, also A.51/2, 87, 88, 126/7, 133, 142, 151, 154, 169, 176, 179.
 5. A.64.
 6. A.162.
 7. A.145.
 8. A.157, also A.206 -- stealing wool.
 9. A.32, also A.52/3 -- banished from Sheriffdom.

XI: THEFT. (Contd.)

1. JUSTICIARY COURT.

PART 1. 1488-1650 (Contd.)

In certain of the foregoing cases it would seem that no option was permitted.

On occasions, theft could be equated with treason.

Simon Armstrong was convicted of cattle stealing in the Borders, and giving assistance to the English. He was to be drawn to the gallows and hanged. All his lands and goods were escheat.

Acquittals are noted:-

Walter Drummond was acquitted by assize of concealing the king's crown and some jewels.³

In the middle and later records, the cases follow a standard pattern - the normal punishment was hanging and escheat of moveables.² The usual form of the crime was theft of livestock of all kinds, and also money.

It is not possible to say whether first offences were punished by hanging or if hanging was only imposed where the accused were notour thieves. In some hanging cases the thieves were certainly notour but it is likely that even first offences could carry the death penalty in the Court of Justiciary if they were serious.

The following cases may be noted:-

Adam Sinclair and Thomas Ramsay were convicted of sacrilege, having stolen from a Church. Adam was drowned (through the special grace of the Queen) and Thomas hanged.⁴

Robert Whippo was convicted of a number of thefts and was hanged. His moveable goods were escheat.⁵

Occasionally land and moveables were forfeited if the theft was especially serious or had treasonable aspects.⁶

Combined crimes -

In most cases the theft penalty of hanging ruled.

1. A.172, 173, 173/4 - only moveables.
2. A.133, also Aa.415/6.
3. Aa.358, 384, 400, 411, 413, 432, 450 etc.
B.45, 59, 65, 111, 386 etc.
C.85, 346/7, 347, 352/3, 357, 360, 364 etc.
D.115, 212, 242, 252, 265, 265/6 etc.
Dd.397, 478/9, 555, 565 etc.
E.268, 287.
4. Aa.393/4.
5. C.81/5.
6. C.346/7 - stealing title deeds of landed estate. D.02

XI. THEFT (Contd.)

1. JUSTICIARY COURT.

PART 1. 1488-1650 (Contd.)

1. Murder & Theft.

Allister McKie and others were convicted of the murder of certain servants of the Laird of Luss and stealing sheep and cattle. They were hanged and their moveable goods escheat.

In many combined murder and theft cases, the body was dismembered after hanging - sentenced to be hanged and his head cut off after death or his head and right hand to be cut off after death and placed in prominent positions. This could extend to a full treason quartering:-

Allaster McGregor and others were found guilty of murder and theft and were sentenced to be hanged and after death their bodies were to be quartered - heads, legs and arms to be placed in prominent places. Their lands and moveables were escheat owing to the treasonable aspects of this case.

In another murder and theft case, the standard penalty of hanging was imposed, but with forfeiture of lands and moveables - he stole cattle from the President of the College of Justice.

2. Slaughter & Theft.

In the cases of slaughter and theft, the normal penalty was hanging and escheat of moveables. One case showed hanging and forfeiture of lands and moveables, but there was no particularly treasonable activity - three slaughters and theft.

In occasional cases, the slaughter penalty of beheading was imposed.

John Johnston was convicted of two slaughters and theft and was sentenced to be beheaded and his moveable goods were escheat.

3. Assault & Theft.

The assault and theft cases show hanging as the normal penalty.

1. C.413/4, also C.415, 542.

2. C.403/4.

3. C.384/5, 422/3, also B.372 - murder assault and theft - hanged and head and right hand cut off, mov. escheat.

4. C.432/3.

5. C.562.

6. e.g. C.365, 444, also C.418/9, 424 (McGregor).

7. C.528/9.

8. C.425/6, also Dd.484/5, 538

XI. THEFT (Contd.)

1. JUDICIARY COURT.

PART 1. 1488-1550 (Contd.)

Thomas Cunningham was convicted of assaulting Patrick Gemmill in his house and stealing from him. He was sentenced to be hanged and his moveables were escheat.

4. Incest and Theft.

In a case of incest and theft, the accused was hanged and had his land and moveables forfeited.²

In some instances of theft, the standard penalty was not observed.

Grisel Matthew and William Calder were convicted of stealing a coffer containing letters and titles. Grisel Matthew was a servant in the house from which the theft took place and she was sentenced to be drowned in the North Loch of Edinburgh and her moveables escheat. William Calder took a lesser part in the theft and he was scourged through Edinburgh and banished from Edinburgh and Aberdeen.⁷

Banishment is noted sometimes with scourging or branding added and in practically every such case the accused confessed or placed himself in will.

Achilles Henderson was found guilty by an assize of stealing nine lambs. He was sentenced to banishment from the Sheriffdom of Edinburgh and scourged through the town.⁴

Certain other cases show banishment, and again there tended to be special circumstances.

Andrew Reid was accused of theft from a house but he had been tried in the Sheriff Court of Kincardine and no sentence had been given. However, he was banished now.⁵

Margaret Heartsyde was convicted of detaining jewels belonging to the Queen. She was banished to Orkney and formally declared infamous at the king's command. This was repealed later.⁶

Lady Rothiemay was accused of theft against the Laird of Frendraucht - she had organised a gang of robbers who plundered the surrounding land. Owing to political influence, there were many continuations, but eventually she was tried and sentenced to remain south of the Forth for a period and under penalty of 2000 merks.⁷

Acquittals are noted.⁸

1. C.359/0, also 391/3.

2. C.424/5.

3. C.93/4 - for drowning see also Aa.393/4.

4. B7, also Aa.388, 396, 458 (all confessed)

D.99,270 (will)

Dd.441/2 (confessed)

Dd.445 - scourged, branded and banished.

Dd.540, 541/2 - banished (all confessed).

5. C.411/3 - also Dd.569, E.222.

6. C.544/551.

7. E.277. 8. B.15, 31/2, E.197, 206.

XI. THEFT. (Contd.)

1. JUSTICIARY COURT.

PART 2 - 1661-1747.

The basic penalty was hanging.

Thomas Burntfield was found guilty of stealing furniture and clothes from house and was hanged.¹

James Provan and king's Advocate against Pat. McGrigor, for theft and hamesucken. McGrigor called at Provan's house at midnight demanding to be shown the way to an alehouse. He refused, but when McGrigor threatened to burn the house down and kill them, his wife opened the door and McGrigor and his accomplices seized them and forced Provan to give them money. He was acquitted of hamesucken, but hanged for the theft.²

Katherine Reid was indicted for nocturnal theft and robbery. She and her gang invaded John Meldrum's house, and after tying him and his family with cords, pricked them with daggers to make them reveal their money. She was under sentence of banishment at this time and also had broken from prison. She was hanged.³

Francis Bell and William Harewood were convicted by assize for highway robbery - they stopped persons travelling alone and robbed them of their clothes and money. Bell was sentenced to be hanged in the Grass-market (on 7th Nov. - this was 27th July). Harewood escaped from the Tolbooth of Edinburgh and was declared fugitive.⁴

In one case, involving the disturbance of ministers, the indignity of hanging in irons was added -

John Smith and others were accused of robbery and oppression of various ministers, including wounding them and demanding that they should not preach in their parishes. They were convicted by assize and were sentenced to be hanged at the Gallowlee between Leith and Edinburgh between two and four in the afternoon. The bodies of the two principal accused were to hang in chains till they rotted. Their moveables were escheat.⁵

The later record does not state how the thief was executed. It is noted only that he was condemned to death, but it would seem very likely that he was hanged.

John Caldwell was convicted of robbery in spite of pleading madness and was condemned to death.⁶

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1. F.9, 11, 13, 19, 54, 57.
 2. F.121/2.
 3. F.62/3.
 4. G.301/3, F.314 (murder and theft.)
 5. G.113/5.
 6. H.85.1737, H.88/9. 1743.

XI. THEFT (Contd.)

1. JUSTICIARY COURT.

PART 2. 1661-1747 (Contd).

Many instances occur in the middle record of actions against highlandmen - usually more crimes than theft are noted.

Again the basic penalty was hanging --

John Lyon of Muiresk against John Roy for assisting thieves and giving them succour - the thieves were McGregors and McIntoshes, but no determination is noted against Roy. However, Muiresk caught up with Lauchlan McIntosh and he was hanged for many thefts and robberies.¹

Advocatus against Callum-oig McGregor for sorning, oppressing the lieges and poor people in the country by taking meat, drink, lodging and money from them without payment, invading houses, trafficking with thieves, and taking blackmail from the people, and adultery and incest. He was hanged.²

Indignities and mutilation could be added --

Advocatus against Alaster More McGregor and John McIntosh, two companions of Lauchlan McIntosh. They were accused of fire-raising, robbery and murder (of John Lyon of Muiresk). They were sentenced to be hanged in Edinburgh and then their bodies hung in chains between Leith and Edinburgh. Before being hanged, their right hands were to be cut off.³

Some cases show indirectly the lawlessness of the Highlands:-

John Lyon took out letters against highlandmen for theft, and found caution to have the letters executed, but he stated that he could not have them executed - no messenger would serve them on the highlandmen in Badenoch and he was excused caution.⁴

While hanging was the standard penalty for theft throughout the period, other sentences are noted:-

-- Banishment --

David Murdoch was accused of stealing 7 cows - he confessed but in his sentence it was stated that this was his first fault and had been committed out of necessity. He was penitent and sentenced to banishment.⁵

1. F.133, 140, also F.96.

2. F.315/9, also F.319/327.

3. F.260 - in chains G.15/6, 198/0.

4. F.63, also F.9 - refused to go to Caithness - the highlandmen never appeared even if they were cited. F.108, 120, 123, 129, 133, G.26.

5. F.10/1.

XI. THEFT (Contd.)

1. JUSTICIARY COURT.

PART 2. 1661-1747 (Contd.)

- Branding and Banishment -

John Rae and his son were accused of stealing four sheep. They had been taken redhanded. The son was dismissed on account of his age - he was 12 - and had acted on his father's command. The father was branded on his cheek and banished from the Lothians.

- Scourging and Banishment -

Wm. Thomson and two others were convicted of stealing three hides, clothes and money and they were sentenced by order of the Privy Council to either branding or scourging at the justices' discretion and then banishment. They were sentenced to scourging - to receive seven strokes from the hangman and then imprisoned until there was an available ship.²

There is a note that the Privy Council's warrant was necessary to restrict the punishment - the restriction was justified as the Privy Council thought the thefts were "pyking" thefts, i.e. trivial.

- Fining -

Paul Ferleir and Wm. Bisset with the King's Advocate, accused John Watson and others of theft for having come to a mill in a group, armed, and having taken away sacks of corn belonging to Ferleir. The crime was stated to be Riot and masterful oppression and to be a breach of lawburrows. The assize convicted and the accused were fined 400 merks and 100 merks. Riot was punished by fining, but the lawburrows might also have had a bearing on the fine.³

In some cases, acquittal is given -

King's Advocate and Donald Melleconnell against George Petrie for stealing two horses - Petrie was held by the assize to be clean, innocent and not guilty of the theft. he proved he bought the horses in a public market.⁴

King's Advocate and Hugh Munro against Earl of Caithness and a band of Sinclairs for killing oxen and cattle, robbery, theft, fire-raising and wrongful imprisonment, but the Caithness group produced remissions and the case fell.⁵

1. F.24.

2. F.83, 87/8, F.99 - 30 strokes and banished.

3. F.140/2 - £40.

4. F.37/8, also F.308/12, F.80, G.121/5.

5. F.264.

XI. THEFT (Contd.)

2. ARGYLL JUSTICIARY COURT. 1664-1747.

The theft cases are by far the most frequent, and standard penalty was hanging.

Duncan Ban McIlbreid was convicted of the theft of two horses and some cheese and was sentenced to be taken to the gallows at three in the afternoon and to be hanged to the death and to forfeit and tync (escheat) his goods and gear.¹

The cases show that for theft of animals - horses, cattle, sheep and goats - hanging was the usual sentence. Hanging was also the sentence if the theft was considerable or if the accused had a previous conviction.

Donald Dow McGowan was convicted of theft of horses - "he laid aside all fear and reverence of God and regard to His Majesty's laws and authority, in open breach of human society and did live in a constant trade of theft". He was caught driving a herd of horses over a moor and was stated to be a known thief pessimae famae. He was hanged on the ordinary gibbet between two and three in the afternoon and his moveables were escheat.²

Reference is made to the armed gangs which moved across the country plundering as they went. Needless to say, if they were caught, they were hanged.

Lauchlan Campbell and another were convicted of theft, robbery, stouthreiff oppression and exacting blackmail - in company with others they stole animals, killed some for food and used and sold others, plundered houses, imposed blackmail and protection money, robbed and plundered travellers and merchants and generally disturbed the public peace. They were sentenced to be hanged and their moveables escheat.³

In cases of theft, where the victim was murdered, hanging was also automatic.⁴

Even if the theft did not include animals but involved serious assaults, or was of especially valuable goods, hanging could be imposed.

1. I.1/3, also I.3/4, 4/6, 6/8, 8/10, 28/9, 30/1 etc.
J. 6/1710, 10/1712 etc.
2. I.193/5.
3. I.186/9, also I.137/8, 161/4, 183/6, 193/5,
I.171/4, plundering with drawn swords and loaded
firearms.
J. 3/1741, 7/1741.
4. See murder cases.

XI. THEFT (Contd.)

2. ARGYLL JUSTICIARY COURT. 1664-1747.

Hugh McLean was hanged for theft and hamesucken and his moveables were escheat - he invaded John McNicol's house, tied him up and robbed McNicol and his wife of various goods.'

Duncan McCallum was hanged and his moveables escheat for stealing a great quantity of wool from a mill by night.²

But for small thefts, some first convictions and in mitigated cases a wide range of personal punishments could be imposed.

Scourging was the most frequent form of personal punishment but a considerable number of combinations of punishment could be added to the scourging - mutilation, banishment, escheat of moveables, caution for future good behaviour, imprisonment and fining.

Two young boys were scourged publicly at the Mercat Cross for stealing and killing three goats. They had to find caution for their future good behaviour under penalty of 500 merks and pay for the damage they had caused.⁷

David McDavie was convicted of stealing a mare and filly and the justice mitigated the sentence to scourging through the town by the common executioner. His moveables were escheat and he was threatened with death if he was convicted again.⁴

For several pykeries and escaping from ward, he was scourged (39 stripes) and then nailed to the gallows by his ear for an hour. He was banished from Inveraray.⁵

1. I.30/1.
2. I.156/7.
3. I.75, also I.52/3, scourged : death threat.
4. I.129, also I.77.
5. J. 4/1718, also J.12/1721 - also the following -
 - scourged - I.12/4.
 - scourged & death threat - I.106/7.
 - scourged & fined - J.12/1710.
 - scourged & caution for good behaviour - J. 3/1730.
 - scourged & caution for good behaviour and imprisoned till found - fined £20 - I. 88/0.
 - scourged -do- (500 merks) -do- escheat I.100, I.50/2.
 - do- (100 merks) -do- -do- I.100.
 - do- -do- -do- death threat I.92/3.
 - scourged and caution to remove from town - death threat - I.125/6.
 - scourged and dismissed the town - J. 6/1707.
 - scourged and banished the shire - J.1/1734, J.12.1735.
 - scourged and transported to America - J. 10/1722.

XI. THEFT (Contd.)

2. ARGYLL JUSTICIARY COURT. 1664-1747.

Branding was imposed on occasions, again usually combined with another penalty.

John Dow McLean was convicted by assize of the theft of clothes, money and food and was sentenced to be branded on the cheek with the letter "T". This punishment was inflicted because the goods had been recovered. He was hanged later for another theft.

Branding and scourging could be combined -

John McConachie McKay was convicted of stealing clothes and money and other items. McKay was sentenced to be burnt on the cheek with the letter "T" as the mark of a thief, and thereafter to be scourged through the town about two hours in the afternoon.²

Hew McInleish and another were convicted of the theft of tobacco and ribbons and other items. They were scourged through the town and after the scourging they were branded by the common hangman on their palms. They were ordered to leave the shire within three days under pain of death and any future theft would mean certain death.³

Branding could be threatened -

Archibald and Mary McIndeor were convicted of the theft of two sheep. It was stated that they were known thieves and peakers and Mary McIndeor was scourged through the town and if she did not find caution for her future good behaviour she was to be branded on her shoulder (no penalty is given for Archd. McIndeor).⁴

The threat in some cases that if the accused was convicted again of theft he would receive a death sentence was not an empty boast:

John McLean was convicted of the theft of cloth, jewellery and other items and it was stated that he had been convicted before of theft and had been branded on his cheek as a punishment. On this occasion, he was hanged on the ordinary gibbet between two and three in the afternoon and his moveables were escheat.⁵

Other forms of personal punishment are noted -

Jougs.⁶

Mutilation. //

1. I.18/19.
2. I.12/4 - also J.8/1707.
3. I.106, also J.12/1710.
4. I.33/6.
5. I.19, also I.43/4 - previously branded.
I.117/9 - previously scourged.
6. J.8/1715 - jougs and banished, also J.11/1740, 4/1730.

XI. THEFT (Contd.)

2. ARGYLL JUSTICIARY COURT. 1664-1747.

Mutilation:

For stealing cows, the accused was nailed to the gallows by his right ear for an hour and then banished from Great Britain under pain of death.¹

Banishment was imposed frequently - usually after some personal punishment.²

A few cases, however, show banishment imposed as the only penalty.³

In some cases fining was the sentence. It seemed that if the theft was small and the goods were restored, or their value paid, then the criminal aspect was satisfied by payment of a fine.

John McDowall McIllehawish was convicted of theft of cattle but was only ordered to return the two beasts or else their price of £20 and was fined £10. The procurator fiscal said that he passed from the criminal aspect.⁴

John McIllehalum and Neill McNeill were convicted by assize of receiving a stolen horse and they were fined 100 merks and £40 respectively. They were warded till they paid or found caution to pay and also till they found caution for good behaviour.⁵

Donald McIlvain was acquitted by assize for theft but was fined £40 by the justice for his judicial confession - but in fact he had confessed to pasturing his beasts unlawfully, not to the theft.⁶

1. J.4/1730 - for an hour, also J.4/1718.
2. Scourged and dismissed the town - I.125/6, J.6/1707,
J.8/1707 & branding.
J.12/1707 -do-
scourged and plantations - J.10/1722.
scourged and banished shire - J.10/1729.
J.1/1734, J.12/1735.
jouis and banished jurisdiction - J.8/1715.
J.11/1740.
banished Britain - J.4/1730.
mutilation and banished Britain - J.4/1730.
& plantations - J.12/1721.
only mutilation - J.4/1718.
3. Banished realm - J.11/1705, 1/1711, 12/1712.
furth of Scotland - J.9/1706.
Britsin - J.4/1729, 12/1731.
jurisdiction - J.2/1740.
transported to America - J.12/1718, 3/1726.
to serve in the Army - J.4/1706.
4. I.28, also I.29/0 - ordered to restore and fined
100 merks - horse and cow.
5. I.95/6, also I.48/9 - 17 merks and restoration,
also J.6/1711.
I.139/0 - ferrying stolen horses - £200, £100, £50.
I.138/9 - £100, £50. I.71/2 - £40, £20. I.121 - £10.
6. I.109/0.

XI. THEFT (Contd.)

2. JUSTICIARY COURT. 1664-1747.

In the later period of the Argyll record, it is noted that the capital sentence following on a theft conviction could be avoided if the accused agreed to act as the common executioner.'

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1. J.12, 1710 - suspended sentence if he acted as executioner.
J.12/1716.
J. 3/1739.

XI. THEFT (Contd.)

3. SHERIFF COURT. 1515-1747.

In the Fife record, the main theft cases show a standard pattern in their punishment - if the accused was found guilty, he was hanged.

A. was indicted and followed by B. for the theftuous stealing of ten sheep and was also accused of common theft. The assize found him guilty and the judge sentenced him to be taken to the gallows and be hanged until he was dead.¹

But the record also shows acquittals -

A. was "folowit" by B. and accused of the theft of corn, a cow and some sheep. The assize considered the evidence and found A. quit, clear and innocent of the accusation.²

However, many cases of spuilzie (a form of theftuous use of land or moveables) are noted and the standard sentence was fining and restoration of the article taken.

- fined for wrongfully seizing plough and other implements and ordered to restore.³

- wrongfully seizing 4 oxen and 2 horses and land, ordered to restore to their rightful owner and fined.⁴

In view of the frequent references to spuilzie, it is possible that if the circumstances permitted, the charge was drawn as spuilzie and not as theft because of the difference in penalties. Theft actions could have been taken only if the thief was "notour" or also if he had insufficient funds or influence to make certain that the crime was classified as spuilzie.

In the later records, only one reference to death is noticed - an indirect reference to a thief being hanged at Paisley under an execution ordered by the Sheriff,⁵ and the normal sentence for theft was personal punishment - branding, scourging and indignities, usually with banishment and fining added.

1. Ka.15, also 130, 191, 210/1, 217, 222.
2. Ka.135/6, 191/2.
3. Ka.26, also Ka.111/2.
4. Ka.202/3, 261/2, 267 etc.
5. Kb.246.

XI. THEFT (Contd.)

3. SHERIFF COURT. 1515-1747.

- branded on the face, scourged through the town (6 strokes at 7 places throughout the town) accompanied by a drummer, and then banished the shire under pain of death.¹

- placed in the jougs for an hour, fined £100 and imprisoned until paid and then banished the shire under pain of branding on the cheek.²

- fined 500 merks and placed in the jougs with a paper stating his crime attached to his breast, and imprisoned until he performed his public punishment.³

- fined £180 and sent abroad to serve in the Army⁴ (which was an alternative to banishment).

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1. Kb.186.
 2. Kb.203.
 3. Kb.193 - simply jougs Kb.201.
 4. Kc.98.

XI. THEFT (Contd.)

4 (a) SHETLAND COURT. 1602-04.

It is plain from the penalties and from the frequency of the references that theft was the most serious crime in this society, but contrary to popular impressions and indeed also many statutes, the death penalty was inflicted rarely, even in cases of sheep stealing.

In this record, out of the great number of theft references, there are only two cases in which the death penalty was imposed.

William Johnson was accused of stealing three sheep at various times and having confessed, the assize decreed that his goods, gear and lands should be escheat and that he should be taken to the gallows and hanged by the neck until death, to the example of others.'

Such cases were severe, but in each case the list of articles stolen was considerable and the accused were "notorious pykars". It was certainly not the case that every theft of sheep received the death penalty -- in fact if it was a first offence, some cases show a 2 merks fine.

The penalties show a graded variation in severity -- from nominal fines to death in exceptional cases. But while death sentences were reserved for certain known thieves, the much more usual penalty for known thieves was escheat and banishment.

Symon Nicholson was accused of stealing a spade and a fleece of wool, and the assize knowing that he was a notorious thief and pykar, decreed that his goods, gear and land be escheat and that he should be banished from the country within a month, or at the first passage and if he was ever apprehended for the theft of even an ure (a nominal sum) in the future, he would be hanged, to the example of others.'

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1. L.11, 18/9.
 2. L.2 etc.

XI. THEFT (Contd.)

4(a) SHETLAND COURT. 1602-04.

This was the standard penalty for known thieves and although there were variations, it is plain that there was a reluctance to impose a death sentence and it was much preferred to pass the thief out of the country - "country" in this case meaning Shetland.

Normally no place of banishment was specified, but in one case the thief was banished to Norway.¹ In another, the thief had already been banished from Orkney and in his sentence of escheat and banishment, under pain of hanging, he was banished, not merely from the "Country of Shetland" but also from "the Countries of Orkney and Shetland".²

The cases show that normally the banished thief was a notorious pykar and sometimes the list of articles taken was considerable, including sheep and lambs and other livestock.³

This penalty applied equally to women, with the one change that their death threat was drowning instead of hanging.⁴

It also applied to children, but no indication of their age is given.⁵

Banishment was not normally imposed for first offences, even if it was sheep stealing - there are many instances which show that first offences, even for stealing sheep, were fined, but a few instances of banishment for first offences are seen.⁶

In the banishment decree, escheat of goods, gear and lands was normal, although in a few cases only moveables were escheat.⁷ Solely escheat⁸ and solely banishment⁹ are noted occasionally.

1. L.30.
2. L.147.
3. L.28, 21/2 etc.
4. L.3, 7/8, 12 etc.
5. L.21/2, 31.
6. L.7/8, 8.
7. L.10/1, 15/6 etc.
8. L.71.
9. L.66.

XI. THEFT (Contd.)

4(a) SHETLAND COURT. 1602-04.

Personal punishment was imposed, but it was infrequent.

In one case, mutilation is added - over and above escheat and banishment, the thief had a piece of his ear cut off.¹

Scourging was inflicted on men, women and children,² but this is not frequent and again it was used for notorious thieves, although there is one case in which a person was "beltit about the kirk on a Sabbath" for a first offence of theft.³ It is possible that to belt a person, as opposed to scourge him, was a milder penalty - in another case children were "belt about the kirk" for theft.⁴

Escheat was added to the scourging occasionally.⁵

In all other cases where the sentence is given, and these form the vast majority of the references, the penalty was fining.

The most frequent amount was 2 merks,⁶ with other fines of 1,⁷ 3⁸ and 4⁹ merks. This range of fines indicated first offences normally, which could include sheep stealing, even with the aggravation that the theft was committed at night.

A series of cases show a standard fine of 40/- for "gripstair" - theftuous use.¹⁰

The text shows a definite progression for first offences. If a person, who had failed previously to clear himself by larycht oath, was accused again of theft, he had to clear himself by the saxter oath. If he was found guilty this second time, the standard fine was 6 merks.¹¹ Again the articles were varied and included sheep and livestock.

1. L.33.
2. L.8,12,14,21 etc.
3. L.112.
4. L.8.
5. L.14.
6. L.5, 6, 8, 9, 12, 13 etc.
7. L.22.
8. L.67, 68, 72 etc.
9. L.4/5, 7, 8, 9 etc.
10. L.5 etc.
11. L. 8, 12, 16, 20 etc.

XI. THEFT (Contd.)

4(a) SHETLAND COURT. 1602-04 (Contd.)

If the person was accused at a later date, he was tried by twalter oath, and in the event of being found guilty, the standard penalty was 12 merks.¹ The articles stolen were considerable and included sheep. In one case, the Court declared that if he appeared again charged with theft, he would be hanged.²

If a person was guilty of another theft, having failed previously the twalter oath, he was sentenced to escheat and banishment.³

In one case, where a person sheltered a thief who had returned from banishment, he was fined £40.⁴

Many cases of theft show that the person passed into the judge's will but no indication is given as to the ultimate decision.⁵ The cases varied in their seriousness from first offences to a person who had failed previously the twalter oath.⁶

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1. L.9, 66/7, 71, 97 etc.
 2. L.66/7.
 3. L.128, 134.
 4. L.31/2.
 5. L.2, 3, 6, 8, 9 etc.
 6. L.26.

XI. THEFT (Contd.)

4(b) ORKNEY & SHETLAND COURT. 1612-13.

The references to theft are few and only one case is noted which gives a determination and that was an acquittal.¹

Various court statutes gave details of penalties - but no cases are noted.

- forbidden to pull wool from the sheep's back under penalty of 6 merks (and any dog which was with the accused to be hanged) for the first fault, 6 angels for the second fault and to be punished as a thief the third time. He would also be punished as a thief if he was found on another's holm (small island) without permission.²

If it was discovered that pedlars and chapmen were dealing in stolen hides, their packs would be confiscated.³

No information is given about the actual punishment of a thief. It would seem likely that the statutes meant hanging, but it has been seen that this was not necessarily imposed, and it might have been public punishment, e.g. jugs.

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1. M.67/8.
 2. M.20/2, also punished as a thief, M.23.
 3. M.23.

XI. THEFT (Contd.)

5. REGALTY COURT. 1547-1706.

References to theft cases are frequent, but in no case is there any reference to a death sentence, even for a notour thief.

Caution for good behaviour and fining were the normal sentences. The earlier records tend to show caution as the penalty, with banishment as the sanction. In one case, the accuser asked that the woman who had stolen should be fined and punished conform to Acts of Parliament and common practice, but she was ordered to find caution not to trouble the accuser again under pain of banishment.¹

Imprisonment is mentioned. For breaking into an orchard and stealing fruit, a sentence of imprisonment was imposed until the damage was refunded or caution found not to commit the like again.²

In another case it was stated that Barbara Ker had escaped from prison where she had been held for a long time and that she was a known thief. The punishment which was imposed eventually was banishment, but only as a last resort - only after she had been ordered to find caution for her good behaviour in future and had refused or been unable to do so.³

Fines of £10 and £5 were frequent - for a very considerable list of items stolen - lambs, ewes, cows and having opened some locked places with a false key and having taken jewels, money, writs and many other goods, the sentence was restoration of the items taken and a fine of £10.⁴

-
1. Na.200.
 2. Nb.70/1, also Nb.25.
 3. Na.267, Nb.17/8.
 4. Nb. 42/3, also Nb. 321 - restoration was sought Nb.396.

XI. THEFT (Contd.)

5. REGALTY COURT. 1547-1706 (Contd.)

Where an orchard was robbed, the Court fined the intruder
£5.

If a person found lost articles, he was supposed to
proclaim his find at the kirk door and market cross and
in the event of the finder temporarily overlooking these
formalities, he could be fined £5.²

Absolutions in theft actions are frequent.³

-
1. Nb.150 - fining was the normal sentence. Wa.200,
Nb.396 - no amounts.
 2. Nb. 22, 224, 309.
 3. Nb. 22, 25/6, 95, 143, 147/8, 396, 420.

XI. THEFT (Contd.)

6. BARON COURT. 1523-1747.

The entries for theft are fairly frequent throughout the period covered by the records. In the introduction to the Carnwath record, it is stated that - "in the criminal actions coming before the court, the entries are so brief that they afford no clue as to the procedure which was followed..... The reason was twofold - in the first place the penalty was death - if the accused was found guilty he was hanged..... and in the second place the procedure itself was so summary that no fuller entry could be given."

The charge of brevity applies to most of the entries throughout the whole of the Carnwath record, but there are a number of theft entries in normal terms. Admittedly the record contains two indictments, one of which the writer quotes in his introduction² and in which no details of procedure are given, but in the other, the matter was referred to the inquest³ and there are many other entries which show that for pykerie at least the cases were taken by the inquest in the normal way⁴ and there is certainly no difference in procedure between theft and pykerie in the later records.

There is no direct evidence that the penalty of hanging was inflicted - admittedly there is no direct evidence that this penalty was not inflicted, and the writer quotes from the Glenorchy Court Book of the same period where hanging was inflicted.⁵ But in the records of all other Courts where sentences of death or personal punishment are inflicted, the details are fully stated.

In //

1. O. Intro ciii.
2. O.61.
3. O.37.
4. O.13, 23, 25, 63, 64 etc.
5. O. Intro cviii. f.n. 5 and x/vii f.n.

XI. THEFT (Contd.)

6. BARON COURT. 1523-1747.

In Carnwath record, there is no evidence that the Baron exacted the death penalty and in the later records, fifty and a hundred years later, the death penalty was certainly not inflicted for theft and then the most serious penalty imposed for theft was banishment from the Barony.

P.F. --v-- Ninian Gardiner was charged with several theftuous actions about which various witnesses were examined and he was ordained to find caution for his good behaviour till next Whitsunday when he was ordered to remove himself and his family from the Barony.²

But such sentences and decrees are rare and in all the later records there are many entries, both statutes and cases, which show that theft was punished by a fine. The amounts vary considerably, but seldom exceed £10.

Noting the statutes first -

All persons found in unlawful possession of goods shall be fined £10 and shall be ejected and discharged from service by their masters.³

All persons found stealing their neighbour's peats shall pay 20/- for each horse load and 40/- for each cart load.⁴

Also directed against theft are the numerous statutes prohibiting the jumping of dykes and fences⁵ and also the statutes prohibiting the settlement of unknown persons in the Barony.

e.g. Every husbandman who has either a cotter, grassman or woman who is thought not to be honest and lacks kail and peats, shall evict them within eight days or thereafter pay £10 half to the Baron and half to the party, "skaythit", i.e. the person robbed.⁶

While the Urie record has numerous statutes concerning theft, the cases are not numerous and those cases which do occur are concerned mainly with the theft of peats.

P.F. --v-- John Buchan for stealing peats was fined £20 and ordered to give satisfaction from the person from whom he stole.⁷

1. See P. Intro vi. & vii.

2. Ra. Intro 208
Q.191/2, also P.86/7, 87.

3. P.5.

4. P.32/3, simil P.33, Q.139/0, S.76

5. P.111, S.83/4, 152.

6. P.45, also P.110, S.99.

7. P.101/2, also P.115 - £5. 40/- 20/- P 100 - £10

XI. THEFT (Contd.)

6. BARON COURT. 1523-1747.

The other records show that the usual fine in theft was £5, with £10 on certain occasions and also, but much less frequently, £20. In addition to the fine, restitution or damages could be ordered:-

For taking away and using a horse a fine of £5 was imposed with the additional liability to pay for the damage sustained to the owner by the loss of the horse.

Whatever may have been the position regarding the penalty for theft in Carnwath, the later records show that a capital punishment was not demanded. In the most serious cases, banishment was enforced with the threat of escheat but the normal penalty was a fine of £5, with £20 or £10 on occasions. Prison does not appear to have been used, although the Urie record refers to the Stoneheaven prison as "the Thief's Hole" in an action of ejection in a tenancy dispute, but the thieves could have been sent to this prison from the Sheriff Court, and not from a Baron Court.

1. Q. 106, 180,
P. 101/2.
Ra.289

XI. THEFT (Contd.)

7. BURGH COURT. 1398-1714.

The theft entries are few in the Aberdeen record and details are sparse -

Mariota Fethes was banished from Aberdeen for resetting thieves, for two years, under pain of being branded with the seal of Aberdeen on her face.

While the references to theft are rare in the Court record, the old laws give more details -

If anyone be taken with a loaf worth a half-penny in the Burgh, he ought to be scourged through the town; and from a half-penny to four pennies he ought to be more severely scourged; for a pair of shoes of four pennies, he ought to be put on the cuckold and after that led to the head of the town where he will forswear the town; from four pennies to eight pennies and a farthing, he shall be put upon the cuckold and after that led to the head of the town and there he ought to have one of his ears cut off; from eight pennies and a farthing to sixteen pennies and a half-penny, he shall be set upon the cuckold and after that led to the head of the town and there have his other ear cut off. After that, if he is taken with eight pennies and a farthing, he that takes him will hang him. For twenty four pennies and a half-penny, he that takes a thief can hang him.²

If any thief is taken with the fang, that is, having his hand on the article, or any murderer with redhand, and this be in the Burgh, they who have rights of a barony within the Burgh shall act at the request of the accuser and shall immediately do full justice on the person of the evil doer by day or night for in this case they shall be reputed to be barons.³

In the Stirling record, some cases show capital sentences but it is clear that in such cases the court acted under a special grant of justiciary and was not acting as a burgh court at all.

Ritschart Broun was convicted and fined for stealing two mares and was sentenced to be hanged until he was dead.⁴

1. V. 92, V. 197 - convicted of resetting thieves and pykars. V.176 - note re. pykars, but no details.
2. F.C. XXXIX. p.180.
3. F.C. LI. p.185, also L.Q.B. LXXIV. p.36/7.
For procedural details see L.Q.B. LXXXVII. p.42/3,
and L.Q.B. XXVI. p. 13/4.
4. Z.22. 1525, also
Z.24. 1525 - stealing various items - assize.
Z.53. 1548 - stealing blackhorse.
Z.63/4. 1555 - stealing brown mare, also Z.71. 1557.

XI. THEFT (Contd.)

7. BURGH COURT. 1398-1714.

In the other cases, personal punishment was normal and the form of the punishment varied between mutilation or branding or scourging or a combination of any two, or in one case, all three. After the personal punishment was inflicted, the thief was usually banished from the town.

Some men were convicted of pykerie and each had one ear cut off and a woman with them was branded on her cheek. They were all banished under pain of hanging.¹

William Brouin and James Duncanson were convicted of pykerie and were banished from the town after their ears were cut off and nailed to the tron.²

Jonet Wright was convicted of pykerie by assize and was branded on her cheek and banished.³

James Ramsay was scourged through the town, branded on his shoulder and banished - for pykerie. He and his family were considered vagabonds.⁴

John Fischair was convicted of theft and was sentenced to be nailed by his ear to the tron and then to have his ear cut off. Also he was to be branded on his cheek and scourged through the town. Thereafter he was banished under pain of death.⁵

In some cases the full punishment was not imposed but further punishment was threatened if the person was convicted again.⁶

The earlier Peebles record does not show personal punishment as severe as imposed in Stirling, but the threats were similar.

Isabel Mare was accused of pyking as she was caught taking turf. She found caution that she would not do this again under pain of £20 and banishment, with branding on the face for the first fault and death on the second.⁷

The inquest made an act calling for strict enforcement of the law against pykers. They were to be banished, unless they found caution to abstain, under pain of scourging and banishment. If they did not find caution they would be branded on their cheek with an iron and banished.⁸

1. Z.64.1555.
2. Z.40.1545.
3. Z.48.1547.
4. Z.162/3. 1629.
5. Z.45.1546.
6. Z.42.1546 - drowned if she offended again.
Z.80.1563 - banished under pain of drowning.
7. X.222.1555, also 222.
8. X.224/5.1555. X.263.1560 - Acts to be enforced - 20/
reward for informers. X.225.1570 - to be enforced.

XI. THEFT (Contd.)

7. BURGH COURT. 1398-1714.

The later period showed a change in punishment.

The most usual penalties were fining and public indignity, with the frequent addition of banishment.

(a) Fining. - the amounts varied but did not exceed £5.

Some were convicted of receiving stolen goods and were fined 30/- and ordered to restore the goods.¹

James Wadie and others were fined for stealing corn, 10 merks and 40/- and imprisoned for 48 hours - caution not to repeat the crime under pain of public punishment at the cross with a paper on their foreheads.²

(b) Public Punishment.

The threat of public punishment was enforced.

James Campbell was ordered to stand at the cross from 11 a.m. to mid-day with a rope attached to him from the "stalk of the cross" and with a paper on his head for cutting off James Johnstoun's purse.³

Only one case gives details of scourging and public punishment.

Gilbert Mitchell was accused of stealing merchandise from a packman and was sentenced to stand for an hour at the cross with a paper on his head stating his crime and thereafter to be scourged from the Cross to the West Port.⁴

Fining and public punishment could be combined -

William Eumond was fined £18 for stealing a harrow and was imprisoned until he paid and also for 48 hours. Both he and his father were also fined for reset and fined 40/- and £12 respectively. Both had to sit at the cross during market day, bareheaded with the stolen goods about them. The father paid £22:16/- and was released from the punishment.⁵

(c) With Banishment added.

Alexander Laidlay came in will for stealing sheaves of bear. He was imprisoned till the next market day when he had to stand for an hour at the Tron with a sheaf beside him. He was banished under pain of death.⁶

1. Y.26.1655, Y.49.1661 - fined 40/- woman stealing corn
Y.49/50.1661 - £3 - both caution for good behaviour.
Y.91.1675 - fined 5 merks and caution under pain of banishment.
2. Y.57.1663.
3. X.396. 1652.
4. Y.25/6. 1655.
5. Y.88.1673.
6. Y.90.1674. Y.110.1683 - joughs: otherwise as above except death.

XI. THEFT (Contd.)

7. BURGH COURT. 1398-1714.

Two women were ordered to stand for an hour at the cross during market time with a paper on their heads and thereafter were banished.¹

James Paterson and his family were ordered to remove from the town for pykerie, under pain of banishment.²

The penalty of banishment could be reversed on petition to the council.

George Brown was convicted of taking sheaves of oats for his horse and was sentenced to be banished. He was imprisoned until he could be banished by roll of drums or until he found caution to remove his wife and family. He petitioned the council and said that because of the condition and multitude of his family, he had nowhere to go. It was agreed that he should be imprisoned for 4 days, find caution for his good behaviour and on the last day be put in the cuckstool for 2 hours with a sheaf of oats about his neck.³

Imprisonment could be imposed.

For resetting bear, John Brotherstaines was imprisoned during the magistrates' pleasure and also had to find caution not to commit the like under pain of banishment.⁴

One entry is particularly interesting -

Alexander Stewart and Walter Buchanan appeared before the council and produced a pass signed by James Stewart of Ardvorlich, one of the commissioners of justiciary for securing the peace of the highlands permitting them to search throughout Scotland for a stolen horse. They had found the horse in the custody of John Dickison, couper in Teebles, but he said he bought the horse in the public market. The pursuers produced witnesses who said the horse was the one they sought and the council stated that unless Dickison could prove he bought the horse as he stated, by noon the next day, he would be reputed the thief. He was able to prove by witnesses that he bought the horse at the market. The council absolved him. However, he was ordered to deliver the horse to the pursuers.⁵

1. Y.26. 1655. Also 54/5. 1662 - stealing clothes, jugs for an hour on market day with a paper on his head - banished. Y.60/1. 1664 -do- but no paper.
2. Y.83.1671. Also Y.91.1675 - banished under pain of death for stealing bear. Also Y.148.1694 - pain of branding.
3. Y.163. 1700.
4. Y.91. 1675.
5. Y.158/0.1697 - witnesses produced testimonials signed by their minister and elders.

XI. THEFT (Contd.)

7. BURGH COURT. 1398-1714.

It is noteworthy that the defender was held to be guilty until proved innocent, and the title of a purchase at a public fair was ignored.

Unlawful Detention of Property.

Many cases occur where a person claims that another person has detained some article or money which belongs or is owing to the claimant and the record clearly shows that the following Aberdeen statute was reinforcing a standard practice. It is not possible to say the amounts of the fines in the actual cases.

If any Burgess of the town wilfully detains anything owned or owing to another Burgess and permits the claimant to proceed against him before the bailies up to the fourth day of the action and then is convicted by the Court or confesses the claim, the defender or detainer will be fined 8 solidi without remission. ¹

The cases are frequent -

Thomas Halt was fined for unlawfully detaining 7 solidi from Willelmus Strade. ²

Thomas Blake was fined for taking bread from the wife of Willelmus Blackburn without paying and without official authority. He was also fined for threatening to strike Willelmus. ³

Ion Paw placed himself in will for unjustly taking a "cobyll" from Willelmus Scot and for unlawfully working on it. ⁴

Of the later records, only Stirling showed similar cases.

Andro Borell was fined for withholding a pair of black cloaks which he had borrowed and was ordered to restore them. ⁵

Jonet Clerk admitted that she had received a pair of black cloaks and was ordered to remain in the tolbooth (until she returned them). ⁶

1. V.216.
2. V.31, also V.35, 39, 40, 50 etc.
V.47 - in will and fined.
V.66 - ring, ordered to restore or pay its price - fined
Also 69, 110, 120/1, 141, 147, 199.
Shovel - 124 - fined.
Axe - 135, 140, 164 - fined.
3. V.64.
4. V.50.
5. Z.11.1521.
6. Z.11.1521.

CONCLUSIONS.

XI. THEFT.

1. The basic sentence in the main courts was hanging and escheat.

2. In the earliest period in the justiciary courts, compounding and remission is noted again. It is seen, however, in this case that if the person could not pay he was hanged. Some instances in the earliest period show hanging or, less frequently, beheading without the option of compounding, but it is not possible to say whether the accused could not afford to pay or did not have the chance to pay - some cases show dishonourable circumstances, e.g. stealing while disguised as a mummer and it is likely he was not permitted to compound. Isolated instances of national and local banishment are noted, usually with scourging.

3. In combined crimes in the middle period the hanging sentence ruled, but in serious cases (usually murder and theft) mutilation was added, the head and/or right hand was cut off after death and exposed. In exceptional cases this could extend to a full treason sentence. In the later period combined theft and murder resulted in mutilation only if it stemmed from the clan wars or ravages.

4. Banishment, usually with scourging and branding added, is noted in the middle period, but such a sentence tended to follow a reference to the king's will, or else there were exceptional circumstances. But in the later period, banishment was imposed frequently, almost always with scourging or branding added.

5. While Argyll conformed to the main justiciary court pattern, the emphasis on personal punishment was stronger and hanging was imposed less frequently.

Combinations //

CONCLUSIONS.

XI. THEFT (Contd.)

Combinations of scourging, mutilation (right or left hand) escheat, caution for good behaviour, banishment (local, national and transportation) fining and imprisonment are seen.

6. Fining is noted in the main courts, occasionally in the justiciary courts, more frequently in Argyll.

(a) Justiciary courts - 400 merks, 100 merks.

(b) Argyll - £200, £100, £50, £40, £20, £10, 100 merks.

7. The lower courts show a similar pattern to the main courts - hanging, personal punishment, banishment and fining. Hanging was relatively infrequent and was imposed on notour thieves - first offences normally received a fine, but if they were serious could receive personal punishment and banishment.

(a) Sheriff Court - early period - hanging.
- fining (no amounts)
- later period - hanging (exceptional)
- branding, scourging and local banishment, jugs and banishment.
- fining - £180, £100, 500 merks.

(b) Shetland Court - earlier - hanging (exceptional)
- escheat and local banishment (standard for notour thieves)
- scourging (infrequent)
- fining (normal) 2 merks (also 12 merks, 6 merks, 4 merks)
- later - fining - 6 merks.

(c) Regality Court - death sentences were not given and the basic sentence was fining - £10, £5.

Caution for good behaviour and banishment are also noted.

(d) Baron Courts - death sentences are not given and even banishment was rare.

The standard sentence was fining and the amounts rarely exceeded £10.

(e) Burgh Courts - early period - the old laws authorised hanging, but the cases do not show this sentence (except in Stirling, but they had special powers). Banishment is given in Aberdeen and in the other early records mutilation, branding and scourging are added to //

CONCLUSIONS.

XI. THEFT (Contd.)

to banishment.

The later records show less severe sentences - although personal punishment and banishment were still in vogue fining was frequent (the usual amounts not exceeding £5) and imprisonment as a definite punishment is seen.

XII. PIRACY.

1. JUSTICIARY COURT.

PART 1. 1488-1650.

Piracy cases are seen only in the first part of the Justiciary records and the standard penalty throughout the period was hanging, but the addition of mutilation or further indignities e.g. chains, is noted in certain cases.

Robert Love and others, English pirates, were convicted of piracy and sentenced to be hanged within the flood mark on the sands of Leith - Their moveables were escheat.

John Davidson was convicted by assize of violently boarding a French ship from Bordeaux. He was hanged in irons and his moveables escheat.²

John Brown and others were convicted of murdering three merchants on their ship and stealing their gear. They were hanged in irons and after death their heads were cut off. Their moveables were escheat.³

L.V. -v- John McRorie McAllister & Others: There was a long list of crimes - boarding vessels, killing the crew and stealing the cargo, also landing in Ardnamurchan killing men and stealing livestock. They were convicted by assize and sentenced to be hanged on the sands of Leith within the flood mark, with escheat of moveables.⁴

Acquittals could also be given.

Walter Cowsland and others were acquitted of receiving goods from a pirate. They were accused of stealing from a ship in Bordeaux and later sinking and drowning the ship to cover their crimes.⁵

1. JUSTICIARY COURT.

PART 2. 1661-1747.

The case of Thomas Green is noted. He and the others in his crew found guilty were sentenced to be hanged on the sands of Leith.⁶

1. D.101, also D.107, 244.
2. Aa.358, also Aa.379/0, 381 - hanged and escheat, also A.13
3. Dd.569/72.
4. E.25.
5. B.27/8 and B.93/4 - court's jurisdiction challenged by Admiralty Court and case continued.
6. Arnot 248/261 - 1705.

CONCLUSIONS.

XII. PIRACY.

1. The standard sentence was hanging and escheat, but as the crime was aggravated theft, the normal aggravation sentence could be added - mutilation after death (head and/or right hand) or indignities (hanging the body in irons).
2. It should be noted that the traditional concept of hanging pirates in irons was a penalty in no way peculiar to piracy - hanging the body in irons was a standard addition for an aggravated capital crime.
3. One part of the sentence which was peculiar to Scottish piracy hangings was the erection of the gallows "on the sands of Leith within the floodmark".

XIII. FIRERAIISING.

1. JUSTICIARY COURT.

PART 1. 1488-1650.

In the earliest part, the standard determination of remission applied.

Gilbert Schevil produced a remission for burning Minto and found a cautioner to guarantee his compensation.¹

In some cases, however, the benefit of remission was excluded.

Torquil Macleod was sentenced to forfeiture of his life, lands and goods for burning Badenoch, but this was part of what amounted to armed rebellion.²

The crime was equated with treason, but no case shows a full treason sentence. In the later periods, a death sentence was imposed on occasions, but it was not inevitable. Hanging was the most frequent form, but a case of drowning is noted.

Janet Anderson was convicted of burning a barn and the cattle therein. She was sentenced to be drowned.³

Robert Anderson was convicted of fireraising and hanged.⁴

John Henry was convicted of setting fire to a coal pit. The crime was equated with treason but the sentence was not a treason sentence - he was hanged, and his head cut off and placed on a spike near the coal pit. His moveables were escheat.⁵

Andrew Thomson was convicted of burning another's corn and he was burnt, but no details are given.⁶

Some cases show fireraising combined with another crime which was capital in its own right.

John MacFarlane was convicted of fireraising and theft and hanged.⁷

William Donald and another were convicted of burning corn treasonably and maliciously, and stealing sheep. They were hanged.⁸

David Armstrong was convicted of the slaughter of John Johnston and Robert Currie and also for burning down a hostelry. He was hanged and his moveables escheat.⁹

1. A.19, also 23, 25, 26, etc.
2. A.45/8 - hanged for fireraising, slaughter and theft. A.61/2, 173, 173/4.
3. A.162.
4. Aa.375.
5. Dd.361/2.
6. B.70.
7. A.225.
8. B.45.
9. C.441.

XIII. FIRERAISING (Contd.)

1. JUSTICIARY COURT.

PART 1. 1488-1650. (Contd.)

Not every case shows a capital sentence:-

Isobel McFarlane was convicted of fireraising and sentenced to be branded on her cheek and thereafter banished from the Stewartry of Strathern under pain of drowning.'

Some cases do not show any sentence at all:-

Little was accused of treasonably burning the dwelling of a minister under silence and cloud of night. The case dragged on because accused would not answer questions. The minister petitioned the Privy Council to obtain power to collect evidence and also power to put one witness to torture as he had given conflicting statements. The Privy Council granted the request and ordered one witness to remain in ward till he answered the questions.²

The text makes reference to letters of horning against George Meldrum for burning Frendraucht Castle and also Viscount Melgun and others and their belongings. Meldrum did not appear and was declared rebel and his cautioner fined.³

1. JUSTICIARY COURT.

PART 2. 1661-1747.

No punishment is given in any of the cases.

L.A. and James Stampfield against Barbara Finnick for fireraising, having caused a fire in a room in his house. She confessed and was convicted by assize, but no sentence is noted.⁴

John Williamson against Bessie Bruce for wilful fire-raising. She was released from prison on the pursuer's application that she was furious.⁵

1. Aa.346.
2. E.171/6.
3. E.151/3, 175, 176 -- Mackenzie states that a John Meldrum was executed in this case, but no details are given (p.73).
4. G.25, also F.97.
5. F.300.

XIII. FIRE-RAISING (Contd.)

2. SHERIFF COURT. 1515-1747.

This was not a crime with which the Sheriff Court could deal competently, but one case is noted.

Two women were accused of burning stacks of corn. The younger woman was to be imprisoned for 12 months and every 14th day she was to be scourged through Paisley between noon and 3 p.m. After her year's imprisonment, she was to be branded on her forehead, put in the joughs for a period and then banished, under pain of having the whole sentence repeated. The old woman was to be imprisoned, scourged and banished.

However, the sentence was so severe that no one would carry it out, and in fact, the two women were freed on caution to go into banishment.

3. REGALTY COURT. 1547-1706.

Two cases are noted, but details as to the punishment are unsatisfactory - in one case the accused fled to avoid the charge - that he most wickedly set fire to the pursuer's house and for beating and striking the pursuers.²

In the second case, it was stated that the defenders did most wickedly, under cloud and silence of night, set the pursuer's house on fire at four several parts, intending not only to prejudice the pursuer but also take his life, but the defenders were absolved as the pursuer could not prove his case.²

1. Kb.238.

2. Nb. 406/7.

3. Nb. 407/8.

CONCLUSIONS.

XIII. FIRERAISING.

1. Hanging was the basic sentence in the main period, but compounding and remission is seen in the earliest period.
2. Although equated with treason, a full treason sentence was never imposed, although occasionally mutilation (exposure of his head) is noted. In one exceptional case in the beginning of the middle period, a man was "burnt" for burning corn. No details are given as to how he was burnt, but if he was burnt alive, the sentence followed a pagan precedent.
3. In combined crimes, hanging was standard.
4. Occasionally branding and banishment was given.
5. No sentences are noted in the later period.
6. References occur in the Sheriff and Regality courts, but no full sentences are given although one case in the Sheriff court shows branding, scourging, imprisonment and banishment, but this was not enforced (because it was too severe).

XIV. FORGERY.

1. JUSTICIARY COURT.

PART 1. 1488-1650.

Throughout the whole period, forgery was considered a most serious crime and was punished severely. A distinction was made between cases of counterfeiting money and other cases of forgery - counterfeit cases being punished more rigorously than the others.

During the early period, they were equated with treason and during the main period the punishment of strangling and burning (i.e. the same as witchcraft, bestiality and incest was imposed.

Even for ordinary forgery (i.e. a deed etc.) it is the only crime during the early period, even including treason itself, which does not show remission and compounding.

As examples from the early period, the following may be noted:-

Counterfeit money.

George Caball was convicted of importing forged money into Scotland from Flanders and sentenced to be drawn to the gallows and hanged. His head was to be cut off and his body quartered. His land and moveables were escheat.¹

Patrick McKie was convicted of treasonably counterfeiting money and was sentenced to forfeiture of life, lands and goods. He was hanged.²

But in one case which involved using rather than actually making false money, the accused was given the mission of finding those responsible -

John Sutherland confessed to treasonably using false money - he was warded till sentence. The Regent banished him during his pleasure, and under penalty of 1000 merks to go and seek out the actual forgers.

Other forgeries -

Sir David Anderson and Sir John Crawford were accused of forging an instrument. Crawford confessed and was hanged. The other was acquitted.³

1. A.137 - for forging false coins - hanged - Aa.364/5, 365, 397 - hanged, quartered and forfeited. Aa.440/1 - beheaded (by special grace) Aa.392/3.
2. B.134.
3. B.66.
4. B.45, also B.85, 87, 385/6.

XIV. FORGERY (Contd.)

1. JUSTICIARY COURT.

PART 1. 1488-1650 (Contd.)

Certain cases show a variety of more lenient sentences.

Thomas Barry Unicorn Pursuivant Herald was convicted of treasonably forging the Regent's signature. He confessed and was banished, but his right hand was cut off.¹

For using a false deed, Thomas Charteris was imprisoned in Edinburgh Castle during the King's pleasure and all his moveables escheat.²

Patrick, Master of Gray, confessed to various charges of meddling in the royal affairs to the prejudice of the king's interests including using the royal seal without authority. He placed himself in will, but no sentence is noted.³

The middle period continues the trend of hanging for general forgery, but a new trend is discernible - for counterfeiting money the forgers were strangled and their bodies burnt.

Elspeth Skirling and others were convicted of making and passing counterfeit coins. They were sentenced to be strangled at the stake and their bodies burnt. Their moveables were escheat.⁴

In such cases, the escheat usually included lands as well as moveables.⁵

In a few counterfeiting cases, hanging was imposed with the escheat varying between lands and moveables⁶ or only moveables.⁷

In the middle period, the pattern for general forgery was the same as before - hanging.

John Haliday was hanged for giving a forged discharge.⁸

Alexander Cook was convicted of giving a false extract from his protocol book - hanged and escheat.⁹

Scourging is noted occasionally.

William Strachan, messenger, was convicted of forging a false letter of execution. He was sentenced to be scourged through the town and lost his office.¹⁰

1. B.19/20, also Aa.387 - declared infamous and banished. Aa.375, 394, 402/3, 432.
2. A.222, also Aa.439/0 - warded pending decision.
3. B.157/8, also B.64/5, but B.82 acquitted.
4. C.75/6, C.79, 100, 356, 357, 366, 383, 403.
5. C.79, 100, 356, 357, 366, 383.
6. C.404, 418.
7. C.398/9.
8. C.34, also C.104/5, 353/6, 356/7.
9. Dd.416/8, also Dd.430/1, but Dd.487 - beheaded and mov.escl
10. C.455.

XIV. FORGERY (Contd.)

1. JUSTICIARY COURT.

PART 1. 1488-1650 (Contd.)

In the last period, the trend changed and the death sentence was relaxed - to banishment and personal punishment.

Richard Home was accused of forging a false passport and testimonial. He was scourged through Edinburgh, branded on his hand and banished.

William and Thomas McKie were accused of forging a discharge of a bond. They confessed before an assize. This case narrates the statutory penalties - proscription, banishment, dismembering of hand or tongue and infamy if the crime was perjury. In this case the Lords of Council and Session had already enquired and found the writ false. The Justice warded them till he conferred with the Privy Council who ordered infamy, loss of office (they were sheriff clerks) escheat of moveables and ordered them to be taken to the Market cross with a placard giving details of their crime from 11 a.m. until midday the following day. They were banished, one for life, the other during king's pleasure, and were returned to prison to await a convenient ship.

Thomas Tulloch and Wm. Forsyth were accused of forging a charter. They confessed and one was banished, never to return, suffering loss of office (being a notary) infamy and was ordered to stand at the Cross with a placard from 10.45 a.m. till 12.15 p.m. (same day). He was warded until a suitable ship was ready. The doom of the other was held up - returned to ward.

1. E.150.
2. E.259.
3. E.294.

XIV. FORGERY (Contd.)

1. JUSTICIARY COURT.

PART 2. 1661-1747.

Hanging was the standard penalty -

Alexander Kennedy, sometime porter in the Castle of Edinburgh, and thereafter prisoner there, was accused of forging bonds and contracts. The Advocate was ordered to prosecute him and it was also ordered that the accused should lose his life and moveables, to the terror of others. The assize convicted and he was sentenced to be hanged.

Indignities could be added to the death sentence -

Advocatus against Robert Binning for forging a false relaxation of a decree and others. The assize by plurality of votes (in spite of a threat of wilful error) convicted him as he had confessed to part of the indictment. He was sentenced to be hanged at the Mercat Cross, with the false letters about his neck.

The death sentence could be mitigated to banishment, but a case shows that notwithstanding this penalty, the convicted persons returned to Scotland - not surprisingly they were hanged.

For counterfeiting coins, Thos. Anderson and John Weir were sentenced to be hanged, but the Privy Council commuted the sentence to banishment, provided they did not return to Scotland, under pain of death. They did return, and were now sentenced to be hanged.³

Also William and John Baillie were accused of being Egyptians (which carried a statutory capital sentence) and William was also accused of forging a pass for which he had been convicted and sentenced to be hanged, but the Privy Council commuted this to banishment to America under threat of death if he returned. He gave security of 500 merks that he would not return. He had gone into banishment but he had now returned, but no further action is noted in the record.⁴

Remissions could be granted for forgery -

Richard Murray was accused of forgery. He had already been declared fugitive, but it was stated that Murray was necessarily out of the kingdom and a remission was produced.⁵

1. F.57/9, also H.72/4. 1727, Arnot 282/304, 1726.
2. F.38/41.
3. H.17,1701 - this was more lenient than in the earlier periods when counterfeiting money was among the most serious crimes in the calendar.
4. H.57/9. 1715.
5. F.255/6.

CONCLUSIONS.

XIV. FORGERY.

1. This crime was considered one of the most serious in the calendar and is the only crime which does not show compounding and remission in the earliest period.

2. A distinction was made between counterfeiting money and other forgeries.

3. Counterfeiting money - early period - full treason sentences were given.

- middle period - strangling and burning (which was a clear indication of the seriousness with which the crime was viewed)

- later period - no instances are given of counterfeiting money.

4. Other forgeries - early and middle periods

- hanging and escheat personal punishment and banishment.

- later period

- hanging (infrequent) personal punishment and banishment.

5. Remissions are noted in the latest period.

XV. FRAUD.

1. JUSTICIARY COURT.

PART 1. 1488-1650.

No standard penalty can be seen in this period - the sentence ranged from hanging to fining.

John Moscrop was convicted of holding himself out as a notary. He was sentenced to be hanged and his moveable goods escheat.¹

William Abercrombie and John Rankin petitioned from ward to the Privy Council who gave a warrant that they should be banished for giving false testimonials.²

William Brownlie was found guilty by assize of giving false measures at his mill. The Justice referred sentence to the Privy Council who fined 100 merks and also ordered caution not to repeat under penalty of 500 merks.³

LA -v- Neilson & others: It was stated that the accused had sold cloth using a false measure and the statute ordered that they were to be punished as if for theft. They produced a warrant from the Privy Council proceeding on their petition which stated that they used the measure they had always used and the process was stopped.⁴

1. JUSTICIARY COURT.

PART 2. 1661-1747.

The cases are infrequent and no pattern can be stated -

Banishment and indignities are noted:

Adam Barras was accused of selling false money and was sentenced to be banished from Scotland, never to return, under pain of death.⁵

Robert Fringle was convicted of the theft and embezzlement of money from the Bank of Scotland. He was to be set in the pillory with a paper in his breast describing his offence and also imprisoned till he paid back the amount he had taken (£425:10/- Stg.)⁶

Andrew Cochran was accused of having false weights and measures, but the court found the verdict unclear and assolized the accused.⁷

1. C.35, 389.
2. E.92.
3. E.123.
4. E.29.
5. F.3.
6. H.19/21, 1705.
7. G.57.

XV. FRAUD (Contd.)

2. ARGYLL JUSTICIARY COURT. 1664-1742.

Only one case is noted, and the circumstances of this case are unique among all the records.

John McAllister Oig was cautioner for John Dow Beg McDonall that McDonall should appear - but he did not, and McAllister obtained a substitute to appear, Donald McCracken. Their plan was discovered and McCracken was sentenced to be scourged through the town by the hangman and have his tongue pierced by a hot iron at the mercat cross at ten hours in the morning, to deter others. McAllister was fined 200 merks for the deception and also fined the amount of the bond - 300 merks. He was to give further security to present John Dow Beg or he would remain in prison until he did so. Others were fined 200 merks and 100 merks each as accessories. John Dow Beg's moveables were escheat. 1

3. SHERIFF COURT. 1515-1747.

A case is reported in the record, but in fact, it was a decision of the Baron Court of Stewalton and shows a fine of £40 for selling goods using false measures. 2

4. SHETLAND COURT. 1602-04.

Two cases show reference to will for falsely signing deeds, but no further reference is made. 3

5. BURGH COURT. 1398-1714.

In the Burgh court records, fraud cases are rare but such as there are relate to false weights and measures. The old laws made detailed provisions concerning this:

All measures and weights will be sealed with the Seal of the Burgh and if anyone uses a false measure or weight, he will pay a full fine. 4

1. I.26.
2. Kb.190.
3. L.133, 150.
4. L.Q.B. XLVIII. p.23, also
F.C. XLVII. p. 183/4 - Chamberlain will carry weights against which the town weights will be checked.

XV. FRAUD (Contd.)

5. BURGH COURT. 1398-1714 (Contd.)

If anyone knowingly uses false measures or weights and if he is convicted, he will pay a fine of eight solidi for his default, and also pay damages to the party and he will be punished by the bailies by fining for the first, second and third occasions. On the fourth occasion, he will be at the king's mercy for life and limb for such fraud pertains to the king's crown since the fine of the Burgh does not exceed 8/- and in such case the king's fine is £10.¹

If any man or woman is convicted of using false weights and measures by an assize of the bailies, he or she will be in the king's will for life and limb and for lands and tenements, and their heirs will be altogether disinherited if the grace of the king does not intervene.²

The Aberdeen record shows fining as the penalty but no amounts:

In will for selling wine without proper measures and fined.³

The Stirling record gives banishment.

David Aikin was convicted of usurping the functions of a Notary and was banished, under pain of scourging. He signed deeds for persons unable to write.⁴

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1. L.Q.B. LXVIII. p.33/4, also F.C. XL. p. 180/1.
 2. F.C. XVIII. p. 184.
 3. V.115, and V.41.
 4. Z.138. 1615.

CONCLUSIONS.

XV. FRAUD.

1. Hanging is noted, but it is relatively rare.
2. Banishment was more frequent, with occasional cases in the latest period of public indignity.
3. In Argyll an unusual case was punished by scourging, mutilation and banishment, for the principal, and fines for the others - 300 merks, 200 merks and 100 merks.
4. The lower courts show fining (Sheriff - £40, Burgh (early 8/-) but banishment is seen in the middle Burgh courts.

XVI. PERJURY.

1. JUSTICIARY COURT.

PART 1. 1488-1650.

The earlier perjury cases relate to wilful error on the part of an assize, unlawfully acquitting the accused, and the penalty was imprisonment and escheat.

Alexander Bertoune and others were convicted by Great Assize of wilfully acquitting accused persons. They were sentenced to be imprisoned for a year and a day and further at the king's will and their moveables escheat. They were declared infamous.¹

The later perjury cases refer to false witnesses, and failure to observe oaths, and the sentences varied between death and personal punishment:-

Alexander Ghene and others were convicted of assault and bribing two witnesses to give false evidence. Ghene was sentenced to be beheaded, one of the false witnesses was hanged and the other was scourged through the town. The second witness had confessed to the plot.²

Robert Graham and others were accused of bearing false witness in a slaughter action. He and some others were convicted and sentenced to be hanged and their moveables escheat. Others were scourged, branded on the cheek and banished and another was scourged and banished.³

Banishment was imposed frequently in addition to personal punishment.

William Galbraith came into will for perjury before the Lords of Session and was sentenced to stand for an hour at the Market cross with a paper on his head declaring his crime and thereafter to be banished from Britain. He was also declared infamous.⁴

William Barclay came into will for perjury and hearing Mass. He had sworn that he was of the reformed faith, but had been taken at Mass. He was sentenced to be declared infamous in respect of the perjury and to be banished for the Mass.⁵

PART 2. 1661-1747.

No. sentences are given.

David Balcanquell against Henry Laurie and James Skinner for giving false witness, but they produced a valid defence and were acquitted.⁶

1. A.72/3, also A.203.
2. C.453/5.
3. D.358, also Dd.538/9 - hanged and escheat. Another's tongue was pierced by a hot bodkin and banished.
4. C.477.
5. C.348/9.
6. F.225 - also F.129/131, etc. 158.

XVI. PERJURY. (Contd.)

2. ARGYLL JUSTICIARY COURT. 1664-1742.

Indignities were imposed in this record:-

For perjury and defamation, the accused was fined and also had to stand at the mercat cross with a paper attached to him stating his crime.¹

3. SHETLAND COURT. 1602-04.

One case is noted which gives a penalty - escheat of land and moveables and banishment.²

4. BURGH COURT. 1398-1714.

The Peebles record gives the only case of perjury:

Adam Gaitcheon and his spouse were convicted of perjury, they gave a wrong return on the excise of malt. They were fined 10 merks and were imprisoned for 48 hours. They had to stand at the cross with a paper on their faces stating their crimes.³

-
1. J. 6/1710.
 2. L. 83.
 3. Y. 92/3. 1677.

CONCLUSIONS.

XVI. PERJURY.

1. The justiciary courts show a standard penalty in the earliest period of imprisonment for a year and a day, escheat of moveables and infamy for wilful error, in assize acquittals.
2. In the middle period hanging was imposed, but this was exceptional - usually the sentence was combinations of scourging, branding, indignities and banishment.
3. Argyll and the Burgh Courts show public indignity and Shetland gave escheat and banishment.

XVII. WITCHCRAFT.

1. JUSTICIARY COURT.

PART 1. 1488-1650.

Many witchcraft cases are noted throughout the course of the record, but their frequency shows a clear cycle. In the earliest part during the reigns of James IV and V, no cases at all are recorded and during the reign of Mary, only one is mentioned. In that case, the relatively light sentence (compared with what was to come) was banishment.

The absence of the cases in the Court of Justiciary can be explained on the grounds that they were taken in the Church Courts.

However, the coming of the Reformation in Scotland changed the pattern, and during the reign of James VI the cases increased steadily. Witches were denounced by anyone who was sufficiently interested, and the zeal with which accusations were laid before the authorities showed that many persons were interested. The kirk sessions and the prosecutors, armed with enthusiastic conviction and certainty of their beliefs in the new reformed faith, pursued with commendable haste.

The belief in the supernatural powers of witches and sorcerers is not in itself a worthy object of derision - every age creates or adapts its own particular fears and menaces which the people accept as real and think their security threatened. Any one who does not fear as keenly as his fellows is regarded as suspect.

In their substance the witchcraft cases fall into two types - either a person consulted a witch for a specific purpose (normally a request to cure an illness, or impose an illness //

1. Aa.432.

XVII. WITCHCRAFT (Contd.)

1. JUSTICIARY COURT.

PART 1. 1488-1650 (Contd.)

illness or death on another) or else the witch used her power on her own initiative for a definite end, e.g. to compass the death of the king.

So far as the Court was concerned, a confession from the witch herself was necessary as the supernatural powers were recognised to be intangible and as the end result was achieved by unnatural powers, it had no tangible, and so no provable, connection with the witch.

The methods employed to obtain the confession were ageless. Compulsion was necessary - even if the witch confessed willingly without pressure, this confession was held to be false and plainly a cover for more, and even worse, practices. Only under pressure could the full truth ever be ascertained.

Although many cases make no reference to torture or pressure others give full details of the forms of pressure. Physical hardship, systematic deprivation of sleep and various machines and appliances to crush and distort limbs, were standard.

Should the powers of evil have so strengthened the witch's spirit that she withstood the pressures and continued to deny the charges, a diligent search about her person could not fail to find the devil's mark at some spot on her body, and on this being found, the burden of proof was satisfied.

Not many withstood the pressures and after a time they were only too willing to confess their crimes, and if necessary, implicate others as accomplices and associates. Once named //

XVII. WITCHCRAFT (Contd.)

1. JUSTICIARY COURT.

PART 1. 1488-1650 (Contd.)

named by a convicted witch as a witch or a sorcerer, doubtless it would be difficult to convince the authorities and the neighbours that the allegations were unfounded.

The penalty was standard - the witch was taken to the stake, strangled and her body burnt. Only in one case, in very special circumstances, was the witch burnt alive. Escheat of moveables was normal. Acquittals do occur, and it is not possible to say that torture was applied in every case.

It is clear from the record that the witches and sorcerers genuinely believed in their powers and the authorities believed equally in the efficacy of these powers.

It is also the case that if the witch's religious background was Catholic, her evil was taken for granted.²

The following cases may be noted in this period -

Bessie Dunlop confessed to various charges of witchcraft, in particular having had contact with spirits in human form and having given special medicines to various persons. She became well known as a fortune teller and gave answers to all enquiries. She was convicted and strangled at the stake and her body burnt.³

Similarly, Alison Peirson was convicted of witchcraft and sorcery having had contact with spirits and fairies and for giving bewitched cures for sickness. She was burnt.⁴

Meg Dow was convicted of witchcraft and child murder and was sentenced to be taken to the Castlehill of Edinburgh and there strangled at a stake, thereafter her body was to be burnt and her moveable goods escheat.⁵

The case of John Fean⁶ who was convicted of conspiring the death of the king by witchcraft and communing with the devil and spirits and who received the standard penalty, gives details of the tortures employed on a serving girl who became known for miraculous cures. She suffered the pilliwinkes //

1. B.257 - plotting to kill the king by sorcery.

2. B.247.

3. B.49, also B.38, 76, 101.

4. B.161.

5. B.186, also B.206, 230, 400.

6. B.209.

XVII. WITCHCRAFT (Contd.)

1. JUSTICIARY COURT.

PART 1. 1488-1650 (Contd.)

pilliwinkes on her fingers (a form of thumbscrew) and the binding and wrenching of her head with a rope. She refused to confess until the devil's mark was found on her, when she confessed that she was a witch and named her associates, one of whom was John Fean. In his turn, he received the rope torture and the boots (a machine that crushed his feet and lower legs). He confessed. However, later he retracted his confession before the king and the Secret Council. He was returned to the torturers who pulled out his finger nails and inserted needles and applied the boots so severely that his legs were totally crushed. He refused to confess, but the Court saw that his resolution was fortified by the supernatural powers and he was convicted in any event.'

The case of Euphemia McCalzane is noteworthy -- she was burnt alive. She was convicted of using malicious spells against various persons, for conspiring the death of the king by witchcraft and for actually killing others by sorcery. Her father had been a prominent political figure, and she herself was a person of substance. She was also apparently known to the Earl of Bothwell. She was burnt alive and all her property, heritable and moveable, was escheat. The connection with Bothwell and the compassing of the king's death by witchcraft were enough to merit the burning alive as a special mark of the gravity of the crime.'

Acquittals do occur:

An action was raised against Kathleen Ross, Lady Foulis, for witchcraft, but it was deserted.² However, a second action was raised and she was accused of plotting the death by witchcraft (using pictures and images and shooting elf arrows at them) and by poison, of her stepson, Robert Munro, and Marjory Campbell. She formed an association with some known witches, who were found guilty and burnt, but in spite of proof of her part in the plot, she was acquitted.⁴ Another stepson, Hector Munro, was accused of using witches to cure his illness -- their cure was to demand the death of his brother, George. George died and Hector recovered. He was acquitted.'

Barbara Napier was accused of seeking the help of witches and necromancers, although she was not charged with being a witch. She was convicted on some counts and acquitted on others. The king ordered the standard penalty, which was given, but the accused stated she was pregnant and she was set free. For acquitting her, the assize were accused of wilful error and their trial was heard before the king who pardoned them as they pled ignorance and not wilful error.⁶

1. B.214.
2. B.247/57.
3. B.185.
4. B.191.
5. B.201.
6. B.242/4 and B.246/7.

XVII. WITCHCRAFT (Contd.)

1. JUSTICIARY COURT.

PART 1. 1488-1650 (Contd.)

John Stewart, Master of Orkney, was accused of consulting with witches to procure the death of the Earl of Orkney. It was stated that he had gone to one of the witches, Alison Balfour, to plan the Earl's death by sorcery, and had also arranged for Thomas Palpla, his servant, and others to kill the Earl by poison or other subtle means. John Stewart denied the plot, but the prosecution produced a confession by Alison Balfour. In the trial, it was ascertained that in Kirkwall she had been tortured for 48 hours in the "caschielaws" a device which encircled the person's leg and varying degrees of heat were applied. Her husband, eldest son and daughter were all tortured in front of her - her husband was put under heavy weights, the son suffered fifty strokes in the boots and her daughter, seven years old, experienced the pilliwinks (thumbscrews). She confessed. She was released, but immediately retracted. She continued to protest her innocence until she was executed. Thomas Palpla also confessed to his part in the plot, after he experienced the caschielaws for eleven days, a period in the boots, and was so flayed by ropes that he had no skin left. He was also executed protesting his innocence. The Court of Justiciary refused to accept the confessions in Stewart's trial because of the oppression and he was acquitted.¹

Alison Jollie was acquitted of consulting with a witch to devise the murder of a neighbour, who had died of a mysterious illness.²

During the later period of James VI's reign, the witchcraft cases follow the standard penalty, although by this time they were much less frequent.

As in earlier cases, the aim of the witch was to effect miraculous cures - which were usually prefaced by an invocation to the Father, Son and Holy Ghost, creating and annulling spells and selling charms. The same penalty of strangulation at the stake, burning of the body and escheat of moveables, was imposed.³

In one case, where the witch was pregnant at the time of sentence, she was imprisoned and her execution postponed. However, after a year she petitioned for her release, which was granted and she was banished instead.⁴

1. B.373.
2. B.398/9.
3. C.25/9, also C.422, 479, 526, 535/6, 543.
4. C.52.

XVII. WITCHCRAFT (Contd.)

1. JUSTICIARY COURT.

PART 1. 1488-1650 (Contd.)

Even in a witchcraft case, however, if the assize had not been summoned, the process was dropped.¹

The later periods show the same penalty, but by this time the cases had become isolated and were now single instances.

Grizel Gardner was convicted by assize of laying sickness on Alex. Newton and diseases on others - she was strangled and burnt and her moveables were escheat.²

In the last period, there were still occasional cases and indeed at the beginning of this period (c.1630) the cases increased slightly. The substance and penalty were the same as in the previous periods.³

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1. C.1.
 2. D.98, also Dd.508/36, 555/8.
 3. E.96, 130, 143, 169, 210.

XVII. WITCHCRAFT (Contd.)

1. JUSTICIARY COURT.

PART 2. 1661-1747.

The standard penalty of strangling and burning was maintained during the greater part of the period.

Margaret Brysson, Elspeth Blackie and others were accused of witchcraft - entering into a contract with the Devil. They were condemned to be strangled and their bodies burnt.'

The same sentence applied in the latest period.

Ten women were convicted of witchcraft and were sentenced to be burnt. The reference is short and there is nothing to suggest that they were burnt alive. It is much more likely that the standard penalty of strangling and burning the body was imposed.'

One case gives details of a different sentence -

James Welsh was accused of witchcraft, having previously declared his guilt publicly, but he denied the charge later and it was found that he could not go to an assize as he was too young. Because he had prevaricated and defamed lieges, he was sentenced to be whipped through the High Street of Edinburgh and to be put to the Correction House to work there for a year.'

Acquittals are noted -

Agnes Williamson was accused of witchcraft - causing the death of a horse, removing a house etc. The assize cleansed her.'

2. ARGYLL JUSTICIARY COURT. 1664 - 1742.

The standard penalty applied.

Janet McNicol was convicted of witchcraft and sentenced to be strangled to death and her body burnt at the gallows of Rothesay at two o'clock in the afternoon and her goods and gear were escheat.'

1. F.6, also F.7/9, 11/3, 13/9, 20/1 - Again the form of witchcraft was imposing sickness and unnaturally curing it.
2. H.5, 1678 and Arnot 365/6, 1697.
3. F.34/5.
4. F.24/6, also F2.
5. I.20/1, but J.10/1728 - soothsaying - scourged and banished the jurisdiction.

XVII. WITCHCRAFT (Contd.)

3. SHERIFF COURT. 1515-1747.

No actual cases are noted, but there is an indirect reference to six persons being strangled and burnt in 1697 in Paisley, but whether as a result of a Sheriff Court decision cannot be said.¹

4. SHERIFF COURT. 1602-04.

Witch-

-craft is referred to frequently - but the standard penalty is 2 merks², with 6 merks for a second offence³ (having failed the larycht oath before).

The facts of the cases are interesting and it is possible, especially in view of the relatively light penalty, that the court treated them more as a source of revenue than as serious attempts to upset the natural order of things by using the black arts.

- A. was accused of taking the profit from B's milk by witchcraft and was fined 2 merks.⁴
- A. and B. were accused of stealing their neighbour's profit from his butter, because they had more butter with their two or three cows than their neighbour had with his seven cows - fined 6 merks.⁵
- A. was accused of sending bewitched milk to B. - fined 2 merks.⁶
- A. was accused of taking a hot stone out of a fire by witchcraft.⁷

5. REGALITY COURT. 1547-1706.

There are indirect references to witchcraft in the record - "John Grieve being imprisoned in the Tolbooth of Lauder for theft and witchcraft"⁸ but it is not possible to state the actual sentence, nor how seriously the charge of witchcraft was taken.

1. Kb.51.
2. L.22, 90/1, 97, 145.
3. L.22, 29, 30.
4. L.22, 27.
5. L.22.
6. L.90/1.
7. L.145.
8. Nb.25.

XVII. WITCHCRAFT (Contd.)

5. REGALTY COURT. 1547-1706 (Contd.)

Again, George Paterson was detained for witchcraft, but he fled before his case was heard and his cautioner having undertaken to produce him, under a penalty of 600 merks, was liable to meet the bond.¹

In a debt action, the debtor attempted to state that the pursuer was a known witch and therefore her oath was worthless. However, the pursuer replied to the effect that supposing she was a witch, which was not admitted, she was still entitled to the remedies of law and in fact obtained decree.²

6. BURGH COURT. 1398-1714.

Reference to witchcraft occurs, but no details are given.

Some old women were banished -- no one was prepared to pursue them and they were reputed to be witches.³

William Mathieson was apprehended by the parson of Peebles for witchcraft and Mathieson's brother became cautioner that Mathieson would appear for trial under pain of 500 merks.⁴

Marion Watson, accused of witchcraft, was imprisoned in the steeple for six months before she found cautioners who undertook that she would appear to underlie the law under pain of 500 merks.⁵

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1. Nb.36/7.
 2. Na.220.
 3. Z.80.1562.
 4. X.368.1629.
 5. X.389/0.1650.

CONCLUSIONS.

XVII. WITCHCRAFT.

1. The standard sentence in the main courts was strangling at a stake and burning the body, her moveables were escheat. Burning alive was exceptional, and only one case is noted, which had political undertones.
2. The earliest case shows banishment and one later case in Argyll gave scourging and banishment.
3. References occur in the lower courts, but while fining is noted, no clear pattern can be seen.
 - (a) Shetland - 2 merks (second offence 6 merks).
 - (b) Regality - imprisonment - but it may have been temporary.
 - (c) Burgh - banished.

XVIII. TREASON.

1. JUSTICIARY COURT.

PART 1. 1488-1650.

The treason cases are frequent throughout the period, and the standard penalty was forfeiture of life, lands and goods. The method of forfeiting life varied between hanging and beheading, and was usually accompanied by quartering.

In the earliest period, while forfeiture was the usual penalty, it was by no means the invariable penalty and in common with all other crimes at this time, many cases of treason were settled by remission granted by the king (or queen).¹ If a financial settlement could not be paid, or caution for its payment found, the accused could be imprisoned for 40 days and if no caution was forthcoming at the end of that period, he would be hanged.²

Ralph Anysle produced a remission for treasonably being with the former Duke of Albany. Surety was found for satisfaction.³

As an example of an early forfeiture sentence, the following may be noted:--

John Ross of Mountgreenan was convicted of treason by James IV and was sentenced to forfeit his life, lands, offices, goods and possessions.⁴

1. Aa.350/1, 353, 358/9, 360/1 etc.

2. A.69/0, 70.

3. A.17, also A.16, 17, 18, 19, 30, 31 etc.

4. A.11, also A.45/8 - feuds in the Western Isles.

A.48/0 - killing messenger.

A.199 - Lord Glamis, hanged, demeaned as traitor - forfeited.

Aa.348 Border raids - drawn to the gallows, hanged and quartered, forfeited.

Aa.480, 481/2 - Rizzio's murder - hanged, drawn and quartered, forfeited.

XVIII. TREASON (Contd.)

1. JUSTICIARY COURT.

PART 1. 1488-1650 (Contd.)

While forfeiture (hanging with quartering) was the full sentence, considerable variations are noted:

- Hanging & forfeiture - without mutilation. 1
- Hanging & moveables escheat - -do- 2
- Hanging - nothing else mentioned. 7
- Beheading & forfeiture. 4
- Beheading - nothing else mentioned. 5
- Beheading & quartering. 6

In one exceptional case - the trial of Lady Glamis for plotting the death of the king, she was sentenced to be burnt alive and her lands and moveables forfeited.

No other treason sentence included burning alive, but one of the trials following Darnley's murder included burning the bodies of the accused after death - they were hanged and after death their heads, arms and legs were cut off and their bodies burnt. 8

Banishment was permitted in one early case. 9

In the middle period, the treason entries are common and the most frequent form relates to armed risings and disturbances. The standard penalties were beheading or hanging and forfeiture of lands and moveables. Various important cases appear, however, concerning the political events of the period.

(a) Murder of the Regent, the Earl of Morton.

John Semple was found guilty and had his life, lands and gear forfeited and was sentenced to be demeaned as a traitor - hanged, drawn and quartered. 10

1. A.173/4 - cattle stealing in the Borders.
2. A.173/4 - border feud.
3. A.40 - supplying rebels and traitors, also A.51/2, 60, 61/2, 63/4, etc.
Aa.400/1 - dealing with English.
4. A.144/5 and 202/3 - Lord Glamis' accomplice.
5. A.201/2 - assistance to rebels.
A.344/5 - dealing with English.
6. A.183/5 - Forbes conspiracy - sentenced to hanging and forfeiture but commuted to beheading and quartering.
Also Aa.466/7.
7. A.187.
8. Aa.491/2.
9. A.203 - an accomplice of Lord Glamis.
10. B.72/3.

XVIII. TREASURY (Contd.)

I. JUSTICIARY COURT.

PART I. 1483-1650 (Contd.)

(b) Murder of Henry King of Scots (Darnley):

John Binning was convicted and sentenced to be hanged and decapitated as a traitor, as was the Earl of Morton, who also had his land and moveables escheat, but a note states that this was mitigated to beheading.²

(c) Gowrie (Ruthven) conspiracy:

This trial was notorious for the exceptional circumstance of a dead man being hanged, quartered and exposed. The Earl of Gowrie and Alexander Ruthven, the principal parties were dead by the time the Court heard the case against their accessories and a sentence was passed against their corpses - which were to be hanged, quartered and drawn, the limbs to be exposed in prominent places. Total forfeiture, including name, arms, honours and memory was imposed.³ Of Gowrie's accomplices Robert Logan had died and the sentence was passed against his body and his heirs, but David Hume, Malcolm Douglas and others were still alive and they were sentenced to be hanged until dead, drawn and quartered as traitors, and also to have their lands and moveables escheat.⁴

(d) Earl of Bothwell:

The references to the Earl of Bothwell are very frequent and the inconstancy of the king's policy is clearly seen. The first decree of forfeiture noted in the record was passed on 25th July, 1591. Bothwell had escaped from Edinburgh Castle, where he had been held accused of treason and witchcraft, and the Court of Justiciary passed a doom of forfeiture of life, lands, goods and honours against him in absence.

Forfeiture was also passed against the Countess of Bothwell in similar terms.

The decrees were repeated periodically, including an exhortation to pursue Bothwell and his followers with fire, sword and all other kinds of rigour, alternated with declarations of friendship.⁵

During the second half of James VI's reign, the same pattern is seen - hanging and forfeiture of lands and moveables, with beheading on occasions instead of hanging.

Patrick Sleich was convicted of taking part in Bothwell's raid on Leith and was sentenced to be hanged and forfeited.⁶

William Cunningham was convicted of holding a castle against the king's commissioners and was sentenced to be beheaded and his lands and moveables escheat.⁷

1. B.95.

2. B.114.

3. C.159/168 - corpses produced in court.
C.276/291, 405/7.

4. B.136 and 139.

5. B.181/2, B.268, B.274, 275, 287, 293, 297, 366 etc.

6. C.21/2, also C.148, 155, D.69, 224, 283, Dd.365.

7. C.366/9, also C.428, 430, 579/0, D.10, 81/7, 318.

XVIII. TREASON (Contd.)

1. JUSTICIARY COURT.

PART 1. 1488-1650 (Contd.)

Occasionally different penalties are given -

John Forbes and others, ministers of the Scottish Church were banished for holding unlawful Assembly.¹

For staying away from a raid, James Connell and others were imprisoned pending the king's will. Their property was forfeited.²

During the last period, the standard penalty of the past still existed, but it was not imposed in any of the treason cases.

Lord Ochiltree was accused of treasonable and slanderous speeches and letters against Royal counsellors. The Secret Council ordered the prosecution, and took a part in the case - ordered continuations, and eventually stopped the case. The accused was imprisoned by order of the king and eventually released by English in 1659.³

1. C.502/4.

2. C.85/8, also C.93.

3. E.176 - also E.230 - Lord Balmerino.

XVIII. TREASON (Contd.)

1. JUSTICIARY COURT.

PART 2. 1661-1747.

The standard sentence for treason in this period was hanging and forfeiture, with mutilation (usually of heads and right hands - not full quartering) on occasions.

King's Advocate against Captain Andrew Arnot and others for rebellion against the king by taking part in the Pentland Rising. The accused confessed and the assize found them guilty. They were sentenced to be taken to the mercat cross of Edinburgh between 2 and 4 in the afternoon and to be hanged until dead. After death, their heads and right hands were to be cut off and disposed of as the Privy Council thought fit. All their lands, heritages, goods and gear were forfeited and escheat. It is noted that in this case, they were all hanged on a long gallows, and that their arms were exposed at Lanark.¹

This period shows the change in the law concerning absent defenders - normally if a person was absent, he was declared outlaw and his moveable goods were escheat. This was a lighter sentence than forfeiture, and so if a person was guilty of treason, it paid him to be absent.²

"It is against reason and justice that when any person is accused of high treason for rising in arms against His Majesty or his authority that if the accused does not appear when cited, his non-appearance should actually benefit him instead of being, as it should be, an aggravation of the crime. Therefore, if, in cases of rebellion, the accused does not appear, the Advocate may insist and pursue such persons and have the case heard and proceed to sentence as if the accused were present - II Act, Parl. 2. Chas II." ³

Advocate against Wm. Maxwell and others for treason, being participants in the Pentland rising. The accused were absent, but their case was put to the assize who tried them in absence and who found them guilty. They had already been declared fugitive and now they were sentenced to death and to be demeaned as traitors. Their lands and moveables were forfeited.⁴

1. F.159, 184, also F.185/7, 187/8, 188/9 - drums were beaten to silence the speeches from the platform.
Arnot - 73/4 - hanged, head exposed forfeited.
2. e.g. F.135/6, 136/9.
3. F.242/3.
4. F.231/240, also F.241/2, G.64/6, H.6.1681,
H.6.1685 - Arnot 79/91 - Fraser's case.

XVIII. TREASON (Contd.)

1. JUSTICIARY COURT.

PART 2. 1661-1747 (Contd.)

However, it is seen that forfeiture in absence was not always inflicted, and even after the act was passed, absence for treason charges could result in the original sentence of outlawry.

One case is noted where the treason sentence was not inflicted.

King's Advocate against James Mitchell for the treasonable attempt on the life of the Archbishop of St. Andrews and the Bishop of Orkney. He fired two pistols at St. Andrews but the shots missed and wounded Orkney. He escaped at that point and travelled to England, Ireland and Holland. He returned eventually to Scotland and he was arrested.² The charge also maintained he took part in the Pentland Rising. He was examined by the Privy Council before being passed to the Court of Justiciary. The proceedings in the first trial were dropped, but he was imprisoned between the first trial in 1674 and the second in 1678. In 1676 he was tortured before the Privy Council to obtain a confession for his part in the Pentland Rising. In the second trial he was convicted of the attempted murder and the invasion of the Archbishop. He was sentenced to be hanged and his moveables escheat. This was a statutory capital crime by 4 Act Parl. 16. Ja. 6 and by 7 Act Parl. 1 Car 2. The treason aspect seems to have been dropped as the sentence was the same as that for ordinary murder.³

Arnot quotes one case of a fine of £200 Stg. on Lord

Fraser for drinking the health of James VII.⁴

Acquittals are noted:-

The King's Advocate and his informer against Neil Macleod of Assynt for treason. It was stated that in March, 1649, he treacherously delivered the Marquis of Montrose to the rebels, by whom Montrose was killed, that he gave aid to the English rebels (Roundheads) against the Earl of Seaforth, and the Earl of Middleton, that he taxed ships in Loch Inver and Assynt and that he committed various assaults, imprisonments and raids against the king and his supporters. In February, 1671, he was declared fugitive by the Commissioners of Justiciary and a Commission of Fire and Sword was granted to the Earl of Seaforth who raised a force to capture him. Macleod in turn enlisted his clan, but his Castle was taken and he fled to Caithness and Orkney where he was captured. The assize assoilized Macleod on most of the points, and no sentence is noted.⁵

1. H.7/8, 1687.

2. G.255/62.

3. G.307/339.

4. Arnot 75/9.

5. G.224/47.

CONCLUSIONS.

XVIII. TREASON.

1. The basic sentence was hanging and forfeiture of lands and moveables, with quartering of the body after death and exposure of the pieces.
2. But variations are seen -
early period - (i) compounding and remission could be arranged, with hanging if there was a default.
(ii) exceptionally, burning alive or burning the body after hanging could be given.
(iii) exceptionally, banishment.
3. In the early and middle periods, beheading could be substituted for hanging and escheat for forfeiture.
4. Banishment is seen occasionally in the middle period, with the express consent of the king.
5. In the later period, hanging and forfeiture was standard but quartering was not given - the extent of mutilation was exposure of heads and right hands.
6. The later period also shows the statutory imposition of forfeiture on absent accused. In theory, forfeiture could only be imposed when the accused was present and if he did not appear, the standard non-appearance decree of outlawry was the most which could be given. It was considered unreasonable that a traitor should actually benefit by his absence (receiving only outlawry and not forfeiture) and the position was altered by II Act Parl. 2. Chas II. However, it is seen that even after this Act, some treason cases still showed outlawry.
7. It is seen that the need for personal appearance to receive forfeiture (in terms of feudal law) was extended in certain cases particularly in the early part of James VI's reign to justify the production of the traitor's body in court //

CONCLUSIONS.

XVIII. TREASON (Contd.)

court if he had died between the crime and the trial. The production of the dead body at the bar to receive a treason sentence was not, in theory at least, a macabre joke but an indication of how strongly the court considered the obligation of presence of the traitor before a full treason sentence, including forfeiture, could be passed.

XIX. SEDITION.

1. JUDICIARY COURT.

PART 1. 1488-1650.

Throughout the record, instances occur of attacks, spoken and written, on the king's personal character. The cases are particularly detailed during the rule of James VI and his retaliation was merciless.

The usual sentence was hanging with either forfeiture or escheat.

Francis Tennent was convicted of writing scandalous allegations about the king and possibly also about the queen. The king ordered the punishment himself which was that the accused should be tortured in the boots, then carried to the market cross where his tongue was to be cut out and then he was to be hanged. However, the king reconsidered this and finally ordered him to be hanged and his moveable goods escheat. The torture was not implemented.

Again, for fixing a portrait of the king to a gallows while pointed goods were being sold, Archibald Cornwall, a town officer, was sentenced to be hanged from the same gallows. His body was to hang for 24 hours with a paper attached stating the crime. His lands and moveable goods were forfeited.

John Fleming was convicted by assize for insulting the king - when Fleming was asked by his minister why his son had not gone to communion, Fleming took the opportunity of expressing his opinion of the king and the church. He was hanged and his moveables escheat.

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1. C.333/5.
 2. C.350/1.
 3. D.359/0.

XIX. SEDITION (Contd.)

1. JUSTICIARY COURT.

PART 1. 1488-1650 (Contd.)

Where an Englishman refused to obey a king's officer and called the king a bastard, the Englishman was hanged.¹

Mutilation before death was added in one case --

Thomas Ross was convicted of publishing a pamphlet against the Scots in England. He was sentenced to have his right hand cut off, beheaded and his head placed on a pike. His moveables were escheat.²

Not every case showed a capital sentence --

Scourging & Banishment:--

For irreverent speeches, William Tweedie was scourged and banished, the judge having consulted the Secret Council.³

George Nicoll was accused of producing a false and calumnious paper on the collection of revenue by the Secret Council. Prosecution was ordered by king's letter but while the accused was in ward, proceedings were stopped by warrant which stated that the Privy Council tried the case themselves and found him guilty. He was banished and was ordered to stand from 8 till 9 in the morning at the entrance to the Tolbooth, bareheaded with a placard on his head, stating his crime and then to be taken by the hangman at 9 a.m. to the Cross of Edinburgh and stand there for 12 hours and to receive six strokes from the hangman. He was returned to ward after that until the next available ship.⁴

Fining:--

Edward Johnston came in to the king's will for seditious speeches and was fined 3500 merks.⁵

PART 2. 1661-1747.

No sentence is given:--

William Dobie was accused of seditious speeches -- he stated that the king should be pulled off the throne and the whole of the royal party hanged. The prosecution asked for a death sentence -- to deter others, but no sentence at all is noted. The assize convicted.⁶

Advocate against John Strachan -- for raising a mob in Edinburgh and for seeking out Sir Walter Seton, then farmer of the customs. The case went to an assize, but no verdict is noted.⁷

1. B.385.
2. Dd.449/454.
3. D.221/2.
4. E.218.
5. C.29/34.
6. F.54/5.
7. F.115/20.

CONCLUSIONS.

XIX. SEDITION.

1. The basic sentence was hanging but various additions were usual.
2. Severe personal punishment could be ordered - torture and his tongue cut out, but this was not enforced. Mutilation of his right hand, however, was enforced in another case.
3. Escheat or forfeiture was added.
4. In a few cases scourging and banishment was given.
5. Exceptionally a fine (3500 merks) was imposed.
6. The cases are seen only in the middle period and relate to direct insults to the king.

XX. RELIGIOUS CRIMES.

1. JUSTICIARY COURT.

PART 1. 1488-1650.

The early record shows many instances of Jesuit priests accused of treasonable activities.

The penalties could on occasions amount to the full treason sentence.

A priest was convicted of openly formenting rebellion and was sentenced to be hanged and quartered (The quartering was not implemented).¹

For resetting priests, the same sentence was passed, but not implemented.²

The usual sentence was banishment.

For celebrating mass, the priest placed himself in will and was banished.³

Indignities might be added --

For celebrating mass, William Murdoch was to stand chained to the Market Cross for ten hours and his clerical clothes and equipment were to be burnt in front of him. He was to be banished.⁴

Herbert Brown was in ward and brought forth by warrant of Privy Council on his supplication. He undertook not to take mass or have anything to do with Catholic faith under penalty of death.⁵

John McBrek was in ward and petitioned Privy Council for release on grounds of health. He undertook to go to the Low Countries and help the Scottish prisoners in Dunkirk and would not return without the king's leave.⁶

Fining:--

A fine could be imposed for celebrating mass - the priest was fined £1000.⁷

Imprisonment:--

In an early case the priest was warded during the queen's (Mary) pleasure.⁸

1. D.350.
2. Dd.375/6.
3. D.254, Dd.378, 541.
4. C.530/1.
5. E.66.
6. E.66/7.
7. D.257.
8. Aa.427/8.

XX. RELIGIOUS CRIMES (Contd.)

1. JUSTICIARY COURT.

PART 2. 1661--1747.

One case is noted of heresy being punished by capital sentence.

For blaspheming and decrying the divinity of Christ and speaking against Christianity, Thomas Aitken was hanged. His body was buried at the foot of the gallows and his moveables escheat.²

2. SHERIFF COURT. 1515--1747.

Only one case is noted -

James Crawford was a covenanter and refused an eldership - fined 200 merks.'

3. REGALITY COURT. 1547--1706.

During the Covenanting period, it is seen that the penalties were increased and were enforced strictly - for frequenting conventicles, fines of £100 are noted,³ with one of £335.⁴

For a wife's irregularities, i.e. attending conventicles, a husband was fined £200 and for a son's irregularities, a father was fined £100.⁴

As a corollary, fines for persons failing to appear in court in that period were also increased (from £5 and £10) and £50 became frequent, with some at £20 and a few at £10.

The record has an unpleasant atmosphere at this stage - persons already fined by their baron court are fined again⁷ by the Regality Court and persons are sent to prison until they tell what they know.⁸

Prohibitions against receiving rebels also increased as some of those who attended conventicles were declared rebels.⁹

- | | |
|--------------------|---------------|
| 1. Kb.25. | 6. Nc.36. |
| 2. H.12/3.1696. | 7. Nc.24 etc. |
| 3. Nc.4/5, 35 etc. | 8. Nc.44. |
| 4. Nc.5. | 9. Nc.30, 32. |
| 5. Nc.13. | |

XX. RELIGIOUS CRIMES (Contd.)

4. BURGH COURT.

Some cases show that the Burgh courts enforced the church rules.

Disobeyers and contemptners of the kirk to be punished as the bailies order.¹

The inquest ordered the bailies to assist the kirk against excommunicated persons.²

Patrick Brotherstaines was fined £12 for not attending church and was imprisoned till paid.³

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1. X.331. 1571.
 2. X.336. 1571.
 3. X.399/400. 1684,
Also Y.108. 1682.
Also Y.131/2. 1689 - Act against sabbath profanation - 5 merks.
Y. 142/4. 1693 - £10 and personal punishment.

CONCLUSIONS.

XX. RELIGIOUS CRIMES.

1. The records show various crimes caused by unacceptable religious practices -- principally the activities of the Jesuits and the Covenanters.
2. The justiciary records show sentences (a) against the Jesuits in the early and middle periods and banishment (usually with indignities) was normal. Treason sentences were passed, but not enforced, (b) in the earliest period there are references to heretics (reformers) and they were burnt, but it is impossible to say if they were burnt alive or strangled first, although some references would indicate the latter.
3. A reference in the Sheriff court records is made to the justiciary court punishing a Covenanter leader with a full treason sentence, but the case is not mentioned in the justiciary records noted.
4. Exceptionally a fine might be imposed.
5. An exceptional blasphemy case in the later period was punished by hanging.
6. The lower courts had a standard sentence of fining for Covenanters --
 - (a) Sheriff Court - 200 merks.
 - (b) Regality Court- £100 (also, but exceptionally, £335, £200).
7. The Burgh courts could enforce attendance at Church - fined £12, £10.

XXI. USURY.

1. JUSTICIARY COURT.

PART 2. 1661-1747.

This crime is noted only during this period and the standard penalty was escheat of moveables and further punishment before the Privy Council. The records do not show what this further punishment was.

James Aitken, James Elder and Thomas Harper were accused of usury in terms of 222 Act Parl. 14 Ja. 6 which stated that those who took more interest for a loan than the prescribed maximum committed usury and the Act imposed a penalty of loss of the principal sum. This was increased by 247 Act Parl. 15. Ja. 6 to punishment in their persons and escheat of moveables, as well as loss of the principal sum. James Elder was convicted by the assize and was sentenced to escheat of moveables and caution of £1000 to appear before the Privy Council for such further punishment as they may decide.

The Earl of Glencairn was the Donator of Usury and most of the prosecutions were in his name.² He collected the penalties and estates recovered under the statutes, and it is possible that the explanation for the prosecutions during this period lies in his activity enforcing his gift.

The Earl of Glencairn and Mushet, his factor, against William Sommerville for usury - for lending on the security of a bond with interest at an excessive rate. The assize found him guilty and he was sentenced to have his moveables escheat and had to find caution of 5000 merks to appear before the Privy Council for such further punishment as they thought fit.³

Acquittals are noted -

The Factors of the Earl of Glencairn against James Wilson and others for usury - Wilson lent money to George Home and then obtained a second bond which was plainly for the excessive interest - but the assize acquitted him (assoilized).

2. ARGYLL JUSTICIARY COURT. 1664-1742.

One case of usury in this record shows fining as the sentence.⁴

1. F.89/0.
2. F. 97/8 etc.
3. F.215/18, also F.277/84, 290 - caution of £1000.
4. F.250, also F.265/8, 285/9.
5. J.6/1710.

CONCLUSIONS.

XXI. USURY.

1. Prosecutions for usury are seen only in the later period of the justiciary records.
2. The standard sentence was loss of the principal sum, excheat of moveables and appearance before the Privy Council for further punishment (the further punishment is never mentioned).
3. The Argyll record gives a sentence of fining.

XXII. MISCELLANEOUS.

1. JUSTICIARY COURT.

PART 1. 1488-1650.

1. Wearing Pistols.

Such cases occur frequently in the later periods, but the penalty varied:-

George Shaw obtained a remission on payment of 500 merks.¹

William Hamilton came into will for wearing pistols in Edinburgh and was banished.²

One case showed a heavier penalty - George Trumbill was acquit of slaughter but his right hand was cut off for carrying and shooting pistols.³

2. Statutes against Gypsies.

Various statutes had been passed ordering all the gypsies to remove from Britain unless they found caution. Many did not leave and could not find caution, so they were hanged.⁴ Their women were sentenced to be drowned, but this was muted to banishment.⁵

3. Poaching.

Poaching cases occur infrequently. In the earliest record certain instances of fishing out of season are noted and the penalty was fining.⁶ For killing hares, the accused came into will.⁷

4. Injury to Animals.

Deliberate injury to animals was considered a serious crime - even to the extent of hanging.

For killing and maiming sheep, George Scott and others were hanged and their moveables escheat.⁸

For hurting another's ox, George Dempster was sentenced to banishment for life.⁹

1. C.129, but C.67 - entitled to wear pistols by king's grace.
2. C.22/3, D.76/7 - warded.
3. C.421.
4. D.202, Dd.398/9, 560.
5. Dd.561/2.
6. A.40 - £5.
54 - £3.
7. A.15.
8. Dd.380/8.
9. C.127/8.

XXII. MISCELLANEOUS. (Contd.)

1. JUSTICIARY COURT.

PART 2: 1661-1747.

1. Insulting.

Donald Campbell was accused of making derogatory remarks about The Earl of Athol, the Lord Justice General, and was sentenced to stand at the cuckold of Edinburgh between 2 and 4 in the afternoon with a paper on his chest, declaring his fault, and to have his tongue bored by the hangman. Thereafter he was to be imprisoned at the court's pleasure. However, the Earl of Athol requested clemency and he was pardoned. The original sentence was similar to some imposed for insulting the king.'

2. Damaging a Coalmine.

Alexander Wardrop of Carntyne against John and Robert Pedies, coalheughers in Carntyne for destroying and drowning the coal heugh in Carntyne and also for striking - The libel stated that the crime was by statute equated with treason but in fact the criminal aspect was dropped, and the question of civil damages was remitted to the Regality Court.²

1. G.137/9 - in another case the Court refused to hear the charges, saying that it should have been raised in a lower court. G.132/4.

2. F.191/5.

XXII. MISCELLANEOUS (Contd.)

2. ARGYLL JUSTICIARY COURT. 1664-1742.

Various miscellaneous cases, mainly of an administrative nature, occur and fining is the standard penalty.¹

1. Suicide - escheat was standard.

A woman committed suicide and her goods were escheat, but only to the extent of one-third, her husband and children keeping the rest.²

2. Poaching.

Various poaching cases occur and the standard penalties were fines of £20 and £10.³

3. Injury to Animals.

A number of cases occur in the later period which show that damage to animals was punished by fining,⁴ or scourging and banishment.⁵

3. SHERIFF COURT. 1515-1747.

A jailer permitted an army deserter to escape and was ordered to produce him or another person as a substitute.⁶

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1. Moorburn - £5: I.22.
Drunkenness - £10: I.79, 94.
Malicious slander - 100 merks. I.82/3.
 2. I.100/1, also J. 4/1730.
 3. Killing salmon (black fish) - £10. I.14,15,74,75,105.
Killing herring (kipperfish) - £20. I.14,15,16,28,75.
£10. I.14,18,74,91,95,105
£5. I.14.
Killing Black cock - £20, I.14, 15.
Killing Black cock and roe-deer - £100. I.14.
Killing roe-deer - £40. I.74.
£10. I.74.
 4. J.6/1710 - fined and jugged for killing horse.
J.2/1714 - fined for killing cattle.
 5. J.12/1710 - killed horse and scourged and banished from Britain for life.
 6. Kb. 48/0.

XXII. MISCELLANEOUS (Contd.)

4(a) SHETLAND COURT. 1602-04.

1. Contempt of Court - failing to appear - 4 merks normally with £10 occasionally.

2. Suicide.

Two cases of suicide are noted (one by hanging and one by drowning) - the moveable goods of the dead person were escheat.

3. Injury to Animals. Fining was normal (160/-, 40/-, 2 merks) but one case of scourging is noted:-

For riding the archdeacon's horse to death the person responsible was to be scourged about the kirk.

Dogs worrying sheep - fined 40/- and dog to be killed.

Keeping dog already found guilty of worrying sheep - fined £10.

4. Statutes.

As in other lower court records, various court statutes are noted, but with the exception of a statute prohibiting false and groundless actions which contained a penalty of loss of the right hand and sword, and for a second offence escheat and banishment, the normal statutory penalty was 40/- with some of £10. No cases are seen of the mutilation being imposed.

5. Miscellaneous.

- (a) For failure to perform feudal services - 40/-d.
- (b) Not burying dead - 40/-d.
- (c) Alleged wrongful possession of land - 40/-d.
- (d) Using Church as byre - 40/-d. and ask forgiveness in sackcloth.

1. L.68, 75, 76, 85, 86 etc.

2. L.18, 23.

XXII. MISCELLANEOUS (Contd.)

4(b) ORKNEY & SHETLAND COURT. 1612-13.

1. Injury to animals:

An act against riding other persons' horses imposed penalties of 4 merks to the king and 4 merks to the owner if the horse was found in the owner's parish - 8 merks to the king and 8 merks to the owner if it was found in the next parish. The fines were doubled accordingly if it was found more than two parishes away. If the accused was unable to pay he was punished in his person.'

2. Statutes:

In a Court statute the magistrates were called upon to assist the minister and session to punish vice within their jurisdiction, but the record does not disclose any particular sign of the magistrates' activity in this respect.

Act against drunkenness - 40/- if contravention.²
Act against vagabonds and beggars - stocks and jugs.⁴

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1. M.23, also pulling wool from sheep's back - 6 merks M.20/2.
Cutting off horse's tail - M.23.
 2. M.17.
 3. M.18.
 4. M.19/0.

XXII. MISCELLANEOUS (Contd.)

5. REGALITY COURT. 1547-1706 (Contd.)

2. Boundary disputes (Contd.)

In the latest period, however, more severe penalties were imposed - £50, but the penalties for all crimes were considerably increased in this period.¹

3. Cutting Timber and Broom.

Such cases are very frequent as are the statutes directed against the offences.

A public act (James VI Earl. 6. Cap. 84) gives detailed penalties - £10 and payment to compensate loss, for the first offence, £20 and damages for the second, £40 and damages for third offence. If the offender is imprisoned (presumably for non-payment of the fine) then the periods were - 8 days in the stocks or irons on bread and water for the first offence, 15 days for the second, 1 month and scourging for the third.²

But there are no cases which show that the full rigour of the penalties was ever imposed. It is noted that immediately after quoting the terms of the national act, the Court passed its own act giving a penalty of 40/- for each fault with imprisonment if unable to pay.³

The cases show a fairly standard penalty of £10, with some of £5. In only one case is there a mention of £20.⁴

4. Statutes.

Statutes were passed frequently by the court concerning a large variety of subjects. From the cases following enforcement of the statutes, it is seen that £10 was the maximum for most contraventions, and the majority of fines were under £5.

In one case, however, referring to a national act concerning weavers, a fine of £400 and in addition imprisonment for 14 days is mentioned, but this is exceptional.⁵

1. No. 8/9, 11/2.
2. Nb.261.
3. Nb.261.
4. Nb.171.
5. Nb.177.

XXII. MISCELLANEOUS (Contd.)

5. REGALTY COURT. 1547-1706.

1. Poaching.

A Court statute gave the penalties for receiving poachers as 10 merks for the first offence, 20 merks for the second, 40 merks for the third, and 48 hours imprisonment in addition for each offence. If poachers were caught in the act, the same penalties were to apply, with the additional provision that, their dogs were to be hanged and gear confiscated.

The only case following the act shows a very light penalty -- "ordained the accused to desist in time coming".²

The middle period shows a certain number of cases, but it is seen that the normal fine was in the region of £10.³

In one case, however, where the accused had laid a trail of corn and shot a number of the superior's pigeons, he was fined £100 with prison until paid or till he found caution.⁴

2. Boundary disputes.

Such cases although not truly criminal were nonetheless treated and punished as crimes.

For throwing down fences and using a private yard as a passage, a fine of 6/8d. was imposed.⁵

Normally the fine for encroaching on another's ground -- by building a new dyke, or by moving the boundary stones, was £10.⁶

For outright annexation the same penalty was imposed,⁷ and also for interrupting another's possession in the future, although the immediate interruption received a fine of £20.⁸

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1. Na.236/7.
 2. Na.349.
 3. Nb.59,80, 206/7 - 10 merks.
 4. Nb. 28/9.
 5. Na.233.
 6. Na.7, 251.
Nb. 75, 274, 409, 414 - prison until paid.
 7. Nb.433/4.
 8. Nb. 411/2.

XXII. MISCELLANEOUS (Contd.)

5. REGALITY COURT. 1547-1706 (Contd.)

5. Contempt of Court.

Non-appearance in court normally resulted in a fine of £10 but in the Covenanted period, this was increased to £20, with a number of £50.

6. BARON COURT. 1523-1747.

1. Poaching.

In the later period of the Urie record, the prosecutions for poaching are usually brought under a national Act - 15 Ja. VI. C.248. The first case reported shows a fine of £10 and confiscation of the weapons, but in the next case, escheat of moveables is imposed as well as a fine of 20 merks and confiscation. Thereafter the sentence is recorded "as prescribed by Acts of Parliament". In two instances, however, a lesser penalty is imposed - for shooting pigeons (the previous cases were for killing hares, pigeons, duck and partridges) a fine of 40/- was given and for killing salmon £10 per salmon, again with confiscation. In the Forbes record, salmon poaching received a £5 fine.

Corshill used a general description of "breaches of penal statutes" in proceeding against poaching which covered not only poaching, but also steeping lint in running waters, killing red fish, cutting green wood, burning moss and others.

1. P.98.
2. P.100/1.
3. P.109.
4. P.109.
5. Ra.297.
6. S.98 etc.

XXII. MISCELLANEOUS (Contd.)

6. BARON COURT. 1523-1747 (Contd.)

1. Poaching (Contd.)

Most entries of this nature do not give details of the fine, but in two cases fines of £50 are noted, with one of £12.²

2. Damage to Property.

This was punished criminally although apparently the damage was caused by negligence: fines were imposed, e.g. destroying a drain for surface water £1:10/-,³ driving a cart through corn and grass £6,⁴ blocking a drain for surface water £3⁵ and for carelessly burning heather £60,⁶ £10.⁷

In Stitchill and Forbes, similar cases occur - for breaking a locked door and for breaking into a stable both incurred £5 fines.⁸

3. Injury to animals.

For cutting off a horse's tail he was fined £40.⁹

For killing a dog without cause - £5.¹⁰

The Corshill record shows a statute passed by the Court, ordaining all whose dogs are suspected of worrying sheep to hang such dogs, under a fine of £5 if they refuse.¹¹

4. Statutes.

The records show many prosecutions for contraventions of court acts, but in content the acts follow a definite pattern.

The usual offences are cutting the Baron's timber, wrongfully //

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| 1. S.212, 214/5. | 10. Ra.274. |
| 2. S.200. | 11. S.91. |
| 3. P.133. | |
| 4. P.146/7. | |
| 5. P.161. | |
| 6. Ra.248/9. | |
| 7. Ra.246. | |
| 8. Q.24, 89. | |
| 9. P.17. | |

XXII. MISCELLANEOUS (Contd.)

6. BARON COURT. 1523-1747 (Contd.)

4. Statutes (Contd.)

wrongfully cutting peats, wrongful grazing, burning heather and contravention of the decrees of service, e.g. failing to go to the Barony's miller or blacksmith, failing to pay duties promptly and failing to give service.

All these offences were punished by fines, the usual amounts varying but seldom exceeding £20. Corshill and Forbes, however, show some statutory offences punished by fines of £50 and £40. In the case of a contravention of a national statute prohibiting burial in linen, a fine of £200 was imposed,¹ but this is by far and away the most severe fine in the Baron Court records, although in a case noted in the Urie record for contravention of a Weights and Measures Act, the punishment was a fine of double the value of the goods concerned and imprisonment at the Baron's pleasure.²

Corshill passed an Act prohibiting the sale of drink to beggars and thieves under a fine of £10 on 8th November, 1670,³ and following from this Act there are some prosecutions against publicans for selling drink to and harbouring beggars and thieves.⁴

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1. Q.159/0.
 2. P.105/7.
 3. S.93.
 4. S.94, 99.

XXII. MISCELLANEOUS (Contd.)

6. BARON COURT. 1523-1747 (Contd.)

5. Contempt of Court.

In each record there are a few entries showing disturbances in court. In Carnwath some persons were found guilty of "tribulans of my lordis court in vordis and in unkleifful langage" and while no details of the punishment are given, it is apparent that a fine was imposed.¹

Absence was also punished by fining.

In Urie for being absent the accused was fined £10² and in Stitchill fines of £10, £5 Scots and 2/6 Stg. were imposed for failing to appear in court and refusing to give evidence when called.

In Forbes the fine for absence was fixed at 40/- with one case of 3 merks, but Corshill had varying amounts of fines - covering both absence and troubling the Court, but no mean can be stated.³

-
1. O.12, 13, 105 - In Corshill fines of £5, 40/- and 20/- are noted. Urie - £10.
 2. P. 118, 167.
 3. £10, £5, £4, £2 etc.

XXII. MISCELLANEOUS (Contd.)

7. BURGH COURT. 1398-1714.

The Burgh Court records show a very large number of miscellaneous offences - contraventions of trading regulations, breaches of administrative rules and threats to the community's security.

There are also references to more general crimes, e.g. taking greenwood, permitting beasts to roam untended etc. also enforcing Church rules and provisions against drinking and gaming.

In almost every case the penalty was fining.

1. Trading Offences.

Many entries relate to contraventions of the burgh laws governing trade and the price regulations in the town.

The aldermannus accused Andreas, son of Gilbertus, of breach of the statute passed by common consent regarding the purchase of wool and Andreas was convicted by an inquisition of his vicini (burgesses).'

The number of trading contraventions shows that there were numerous controls imposed on the traders and merchants both within and outside the guilds. Those within the guilds wished to protect their prices and markets and those without wished to establish their market and earn their profit.

In the earliest record (Aberdeen) the standard penalty was fining although in many cases the entry states that the accused placed himself in the will of the bailies - this resulted in fining also.

1. V.22.

2. V.22., will of prepositus.

In will for -

reducing price of meat - V.36,48,49,76 - fined.

selling flour - V.111 and fined.

selling wrong amount of bread - V.137.

breaking price agreement - V.44,76,79.

buying salmon outside the town - V.61.

selling wine too cheaply - V.122.

Fining: Fined for -

selling flour to the prejudice of the communitas. V.111.

selling meat -do- V.42/3, 76. V.104.

selling coal to prejudice of the communitas. V.77,109.

baking cakes and destroying the market. V.93, 142.

destruit forum. V.93, 122.

XXIII. MISCELLANEOUS (Contd.)

7. BURGH COURT. 1398-1714 (Contd.)

1. Trading Offences (Contd.)

The old laws make provision for trading regulations also -
fines of 8/- were standard.

The other records show a similar pattern.

Brewers are not to sell ale under 12d. the gallon under pain of 8/- for the first offence, 16/- for the second and the breaking of the cauldron and the banishment of the offenders for a year for the third.²

Any brewster who breaks the proper price will be fined a gallon of ale for the first offence, two gallons for the second and 8/- for the third.²

The prices were fixed by the inquest, and they also made general regulations.⁴

A later case shows heavier amounts -

James Haldine confessed that he contravened the Acts of the town by taking "ane heapit capfull" of flour and also 2/- for each boll of wheat ground at the mill. He was fined the statutory penalties of £20 and £10 and he and his servants were sentenced to be imprisoned till they paid. He refused to find caution and observe the town statutes and was ordered to remain in close prison in the steeple of the burgh until he did find caution.⁴

-
1. For brewing bad ale for sale (suspended from office for a year and a day - fined 8/-) - L.Q.B. LXIII. p.30/1.
General regulations regarding sale of meat and drink and for contravention the fine was 8/- L.Q.B. LXVII. p.33.
All country people in the area shall sell their goods at the principal town in the sherrifffdom, or else lose the goods and pay 8/- - F.C. XLVI. p.183
 2. Z.12.1521, also Z. hucksters - 8/- 35.1529.
Laws regulating meat and butchers - 40/- to the kirk work. Z.15. 1522, also Z.17.1522 - 8/-, 20/-.
 3. X.128, 1458.
 4. X.166, 1471.
X.215, 1555.
X.323, 1570 etc.
 5. Y.1.1652.
Y.3. 1652.

XXII. MISCELLANEOUS (Contd.)

7. BURGH COURT. 1398-1714 (Contd.)

2. Foristallacion.

This is described as the purchase or sale of goods before they reach the official market or before the appointed time for opening the market, and acts against this crime and cases of the crime occur throughout all records.

Fining was normal.

The Aberdeen Court makes detailed provisions -

Bakers, Brewers and Butchers taken selling their goods outside (the town) will be fined 12d. for the first offence, 2 solidi for the second and three solidi for the third and will lose their right to trade for a year for the fourth offence.¹

If anyone buys malt or flour in the houses before he comes to the market and the cross of the town he will be fined 2 solidi.²

If any person is convicted of foristallacion, he will be fined 5 merks without remission.²

If any burgess receives or hides a foristallator or his goods to the prejudice of the freedom of the burgh or the common good, he will be fined 40 solidi.⁴

The old laws were similar.

Anyone guilty of foristallacion shall be fined 8/-⁵-d.

This was repeated in the later records.⁶

Decreed by the provost, bailies, council and community that no one shall buy fish or chickens before noon under pain of 8/- to the rood work.⁷

The cases are frequent &

James V. supported the Burgh of Peebles against forestallers who were sentenced by royal letter to have their goods escheat - half to the king and half to the town.⁹

1. V.216.
2. V. 216.
3. V.217.
4. V.217.
5. L.Q.B. LXXII. p.35.
6. X.150.1464 - 8/-
X.215.1555 - fleshers had to bring their meat to the cross under pain of 8/-d.
7. Z.3.1520 also Z.4.1520 - 8/-.
Z.27.1526 - provisions re. meat 9/-d.
8. V.102. Foristallacion - of wood and leather 40/-d.
fined 40d. V.183. fined 12d. V.184. fined 13/4. V.189.
leather and hides 6/8d. V.222, also
V.222 10/- - payable at the feast of the purification of the Blessed Mary and caution that he will not forestall under pain of 5 merks.
9. X. 59/0. 1541.

XXII. MISCELLANEOUS (Contd.)

7. BURGH COURT. 1398-1714 (Contd.)

3. Reqratacion.

The purchase of goods for resale at a higher profit than was permitted.

The record shows fines of different amounts, some greater than the statutory penalty of 8/-.

Anyone guilty of regratacion shall be fined 8/- and lose the articles purchased.'

All records show similar statutes.²

The cases show differing amounts.³

The Dean of Guild was empowered to seek and escheat the goods of unfreemen trading in the town to pursue forestallers and regraters and to present them before the town council.⁴

In another Act it was stated that the forstallers and regraters belonged to the Dean of Guild.⁵

-
1. L.Q.B. LXVI. p.32, also S.G. XXXII. p.78, and V.238 - escheat and fined 13/4d.
 2. X.167. 1471 - 8/-, also X.257. 1559, X.335. 1571.
 3. V.222, 224, 225, 226 - fined 10/-
V.222, 223, 224, 225, 226 - fined 40d.
V.222, 223, 225 - 5 merks.
5 merks and 40d. - V.225.
6/8 - V.223.
16/8 - V.224.
40/- - V.224.
 4. Y.5. 1652 - Also 15.
 5. Y.59.

XXII. MISCELLANEOUS (Contd.)

7. BURGH COURT. 1398-1714 (Contd.)

4. Security.

(a) Watch.

Throughout the records, many acts were passed to protect the security of the town. Fines of 8/- were the normal penalty, but larger amounts are noted occasionally.

The four gates are to be kept shut during pestilence and a man will watch each gate, under pain of 8/- payable to the bridge.¹

Two watches to be kept nightly, under pain of 8/-d.²

One court act gives details of personal punishment, but no cases are noted:-

Anyone who leaps the wall will be punished by (1) warding his body in irons for 24 hours (2) banishment and (3) death for the third offence.³

(b) Civil Control.

The old laws made provision for the community's security-- the penalty tending to be loss of burghs-ship.

If anyone makes any conspiracy against the community to divide or scatter it, he shall be sentenced to give a cask of wine as forfeit.⁴

If any burghs rebels against the community of the burgh or commits any fraud against the burgh, his house shall be struck to the ground and he shall be evicted from the town.⁵

All burghs will assist the council to prevent fights and armed forays in the town under pain of losing their freedom.⁶

If anyone carries a sword in the town he will be warded until he finds caution, under pain of £40 and loss of freedom.⁷

1. X.157, 158, 1458.
2. X.218. 1555, X.219. 1555 - four watches 8/-d.
Gen. condts. X.240. 1557 - 8/-,
X.243. 1557 - 8/-,
X.252. 1558 - 8/- etc.
- X.307. 1568 - all burghs to keep watch - 21/-.
3. X.347. 1572.
4. S.G. XXXVI. p.80.5. F.C. III. p. 161.
6. X.318. 1570. X.336. 1572 - all to assist under pain of £10, £20 and --- for the third offence.
7. X.357. 1605.

XXII. MISCELLANEOUS (Contd.)

7. BURGH COURT. 1398-1714 (Contd.)

4. Security (Contd.)

(b) Civil Control (Contd.)

Acts restricting and controlling unfreemen in the town were frequent.

The Council prohibited any leases of houses to vagabonds or incomers and further ordered that sturdy beggars and others should not be received for longer than one night.¹

Prohibition against taking in outlandmen and women under pain of £40.²

The older records were similar, although the fine was usually 8/-d.³

-
1. Y. 9, 1653, also Y. 59, 1664 - £20,
Y.130, 1689 - 10 merks, Y.162/3 - £10,
Y.176/7, 1708 - £100.
 2. Y.29. 1655, also Y.59 - £20.
Y. 56 - 20/-,
Z.137/8. 1615 - Act against accepting strangers - £5.
 3. X.227. 1555 - houses not to be let to suspicious persons - 40/- to the common work.
X.254. 1559 - 8/- and caution to keep the burgess skaithless.
X.274. 1561 - no strangers will be received.
X.242. 1557 - 8/-
X.311. 1569 - 8/- and skaith.
X.361. 1622 -do- 5 merks.

XXII. MISCELLANEOUS (Contd.)

7. BURGH COURT. 1398-1714 (Contd.)

4. Security (Contd.)

(c) Disease.

Many cases and statutes relate to lepers and the plagues.

The penalty was expulsion from the town.

The inquest passed decrees expelling persons afflicted with leprosy and gave orders that others should be investigated in case they were diseased.²

Frequent orders were made against persons suspected of having the plague, or being in contact with it.³

James Hall failed to put out clothes and others from his house as a woman servant was suspected of having the plague and was ordered to be punished in his body, and his goods and freedom be escheat in the provost's will.⁴

James Finlason agreed to go into banishment and exile because of his infirmity and disease. If he returned he would be scourged for the first return and hanged for the second.⁵

5. Burgess Disputes.

Many cases occur of disputes between burgesses and unfreemen. The penalty tended to be fining, but could be extended to expulsion.

Unfreemen were forbidden to occupy a freeman's craft under pain of escheat for the first offence, punishing their bodies at the bailies' will for the second, and under pain of being held disobeyers of authority for the third.⁶

1. Z.3. 1520 - persons declared to be lepers.
Z.33. 1528 - put out of the town.
Z.34. 1529, Z.37. 1529 etc.
2. Z.37. 1529, Z.39. 1544/5.
3. Z.44. 1546, Z.45. 1546 etc.
4. Z.56. 1549, Z.100.1601 - town closed against plague in Glasgow.
Z.110.1604 - movement restricted because of the plague.
Z.111.1604 - do. under pain of £20.
Z.113. 1605 - strangers barred.
Z.115.1607 - roll of persons died of plague.
5. Z.119.1608. X.373.1636 - fined £10 or banishment for receiving persons during plague.
X.398.1665 - pain of life and goods (U.K. Act.)
6. X.306. 1567.

XXIII. MISCELLANEOUS (Contd.)

7. BURGH COURT. 1398-1714 (Contd.)

5. Burgess Disputes (Contd.)

James V. instructed action to be taken against unfreemen trading in Peebles and reducing the profit to which the burgesses were entitled. The unfreemen were to have their goods escheat, half to the king and half to the town.¹

John Hay was convicted of usurping the liberty of a burgess and was fined 40/-d. He was placed in close ward during the magistrates' pleasure and he bound himself not to usurp the craft again under pain of £20.²

The position was enforced by statute.

No stranger or incomer shall exercise a freeman's trade.³

The old laws gave further details.

If any burgess reveals the secrets of the gild, he will be punished at the will of the Alderman and other brothers in the gild. If he offends a second time, he will lose his freedom of the Burgh for a year and a day.

If he is convicted a third time, he shall lose the freedom of the Burgh for all his life and shall be reputed infamous.⁴

6. Animals.

All records refer to animals and grazing rules, the breach being punished by fining:-

The inquest forbade that swine should be allowed to roam under pain of escheat of the swine and a fine of 8/-d.⁵

1. X.59/60. 1541.
X.147. 1462 - fined 6d. to the clock for buying from an unfreeman.
2. Y.43. 1657.
Y.92. 1676 - fined £3 -do-
3. Y.63. 1665, also
Z.189. 1646 - Act against letting to unfreemen - loss of freedom.
4. S.G. XXXIX. p. 81/2.
5. Z.2. 1519/20, also
Z.9. 1521.

XXII. MISCELLANEOUS (Contd.)

7. BURGH COURT. 1398-1714 (Contd.)

6. Animals (Contd.)

In one case the accused was quit by assize for killing a swine belonging to someone else, because swine were unlawful goods.¹

Taking into account the damage done by hens and fowls scraping in houses and yards, it was ordered that all who have hens and capons shall tie a piece of wood to the foot of each bird to prevent it flying, under pain of 40/- and the bird being seized by the person whose property it damages.²

A dog belonging to Thomas Mosie hurt Marion Williamson to the effusion of her blood and Mosie was ordered to hang his dog and to give satisfaction to the injured.³

7. General Crimes.

Prohibition against leaving or depositing any refuse etc. on the common way or in the market place - fine of 8/-d.⁴

If the Town crier or sergeant of the town acts falsely he shall be fined 8/- and lose his office and shall be declared infamous.⁵

8. Drinking & Gambling.

The record contains provisions against drinking and gambling.

Any found gambling shall be fined 10 merks and be imprisoned until paid. Further he shall be made to stand in the joughs from 11a.m. to 1 p.m. during the next market day.⁶

The case shows a different sentence --

William Allan was convicted of gaming and was banished from the burgh under pain of branding on his cheek. His brother-in-law became cautioner for him and undertook that if Allan returned he would agree to be banished also.⁷

1. Z.21.1524/5, also X.157.1468 - against stray beasts - 4d. Also X.167.1471 against stray swine - 8/- etc. X.225.1556 - grazing regulations - 8/- Also X.232.1556 etc., Y.5.1652 - grazing regulations Also Y.34.116.
2. Y.35.1656, also Y.70/1.1666 etc.
3. Y.2.1652.
4. S.G. XIX. p. 72.
5. L.Q.B. LXIX. p.34.
6. Y.103.1682 etc.
An earlier Act against dice or hazard gave fines of 5/-d. X.159.1468.
7. Y.103/4.

CONCLUSIONS.

XXII. MISCELLANEOUS.

There are a considerable number of miscellaneous or relatively rare crimes, some peculiar to particular courts.

1. Wearing pistols - this was heard in the justiciary court in the middle period - the sentence was normally banishment but one person received mutilation of his right hand.
2. Gypsies - by statute in the middle period gypsies who were still in the country after a certain time would be hanged - this was enforced although the drowning of their women was changed to banishment.
3. Insulting the Lord Justice General - the original sentence of indignities, mutilation of his tongue and imprisonment was cancelled. This was similar to the sedition sentences.
4. Poaching occurred in most courts and the sentence was fining.
 - (a) Justiciary court - early - £5, £3 (no references in the middle and later periods).
 - (b) Argyll court - later period - £20, £10.
 - (c) Regality court - later period - £10.
 - (d) Baron court - middle and later periods - £10, £5.
5. Animals - many cases occur concerning wrongful killing or injury to animals and the sentences could be heavy.
 - (a) Justiciary court - killing sheep - hanged and escheat
- injuring ox - banished.
 - (b) Argyll court - injury to animals - scourged and
banished, fined.
 - (c) Shetland court - -do- - scourged
(exceptional)
fined (160/-,
40/-, 2 merks).
 - (d) Baron court - killing dog - fined £5.
- cutting off horse's tail - £40.
 - (e) Burgh court - the records make frequent reference
to grazing regulations and control of beasts - the
penalties were fines of 8/- and 40/-.

CONCLUSIONS.

XXII. MISCELLANEOUS (Contd.)

6. Suicide - the standard penalty for suicide was escheat of the dead person's moveables.
7. Contempt of court - while failure to appear could result in outlawry in the main courts, the lower courts show fining as the standard sentence.
- (a) Shetland court - 4 merks.
- (b) Regality court - £10 (during the Covenanters' trouble - £50, £20).
- (c) Baron court - £10, £5.
- (d) Burgh court - early - 8/-
- middle and later periods - £10, £5.
8. Boundary disputes, lifting timber, broom etc. and damage to property received fines of £10, £5 in the Regality and Baron courts.
9. The lower courts passed frequent statutes covering many facets of life, but the sanction in each case was fining.
- (a) Shetland court - 40/- (exceptionally with indignities).
- (b) Regality courts - £10, £5.
- (c) Baron courts - £20, £10.
10. The Burgh courts have a large number of miscellaneous crimes, some of which are seen only in the Burgh courts.
- (a) Trading regulations - early - fined 8/-
- later - " £10.
- (b) Foristallacion - early - " 8/-
- (c) Reqratacion - early - " 8/- (exceptionally 40/-, 10/-)
- (d) Town security (i) watch - early - 8/-
(ii) control of inhabitants - loss of burgess freedom, banishment, fines - early 8/-
- later £20, £10.
(iii) disease - expulsion.
- (e) burgess disputes - unfreemen, banished, escheat, fined.
- (f) general crimes - early - 8/-

PUNISHMENT.

1. JUSTICIARY COURT.

PART 1. 1488-1650.

The purpose of punishment was clearly defined in the middle and later periods, i.e. from the middle of the 16th century - the cases expressly state that punishment was imposed to deter others.

A detailed reference is taken from a precept from James VI to his justice in an assault case and while this belongs to the later period, the same principles applied earlier.

James Gibb was convicted of shooting and wounding James Boyd within Holyrood House and offered himself into the king's will for his crime. The king replied as follows:- "Lest through misknowledge or doubting of our will, justice and execution of our laws be delayed or frustrated, we declare that as James Gibb has not spared or feared shamefully and cruelly to shoot and hurt our loving subject, James Boyd, in the back, to the great effusion of his blood, and that within the bounds of our Falace, in proud contempt of us and our Acts of Parliament, and thereby has offered a perilous preparat-ive and example to the rest of our subjects which if it be not condignly punished to the example of others that may promise to themselves impunity and be encouraged to practice the like, none of our best assured subjects of whatsoever estate or condition, may think themselves sure of their lives, therefore we sentence James Gibb to death". (He was, in fact, banished).

Express reference to punishment as a discouragement to others is seen in many cases, usually in similar terms to the following:- "to the example of others to attempt the like treasonable conspiracies in time coming".²

"to the terror of others to commit the like crimes in time coming".³

The basic deterrent was a death sentence, but as death in itself is simple and as death sentences were frequently imposed for a large number of crimes, the system required a distinction to be made in the form of the death sentence, each form carrying varying degrees of dishonour.

Beheading //

1. B.188.
2. B.73.
3. B.113, Dd. 384, 541/2 etc.

PUNISHMENT (Contd.)

1. JUSTICIARY COURT.

PART 1. 1488-1650. (Contd.)

Beheading was the most honourable death sentence - strangling and burning the body the most dishonourable.

In addition to the form of death sentence, gradations in the honour scale were marked by the imposition of mutilations, whether before or after death and indignities. None of these additions was honourable, but the most dishonourable were (1) quartering the body and exposing the limbs and (2) burning the body after death. All were designed to have the maximum effect on the public to deter others.

Hanging in irons kept the body in one piece for a longer period so that it would be seen by more people.

Hanging on a special gallows erected on the site of the crime expressed the state's particular displeasure.

Mutilation after death gave a wider audience than a simple hanging - the one body broken into its component parts and each part suspended over each of the town gates, or sent to other towns, reached a wide public.

Mutilation while alive, scourging and branding all left permanent visible effects on the criminal and he became a walking warning.

Personal indignities, imposed for lesser crimes, involved public exposure in the market place at the busiest times, with the same intention.

During the earliest period, from 1488 to the middle of the 16th century, the deterrent aspect was not so important - personal retribution and compensation was the motive power. The cases of that period show a frequent determination of compounding //

PUNISHMENT (Contd.)

1. JUSTICIARY COURT.

PART 1. 1488-1650 (Contd.)

compounding and remission between the parties. This applied even in cases of treason.

If the accused was unable to pay the compensation or find security, he could be hanged, but normally he had the chance to pay compensation. In addition to compounding and remission the personal retributive aspect is seen in sentences which impose mutilation before death - e.g. cutting off his right hand before hanging - the hanging satisfied the public deterrence, but the mutilation was, in satisfaction of private vengeance.

(Mutilation after death was different - it was entirely deterrent).

It would be wrong to over-emphasise the retributive aspect of punishment at this stage, because while composition was frequent, the deterrent aspect was growing, but it is interesting to see from the cases of this period the ending of a system of personal retribution and compensation which is seen in a developed and active form in the Norse sagas, amongst other sources.

In the beginning of the period under study, capital sentences were certainly imposed, but they tended to be given either in exceptional circumstances or if the accused was unable to pay the compensation required of him (or find a suitable guarantor).

However, as central government developed and increased its control, the disruptive effects of the personal pursuit of justice became too important to be left to individual //

1. See e.g. The Saga of Burnt Njal.

PUNISHMENT (Contd.)

1. JUSTICIARY COURT.

PART 1. 1488-1650 (Contd.)

individual people. The state assumed the responsibility to deter and to forbid, and gradually reduced the individual's responsibility and scope for vengeance.

The concepts of deterrence and vengeance were never exclusive to the extent that one completely superceded the other, but it is seen that the increasing emphasis on deterrence in the court sentences corresponded with the increasing power of central government. However, personal settlement outwith the normal state processes was never completely abolished and remissions, compounding and assythment occur throughout the whole period, but their scope was limited compared to the picture in 1488.

PART 2. 1661-1747.

The aims of punishment in this period are the same as in the latest period of Part 1 - Deterrence was the standard aim. However, in this period, punishment was described as either capital (a death sentence) or arbitrary (all non-capital sentences).

It is seen that the responsibility to carry out the death sentences lay on the magistrates of the town where the trial took place:

In an appeal against a hanging sentence, the Justiciary Court "discharged the magistrates of Edinburgh and all other officers of the law to put the sentence of death in execution".

1. H.82. 1735.

PUNISHMENT (Contd.)

2. ARGYLL JUSTICIARY COURT. 1664-1742.

The deterrent aspect of punishment was maintained.

"They should be exemplary punished for the crime and have incurred the pains and punishment mentioned in the laws and Acts of Parliament which should be inflicted on the accused with all rigour, in their persons and goods, in terror of others to commit the like".¹

Punishment had to have a strong demonstrative effect - the aim was deterrent but to achieve the maximum effect, as many people as possible must know about the punishment.

Branding was inflicted so that all might know the person as a thief.²

Special gallows could be erected on the site of the crime.³

The body could be hanged in irons so that the corpse would stay suspended longer and more people could see it.⁴

Limbs could be cut off and attached to the gallows for more effect.⁵

3. SHERIFF COURT. 1515-1747.

The purpose of punishment in the later Sheriff Courts was plainly to deter others - it was imposed "to the terror of others to commit the like". This phrase appears in nearly every summons.⁶

4. BARON COURT. 1523-1747.

In the Baron Courts the aim of punishment was also deterrent.

"Punishment is inflicted conform to Acts of Parliament and daily practice of this kingdom to the terror of others to commit the like".⁷

1. Murder. I.111/2, 132, 134/5 etc.
Theft. I.26, 70, 71, 86 etc.

2. I.18.

3. I.33/6.

4. I.36.

5. e.g. I.166/8.

6. Kb.25, 36/8 etc.

7. P. 142/3, Q. 96, 127, 157. S. 234.

I. DEATH.
JUSTICIARY COURT.
PART 1. 1488-1650.

Death sentences are very frequent throughout the record and while a basic pattern is discernible both in the form of the death sentence and in the crimes for which a particular form of death sentence is given, the variations in the pattern are considerable.

The forms of death were - hanging, beheading, strangling and very rarely - burning alive, drowning and breaking on the wheel.

(1) Hanging.

In the early period, hanging is mentioned infrequently, compounding being the normal determination. However, if the accused could not make the necessary payment or find security, he could be imprisoned for 40 days and if caution was still not available at the end of this period, he would be hanged.

Some cases during this period do show hanging as the sentence without reference to compounding or remission. In such cases the accused either did not have the chance to compound or else was unable to compound.

The cases do not give many details about the sentence - the usual entry is a simple note that the accused was hanged.²

-
1. A.30/1, 69, 70 etc. Aa.363 etc.
 2. Murder - A.174, 361, 419/0.
Murder, Theft & Rape - A.126/7.
Murder & Theft - A.173/4, 206, Aa.344.
Slaughter & Theft - A.51.
Oppression - Aa.356.
Theft - A.39, 41, 50/1, 51, 51/2, 87, 88,
126/7, 133, 142, 151, 154, 169, 176, 179.
Aa.358, 384, 393/4, 400, 411, 413, 432, 450.
Piracy - A.131, Aa.358, 380, 381.
Fireraising - Aa.375.
Fireraising &
Theft - A.225, 61/2, 173, 173/4.
Treason - A.40, 61/2, 63/4, 81, 87, 133.
Forgery - A.137.
A.354/5, 365, 397, 440/1.

I. DEATH (Contd.)

1. HANGING (Contd.)

1. JUSTICIARY COURT.

PART 1. 1488-1650 (Contd.)

It is not possible to say whether escheat of moveables applied in every case - some cases mention escheat¹ but others make no reference.

Some treason cases give more details - sentenced to be drawn and hanged and to suffer escheat of lands, goods and all possessions to the king.²

-
1. Murder : hanged and escheat. A.174.
Murder & Theft : -do- A.173/4.
2. Treason cases in detail - A.51/2, 60, 172/3, 173, 199,
Aa.348, 480, 481/2, 491/2,
400/1, 400.
- Also forgery - forfeiture and quartering - A.137.

I. DEATH (Contd.)

1. HANGING (Contd.)

1. JUSTICIARY COURT.

PART 1. 1488-1650 (Contd.)

The middle period shows more detail.

Hanging became the standard penalty for almost every crime in the middle and later periods. Further penalties could be added either before or after death, or in some cases, both, e.g. mutilation² and indignities.³ These tended to be aggravations and are noted in detail below.

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1. Murder -- B.14, 96, 115, 371.
C.364, 402, 404, 414, 415, 438, 506
517, 540, 540/1.
D.270.
Dd.270, 430, 482, 565.
E.47, 81.
- Murder under trust -- B.14. D.230.
- Murder & Adultery -- E.71/4, 81/2.
- Murder & Theft -- B.86, 372.
C.364, 384/5, 404, 414, 418, 433,
436/8. 506, 542.
E.268.
- Slaughter -- C.560.
- Slaughter & Theft -- C.365, 418/9, 424, 438, 444, 528/9
D.95, 233/4, 251, 251/2. Dd.568.
- Assault -- (in Royal Palace) -- E.293.
(treasonable) -- E.74.
- Assault & Theft -- C.359/0, 393.
- Hamesucken & Theft -- E.290. C.359/0.
- Adultery & Theft. -- Dd.429, C.424/5.
- Incest & Theft -- C.424/5.
- Rape -- C.475, 567.
- Theft -- B.56, 65, 111, 386.
C.85, 346/7, 347, 352/3, 357, 360, 364,
383, 384/5, 386, 393, 404, 414, 415,
440, 441, 542.
D.98, 115, 212, 242, 252, 265, 266, 270/
Dd.397, 479, 555, 568, 569.
- Piracy -- D.101, 107, 244, 246/7.
Dd.572.
E.28.
- Fire-raising
& Slaughter
& Theft -- Dd.361/2.
-- C.439, 441.
-- B.45.
- Forgery -- B.45, 85, 87, 134, 385.
C.34, 105, 356, 356/7, 399, 404, 418.
Dd.418, 431, 487.
- Fraud -- C.35, 389.
- Perjury -- C.455.
D.358.
Dd.538/9.
- Treason -- B.31, 45, 72/3, 115, 136, 139.
C.21/2, 148, 155, 168, 260, 407.
D.89, 224, 283, 350.
Dd.365.
- Sedition -- C.335, 350/1.
D.359/0.
- Irreverent Speeches -- B.385, D.360.
- Gypsies -- D.202. Dd.398/9, 560.

2. See Mutilation below.

3. See Indignities below.

I. DEATH (Contd.)

1. HANGING (Contd.)

1. JUSTICIARY COURT.

PART 1. 1488-1650 (Contd.)

Normally escheat of moveables was added, but on occasions, when the crime was tainted by treason or equated legally to treason, forfeiture of lands could also be imposed. In such cases, however, the addition of forfeiture was not inevitable as there are some cases which contained treason-able elements and forfeiture of lands did not follow.

The normal terms of the entry were that the accused was to be taken to the gibbet at the market cross of Edinburgh and thereupon to be hanged until he was dead and his moveable goods were escheat.¹

The hanging took place either in the Market Place of Edinburgh or on the Castlehill of Edinburgh, but variations occur - usually as a mark of special displeasure - A person was hanged on the gallows on which he had attached a picture of the king,² and on another occasion a person was hanged on the same spot as he had killed his pregnant wife.³

In piracy cases, the pirates could be hanged within the floodmark of Leith.⁴

In a case of murder and theft, a number of persons were sentenced to be drawn backwards on a cart and hanged at the market cross. The principal accused were to be hanged on a higher gallows than the rest, and their heads and right hands after death were to be fixed to the east and west ports.⁵

Hanging in irons is noted on occasions,⁶ and again special directions could be given regarding the disposal of the body - e.g. burnt after hanging.⁶

1. C.85 etc.

2. C.350/1.

3. C.517.

4. D.101,244. E.28.

5. E.268.

6. See under Indignities.

- I. DEATH (Contd.)
- 1. HANGING (Contd.)
- 1. JUSTICIARY COURT.
- PART 2. 1661-1747.

The hanging sentences are frequent throughout the whole period, but not many details are given:

For murder, James Shaw was sentenced to be hanged in the Grass market.¹

The place of execution varied between the Grass Market,² the Mercat Cross,³ the Castlehill⁴ and the Gallowlee between Edinburgh and Leith.⁵

It is noted that on occasions the time of the execution is stated - the most usual time being between 2 and 4 o'clock in the afternoon.

For attempted murder, the sentence stated that the accused was to be taken to the Grass Market between 2 and 4 in the afternoon and there to be hanged on a Gibbet till he be dead.⁶

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- 1. G.132.
 - Murder - F.62,71,132,254.
H.64/5.
 - Child Murder - F.27,64,71,81,123.
H.11,71/2,66.
 - Attempted Murder - G.255/62,307/39.
 - Murder & Theft - F.198/0, 314, 319, 327.
 - Slaughter - F.23, 155.
H.11, 66.
 - Hamesucken & Theft - F.6.
 - Incest - G.11/14.
H.18.
 - Rape - H.98.
 - Theft - F.6,9,11,13,19,54,57,62/3.
 - Robbery - F.11,19,57,62/3,122,140.
F.198/0,260,327,314,319.
G.15/6,113/5,198/0,301/3.
 - Forgery - F.41, 59,60.
H.17,57,72/4.
 - Treason - F.184,187/8, 189.
G.307/339.
 - Religious Crimes - H.12/3.
 - 2. G.132, 255/62, 301/3.
 - 3. F.41, 59/0, 122, 140 etc.
H.38/41 etc.
 - 4. F.11, 19.
 - 5. G.15/6, 113/5.
 - 6. G.255/62, 307/39: F.184, 187/8, 189.

I. DEATH (Contd.)

1. HANGING (Contd.)

1. JUSTICIARY COURT.

PART 2. 1661-1747. (Contd.)

However, variations are noted -

Thomas Burntfield and John Dickson, convicted of robbery, were sentenced to be hanged on a forenoon between 10 and 12 hours at the Castlehill of Edinburgh.¹

Mutilation could be imposed either before or after the hanging sentence was implemented -

Captain Andrew Arnot and others were sentenced to be hanged between 2 and 4 hours in the afternoon at the Mercat Cross, and after death their heads and right arms were to be cut off. They also suffered forfeiture for their treason.²

Indignities could be inflicted on the body.³

Escheat of moveables was frequently added,⁴ but in certain cases the records omit the reference to escheat.⁵ It is not possible to say⁶ whether escheat really was omitted from the sentence or whether the difference is due to the reporter.

If the hanging was not carried out properly, the person was free from all further punishment. In one case of child murder, the woman was hanged but survived, and she passed free thereafter.⁶

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1. F.11, also F.19, 57, 62/3.
F.122, 140 - Mercat Cross.
 2. F.184, 187, 188, 189.
 3. See below - Indignities.
 4. e.g. F.198/0 etc.
G.255/62 etc.
H.11, 1695 etc.
 5. e.g. F.314, 319 etc.
G.15/6 etc.
H.66.1722 etc.
 6. H.71/2. 1724.

I. DEATH (Contd.)

1. HANGING (Contd.)

2. ARGYLL JUSTICIARY COURT. 1664-1742.

The hanging sentence was standard throughout the record.

Duncan Ban McIlbreid was sentenced to be taken to the gallows at three o'clock in the afternoon and thereon to be hanged to the death and to forfeit and tyne his goods and gear conform to the Acts of Parliament (and appointed the Magistrates of Inveraray to see the same put to execution).'

The record gives the times of executions in most cases and the normal time was between two and three in the afternoon.

It is clearly seen that women were hanged as well as men - there was no question of women being drowned instead of being hanged.

Usually the condemned was hanged on the ordinary gibbet (of Inveraray - but it could be at any of the towns in the county which had a gibbet) and the magistrates were responsible for seeing that the sentence was carried out.

If the crime was particularly severe, the condemned could be hanged at the site of the crime, on a gallows erected for the occasion.²

While escheat of moveables was almost invariable, some cases make no reference to escheat, but this could possibly be an oversight in reporting rather than a variation on the sentence.³

In addition to hanging, indignities could be made on the body - hanging in irons and mutilation.⁴

1. I.2/3, also

Murder - Ordinary gibbet at Inveraray between 2 and 3 p.m.

I.32/6, also I.132/3, 146/8, 149/0, 160/1 etc.

Between 12 and 2 p.m. - I. 103/4.

3 and 4 p.m. - I.181, 183.

Incest - Gallows of Rothesay between 2 and 3 p.m. I.21.

Theft - Ordinary gibbet at Inveraray between

2 and 3 p.m. I.6/8, 19, 28/9 etc.

2. e.g. I.33/6 - murder.

3. e.g. I. 10/1 and 13/4 - both theft.

4. See Indignities.

I. DEATH (Contd.)

I. HANGING (Contd.)

3. SHERIFF COURT. 1515-1747.

Throughout both records, hanging was only imposed in certain theft convictions.

There is no direct reference to hanging in the later record but one reference occurs of a thief being hanged in Paisley. The sentence was imposed by the Sheriff Court.²

4(a) SHETLAND COURT. 1602-04.

Occasional instances of hanging are noted in some theft cases.

William Johnson was hanged for sheep stealing and his goods, gear and lands were escheat.³

The threat of hanging could support a banishment decree.⁴

4(b) ORKNEY & SHETLAND COURT. 1612-13.

Some court statutes provide for the person to be punished as a thief, but no further details are given - it could mean hanging, but it could also mean the jugs.

1. Ka.15, 130, 191, 210/1, 217, 222.

2. Kb. 246.

3. L.11, 18/9.

4. L.2 etc.

5. M.20/2, 23.

I. DEATH (Contd.)

I. HANGING (Contd.)

5. BURGH COURT. 1398-1714.

Alone among the Burgh courts noted, the Stirling record gives details of death sentences, but this court was given a special grant of justiciary powers and its sentences correspond to justiciary court sentences:-

Ritschart Broun was convicted and fined for stealing two mares and was sentenced to be hanged until he was dead.¹

Death could be threatened to support a sentence of banishment -- i.e. if the accused returned he would be hanged.²

But no case is noted of the threat ever being enforced.

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1. Z.22. 1525, also
Z.24. 1525 -- assize conviction.
Z.53. 1548 --do--
Z.63/4. 1555 --do--
Z.71. 1557 --do--
 2. Z.34. 1528 -- no crime.
Z.119.1608 -- disease.
Z.162/3.1629 -- theft.
Z.64.1555 -- theft.
Z.110.1604 -- striking town officer.
Z.41.1545 -- leaving town at night.
Z.45. 1546 -- theft.

CONCLUSIONS.

I. DEATH.

1. HANGING.

(1) Hanging was the ultimate sentence for every crime which reached the main courts. Hanging was not, of course, imposed on every occasion - in some cases hanging was exceptional, and even in crimes like theft where hanging was the basic penalty, frequently other forms of sentence were used, but it is true to say that ultimately if any crime was serious enough, e.g. even assault, hanging could be imposed.

(2) Escheat of moveables was a normal addition to hanging, although this is omitted in some cases - it is not possible to say if the omission was a reporter's oversight or whether escheat was not imposed.

(3) Hanging was the standard sentence for murder, incest (the woman's part) rape (in the middle period, but not in the later period) theft, piracy, forgery, treason and sedition.

(4) The lower courts (Sheriff, Shetland and the Stirling Burgh courts) show hanging only in notour thefts, although the threat of hanging supported banishment decrees in these courts - but no cases are noted where the sentence was imposed.

I. DEATH (Contd.)

2. BEHEADING.

I. JUSTICIARY COURT.

PART 1. 1488-1650.

The early entries do not give any details about the sentence and simply mention the conviction and note that the accused was beheaded.¹

These cases make no reference to escheat of moveables or indeed about any other matter.

Beheading was the standard penalty² for slaughter but beheading operated as a form of mitigation for both murder³ and theft⁴ - as hanging was normal in such cases.

Personal punishment and indignities could be added to the beheading -

Sentenced to have his head and feet cut off and placed in prominent places.⁵

More details are given in some treason cases where beheading was imposed:-

For which crimes he has forfeited his life, lands, goods, moveable and immoveable, which shall be escheated to the king.⁶ On occasions the sentence also included quartering of the body after death.⁷

Beheading was the most honourable of the death sentences and in certain cases pleas are made by the condemned and his relations, not for mercy but that he should be beheaded in preference to the stated sentence of hanging or strangling.

In one forgery case, the accused was beheaded at the special grace of the Queen Dowager.⁸

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1. A.27, 62, 63, 64, 81, 81/2 etc.
 2. A.15, 27, 62, 63, 81, 87 etc.
Aa.350, 363, 366, 368 etc.
 3. A.81/2. Aa.355, 474/5. A.162, 165. Aa.361.
 4. A.64, 145.
 5. A.84.
 6. A.145, 202/3, Aa.344/5.
 7. A.183/5, Aa.466/7.
 8. Aa. 392/3.

1. DEATH (Contd.)

2. BEHEADING (Contd.)

I. JUSTICIARY COURT.

PART 1. 1488-1650 (Contd.)

The entries in the middle period show more detail.

The normal entry stated that the accused was taken to the Castlehill of Edinburgh and there his head was to be struck from his body. An alternative place of execution was the Market Cross of Edinburgh.² Usually his moveable goods were escheat to the Crown (or its assignee).²

Beheading was the standard punishment for slaughter and while it is given in other crimes as well,⁴ no mean or pattern can be stated except that in some cases it did bear some relation to the honour and status of the accused. A noble could be beheaded where a commoner would be hanged for the same crime. Nobles could certainly be hanged, but in some cases, including treason //

1. B. 8/9 etc.
 2. D.58, 222, 237/41 etc.
 3. See below - Escheat.
 4. Murder - B.89.
C.18, 76, 484, 542.
D.75/6, 124, 264, 268/9.
Dd.472, 482, 484/5, 565.
- also exceptional cases.
D.74/6, 124 - murder under trust - escheat.
D.156 -do- - forfeiture.
D.264, 268/9 -do- by poison and
witchcraft - escheat.
Dd.474 - murder under trust - forfeited.
Murder & Theft - Dd.484/5.
Slaughter - B.8/9, 10, 69, 77, 95, 158, 158/9, 388 etc.
C.21, 85, 124, 377, 384, 394, 402 etc.
D.58, 222, 237/4, 249, 329, 358, 360.
Dd.362, 415/6, 437, 441, 471/2, 484 etc.
- Assault &
Perjury. - C.455.
Incest - Dd.576. E.122.
Theft &
Slaughter - B.8/9. C.419, 426. Dd.538.
Forgery - Dd.487.
Perjury &
Assault - C.455.
Witchcraft - Murder by poison and witchcraft. D.264, 268/9.
Treason - B.115 - sentenced to be hanged, mitigated to
beheading by king.
B.116/8.
C.369 - holding castle. C.430 - armed band.
C.580 - corresponding with pope.
D.10 - feuds in the Isles.
D.53 - family feud and murder under trust.
D.81, 318 - Earl of Orkney.
- Irreverent
Writings. - Dd.454.

I. DEATH (Contd.)

2. BEHEADING (Contd.)

I. JUSTICIARY COURT.

PART 1. 1488-1650 (Contd.)

treason cases, the stated sentence of hanging was mitigate to beheading and it was genuinely considered a mitigation. Beheading can be considered in two ways (1) it was a heavy sentence for crimes which did not normally carry a death sentence (e.g. certain assaults) but which were more serious than usual and the normal sentence was too light, or (2) it was a mitigation from a more dishonourable death sentence, e.g. strangling or hanging.

Almost invariably escheat of moveables followed the sentence, but in treason cases and in some instances of serious crimes equated to treason, escheat of land and moveables was imposed.

In the later periods beheading became infrequent. The distinction between slaughter and murder became less sharply defined and by the last period slaughter tended to be absorbed in murder, whose penalty of hanging was applied in preference to beheading.

In the period 1624-1640 only one case of beheading is noted - for incest.

1. C.484.
D. 53, 156.
Dd. 477.

1. DEATH (Contd.)

2. BEHEADING (Contd.)

I. JUSTICIARY COURT.

PART 2. 1661-1747.

The references to beheading are standard:

For the slaughter of his mother, Wm. Sommerville was beheaded at the Mercat Cross of Edinburgh.

The places of execution are the same as noted in the hanging sentences, with the exception that the Gallowlee was not mentioned for beheadings.²

The time of execution was the same as for hanging - "between 2 and 4 in the afternoon".

For the slaughter and murder of a seaman, Archibald Beith and Donald McGibbon were sentenced to be taken to the Mercat Cross of Edinburgh and between two and four hours in the afternoon to have their heads separated from their bodies. Their moveables were also escheat.³

It is noticed that in the main period, beheading was inflicted only in slaughters and certain exceptional murders. The murder cases related to husband and wife killings - one spouse was accused of killing the other, and of adultery with someone else.⁴

In the latest period, beheading is noted only in two cases of killing by shooting. In both cases, it could be stated that the person died not through the actual shooting, but through lack of medical attention, and on this basis, the sentence is similar to the earlier sentences for slaughter.⁵

Escheat of moveables is not mentioned as regularly as in the previous periods.⁶

1. G.1/7, G.18/23 etc.

2. Grass market - G. 165/8, 253.

Mercat Cross - G.1/7, 98.
H.15, 21/4.

3. G.98.

3(a) F.45, 48, 71/2, 158 etc.

G.1/7, 18/23, 98, 165/8.

4. F.90/3, 125/6.

5. H.15. 1697, 21/4. 1709.

6. Escheat: F.71/2.

H.15, 21/4.

1. DEATH (Contd.)
2. BEHEADING (Contd.)
2. ARGYLL JUSTICIARY COURT. 1664-1742.

The record does not make any reference to beheading.

3. SHERIFF COURT. 1515-1747.

Beheading is noted only in certain slaughter convictions, in the early record.

The death penalty appeared to have been imposed reluctantly -

"the assize could not acquit of the crime and found the accused guilty".

4. SHEPHERD COURT. 1602-04.

No actual case of beheading is noted, but the threat of beheading supported a slaughter banishment.²

5. BURGH COURT. 1398-1714.

One justiciary case is noted in the Stirling record:

Robert Mentecht was convicted by assize and was sentenced to be taken to the Heiddin Hill and there his head was to be struck from his body.³

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1. Ka. 215, 266/7.
 2. L.42/3.
 3. Z. 24. 1525 (no crime stated - probably slaughter).

CONCLUSIONS.

1. DEATH (Contd.)

2. BEHEADING.

(1) Beheading was the standard sentence for slaughter throughout the whole period, but it could operate as a mitigation of any hanging sentence if the facts or political influence justified the modification.

(2) In the later period it is seen that beheading was only given in slaughter cases - it was not given as a mitigation in this period and beheading died out as a sentence after 1700. Very few references are given after that date - it was supplanted by hanging, the feudal concept of honour had become obsolete and was inappropriate to the needs of the machine age.

(3) Again escheat was normal, but some cases omit the reference.

(4) The lower courts (Sheriff and Burgh Courts) show beheading for slaughter in the middle period.

(5) It is noteworthy that the Argyll record does not make any reference to beheading or slaughter.

I. DEATH (Contd.)

3. STRANGLING.

1. JUSTICIARY COURT.

PART 1. 1488-1650.

The penalty of strangling was accompanied always with the provision that the body should be burnt to ashes after death.

It should be noted that a sentence of burning alive was passed only twice in the whole record and in each case the circumstances showed exceptional crime.

The sentence of strangling and burning was reserved for crimes which at the time were considered most evil and unnatural - the evil was so strong that it amounted to a physical taint like a disease. There was a definite element of horror attached to crimes which merited this punishment, although later the punishment was extended for political reasons to non horrific crimes.

Those entries which give the burning sentences in detail show that in every case the person was strangled before burning, e.g. sentenced to be taken to the Castle-hill of Edinburgh and there "wirreit" (strangled) until she was dead at a stake and thereafter her body to be burnt to ashes. Her moveable goods were declared to be escheat. Some of the other burning cases do not give details of the sentence and simply state "guilty and burnt". It would seem likely that such cases followed the basic pattern and that the person was strangled first and not burnt alive.

The underlying reason for having the body burnt to ashes was to prevent the evil contained within the body contaminating //

1. See Burning Alive.
2. B.186, 206, 241, 242.
3. B.38, 58, 70, 84, 165, 213, 400.

1. DEATH (Contd.)

3. STRANGLING (Contd.)

1. JUSTICIARY COURT.

PART 1. 1488-1650 (Contd.)

contaminating the ground as would happen if the body was buried intact, after a hanging, or almost intact after a beheading.

The Interests of humanity were satisfied if the person was killed relatively quickly by strangling or hanging rather than being burnt alive.

This penalty was the standard punishment for witchcraft,² but while witchcraft was the most frequent crime for which burning was imposed, it was by no means the only crime:

- Murder by poisoning - for poisoning his wife and committing adultery with his wife's mother, he was burnt (it is not stated if he was hanged or strangled).³
- Incest - for committing incest with his sister, he was strangled and burnt.⁴
- Bestiality - the standard penalty was strangling and burning. The animal was also burnt in the same fire.⁵

An exceptional case of fireraising is noted -

- for burning corn belonging to another, he was burnt.⁶

This was a very old punishment with pre-Christian undertones.

In the middle period this penalty was extended to an entirely different category of crime - counterfeiting money. The grounds for the extension were political, but justifiable no doubt on the basis that false money could do as much harm to the financial health of the state as witchcraft and incest could do to an individual's state of grace.

1. the body could be burnt after hanging - wife murder
B.14, poisoning Aa.419/0.
2. B.38,49,58,76,101,161,165,186,206,213,241,242,257,400.
C.29,422,479,526,536,544.
D.98.
Dd.536,558.
E.120,140,147,171,213.
3. B.84.
4. B.22, also B.84, D.248/9.
5. C.491 etc.
6. B.70.

1. DEATH (Contd.)

3. STRANGLING (Contd.)

1. JUSTICIARY COURT.

PARA 61. 1488-1650 (Contd.)

Elspeth Skirling and others were convicted of making and passing counterfeit coins and were sentenced to be strangled and their bodies burnt and their moveables were escheat.¹

In a number of the counterfeit cases, escheat of lands was imposed as well as moveables.² The escheat of lands is justifiable owing to the treasonable aspect of the cases, and the point of interest is not so much that it was imposed in some cases, but that it was omitted in others. However, the extension of strangling to counterfeiting money was not maintained in the later periods.

Strangling and burning was not given in the earlier records.³

1. C.76, also C.79, 100, 357, 366, 383, 403.

2. C.100, 357, 366, 383.

3. But see passing reference to the burning of heretics - A.209/0 - they were strangled before being burnt - A.213/4.

1. DEATH (Contd.)

3. STRANGLING. (Contd.)

1. JUSTICIARY COURT.

PART 2. 1661-1747.

As in the previous records, this sentence was standard in cases which showed a reckless disregard for the laws of nature.

Witchcraft: Margaret Bryson and others were sentenced to be strangled and burnt for sorcery. ¹

Incest: For adultery, incest and bestiality, Thos. Weir was sentenced to be taken to the Gallowlee and between 2 and 4 in the afternoon he was to be strangled at a stake until he was dead, and thereafter his body was to be burnt. ²

Bestiality: Andrew Love was sentenced to be first strangled and then burnt at the Castlehill of Edinburgh for bestiality. ³

The same places of execution as in other capital sentences are noted (with the exception on this occasion of the Grass Market) ⁴

1. F.6, also F.11/3, 19, 21,
H.5. 1678.
2. G.10/5.
3. F.34, also G.10/5.
4. F.34 - Castlehill.
G.10/15 - Gallowlee.

1. DEATH (Contd.)
3. STRANGLING (Contd.)
2. ARGYLL JUSTICIARY COURT. 1664-1742.

As in the other records, strangling and burning were reserved for crimes of extreme immorality.

Witchcraft: Janet McNicol was convicted of witchcraft and was sentenced to be strangled to the death and her body burnt at the gallows of Rothesay at two hours in the afternoon. Her goods and gear were escheat. '

Bestiality:²

3. SHERIFF COURT. 1515-1747.

There is no direct reference, but the Renfrew record notes that six persons were strangled and burnt in Paisley in 1697 - but it cannot be said that the execution was ordered by the Sheriff Court.³

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1. I.20/1.
 2. I.67/8, and
J. 1/1708, 11/1711.
 3. Kb. 51.

CONCLUSIONS.

I. DEATH (Contd.)

3. STRANGLING.

(1) The sentence of strangling and burning was standard in the middle and later periods for crimes against the law of nature - witchcraft, incest, bestiality and murder by poison.

(2) In the middle period it was extended for political reasons to counterfeiting money, but this did not last.

(3) Reference to this sentence is not seen in the earliest period although there is a passing mention to strangling and burning heretics (protestant reformers).

(4) Escheat of moveables was usual although in some of the counterfeiting cases, forfeiture was imposed.

I. DEATH (Contd.)

4. BURNING ALIVE.

1. JUSTICIARY COURT.

PART 1. 1488-1650.

Burning alive was rare and given only in exceptional circumstances. There are elements of personal vengeance on the part of the king in this sentence.

Janet Douglas, Lady Glamis, was accused and convicted of leading a conspiracy to kill the king and she was sentenced to forfeiture of her lands and goods and to be taken to the Castlehill of Edinburgh and there burnt in a fire until she was dead.¹

Another exceptional case stated that the accused was to be bound to a stake and burnt to ashes, quick (alive) to the death. This was a witchcraft case and the witch, a person of notable birth and substance, had conspired to kill the king by witchcraft.²

1. A. 191.

2. B. 257. The record makes passing reference to the burning of heretics (A.209/0) and while details are lacking, one case shows that heretics were strangled before being burnt (A.213/4).

CONCLUSIONS.

I. DEATH (Contd.)

4. BURNING ALIVE.

(1) This sentence is exceptional and was imposed in two cases only - a treason case in the earliest period and a case of treasonable witchcraft in the middle period.

(2) Because of the treasonable aspects, forfeiture was imposed in both cases.

1. DEATH (Contd.)

5. DROWNING. "

1. JUSTICIARY COURT.

PART 1. 1488-1650.

In theory, drowning was the capital punishment for women, but it was rarely mentioned in this record, and much more frequently women were hanged, beheaded or strangled.

However, the following cases may be noted:

In one case of fireraising, a woman was sentenced to be drowned. ¹

For her part in the theft of title deeds, Grizel Matthew was sentenced to be taken to the north loch of Edinburgh and there to be drowned until she was dead. Her moveables were escheat. ²

Men could be drowned also -

In one case of theft, a youth was drowned:-

Adam Sinclair, son of James Sinclair and Henry Elder were convicted of stealing chests from a Parish Church and other items. Elder was hanged, but Sinclair was drowned "ex speciali gratia Reginae". ³

Drowning could be threatened if the person did not obey a court order. ⁴

-
1. A. 162.
 2. C.94.
 3. Aa.393/4, also A.52/3 - in an adultery, forgery and incest case, the man was drowned. E.95.
 4. Dd. 561/2 - gypsy woman to leave the country.

1. DEATH (Contd.)

5. DROWNING (Contd.)

2(a) SHETLAND COURT. 1602-04.

The threat of drowning was standard support to decrees of banishment where the accused was a woman.

2(b) ORKNEY & SHETLAND COURT. 1612-13.

Drowning was imposed on a woman in this record:-

A woman convicted of slaughter was sentenced to be taken to the Bulwark and cast into the sea to be drowned to death.²

3. BURGH COURT. 1398-1714.

Drowning was threatened, but no case shows the threat being carried out.

Marion Lamb confessed to theft and undertook that she would not commit theft again under pain of drowning.³

Again threat of drowning could be used to support banishment.⁴

1. L.3, 7/8, 12 etc.

2. H.25/6.

3. Z.42. 1546.

4. Z.162/3. 1629 - theft.

Z.80.1563 - woman banished under pain of drowning.

CONCLUSIONS.

I. DEATH (Contd.)

5. DROWNING.

(1) While drowning was traditionally the death sentence for women, it is seen that this was rarely observed in practice - women were hanged and strangled (although rarely beheaded) along with the male defenders, in all periods.

(2) A few isolated references are noted in the early and middle periods, in the justiciary courts, however - for theft and for fireraising, where women were drowned, but it is also seen that men could be drowned - for adultery and forgery and for theft. The references are so few that they may be considered exceptional for both sexes.

(3) It is not seen in the later or Argyll justiciary courts.

(4) However, in the lower courts - particularly Orkney and Shetland, and in the Burgh courts, frequent references are noted - for slaughter a woman was drowned and banishment of women was always supported by a threat of drowning. However, no cases are noted of this being enforced.

I. DEATH (Contd.)

6. BROKEN ON THE WHEEL.

1. JUSTICIARY COURT.

PART 1. 1488-1650.

This penalty was so rare that it can be considered exceptional.

For parricide, John Dickson was sentenced to be broken upon the wheel at the Market Cross of Edinburgh, with escheat of his moveable goods.¹

For his part in an especially treacherous murder, Robert Weir was sentenced to be broken on a wheel until he was dead and his body to remain on the wheel for 24 hours.²

Thereafter it was to be exposed prominently.

1. B.241.

2. C.445.

II. PERSONAL PUNISHMENT.

(a) ALIVE.

(1) MUTILATION.

1. JUSTICIARY COURT.

PART 1. 1488-1650.

Mutilation of various parts of the body was imposed throughout the whole period. In the early periods, ears were cut off:-

For cattle stealing, the accused was scourged and his ears cut off. He was also banished.¹

In the middle and later periods, cutting off the accused's right hand was the normal mutilation. It was given most frequently in forgery cases:-

For forging the Regent's signature, Thomas Barry, Unicorn Pursuivant, was sentenced to have his right hand cut off and to be banished for life or during the king's pleasure.²

But it was imposed occasionally in other crimes:-

George Trumbill had his right hand cut off for unlawfully carrying weapons. He had been charged with slaughter and various armed assaults and had confessed to the slaughter but in spite of this and a threat of wilful error from the Advocate, the assize found him guilty only of unlawfully carrying firearms. The judge imposed the severest penalty he could in respect of the conviction.³

Mutilation could be added as an aggravation to a death sentence, prior to execution, and in this event loss of one's right hand was standard.

In a serious murder, the assassination of the Warden of the West Marches, Thomas Armstrong was sentenced to have his right hand struck off before hanging.⁴

For killing one of the king's guards who were arresting them, Ninian Elliot and William Elliot had their right hands cut off before hanging.⁵

Exceptional variations are noted -- e.g. cutting out his tongue:- //

1. A. 157, 206.

2. B.19/0, also forgery Aa.387/8, 402/3, 432.

3. C.419/21 - also assaulting minister - scourged and right hand cut off. C.417.

4. C.363/4.

5. C.559/0, also slaughter and theft D.95 - irreverent writings. Dd.454.

II. PERSONAL PUNISHMENT (Contd.)

(a) ALIVE.

(1) MUTILATION.

1. JUSTICIARY COURT.

PART 1. 1488-1650 (Contd.)

tongue:-

Francis Tennent was convicted of writing scandalous allegations about the king and possibly also about the queen:- the king ordered the punishment himself - the accused should be tortured in the boots, then carried to the market cross where his tongue was to be cut out and then he was to be hanged. However, the king reconsidered this and finally ordered him to be hanged and his moveable goods escheat. The torture was not implemented.

1..C.333/5 - also for perjury his tongue was pierced with a hot bodkin - Aa.346.

II. PERSONAL PUNISHMENT (Contd.)

(a) ALIVE.

(1) MUTILATION.

1. JUSTICIARY COURT.

PART 2. 1661-1747.

As in the earlier record, mutilation was inflicted as an additional penalty to hanging sentences - prior to being hanged, their right hands were cut off:-

Patrick RoylceGregor and Patrick Drummond were convicted of many robberies, murders and oppressions and were sentenced to be hanged, but before hanging their right hands were to be cut off.

While mutilation after death was frequent and was justified on deterrent grounds, pre-death mutilation was a deliberate increase on the punishment and was retributive either on the part of the state for its own interest, or on the part of the state acting for the persons who had been killed, injured or robbed by the accused, rather than deterrent. Mutilation before death was only imposed in the most serious cases.

One case shows a sentence of mutilation because the Lord Justice General was insulted -

Donald Campbell made derogatory remarks about the Lord Justice General and was sentenced to stand in a public place with a paper on his chest, declaring his fault, to have his tongue bored and then to remain in prison during the court's pleasure. However, the sentence was not enforced.

This case is similar to the penalties given in Part 1 for insulting the king.

1. F.199/0, 260.

2. G.137/9.

II. PERSONAL PUNISHMENT (Contd.)

(a) ALIVE. (Contd.)

(1) MUTILATION (Contd.)

2. ARGYLL JUSTICIARY COURT. 1664-1742.

The first half of the record does not show any sign of mutilation inflicted while the convicted was alive, but the second half makes occasional references to being nailed to the gallows by one's ear and to having one's right hand cut off.

For murder, he was scourged and he was nailed to the gallows by his right ear. Thereafter he was branded on his right hand and banished from Britain.'

Pre-death Mutilation:

For adultery, murder and poisoning, the woman was hanged, but before hanging, her right hand was cut off and fixed to the gibbet. After hanging, her left hand was cut off and exhibited in the Parish Church. ~

-
1. J. 6/1708, also
J.4. 1718 - scourged, nailed, banished.
J.4. 1730 - nailed, banished.
 2. J.11. 1720 - murder J.5. 1742 - right hand cut off -
hanged.

II. PERSONAL PUNISHMENT (Contd.)

(a) ALIVE (Contd.)

(1) MUTILATION (Contd.)

3. SHETLAND COURT. 1602-04.

There is only one instance of physical mutilation - in a theft case the accused was sentenced to have a piece of his ear cut off, as well as having his goods and land escheat, and being banished. Such mutilation was extremely rare and this case is unique in this record.

In a court statute prohibiting false actions the penalty for raising a groundless action was, for the first offence loss of right hand and sword and for the second, escheat and banishment, but no instance of the crime or the penalty is noted.²

1. L.33.

2. L.47/8.

II. PERSONAL PUNISHMENT (Contd.)

(a) ALIVE (Contd.)

(1) MUTILATION (Contd.)

4. BURGH COURT. 1398-1714.

Mutilation occurs in the earlier records and is limited to theft cases:

Ears cut off:-

If a thief steals an article whose value is between four pennies and eight pennies and one-farthing, he shall be put upon the cuckstool and after that led to the head of the town where one of his ears will be cut off. If the article is worth between eight pennies and one-farthing and sixteen pennies and one half-penny, he will be set upon the cuckstool and after that led to the head of the town and there have his other ear cut off.

This was enforced:-

John Fischair was convicted of theft and was nailed to the Tron by his ear, thereafter his ear was cut off. He was also branded on his cheek and scourged.²

1. F.C. XXXIX. p. 180.

2. Z.40. 1545.

Z.64. 1555.

Z.45. 1546.

CONCLUSIONS.

II. PERSONAL PUNISHMENT (ALIVE)

1. MUTILATION.

(1) Mutilation of various parts of the body while the accused was alive was common in the early and middle periods, but such punishments were much less frequent after 1660 although occasional instances are noted. Usually some further punishment was added - banishment or another form of personal punishment.

(2) In the earliest period the standard mutilation was cutting off one or both ears or nailing the person by his ear to the gallows stalk for a period. Cutting off the ear or ears is seen in thefts in the early justiciary records, in the early Sheriff courts, in Shetland and in the old laws. The burgh courts show nailing to the tron or gallows (again for theft) as does a later case in Argyll.

(3) In the remainder of the periods, the normal mutilation was cutting off his right hand. This could act as a straight sentence (or even as a mitigated death sentence) and was usually combined with scourging or banishment (e.g. in forgeries) or it could act as an aggravated sentence before death, e.g. in serious murder and/or theft.

(4) Loss of one's right hand, in feudal theory, was more than the loss of a useful limb - it meant loss of the ability to use a sword, with all that entailed.

(5) In a few cases, reference is made to the accused having his tongue bored with a hot iron - this was an exceptional sentence and tended to be limited to insulting the king or his principal officers, and to perjury.

II. PERSONAL PUNISHMENT (Contd.)

(a) ALIVE (Contd.)

(2) SCOURGING.

1. JUSTICIARY COURT.

PART 1. 1488-1650.

Scourging was imposed frequently - but never as the sole penalty.^{1a} The commonest combination was with banishment.

The sentence was given most frequently in theft cases.

- for stealing lambs, the thief was scourged through Edinburgh and thereafter banished the town.¹

- for theft, William Calder was scourged through Edinburgh and banished.²

But scourging and banishment was given in other crimes also.³

Further personal punishment could also be added to the scourging:-

- Mutilation: For cattle stealing Michael Scott was sentenced to be scourged through Edinburgh and thereafter his ears were to be cut off. He was banished.⁴

- for assaulting a minister, the accused was scourged and his right hand was cut off.⁵

- Branding was added frequently.⁶

Additions of public punishment⁷, loss of office⁸ and escheat of moveables⁹ are noted.

Scourging could also be given before a death sentence - in a treason case he was scourged before being beheaded and quartered.¹⁰

1. B.37.
- 1a. One very early exception A.16 - a boy of eight years was flogged for killing another youth.
2. C.94, also Aa.458, B.7 (from the parish).
D.99, 270.
Dd. 442.
3. Forgery - E. 164.
Perjury - D.358.
Sedition - D.221/2.
4. A.157, also A.206 - stealing wool from sheep.
5. C.416/7.
6. Theft - Dd.445 - scourged, branded and banished.
Forgery - E. 151 - -do-
Perjury - D.358 - -do-
7. Sedition - E.218 - scourged and banished.
8. Forgery - C.455.
9. False Evidence - C.455.
10. Aa.467.

II. PERSONAL PUNISHMENT (Contd.)

(a) ALIVE (Contd.)

(2) SCOURGING (Contd.)

1. JUDICIARY COURT.

PART 2. 1661-1747.

As in the previous periods, scourging was imposed along with another penalty, usually banishment.

It is seen that in some of the cases where scourging was imposed, this sentence was a mitigation as the crime could have carried a death sentence. The crimes vary - slaughter, adultery, rape and theft are noted.

Only Scourging:-

James McNab was convicted of wounding Thomas McCormick to the death with his sword and sentenced to be taken to Crieff and there scourged on two market days.¹

Scourging & Banishment:-

For murder (manslaughter) Robert Carmichael was scourged - seven stripes in the Lawn Market, six at the Cross and five at the Fountain-well. He was imprisoned till he found caution to leave the kingdom, never to return under pain of death.²

Wm. Thomson and others were convicted on their confession of theft and sentenced to be scourged - 7 stripes from the hangman at the Mercat Cross and to be banished. They were to lie in prison "till there be occasion of ships".³

Scourging, Banishment & Indignities:-

Matthew Foulden was scourged through Jedburgh for a rape and banished from the town under pain of further scourging. During the scourging a paper stating his crime was fixed to his head.⁴

Scourging was imposed for adultery fairly frequently.

John Reidpeth was sentenced to be scourged through the High Street from the Castlehill to the Netherbow on a forenoon and thereafter to be banished, for double adultery.⁵

1. H.56/7, 1714.

2. H.16/7. 1699, also H.19. 1705 - poisoning - scourged and banished.

H.55/6. 1713 - slaughter - scourged and banished.

3. F.83, 87, 99.

4. H.76/9. 1732, also

H.71/2. 1724 - scourging for child murder.

5. F.55, also F.3.

II. PERSONAL PUNISHMENT (Contd.)

(a) ALIVE. (Contd.)

(2) SCOURGING (Contd.)

1. JUSTICIARY COURT.

PART 2. 1661-1747 (Contd.)

Scourging could be imposed by the court where the person was acquitted or avoided his proper punishment by a legal technicality, and the court was satisfied that some sort of punishment should be given.

James Welsh had confessed out of court to witchcraft, but because of his youth he could not be put to an assize. Because he prevaricated at the enquiry for defaming lieges, he was to be whipped through the High Street and to be put in the Correction house, to work there for a year.'

1. F.34/5, also
F.28/9, 49 - acquit of child murder, but whipped and banishment.

II. PERSONAL PUNISHMENT (Contd.)

(a) ALIVE. (Contd.)

(2) SCOURGING (Contd.)

2. ARGYLL JUSTICIARY COURT. 1664-1742.

Very few scourging sentences show scourging as the sole punishment. -- much more frequently there were a number of parts to the sentence, only one part being the scourging.

Gilbert McOnlea was sentenced, for the theft of cattle, to be scourged through the town by the hangman between nine and ten in the morning.¹

Scourging was imposed most frequently in theft cases,² and it is seen that scourging (or scourging and additional personal punishment) could operate as a mitigation of a death sentence.

David McDavie was convicted of driving away a mare and filly, but because various witnesses confirmed that he lived honestly and virtuously, he was sentenced to be scourged through the town by the hand of the common executioner and his moveables were escheat. The justice declared that it was a mitigated sentence and if any future theft was committed by him he would suffer a death sentence.³

For murder, he was scourged, then nailed by his right ear to the gallows for two hours, branded on his right hand and then banished from Great Britain.⁴

Frequently the threat of a death sentence if there was a future conviction was added.

Janet McKellar was convicted of the theft of money and jewellery and was ordered to be taken to the cross and scourged through the town between 2 and 3 in the afternoon, under declaration that if she was convicted again she would suffer the death sentence.⁵

The additions to scourging took various forms:--

Escheat and caution for future good behaviour.

Donald //

1. I. 13/4.
2. Exceptions: Murder - J.6/1708.
Adultery - I.124/5, J.12/1707.
Fraud - I.26.
Conceding
Pregnancy - J.2/1719.
Killing
Horse - J.12/1710.
3. I.129 - also I.77, 75.
4. J.6/1708 - also theft J.4.1718, J.12.1721.
5. I.52/3, also I.106 - scourged, branded, banished: death threat
I.106/7 scourged: death threat.
I.92/3 scourged: escheat: caution for
good behaviour

II. PERSONAL PUNISHMENT (Contd.)

(a) ALIVE (Contd.)

(2) SCOURGING (Contd.)

2. ARGYLL JUSTICIARY COURT. 1664-1742 (Contd.)

Donald McLaertie was convicted of the theft of a cow and was sentenced to be scourged through Inveraray. His goods were escheat, but in fact the procurator accepted 100 merks in lieu of escheat. He had to find caution for his good behaviour in all time coming.¹

John McKeynich was convicted of stealing cattle and sheep. He was sentenced to be publicly scourged through the town between 12 and 1 in the afternoon. He had to find caution for his good behaviour under pain of 500 merks, over and above payment of damages. He had to pay £40 for the cost of the cow. His goods were escheat, and he was imprisoned till he found caution.²

Branding or the threat of Branding.

Hew McInleish and Moira McIlmond were convicted of the theft of tobacco and ribbons, money and food and were sentenced to be scourged through Inveraray by the hangman at 2 p.m. and after the scourging they were to be taken to the cross and branded on their palms. They had to leave Argyllshire under pain of death and also suffered pain of death if convicted of theft again.³

John McConochie McKaig was convicted of stealing a coat and some money and was sentenced to be burnt on the cheek with the letter "T" as the mark of a peaker (small thief) and thereafter he was to be scourged from one end of the town to the other at about two hours in the afternoon. ⁴

Mutilation.

For //

1. I. 102.
Escheat - I.51/2, 77, 92/3, 100, 124/5 (adultery) 129.
Caution for good behaviour - I.35/6, 51/2, 75, 77,
89/0, 92/3, 100, 124/5 - J.3. 1730 - 500 merks
was the usual amount.
2. I.51/2.
I.89/0: scourged, fined £20, caution, warded.
I.100 : caution, escheat, warded.
3. I.106, J.6/1708, also scourged, branded and banished:
J. 8/1707, 12/1710, also
I.35/6: scourged: caution (if no caution, branded).
4. I.14, also I.26: scourged and his tongue bored.

II. PERSONAL PUNISHMENT (Contd.)

(a) ALIVE (Contd.)

(2) SCOURGING (Contd.)

2. ARGYLL JUSTICIARY COURT. 1664-1742 (Contd.)

For several small thefts, he was scourged (39 stripes) and nailed to the gallows by his right ear for one hour. Thereafter he was banished from Inveraray.

Scourged and Jouggs.

For concealing her pregnancy she was scourged and put in the jouggs.²

Banishment.

Fingal McCannill was convicted of adultery and she was sentenced to be scourged from the mercat cross of Campbeltown between two and three p.m. by the common executioner. Thereafter she was to be imprisoned until she found caution for her good behaviour, or bound herself to leave Argyllshire. Her moveables were escheat.³

-
1. J.4. 1718 - also J.12, 1721. Murder J.6. 1708.
 2. J.2. 1719 - 12/1707.
 3. I.124/5, also
I.125/6, theft - scourged: caution to remove:death threat
I.106 - scourged, branded, banished, death threat, also
J.8. 1707, 12.1710.
Scourged & dismissed the town (theft) - J.6/1707.
banished (Argyll) (theft) - J.10/1729, 1/1734
12/1735.
banished jurisdiction
(fortune telling) - J.10/1729.
banished Britain (killing
Horse) - J.12/1710.
banded, nailed, banished
Britain (murder) - J.5/1708.
transported America
(theft) - J.10.1722,
12/1721.

II. PERSONAL PUNISHMENT (Contd.)

(a) ALIVE (Contd.)

(2) SCOURGING (Contd.)

3. SHERIFF COURT¹ 1515-1747.

The later record shows that scourging was always imposed along with another penalty.

Theft: He was branded on the face, scourged through the town and banished under pain of death.¹

Fireraising: She was sentenced to be imprisoned, scourged, branded, jouged and banished (but it was not enforced).²

The cases give details information on scourging.

- He was to receive six strokes at the Tolbooth and then to the accompaniment of a drum beat, he was taken round Faisley receiving six strokes at the Townhead, the same at the West port, Mealmarket, the Cross, Abbeygate, and then seven strokes at the Walnook.²

Both men and women were stripped to the waist for the scourging.

1. Kb. 186.

2. Kb. 238, also 238 - scourged, imprisoned and banished.

3. Kb.188, also 245 - size of lash specified.

II. PERSONAL PUNISHMENT (Contd.)

(a) ALIVE (Contd.)

(2) SCOURGING (Contd.)

4. SHETLAND COURT. 1602--04.

Scourging was not imposed frequently, but such references as there are relate to thefts.

- The fold (Court officer) is ordained to scourge A. about the parish Kirk next Sunday as a notorious thief, to the example of others.'

This applied also to women and children found guilty of theft.²

While this was more usually the penalty for notour thieves, it could be imposed for the first offence² - in that particular case, however, the thief was caught in possession of the goods. There is only one non-theft case which shows a sentence of scourging - the Archdeacon's horse was ridden to death and the instigator was scourged about the kirk.⁴

Escheat of goods, gear and lands could be added to scourging.⁵

-
1. L.12, 14, 21, 31 etc.
 2. L.8, 78, 90.
 3. L.112.
 4. L.33.
 5. L.14.

II. PERSONAL PUNISHMENT (Contd.)

(a) ALIVE (Contd.)

(2) SCOURGING (Contd.)

5. BURGH COURT. 1398-1714.

No reference is made in the Aberdeen record to scourging as a penalty, but the sentence is mentioned in the old laws concerning theft.

If a thief steals a loaf or anything worth up to one half-penny in the Burgh, he ought to be scourged through the town. If the article is worth from one half-penny to four pennies, he ought to be more severely scourged.¹

The other records show that it was imposed occasionally in theft cases.

John Fischair was convicted of theft and had his ear cut off, was branded on his cheek and scourged through the town. Thereafter he was banished.²

Gilbert Mitchell was convicted of stealing from a packman and was sentenced to stand for an hour at the cross, during market time, with a paper on his head - stating his crime and thereafter was scourged from the cross to the West Port.³

The threat of scourging was used to support a decree of banishment.⁴

1. F.C. XXXIX. p. 180.

2. Z.45. 1546.

Z.162/3. 1629.

For theft - scourged and branded on his shoulder and banished.

3. Y. 25/6. 1655.

4. Z.119. 1608 - plague.

Z.129. 1612 - No crime stated.

Z.138. 1615 - Fraud.

Scourged and hanged if returned from banishment.

Z.110 - striking town officer.

CONCLUSIONS.

II. PERSONAL PUNISHMENT (ALIVE)

2. SCOURGING.

(1) Scourging was a frequent sentence in most records. There were great variations in its use, but the following patterns are seen.

(a) Scourging was a standard sentence for thefts which did not merit hanging.

(b) It could also be given as a mitigated death sentence, again usually in theft.

(c) It was seldom given as the sole penalty -- usually banishment was added, but some further personal punishment -- particularly branding and/or indignities -- could also be given.

(d) Apart from thefts, scourging was imposed in the main period of the justiciary courts, in adultery and less frequently in murder, rape and forgery. The adultery sentence tended to be standard, whereas the other crimes were mitigated death sentences.

(e) Some cases show an acquittal which the judge was not prepared to accept and in those cases, scourging was the standard penalty imposed.

(2) While the Argyll record shows the same pattern as has been noted, the number of combinations of punishments imposed by the court in addition to scourging is noteworthy -- mutilation, branding, indignities, escheat, caution for good behaviour, fining, imprisonment and banishment.

(3) The lower records (Sheriff, Shetland and Burgh courts) show scourging imposed only in thefts, but again a variety of further punishments were added -- usually branding, indignities and banishment. In these courts a scourging sentence would not be a mitigated sentence, but rather a standard sentence.

III. PERSONAL PUNISHMENT (Contd.)

(a) ALIVE. (Contd.)

(3) BRANDING.

1. JUSTICIARY COURT.

PART 1. 1488-1650.

References to branding occur occasionally. As in scourging, branding was not imposed as the only punishment, and some other form of personal punishment was added.

For theft of a purse, John Brown was sentenced to be scourged, burnt on his cheek and banished.¹

For forgery - scourged through Edinburgh, branded on his hand with a hot iron and banished.²

For perjury, James Boyle and others were sentenced to be scourged through Edinburgh, branded with a hot iron on their cheeks and banished from Scotland.³

Also David Trumble was taken to the Market Cross of Edinburgh and there his tongue was pierced with a hot bodkin. He was also banished.⁴

Convicted of fire-raising, Isobel McFarlane was branded on her cheek and banished.⁵

PART 2. 1661-1747.

Branding was given infrequently in the period - it was imposed in thefts.

John Rae, convicted of theft, was adjudged (by advice of the Privy Council) to be burnt on the cheek with the Castlemark of Edinburgh, within the Tolbooth and thereafter banished from the three Lothians.⁶

William Thomson and others were convicted of several small thefts ("pyking thefts") and the Privy Council recommended the justices to have them either marked with Edinburgh's burning iron or scourged, or both if the justices wished - and thereafter have them banished. They were scourged and banished.⁷

1. Dd.445.
2. E.151.
3. D.358.
4. Dd.538/9.
5. Aa.346.
6. F.24.
7. F.87/8, also F.99.

II. PERSONAL PUNISHMENT (Contd.)

(a) ALIVE (Contd.)

(3) BRANDING (Contd.)

2. ARGYLL JUSTICIARY COURT. 1664--1742.

Branding occurs in theft cases principally.

Normally branding was only part of the sentence, but one case gives branding as the sole sentence.

John Dow McLean was convicted of the theft of clothes and food and was sentenced to be taken to the mercat cross of Inveraray and there burnt on the cheek with the letter "T" as a mark whereby he may be known afterwards as a thief. This was inflicted because all the stolen goods were recovered. (If they had not been recovered, he would have been hanged) 1

More usually there was a composite sentence.

Branding and Scourging:--

John McConachie was convicted of the theft of clothes and money and was sentenced to be burnt on the cheek with the letter "T" as the mark of a peaker and thereafter he was to be scourged through the town. 2

For the theft of tobacco, ribbons and money, Hew McInleish and Moira McIlmound, his mother, were to be scourged through Inveraray at 2 p.m. and immediately after they were to be brought to the cross and to be branded by the hangman with the ordinary iron on their palms. Thereafter they were banished from Argyllshire under pain of death. 3

For fraudulently appearing to satisfy a bond of caution, Donald McCracken was scourged through the town and his tongue was bored by a hot iron at the mercat cross at 10 a.m. 4

Mary McIndeor was convicted of the theft of two sheep and was sentenced to be scourged through the town at 10 a.m. and if she did not find caution for her future good behaviour, she was to be branded on the shoulder with a hot iron. 5

1. I.18, also I.44.

2. I.14.

3. I.106, also

Theft - scourged, branded, banished: J.8/1707, J.12/1710.
(both branded with "T" on his palm).

Murder - scourged, nailed, branded (on right hand)
banished: J.6/1708.

4. I.26.

5. I.36.

II. PERSONAL PUNISHMENT (Contd.)

(a) ALIVE (Contd.)

(3) BRANDING (Contd.)

3. SHERIFF COURT. 1515-1747.

Branding was imposed in addition to other forms of
punishment --

For theft, he was branded on the face, scourged and
banished under pain of death.¹

For fireraising, she was sentenced to be imprisoned,
scourged and branded on her forehead -- but the sentence
was not carried out.²

Threat of branding could be used to support a banishment.
For theft, he was banished under threat of branding on
his cheek.³

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1. Kb. 186.
 2. Kb. 238.
 3. Kb. 203, 246.

II. PERSONAL PUNISHMENT (Contd.)

(a) ALIVE (Contd.)

(3) BRANDING (Contd.)

4. BURGH COURT. 1398--1714.

In the Aberdeen record, branding was not actually inflicted but it was threatened to support a decree of banishment for theft.

Mariota Fether was banished from Aberdeen for resetting thieves, for two years, under pain of being branded with the Seal of Aberdeen on her face.¹

Elena Scotcook was banished for a hundred years and a day and if she returned to the town she would be branded on her cheek - this decision was given by the assize. Repertum est et ordinatum per assisam.²

The Stirling record showed instances of branding in theft cases.

John Fischair was convicted of theft and had his ear cut off, was branded on his cheek and was scourged. Thereafter he was banished.³

Jonet Wrycht was convicted of pykerie and was branded on her cheek and banished.⁴

Branding was threatened in other crimes, where the basic sentence was banishment.⁴

In the later records, no actual instances of branding are noted, but it is threatened to enforce a decree of banishment.

William Allan was convicted of gaming and was banished from the town under pain of branding on the cheek.⁶

A Court Act against men and women staying in the town without references provided that if they stayed more than eight days they would be branded on the cheek, but no cases are noted.⁷

1. V.92.

2. V.142.

3. Z.45. 3.1546.

Z.162/3. 1629 - scourged and branded on his shoulder for theft - banished.

4. Z.48. 1547, also Z.64. 1555.

5. Z.29. 1612 (Scandalous and offensive person).

6. Y.103/4. 1682, and

Y.148. 1694.

Theft -do- Cheek with town's arms.

7. Y. 109.

CONCLUSIONS.

II. PERSONAL PUNISHMENT (ALIVE)

3. BRANDING.

(1) Branding was imposed in very similar circumstances to scourging - but it was less frequent and could be described as an aggravation to a standard sentence of scourging.

(2) The branding was made on the cheeks or hand of the accused, and the brand was of the town's mark, although sometimes the brand was a "T" for thief or "P" for pykerie.

(3) It was seldom given as the sole penalty and usually followed a scourging, and again the crime of theft figured prominently in branding sentences.

(4) Branding is noted throughout the whole period, but in the lower courts (Sheriff and Burgh courts) it was given only in thefts - and there it was used principally to support a decree of banishment - few cases are seen of its enforcement.

II. PERSONAL PUNISHMENT (Contd.)

(a) ALIVE (Contd.)

(4) INDIGNITIES.

1. JUSTICIARY COURT.

PART 1. 1488-1650.

Throughout the whole period penalties designed to humiliate the accused are noted. The crimes for which this penalty was imposed varied.

The usual form of the penalty was public exposure with a notice declaring the crime.

- For forgery, William McKie and Thomas McKie were sentenced to be deemed infamous, had their goods escheat and were to be carried by the ordinary hangman from the tolbooth to the market cross and there to stand for an hour with a notice on their heads "I am declared infamous for falsett". Both were banished.¹
- For writing a paper against the king and the government, George Nicoll was sentenced to stand with a paper on his head declaring his crime for three hours. Thereafter he was to receive six lashes from the hangman and be banished.²
- William Murdoch, a priest, was convicted of unlawfully celebrating mass and he was sentenced to stand for 10 hours chained to the Market Cross, in his priest's clothes. Thereafter his clothes and symbols were to be burnt, and he was to be banished.³
- For carrying out baptisms and celebrating marriages after being excommunicated, Sir Thomas Ker and others placed themselves in the king's will and were sentenced to stand for two hours at the Market Cross of Edinburgh with papers on their heads declaring their crime.⁴

One case showed the standard penalty of the burgh court --

Nicholas Rynd was convicted of blood and was to stand publicly for an hour and ask forgiveness. He lost his freedom of the Burgh and was banished.⁵

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1. E.262, also E.297, C.477.
 2. E.222.
 3. C.530/1.
 4. B.189/0.
 5. Aa.399.

II. PERSONAL PUNISHMENT (Contd.)

(a) ALIVE (Contd.)

(4) INDIGNITIES (Contd.)

1. JUSTICIARY COURT.

PART 2. 1661-1747.

The same form seen in the earlier period was continued - exposure with a notice or placard attached to one's person stating the crime.

- For making derogatory remarks about the Justice General, Donald Campbell was sentenced to stand at the cuckstool of Edinburgh between 2 and 4 in the afternoon with a paper on his chest, declaring his fault and have his tongue bored by the hangman. Thereafter he was to remain in prison during the Court's pleasure.'

The notice could be attached before a scourging:-

- Matthew Wouliden was scourged through Jedburgh with a paper tied to his forehead stating that he had been convicted for rape and thereafter banished from Jedburgh under pain of further scourging.²

The indignities could take the form of being placed in the pillory:

- For embezzling money from the Bank of Scotland, Robert Pringle was sentenced to be set in the pillory with a notice on his breast describing his offence. He was imprisoned till he repaid the amount he had taken. (£425:10/-d. Stg.).³
- For poisoning his wife, William Bisset was scourged, pilloried and banished to the East or West Indies plantations.⁴

-
1. G.137/9.
 2. H.76/9. 1732.
 3. H.19/21. 1705.
 4. H.19. 1705, also
H.19/21 - pillory - embezzlement.
G.137/9 - cuckstools - insulting.

II. PERSONAL PUNISHMENT (Contd.)

(a) ALIVE (Contd.)

(4) INDIGNITIES (Contd.)

2. ARGYLL JUSTICIARY COURT. 1664-1742.

The form of the indignities varied in this record --

Jougs were frequent, both with and without further punishment.

Public Forgiveness. For a riot against the magistrates, the accused was fined and had to crave pardon on his knees before the court. He had also to crave pardon of the magistrates, bareheaded at the mercat cross, and his burgess ticket was destroyed publicly.²

Public notice. As in the other records, frequently the convicted had to carry or wear a notice stating his crime.³

In this record, it is noted that the position of common executioner was offered to various convicted persons instead of punishment.⁴

-
1. Child murder: scourged and jougs: J2/1719.
Adultery : jougs and paper stating crime: J.12/1707.
Theft : jougs, banished: J4/1730, 11/1740.
jougs and rope round his neck;
banished J.8/1715.
Killing horse: fined and jougs. J.6/1710.
 2. J.2/1710.
Also J.6/1710 -- crave pardon in court and fined.
 3. Adultery : J.12/1707 -- jougs and paper,
perjury and defamation: J.6/1710 --
fined and paper.
 4. Theft : J.12/1710.
J.12/1716 -- under pain of death.
J.3./1739 --do--

II. PERSONAL PUNISHMENT (Contd.)

(a) ALIVE (Contd.)

(4) INDIGNITIES (Contd.)

3. SHERIFF COURT. 1515-1747.

Imposition of indignities was made frequently in the later record. Public forgiveness and exposure with a notice stating the crime were usual.

The penalty was imposed in minor thefts and cases of insulting and defamation.

For falsely accusing persons of witchcraft, some persons had to ask forgiveness publicly of the people whom they had accused. If they refused to crave forgiveness, they were to be taken to the Cross and there they had to confess their fault publicly saying "by our false tongues we lied" and also they were to be exposed at the Cross for an hour at midday with a paper on their breasts stating their crime. They were also fined 100 merks.

The jugs were used on occasions.

For stealing corn, he was fined 500 merks and placed in the jugs with a paper on his breast.

-
1. Kb. 50/6,
Also Kb. 129/0 -- crave forgiveness, confess in court.
jugs for an hour and paper.
£50 fine and £200 damages.
 2. Kb. 193, also Kb. 201, 203, all theft.
fireraising: Kb.238.

II. PERSONAL PUNISHMENT (Contd.)

(a) ALIVE (Contd.)

(4) INDIGNITIES (Contd.)

4(a) SHEPHERD COURT. 1602-04.

Public forgiveness was the standard form - in some assault and insulting cases the accused had to crave forgiveness of the injured person before the whole congregation and minister on a Sunday.

The assaults related to the Church in any event:

For striking the minister with a spade, A. was compelled to ask forgiveness from the minister at the next service, under pain of £20.'

But in the insulting cases the accused had to crave forgiveness in Church:-

For insulting, the accused were fined 40/- and had to ask forgiveness in Church from the person insulted.²

For using the Church as a byre, he was fined 40/- and ordered to ask forgiveness in sackcloth from the minister and congregation.³

-
1. L.125, also L.135 - fighting in Church.
fined 2 angels and 8/- : minister's forgiveness.
L.113 - assaulting his father - fined 2 merks and forgiveness from his father three times.
 2. L.3 - also L.86 - 8 merks and forgiveness.
L.113 - 2 merks and forgiveness of the person insulted.
L.113 - 4 merks and forgiveness in sackcloth.
L.81/2 - insulting Sheriff - £40 modified to £5 - forgiveness.
L. 23/4 - forgiveness on his knees in Church.
 3. L.82.

II. PERSONAL PUNISHMENT (Contd.)

(a) ALIVE (Contd.)

(4) INDIGNITIES (Contd.)

4(b) ORKNEY & SHETLAND COURT. 1612-13.

The references to personal punishment are few - again it tended to be imposed in minor thefts and insults.

A court statute contains the only clear references.

An Act against vagabonds and beggars ordered such persons to be placed in the stocks and joughs.'

Two statutes make provision for personal punishment, but no indication at all is given about the form of the punishment.² It would seem likely that it would be stocks or joughs. It is noted, however, that personal punishment was imposed in these statutes only if he was unable to pay a fine.

A court statute against defamation stated that the penalty was a fine of 5³/₄d. payable to the king and a sum at the judge's discretion to the party offended. The offender had also to ask forgiveness from the person insulted before the minister and the congregation on the following Sunday, but no case is noted.

1. M. 19/0.

2. M.18, 23.

3. M.22.

II. PERSONAL PUNISHMENT (Contd.)

(a) ALIVE (Contd.)

(4) INDIGNITIES (Contd.)

5. REGALITY COURT. 1547-1706.

There are occasional references to personal punishment throughout the record, but they are not frequent. In this record the personal punishment was a spell in the stocks or jougs. It is noted that personal punishment was imposed by certain statutes, both national and court, but the full severity of the national statutes was not observed in the cases.

A court statute concerning assaults imposed a penalty of £10 in respect of threatened assaults with the additional punishment that the bodies of offenders should be "wardit in irnes and stokis to thair schame and disgrace". This actual sentence was not imposed for a threatened assault, but in one assault case - where a minor was found guilty of a blood assault, he was sentenced to remain in the jougs for half an hour.²

A national statute prohibiting the removal of broom had more severe penalties - as alternative to fining, the Court could imprison the offender in the stocks or irons for eight days on bread and water for the first offence, fifteen days for the second offence, one month for the third offence and scourged at the end of the month.³ There is no case which shows that these penalties were ever enforced, and indeed immediately afterwards, the court enacted its own order giving 40/- for each offence, with imprisonment in the event of failure to pay.³

1. Na.33/4.
2. Nb.10.
3. Nb.261.

II. PERSONAL PUNISHMENT (Contd.)

(a) ALIVE (Contd.)

(4) INDIGNITIES (Contd.)

5. REGALTY COURT. 1547-1706 (Contd.)

Thus, it is seen that in practice, the severe statutory penalties were not enforced.

However, the Court did impose a spell in the jugs in certain cases. The period was indefinite - during the bailie's pleasure - but it is likely that the period would not exceed twelve hours.

A court officer who allowed a murderer to escape suffered loss of office and the stocks during the bailie's pleasure. 1

A court statute relating to the cutting of broom gives a penalty of 13/4d. and the stocks during the bailie's pleasure. 2

1. Nb.345/6.

2. Nb.57.

II. PERSONAL PUNISHMENT (Contd.)

(a) ALIVE. (Contd.)

(4) INDIGNITIES (Contd.)

6. BARON COURT. 1523--1747.

Imposition of the stocks is noted in certain minor crimes.

The period varied but 24 hours is noted -

- In a non-blood assault the sentence was a fine of £5 and a spell in the stocks during the Baron's pleasure.¹
- For insulting, the accused was to remain in the stocks.²
- For deforcement, a fine of £40, escheat of moveables and stocks for 24 hours.³
- A theft statute imposed a penalty of 3 fold restitution and 24 hours in the stocks.⁴
- The longest period is 4 days given in Forbes for contravention of a court statute concerning service to the Baron.⁵

There are a number of references to personal punishment, but no details are given,⁶ but it is likely that this meant the stocks. It is noted that normally the stocks were combined with a fine and not imposed on its own.

1. Q.22.
2. P.51.
3. Rd.222, S.116, 123.
4. Q.139/0.
5. Ra.232.
6. Q.24, 48, 50 etc.
S.234.

II. PERSONAL PUNISHMENT (Contd.)

(a) ALIVE (Contd.)

4. INDIGNITIES (Contd.)

7. BURGH COURT. 1398-1714.

The Aberdeen record does not show any actual instances of indignities, but a court statute imposed a punishment of indignity for insulting an official.

It is ordained that if anyone insults the Prepositus, Bailies or any of the king's officers, for the first offence he will have to kiss the cuckstool, for the second offence he will be placed on the cuckstool, and shall be covered with eggs, dung, mud and such like, and for the third offence he will be banished from the town for a year and a day.'

The old laws also provide for the infliction of indignities for small thefts. Where a person steals an article whose value is between four pennies and eight pennies and one-farthing, he shall be put upon the cuckstool and after that led to the head of the town and there he ought to have one of his ears cut off.²

In the middle and later periods, imposition of public punishment or indignity became a standard penalty and was second only to fining as being the most frequent of all punishments. In the Stirling record it was more frequent than fining.

The crimes for which this penalty was imposed varied, but in the middle records, they were insulting, defaming and assault.

In the middle period, the basic form of the indignity was to seek forgiveness from the person.

(1) Forgiveness had to be asked while kneeling, from the insulted or injured either (a) at the place where the incident took place or (b) in court or (c) at the market cross.³ In the insulting cases the guilty person had to say "Tongue you lied about him"(the person who had been insulted) This formula was held to cancel the insult.

1. V. 217.

2. F.C. XXXIX. p. 180.

3. Insulting: Z.43. 1546.

Also Z.48. 1547. Z.116/7. Z. 120.1608.

Blood and trouble: Z.55.1549, also Z.78.1560/1.

II. PERSONAL PUNISHMENT (Contd.)

(a) ALIVE (Contd.)

4. INDIGNITIES (Contd.)

7. BURGH COURT. 1398-1714 (Contd.)

(2) In addition to asking forgiveness the accused might have a personal punishment added, e.g. an iron collar or mask.

For making insulting remarks, Marion Ray had to ask forgiveness on her knees, saying "Toung, you leid on thaim". She was warded until an iron clasp and calvill was made for her which was to be locked on her for 24 hours.¹

For calling another woman a thief, Jonet Blakadir had to stand in irons at the will of the provost and bailies. She had to pass to the place where she said the words and on her knees, ask forgiveness of the woman she insulted saying "Toung, scho leid".²

Marion Ray was fined for insulting Agnes Henderson and the Court ordered her to be suspended in a basket from a joist on the top of the tolbooth, during the will of the provost and bailies.³

For mocking burials, Laurence Thomson was sentenced to be drawn through the town on a sled, barefooted, bare-headed, wearing a white sark and with a paper on his head, stating his crime. Others were to walk through the town barefooted and bareheaded and stand at the cross during the bailies' will.⁴

(3) Some cases required a further act of humility:

For assaulting and insulting, Katherine Jak had to go to the market cross at 10 a.m. on Saturday with a white wand in her hand and ask forgiveness.⁵

For insulting, Agnes Henderson had to precede the procession on Sunday wearing a sark and carrying a wax candle to be offered to the Rood Light and ask forgiveness of the woman she insulted.⁶

1. Z.43. 1546.

2. Z.39. 1544/5.

3. Z.48. 1547. This was threatened in a troublance action - 48 hours in the basket. Z.48. 1547. Ayr used a cage also - Murray I.246 n.

4. Z.116. 1607. A Court act punished insulting by exposure at each of the four gates of the town, carrying a halter which supported two large stones. X.167.1476.

5. Z.40.1545.

6. Z.40/1. 1545, also

Z.47/8. 1547 - except no candle.

II. PERSONAL PUNISHMENT (Contd.)

(a) ALIVE (Contd.)

4. INDIGNITIES (Contd.)

7. BURGH COURT. 1398-1714 (Contd.)

For adultery, Thomas Thomson was ordered to ask forgiveness in face of the congregation and on the next market day he was to be carted.¹

To insult or disobey a town official could result in public punishment and again forgiveness could be demanded.

For insulting a bailie, James Stewart and Thomas Hyslop were fined 5 merks and further had to come with a candle in hand as a sign of forgiveness before the parish.²

Towards the end of the middle period, forgiveness overlapped with public exposure and confession which developed into the standard mark of indignity punishments in the later periods.

In one case the accused was given a choice of forgiveness or public confession.

Robert Bullo was ordered to appear before the congregation and ask Marion Stenson's forgiveness for ravishing her. If he refused he was to stand at the market cross for 24 hours with a paper bound to his head stating his crime.³

Public Confession:-

For disobeying the kirk and magistrates, John Henderson was fined £10 and had to confess his fault publicly at the market cross. If he refused he would be banished for three years.⁴

Both forgiveness and public confession could be imposed.

Thomas Moses was fined £12 for unjustly accusing Robert Steil of theft and was ordered to stand for two hours at the mercat cross with a paper on his head stating his crime. He had also to crave the pardon of the person he accused and be imprisoned till he paid the fine.⁵

1. X.269.1560.
X.273.1561 - Act ordered couples to separate - branded on cheek and banished.
Z.155.1622. Adultery: couple were to be carted through the town.
2. X.292/3.1563, also being rebellious - forgiveness on his knees at the Cross: if again, banished and loss of freedom. Z.123.1609. Also insulting and striking the provost: forgiveness on his knees and if again, banished and loss of freedom. Z.133.1613.
3. X.274.1561.
4. Z.93/4.1599, also for insulting a bailie, fined £5 and public confession at the cross. Z.94.1599.
5. Y.10/11.1653. Craving pardon unjust accusation.
Y.111.1683.

II. PERSONAL PUNISHMENT (Contd.)

(a) ALIVE (Contd.)

4. INDIGNITIES (Contd.)

7. BURGH COURT. 1398-1714 (Contd.)

In the later period, public confession gave way to exposure of the accused with a notice around his neck or on his head. This had the same effect as public confession, and was more practical - the accused could refuse to speak when exposed, whereas he was compelled to accept the notice.

Public notice was imposed frequently in theft cases.

Two women convicted of reset from Gilbert Mitchell were also ordered to stand for an hour at the cross during market time with a paper on their heads and thereafter were banished from the town.¹

Sometimes the person had to stand with the stolen goods beside him.

Alexander Laidlay was convicted of theft and had to stand for an hour at the tron with the stolen goods beside him. Thereafter he was banished.²

Public punishment could be avoided if the person paid the council a further sum.

William Emond and his father, Andrew, were fined 40/-d. and £12 for reset and were to sit at the cross for two hours during market day, bareheaded, with the stolen goods around them. The father paid £22:16/-d. and was released from the public punishment.³

Various further penalties could be added to the public punishment.

(a) Scourging.

Gilbert Mitchell was sentenced to stand an hour at the cross at market time, with a paper on his head (stating his crime) and thereafter was scourged from the cross to the West Port.⁴

(b) Stocks.

Hew Black was sentenced to the stocks for an hour for insulting, threatening and cursing. He had to have a paper on his face written in great letters and thereafter was banished under pain of death.⁵

1. Y.26.1654, also Y.54/5.1662 - joughs, hour, paper, banished.
Y.60/1.1664 - joughs and banished. No paper. Also
Z.396.1652.
2. Y.90.1674, also Y.110.1683 - joughs.
3. Y.88.1673.
4. Y.25/6.1655.
5. Y.63/4.1665.

II. PERSONAL PUNISHMENT (Contd.)

(a) ALIVE (Contd.)

4. INDIGNITIES (Contd.)

7. BURGH COURT. 1398-1714 (Contd.)

(c) Banishment.¹

(d) Imprisonment.

Adam Caitcheon and his wife were fined 10 merks for perjury and were imprisoned for 48 hours. They had also to stand at the cross with a paper on their faces.²

The indignity could be detention in --

(a) the stocks.

This applied throughout the whole period.³

Hew Black was sentenced to the stocks for an hour for insulting, threatening and cursing. He had to have a paper on his face written in great letters and thereafter was banished under pain of death.⁴

(b) the cuckstools.

For discharging a firearm at two people, Edmond was imprisoned for 24 hours and until he found caution. Also was to be placed in the cuckstools for an hour with the gun about his neck.⁵

George Brown was ordered to be imprisoned for four days for theft of oats and also was to be put in the cuckstool for two hours with a sheaf of oats about his neck.⁶

(c) the jougs.

An Act against gambling gave penalties of 10 merks and imprisoned till paid. Further he must stand in the jougs from 11 a.m. till 1 p.m. during the next market day⁷

1. Y.90. 1674.

Y.110.1683.

2. Y.92/3. 1677.

3. If unable to pay fine then stocks for 8 days and then banished. X.164/6. 1470.

Also Z.30.1527, and for breaking dykes 24 hours in stocks and damages. X.168. 1472.

4. Y.63/4. 1665.

5. Y.160.1698, also

X.256. 1539.

X.325. 1570.

6. Y.163. 1700, also

Y.111. 1683.

7. Y.103. 1682.

CONCLUSIONS.

II. PERSONAL PUNISHMENT (ALIVE)

4. INDIGNITIES.

- (1) Various penalties were imposed which were designed to humiliate the accused, but a difference in form is noted during the period, especially in the lower courts.
- (2) In the middle and later periods in the justiciary courts the usual form was exposure in a public place with a notice around one's neck or on one's head declaring the crime - and this form was frequently combined with banishment (and on occasions scourging also).
- (3) It was applied to most crimes, but it was related to the main penalty (i.e. scourging and banishment) rather than the crime - i.e. it was an incident of the personal punishment rather than a particular crime.
- (4) The lower courts show the same form, but they also show the development of the sentence.
 - (a) In the earlier Burgh courts, the accused was made to ask forgiveness from the injured or insulted (for the penalty of craving forgiveness was used specifically for assaults and defamations) in church or in the market place.
 - (b) At the beginning of the middle period, this became confession of the crime (basically any crime, not merely assault or defamation - although these were common) in a public place.
 - (c) For the remainder of the periods, public confession was supplanted by public exposure with a notice declaring the crime. This final form was used for all crimes, but here theft is noted frequently in the lower courts.
 - (d) Other punishment could be added, especially in the Burgh courts - scourging, fining, imprisonment, jugs etc.
- (5) //

CONCLUSIONS.

II. PERSONAL PUNISHMENT (ALIVE)

4. INDIGNITIES (Contd.)

(5) Forgiveness is seen in the other courts on occasions -- even Argyll -- but as in the Burgh courts, it tended to be limited to assaults, insults to the magistrates and defamation.

(6) Periods in the stocks, jugs, cuckstools and pillories are noted, but they were infrequent.

(a) the later justiciary court shows a spell in the pillory for embezzlement and also for poisoning (the latter being totally exceptional). In both cases further punishment was ordered, but no details of the actual length of time in the pillory are given.

(b) Jugs, stocks and cuckstools were inflicted in all the lower courts, but no particular crime is noted. These sentences could be avoided if the accused could afford a fine. The lengths of time are not usually given, but in the Baron courts it did not exceed 24 hours. Again a further sentence could be added -- e.g. banishment.

(7) The jugs were frequently imposed on minors convicted of crime, even if the crime was normally capital.

(8) It is seen that among the indignities given by the courts who had capital powers was the offer of the hangman's job to any convicted thief whom the court thought suitable.

II. PERSONAL PUNISHMENT (Contd.)

(b) DEATH.

1. MUTILATION.

1. JUSTICIARY COURT.

PART 1. 1488-1650.

The cases make frequent reference to mutilation after death.

Mutilation was imposed so that the limbs of the accused might be shown to the greatest number of people as a deterrent. The limbs were exposed in the most prominent places - e.g. on the gates of the town.

The crimes had to be more than usually serious before mutilation was added. It was imposed frequently in treason cases, and cases equated with treason, and also in aggravated capital crimes.

(i) Quartering.

In treason the accused was sentenced to be hanged (exceptionally - beheaded) and demeaned as a traitor.²

The demeaning was drawing to the gallows on a hurdle and quartering - i.e. head, arms and legs were cut off and the remains buried in a common grave.³ The limbs were exposed in a public place.

One entry in the Stirling Burgh Court is interesting as it refers to a justiciary court treason sentence:

James VI wrote to the magistrates of Stirling and enclosed two quarters of the late Earl of Gowrie and his brother which were to be exposed in the town - on the steeple of the tolbooth.⁴

Contrary to English practice, the quartering took place after death - the sentence was hanging until dead and thereafter demeaned.

1. Aa.467 - scourged, beheaded, quartered, also C.260.

2. B.72/3, 95/6, 136, C.260, 407.

3. B.115, or burnt - Aa.492, C.168.

Quartering - A.185, 198, 199.

(Treason) Aa.348, 480, 481/2, 492.

B.72/3, 136, 139.

C.260, 407, 433.

D.350.

4. Z.96. 1600.

II. PERSONAL PUNISHMENT (Contd.)

(b) DEATH (Contd.)

1. MUTILATION (Contd.)

1. JUSTICIARY COURT.

PART I. 1488-1650 (Contd.)

While quartering is considered an incident of a treason sentence, many treason sentences do not mention quartering - the true criterion of a treason sentence was forfeiture of lands.

The records do not make any reference to the form of treason sentence mentioned in the Judicial Records of Renfrewshire and in Prebble's Culloden. In those books, the accused were hanged, but cut down while alive and then disembowelled, the guts being burned and their bodies being quartered, but such a sentence is never mentioned in the court records noted where hanging to the death seemed the standard penalty.

Quartering could be applied to a person who was dead before he was tried for treason. The dead body could be dismembered.²

Quartering could be applied to cases which were not treason but which were equated with treason.

George Caball was convicted by an assize of treasonably importing false and forged money into the kingdom from Flanders and using them. He was sentenced to be drawn to the gallows and hanged until dead. His head was to be placed on an iron pike and fixed on the east gable of the Tolbooth of Dundee. His body to be quartered and each quarter was to be suspended by an iron chain and affixed to each of the principal ports (gates) in the burgh, to remain as a perpetual example to others. His lands and moveables were escheat.³

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1. Kb.14 and John Prebble: Culloden - Penguin Books 1967. p.257.
 2. C.168, 407.
 3. A.137 - also forgery - Aa.440/1.
murder & theft C.404, 433, E.268.
Murder under
trust and
adultery - E.71.
treasonable
assault. - E.74.

II. PERSONAL PUNISHMENT (Contd.)

(b) DEATH (Contd.)

I. MUTILATION (Contd.)

1. JUSTICIARY COURT.

PART 1. 1488-1650 (Contd.)

In one particularly interesting case, John Ogilvy, a Jesuit priest, was convicted of treasonable activities because in 1615 he advocated the supremacy of the Pope and declined the king's authority - he was sentenced to be hanged and quartered (but the quartering was not carried out).

(ii) Mutilation: less than quartering was also imposed in other cases if there was a serious aggravation.

Such mutilation was common in murder and theft cases.

For murdering a person in Edinburgh Castle and stealing money and then escaping from the Castle, Andrew Adamson was beheaded and after death his head, hands and feet were cut off - all to be exposed in prominent places.²

Head exposed.

For murdering a French soldier and stealing money from him, Thomas Littlejohn was hanged and thereafter his head was cut off and fixed to the gate of Cupar.³

Head and right hand exposed.

In a murder and theft case, the head and right hand were to be cut off after hanging and put upon the west port of Edinburgh.⁴

Also for murder and theft, James Cruikshank was sentenced to be hanged and after death his head and right hand were to be struck from his body and both to be placed in prominent places.⁵

In a hamesucken and slaughter case, he was beheaded and his right arm was cut off.⁶

1. D.350.

2. A.84.

3. Aa.361 - also murder - A.174.
murder & theft - C.404.
piracy - D.246/7. Dd.572.
fireraising - Dd.361/2.

4. B.372, also B.268, 274.
murder under trust and adultery - E.71/4.

5. C.384/5, also C.422/3.
irreverent writings: Dd.454.

6. B.158.

II. PERSONAL PUNISHMENT (Contd.)

(b) DEATH (Contd.)

1. MUTILATION (Contd.)

1. JUSTICIARY COURT.

PART 2. 1661-1747.

Quartering is not given in detail during this period. One treason case stated that the accused should be demeaned as a traitor, but in the other treason cases, the extent of the mutilation was removal of their heads and right hands after death.

The rebels in the Pentland rising were sentenced to be hanged and after death their heads and right arms were cut off and exposed, some in Lanark, others in Glasgow, Dumfries and Ayr.²

In a case of clan warfare, the heads of the outlaws were exposed:-

Sir James MacDonald obtained a commission of fire and sword to avenge clan murders. He caught the murderers and their associates, cut off their heads and sent the heads to the Privy Council to be set in a public place.³

1. G.64/6.

2. F.184, 187, 188, 188/9.

3. F.127.

II. PERSONAL PUNISHMENT (Contd.)

(b) DEATH (Contd.)

1. MUTILATION (Contd.)

2. ARGYLL JUSTICIARY COURT. 1664-1742.

The only instances of mutilation after death are in murder cases where there is a further severe aggravation - theft or poisoning. The extent of the mutilation was the right hand or arm.

Neil McCauish was convicted of the murder of Thomas McFarlan whom he shot in the back and robbed of his money. He was hanged and after death his right hand was cut off at the elbow and placed on an iron pyke at the gallows. His hand was to remain there until it should rot and evenish away. His moveables were escheat.

-
1. I.166/8, also
I. 176/8 - murder and theft.
I. 178/0 - murder for theft.

J.11/1720 - murder, adultery, poisoning - left hand cut off after hanging and fixed to pole in Parish Church.

CONCLUSIONS.

II. PERSONAL PUNISHMENT (DEATH)

1. MUTILATION.

- (1) The most severe form of mutilation after death was quartering -- it was part of the standard treason sentence but while it was given frequently in treason cases, it was much less frequent in crimes equated with treason, although it certainly occurs in such cases.
- (2) The cases show that the body of a traitor already dead when the court sentenced could be quartered.
- (3) The treason cases in the later period do not show quartering -- only the mutilation which was normal in serious and aggravated capital crimes.
- (4) The lesser forms of mutilation were exposure of the head or right hand and in more serious cases both the head and the right hand. Such sentences were given in serious murders, thefts, combined murders and thefts, fireraising, piracy, clan crimes -- capital crimes which showed particular aggravations.
- (5) Such sentences were only passed by the justiciary courts.

II. PERSONAL PUNISHMENT (Contd.)

(b) DEATH (Contd.)

2. INDIGNITIES.

1. JUSTICIARY COURT.

PART I. 1488-1650.

Some cases show various indignities inflicted on the body after death.

(i) Hanging in chains ensured that the body remained longer in one piece on the gallows than if it was not bound together and so would be seen by more people. This was standard in piracy cases - hanged in irons¹, but could also be given in serious or aggravated murder and theft cases,² e.g. for the assassination of a Border warden.³

(ii) Special gallows could be erected as a mark of dishonour. McGregor was hanged on a higher gallows than the rest of his gang.⁴ Robert Love was hanged for piracy on gallows erected below the high water mark.⁵

(iii) The body could be burnt after execution, e.g. as noted in strangling and burning, and also in some cases after hanging.

For murder under trust, John Kelso was hanged and his body burnt.⁶

For murder by poisoning, Adam Colquhoun was hanged and burnt.⁷

(iv) After a full treason sentence the accused suffered loss of life, lands, goods, honour, armorials and memory.

1. Bd.572.

Aa.358 - also Aa.380 "hanged as pirates".

2. C.264.

3. C.363/4.

4. E.269.

5. D.10, also B.25/8.

6. B.14.

7. Aa.419/0, also B.34.

II. PERSONAL PUNISHMENT (Contd.)

(b) DEATH (Contd.)

2. INDIGNITIES (Contd.)

1. JUSTICIARY COURT.

PART 2. 1661-1747.

The indignities took various forms -

(i) Hanging in irons was frequently given in multiple thefts and robberies.

For numerous thefts, sornings, slaughters etc. William Bruce was hanged till he was dead and his body was to be hung in chains "till the same rot". A person convicted with him was hanged, but his body was expressly permitted to be buried.

(ii) Exhibiting evidence of his crime:-

For forgery, Robert Binnie was hanged with the false letters about his neck. 2

(iii) Dishonourable burial:-

For blasphemy and heresy, Thomas Aitken was hanged and his body buried at the foot of the gallows. 7

1. G.16, also F.198/0 - Macgregor thefts.
F.260 - hanged at Edinburgh and the bodies
rehung in chains between Edinburgh
and Leith.
- for theft G.113/5.
2. F.38/41, also F.59/0.
3. H.12/3. 1696.

III. PERSONAL PUNISHMENT (Contd.)

(b) DEATH (Contd.)

(2) INDIGNITIES (Contd.)

2. ARGYLL JUSTICIARY COURT.

(i) Special gallows:--

For a particularly cruel murder, John McIlmichell was hanged on a special gibbet erected on the spot of the murder. After death his body was to remain in iron chains till it was consumed. '

(ii) Dishonourable burial:--

The body could be burnt after death^a or buried at the foot of the gallows. †

1. I.33/6.

2. Bestiality -- J.1/1708 -- hanged and burnt.
J.11/1711-- -do--

3. Murder & Poisoning -- J.11/1720.

CONCLUSIONS.

II. PERSONAL PUNISHMENT (DEATH)

2. INDIGNITIES.

(1) Various indignities could be imposed on the body after death.

(a) Hanging in irons was common, again in aggravated capital crimes.

(b) Special gallows could be erected on the site of the crime or made higher than the rest.

(c) The body could be burnt after death - particularly in unnatural crimes - after strangling, but it is also noted after hanging in treacherous murders.

(d) Dishonourable burial at the foot of the gallows could be imposed.

(2) In full treason sentences, the honours, arms and memory of the accused were cancelled.

III. TORTURE.

1. JUSTICIARY COURT.

PART 1. 1488-1650.

References to torture do occur. Torture could be used during the preliminary enquiries - before the case was heard in court, either to obtain a confession or to find more evidence.

Peter Narne was thought to have organised a conspiracy against the English and a warrant from the king authorised Lord Roxburgh to torture Narne to find the truth.¹

Again in a forgery case, the accused retracted his confession as he stated that he had made it under torture.²

In an earlier case, Lord Glamis was imprisoned for treason and while in prison was shown persons on the rack in an attempt to extract a confession from him.³

Torture to obtain a confession also figures prominently in the witchcraft cases.⁴

However, torture could be used as a punishment in itself, but this was rare.

In a case of a seditious libel against the king, the king personally ordered the accused to be tortured by the boots, not to find the truth, but as a punishment, and thereafter his tongue was to be cut out and finally he was to be hanged.⁵

However, the sentence was ultimately commuted to only hanging.

1. C.352.

2. C.78.

3. Aa.327.

4. B.50, 213/23, 375/6.

5. C.335.

III. TORTURE.

1. JUSTICIARY COURT.

PART 2. 1661-1747.

References to torture occur, but not as a punishment.

The records show that torture was used by the Privy Council to obtain information about the crime.

James Mitchell was tortured before Privy Council to obtain a confession for his part in the Pentland Rising.¹

In the case of Patrick McGregor, it is noted that he had endured the torture of the boots in the Privy Council -- it is not possible to say if this was a punishment or a method of enquiry.²

1. G.307.

2. F.200.

CONCLUSIONS.

III. TORTURE.

(1) Torture was used in the middle and later periods, by the Privy Council to obtain information from the accused in serious cases - it was not used as a legal punishment, although it was ordered by James VI in a case of sedition, but this was not enforced.

IV. WILL.

1. JUSTICIARY COURT.

PART 1. 1488-1650.

In many cases throughout the record, the person confessed to the accusation and placed himself in the king's will - accepting the punishment decided by the king. The justice referred the case to the king who gave his sentence.

This was not as haphazard or discretionary as it might seem at first sight as the penalty imposed throughout the record followed definite patterns.

The actual penalty changed in the course of time.

In the earliest period when composition between the parties was the standard determination for most cases, the king usually demanded that the accused should find caution to satisfy and pay the other party the agreed sum. As this reference to will amounted to a confession on the part of the accused and as the king was accustomed to demand a fine in addition to the composition, if guilt was declared in court, caution usually covered the king's fine as well.

Symon Ford and others came into the king's will for hamesucken and theft. Cautioners were found to satisfy king and parties. The accused were fined £4 to the king.

At the end of this period, the person was imprisoned in the will entries but the record does not state if this was temporary detention pending the king's decision or an actual penalty.

Alexander McCulloch came into the king's will for oppression and wounding and was delivered to be warded to the Edinburgh Castle.

The king could order the accused to enter a state of free ward.

1. A.15, also A.17, 18 - both 40/- fines.
Assault & Theft - A.21 - 5 merks.
Assault - A.24 - 178.
A.16 - £3, £2.
2. A.218/9, Aa.357/8.

IV. WILL. (Contd.)

1. JUSTICIARY COURT.

PART 1. 1488-1650 (Contd.)

John Strathauchin came into the king's will for his part in a treasonable conspiracy and the king sentenced him to be warded. But he was permitted to go and remain beyond the Water of Dee and the order commanded that he should live undisturbed and not to be troubled.¹

By the time of James VI however, the penalty had become standard as banishment:

Adam Crichton was accused of slaughter and placing himself in will, he was sentenced to perpetual banishment²

For carrying pistols in Edinburgh, William Hamilton placed himself in the king's will. He was sentenced to leave the realm within 40 days and never return during his lifetime, under penalty of death.³

This was the normal penalty which the king imposed and it was imposed irrespective of the crime.⁴

Until the king's decision was known, the person was imprisoned.⁵

In one case, where the accused had placed himself in will for having led a raid on another person's house and for adultery, he made the proviso that he was only placing himself in will provided his life would be safe.⁶

While banishment was the standard penalty, some variations are noted.

1. A.200, also Aa.354/5 - free ward.
2. B.165 -- also B.46, 187/9.
3. C.22/3.
4. Slaughter - C.410.
Attempted murder - C.40.
Assault - D.59/0.
Hamesucken & Adultery - C.399/0.
Adultery - C.401.
Adultery & Theft - C.387/8.
Perjury - C.477.
Buying poison - C.336.
Religious (mass) - C.348/9,
D.254.
Dd.377/8.
Hurting another's Ox - C.127/8.
5. B.98/9, 159 etc.
6. C.400.

IV. WILL (Contd.)

1. JUSTICIARY COURT.

PART 1. 1488-1650 (Contd.)

Personal Punishment:

For baptising and conducting marriages after being excommunicated, the accused placed themselves in the king's will and they were sentenced to stand for two hours with papers on their heads, describing their crime.¹

Fining:--

In the middle period, fines were imposed, but the amounts varied considerably.

For making seditious speeches, Edward Johnston placed himself in will and was fined 3500 merks.²

For attempted murder, Matthew Stewart placed himself in will and was banished and fined 1000 merks.³

For absenting himself from a king's raid, George Kennedy placed himself in will and was fined £100.⁴

For abducting a widow, John Kincaid placed himself in will and was fined 2500 merks and had his brown horse escheat.⁵

For assaulting another in the vicinity of the king, John Dundas came in will and was fined 1750 merks.⁶

For adultery, David Gray came in will and was fined £40 and banished from Edingurgh.⁷

Free ward:--

In a slaughter which stemmed from a feud between the Master of Ogilvie and the Lord of Spynie, Ogilvie was confined to Haddington and to the East thereof and Spynie was confined to Linlithgow and to the West thereof. Both were fined 5000 merks.

1. B. 139/0.
2. C.29/34.
3. C.40.
4. C.135.
5. C.339.
6. C.358/9.
7. C.369.
8. C.146.

IV. WILL (Contd.)

I. JUSTICIARY COURT.

PART 1. 1488-1650 (Contd.)

It is plain that by placing oneself in the king's will one's life was safe, as there are few cases of the king insisting on a death penalty. The reference to will is not limited to any category of crime - but the cases noted tend to be less serious than others. Slaughter cases occur frequently in will entries, and it could be that no one was likely to object if the state gave banishment provided that assythment had been paid and accepted.

It is possible that in the serious cases, the accused preferred to take his chance with the assize, knowing that for say treason he would be sentenced to death if he confessed and placed himself in the king's will. However, the end result of placing oneself in will was banishment, fining, or free ward.

PART 2. 1661-1747.

Only few cases are noted of the accused coming into the king's will, and as in the previous records, a sentence of banishment was imposed.

For adultery, John Murdoch and Janet Douglas came into the king's will and were banished from Scotland for life.

1. Close shaves - assault in king's palace - B.187/9.
incest - E.121/2, both death sentences by the king, but avoided by intercession.

2. H.16. 1699, also
F.72 - no penalty noted.

IV. WILL (Contd.)

2. SHELLAND COURT. 1602-04.

Reference to the judge's will occurs frequently in all crimes, but a final sentence is seldom given.¹

However, general details of fines are given in one part of the record² and it is likely that the judge's will was expressed in the fines mentioned in this part - the amounts correspond to the non-will sentences.

In one case of accidental killing, the person responsible passed into the judge's will and assythment of £10 was agreed.³

The full reference to will was - "the accused confessed in judgement and submitted himself in my lord's courtesy and reverence therefor to be punished for the same according to his lordship's discretion."⁴

3. BARON COURT. 1523-1747.

Reference to will is frequent, but the normal result was a fine - the amount closely corresponding to the actual penalties of the non-will cases.⁵

In Carnwath, a person could be imprisoned for a year at the baron's will - this meant imprisonment for a period at the Baron's pleasure, but not exceeding a year.⁶

1. L.35, 111, 123 etc.

2. L.51/64.

3. L.35, 63.

4. L.145.

5. O.22 etc.

6. O.136 - £10 deforcement.

6. O.138/9 - deforcement - also breaking arrestments.

IV. WILL (Contd.)

4. BURGH COURT. 1398-1714.

Reference to will is very frequent in the Aberdeen record - the accused placed himself in the will of the Bailies -
posuit se in voluntate ballivorum.

Christinus de Clunes placed himself in the will of the Bailies for assaulting a woman and was fined.¹

Fining appeared to be the standard punishment following such a submission, but many cases do not give any penalty.²

The old laws made similar provisions:-

If any gild brother draws blood violently from another with a staff or any iron weapon or any other weapon, or makes any mutilation, he will be condemned in the will of the Alderman.³

If any gild brother trespasses against another through insulting, he shall pay 40 pennies for the first, second and third offences, and if he offends for the fourth time, he will be condemned at the will of the Alderman, the Dean of Guild and the rest of the gild brothers, and further shall make amends for his insults.⁴

1. V.24.
2. (1) Verberacion.
V.24 - and was fined - V.49, 66, 79 etc.
V.45 - no fine - V.49, 54, 57 etc.
(2) (a) Perturbacion of the town and was fined.
V.26, 29, 35, 119 etc.
No fining - V.43, 51, 127 etc.
V.133, 136, 148 etc.
V.124 - already under caution of £100.
(b) Perturbacion of a court.
V.76, 77, 78 etc. (no fines).
V.129, 139 - fines.
(c) Perturbacion of a house.
V.53, 54.
(3) Assault.
V.44 - no fine, 44/5, 130/1.
V.120 - stabbing with knife - fined.
V.142 - percussion - no fine.
3. S.G. IX. p.68.
4. S.G. V & VI. p. 66/7, also
L.C.B. C. p. 48/9.

IV. WILL (Contd.)

4. BURGH COURT. 1398-1714 (Contd.)

Reference to will in the other crimes was dealt with similarly.

The later records contain references to will, but they are less frequent. Fining was the standard result.

John Hope came into will for riot and was fined £4 and ordered to remain in ward until paid.²

Sometimes no penalty is noted.³

-
1. (1) Malediction. V.24 and was fined.
 - (2) Disobeying Bailies. V.51,68,130/1 - no fines.
V.48,49,75,107 - fined.
 - (3) Deforcement. in will and fined - V.117, 209.
 - (4) Unlawful detention. in will and fined. V.47.
in will . V.50.
 - (5) False Weights & Measures. in will and fined for wrong
measure of wine - V.115.
2. Y.4. 1652 and
Y.8.1653 - will for riot and fined £5, also
Y.11. 1653 - in will and fined £3.
Y.11. 1653 -do- 10 merks.
Blood:
Y.8.1653. £12.
 3. Y.2.1652 - in will for saying that the provost lied.
Y.45 - in will for wrongfully raising lawburrows.
Also
Y.10.1653.

CONCLUSIONS.

IV. WILL.

(1) In all records throughout the whole period cases occur of persons placing themselves in the judge's will - i.e. placing themselves at the court's mercy, and it is noteworthy that in the justiciary courts a particular sentence was imposed in such cases - irrespective of the crime.

(2) In the period of compounding and remission in the justiciary court, the king exacted a fine (£4, £3) and ordered payment of assythment.

(3) For a short time at the beginning of the middle period, the person was ordered to enter a state of free ward.

(4) During the middle and later periods, the sentence became standard at national banishment, although for a time in the middle period a substantial fine could be imposed instead (3500, 2500, 1000 merks).

(5) The crimes varied greatly, but murder, slaughter and adultery were frequent - theft, treason and forgery were rare and it is plain that the accused had to decide carefully whether he would be better off with an assize (in a case where the king had an interest) or take his chances with king and banishment.

(6) In the lower courts, reference to the judge's will resulted in fining - the amounts corresponding to the ordinary fines.

V. BANISHMENT.

1. JUSTICIARY COURT.

PART 1. 1488-1650.

Banishment was imposed throughout the whole period, but there is a change in the form of sentence. In the later records the sentence either followed a confession (placing himself in the king's will) or else was imposed with the consent of the accused, but in the earliest record, there is no mention of consent.

An old man was originally sentenced to be hanged for theft - this was changed to drowning, and finally he was ordered to leave the shire, never to return on pain of his life.¹

Convicted of theft, he was scourged, had his ears cut off and was banished for life, never to return, under pain of his life.²

Convicted of selling poison, he was banished from all parts of Scotland, under pain of death.³

These cases show banishment as a punishment inflicted without the consent of the party.

It is seen that if the banishment was national, i.e. from Scotland, the king either gave the sentence or agreed to it.

During Mary's reign, a similar pattern is seen -

Convicted of assault, he was ordered to stand for an hour at the market cross bareheaded and barefooted and ask forgiveness of God, the queen and the town council; he lost his burgh freedom and was banished from the burgh, under pain of death. This was a modified penalty ordered by the queen.⁴

Convicted of witchcraft, she was banished - this is all that is given, but even so it was a lenient penalty compared to the penalties to be imposed in the next reign.⁵

Convicted of theft, he was scourged through the town and banished from the realm during the queen's will. He had to leave within 10 days and not return without the queen's licence.⁶

1. A.52/3, also A.92: adultery:banished shire.
2. A.157.
3. A.203: in only one case did it follow a confession - theft and banished from Scotland, A.32.
4. Aa.399.
5. Aa.432.
6. Aa.458.

V. BANISHMENT (Contd.)

1. JUSTICIARY COURT.

PART 1. 1488-1650 (Contd.)

However, other cases during this period begin to show the element of consent.

From the start of James VI's reign, the standard situation of banishment evolves: either following a confession (in the king's will) or else having been convicted, the accused volunteers or consents to be banished.

Captain John Pentland came into the regent's will for slaughter, he sought mercy and having given surety for assythment to the relatives of the slain man, agreed to go into banishment from the realm during the regent's pleasure. He also gave caution for £1000 that he would leave within 18 days and not return.²

James Gyb confessed and offered himself into will for assault - shooting and wounding in a royal palace. The king ordered death, but the injured person interceded and having given assythment, the accused consented to banishment from the realm for the rest of his life.³

Confessed to forgery - sentenced to have his right hand cut off and banished from the realm during the king's pleasure and not to return without the king's licence.⁴

In one case where the accused confessed to using counterfeit money, he consented to banishment from the realm during the regent's pleasure and never to return without permission, under penalty of 1000 merks. Further, he was ordered to seek or trace the actual forger abroad and report his findings to the justice.⁵

During this period the decision of banishment was given by the king or regent personally, but there is one reference to the decision being given by the secret council.

1. Slaughter: banished from Scotland - Aa.366.
Aa.396(Consented)
- Theft : banished for life - Aa.388,395/6,458
(all consented).
- Forgery : banished from Scotland - Aa.375,394,402/3,
(all consented).
-do- and right hand cut off.Aa.387/8.
2. B.46, also B.165.
3. B.187/9.
4. B.19/0: will: adultery - banished Scotland C.387/9,399/0.
5. B.66.

V. BANISHMENT (Contd.)

1. JUSTICIARY COURT.

PART 1. 1488-1650 (Contd.)

Convicted of adultery (no confession) he consented to the Secret Council's warrant of perpetual banishment from the realm and gave an undertaking not to commit the like again under a penalty of 1000 merks.¹

The middle period (1596-1609) continues the pattern -- the terms of banishment become wider, instead of "realm" "our whole dominions" is stated.

The cases still show that the order of banishment from Britain came direct from the king, but in this period some of the cases for which national banishment was given affected the king either personally or politically. However his sentences of banishment are lenient in the circumstances as it could have been treason.

William Murdoch, a priest, confessed to celebrating mass and the king ordered him to be dressed in his full regalia and taken to the market place of Edinburgh and in full view to be stripped and his religious clothes and objects burnt. He was sentenced to be banished for life from the king's dominions under pain of death. He was warded until a ship was ready.²

Margaret Heartsyde confessed to misappropriating some of the queen's jewels and placed herself in will. The king ordered the punishment -- she was declared infamous and was banished to Orkney to be confined there for life. She had to leave in 40 days and find caution for 10,000 merks that she would leave.³

For unlawfully holding a General Assembly, John Forbes and others were banished for life from the king's dominions under pain of death. This was ordered by the king personally. They had to leave within a month, otherwise they would be convicted of treason.⁴

It is seen therefore that while the persons did not come into will expressly, the king had or took a personal interest. He gave a sentence as if the persons had come into will.

1. B.78, 80 -- In the later periods the Secret Council gave the decision.
2. C.530/1.
3. C.555/7.
4. C.502/4.

V. BANISHMENT (Contd.)

1. JUSTICIARY COURT.

PART 1. 1488-1650 (Contd.)

It is noted that where persons are banished by the court, without reference to the king, the banishment is only from the shire, parish or burgh. It would appear that the court had not power to banish abroad unless the king agreed.

William Calder confessed to theft and was sentenced to be scourged through Edinburgh. He was banished from Edinburgh and Aberdeen.⁶

Confessed to theft and was sentenced to be scourged through Edinburgh. He consented to be banished from Edinburgh.⁷

Where there was royal banishment, this was from the crown's dominions in the majority of cases, but there are occasional cases showing internal banishment.

The Master of Ogilvie was ordered to enter ward in Haddington within 6 days, to remain there or to the east thereof and Lord Spynie was ordered to enter ward in Linlithgow and to remain there or to the west thereof, for feuding between each other.⁴

The subsequent periods during the later part of the reign of James VI and the reign of Charles I show the same pattern. Banishment usually followed a confession or a placing in will. During the last period the king's will was given by the Secret Council.

Robert Phillop confessed to celebrating mass and placed himself in will. Hewas warded in straight firmance until the decision. The Secret Council sentenced him to be banished the king's dominions and to leave within a month, never to return without the king's licence, under pain of death.⁵

1. e.g. Theft - C.94 - parish.
Adultery - A.92 - C.401 - Dd.428 - burgh.
C.369.
Adultery - A.92.)
Theft - A.52/3.) - shire.
Fireraising - Aa.346)
2. C.93/4.
3. B.7.
4. C.145/6 - also C.556 - Orkney.
5. D.254 - also Dd.377/8, 437/8.
Dd.541, 569.
Dd.541/2.

V. BANISHMENT (Contd.)

1. JUSTICIARY COURT.

PART 1. 1488-1650 (Contd.)

Additional personal punishment could be added to the sentence of banishment.

James Boyle and others confessed to suborning witnesses and perjury and were sentenced to be scourged through Edinburgh, burnt with a hot iron on the cheek and banished from Scotland and not to return without the king's licence under pain of death.¹

William McKie and Thomas McKie confessed to forging a discharge and the Secret Council ordered them to be adjudged infamous, their moveable goods to be escheat and to stand for an hour at the market cross in Edinburgh each with a paper on his head declaring his crime and thereafter they were banished. William McKie was banished during the king's pleasure and Thomas for life. They had to leave in 40 days and to remain in prison until their ship was ready.²

Cases do occur of the prisoner placing himself in the justice's will - not the king's. In such cases, banishment followed, but only local banishment.

George Ramsay came into the Justice's will for theft and was sentenced to be scourged through Edinburgh and thereafter banished from Edinburgh and four miles about for life, under pain of hanging.³

Having found the accused guilty, the justice could refer the punishment to the king's will (as opposed to the prisoner placing himself in the king's will voluntarily). However, in such cases, banishment was still imposed.

Andrew Henderson was convicted of dismembering Adam Montgomerie by cutting off three fingers in Montgomerie's left hand and of hamesucken. The justice referred the sentence to the king's will - which was that Henderson should be banished from the whole dominions for life and never to return under pain of death. He was imprisoned in the Tolbooth until a ship was ready.⁴

1. D.358 -- also Dd.438/9 and forgery: scourged, branded and banished - E.150/1, 163/4.
2. E.259, also 297/8.
3. D.99, also D.270, Dd.540.
4. D.59/60 - also D.221/2-- scourged and banished.

V. BANISHMENT (Contd.)

1. JUSTICIARY COURT.

PART 1. 1488-1650 (Contd.)

Banishment could operate as a mitigation of a punishment already imposed -- again it stemmed from the king or the Secret Council.

Alexander Thomson and Janet Cuthbert confessed to adultery and bigamy and placed themselves in the king's will. The king's warrant stated that "although their crime and offence is capital and must infer pain of death, yet out of our princely grace and mercy we are pleased to mitigate the severity of the law". Thomson was banished from "our dominions" and his moveables escheat. Janet Cuthbert was banished from Edinburgh.¹

In a counterfeiting case, the justice was ordered to moderate the penalty of the person who had turned king's evidence and had confessed the plot. The king specifically ordered the accused to be banished from the realm and to leave in eight days -- he was not to be strangled and burnt as the others were, but he was never to return again.²

Andrew Crichton confessed to treason and was sentenced to be hanged and demeaned as a traitor. However, it pleased His Majesty "out of his gracious disposition to clemency and mercy to mitigate the sentence" and instead ordered him to be banished from His Majesty's whole dominions for life, under penalty of hanging. He was warded until there was a suitable ship.³

Helen Fae and other gypsy women were sentenced to be drowned for being thieves and egyptians. However, the king was moved to pity them and ordered instead that they were to leave the country within a further period, under pain of death if they were still in the country at the end.⁴

From prison, the person could appeal to the Secret Council stating that he accepted banishment.

1. Dd.428, also incest E.121/2.

2. C.99 -- also theft C.412 witchcraft -- mitigated because of pregnancy -- C.52/3.
--do-- -- D.269.

3. D.89.

4. Dd.561/2.

V. BANISHMENT (Contd.)

1. JUSTICIARY COURT.

PART I. 1488-1650 (Contd.)

James Middleton in prison under a death sentence for slaughter, appealed to the Secret Session and was banished from Scotland and England and never to return without the licence of the Justice Clerk and the heir of the person slain. He had agreed assythment with the representative of the deceased person.'

Banishment is seen to be largely a matter of agreement and where it was not expressly agreed, it was given in mitigation of a capital sentence, and it cannot be supposed that in these circumstances the accused would complain.

From the foregoing, it is seen that banishment took many forms and the following patterns emerge.

1. One could be banished from --
 - (a) the town.²
 - (b) the parish.³
 - (c) the shire.⁴
 - (d) Scotland.⁵
 - (e) Scotland & England.
 - (f) realm.⁷
 - (g) whole dominions.⁸

1. Dd.459, also E.92, 140, 164.
2. Assault: Aa.399.
Adultery: C.369, 401, Dd.428.
Theft: B.7.
C.93/4.
D.99.
3. Theft: Dd.540.
4. Adultery: A.92.
Theft: A.52/3.
Fireraising: Aa.346.
5. Slaughter: Aa.366.
Adultery: C.387/9, 399/0.
Theft: A.32.
Perjury: D.358.
Forgery: Aa.375.
Selling Poison: A.203.
Priest: Dd.541.
6. Slaughter: Dd.459.
7. Slaughter: B.46.
Assault: B.187/9.
Adultery: B.78/0.
Theft: A.458.
Forgery: B.19/0, 66.
Witchcraft: C.52/3.
8. Slaughter: E.140.
Treason: C.502/4, D.89.
Priest: C.530/1, D.254, Dd.377/8, 541.

V. BANISHMENT (Contd.)

1. JUSTICIARY COURT.

PART 1. 1488-1650 (Contd.)

2. Personal punishment could be added to the banishment -

- (a) Mutilation.
- (b) Scourging.
- (c) Branding.
- (d) Indignities.

3. One's departure was compelled by threat of death (or occasionally by caution to leave) and the period of banishment was supported by the threat of death.

4. The penalty for returning within the period was death by hanging or drowning and the record shows that the threat was enforced.

5. The term of banishment was -

- (a) for life.
- (b) during the queen's will.
- (c) during the king's pleasure.
- (d) not to return without the king's leave.
- (e) during the regent's pleasure.
- (f) during the victim's pleasure.
- (g) during the pleasure of the deceased's representatives.

1. Theft - A.157 - ears cut off.
Forgery - Aa.387/8, B.19/0 - right hand cut off.
2. Theft - A.157, Aa.488, B.7, C.93/4, D.99.
Forgery - E.150/1.
Perjury - D.358.
Sedition - D.221/2, E.222.
3. Forgery - E.150/1.
Perjury - D.358, Dd.538/9.
Fireraising - Aa.346.
4. Assault - Aa.399.
Forgery - E.259, 297/8.
Sedition - E.222.
Priest - C.530/1.
5. Assault - Aa.399 etc.
6. Slaughter - B.46: £1000.
Theft - C.555/7, 10,000 merks.
7. Theft - A.52/3, 157 etc.
8. D.89.
9. Aa.346 (fireraising).
10. This was by far the most common: A.157.
Aa.388, 395/6 etc.
11. Aa.432.
12. B.46, 19/0, E.259.
13. Aa.366, 458, B.19/0.
14. B.66.
15. C.40.
16. Dd.459.

V. BANISHMENT (Contd.)

1. JUSTICIARY COURT.

PART 1. 1488--1650 (Contd.)

Few details are given as to the actual place of banishment.

Some special cases show banishment to a place in Scotland.

Other cases make reference to the accused being taken to the wars.

John McBrek, a priest, petitioned the Secret Council from prison. He craved release from ward as he was old and in ill health and also poor and unable to entertain himself in prison. He undertook, if he was released, to go to West Flanders and there assist the Scottish prisoners in Dunkirk. He was banished to the Low Countries never to return without the king's leave, under pain of death.²

George Wright was convicted of stealing and the Justice referred the punishment to the Secret Council, the accused being imprisoned meanwhile. He received a general pardon provided he went into banishment and went to the wars. He agreed, however he missed his ship and was returned to prison. He petitioned the Secret Council again. He requested a second doom of banishment, to go where he pleased. He was banished from the kingdom, to leave in forty days.³

William Forsyth, a notary, was convicted of forging a charter and was banished. He was imprisoned "till the commoditie be had of some capitaine who sall tak him out of the cuntrie to the warres".⁴

1. Orkney: C.555/7.
West of Linlithgow: C.145/6.
East of Haddington: do--
North of the Spey: Aa.439.
2. E. 66/7.
3. E.224/5.
4. E.297.

V. BANISHMENT (Contd.)

I. JUSTICIARY COURT.

PART 2. 1661-1747.

As in the previous periods, the form and content of banishment varied - it could be imposed as the ordinary sentence e.g. for adultery, or it could operate as a mitigation for a capital sentence.

The banishment could be local or national but in the later period the emphasis changed from a general order to leave Scotland or Britain to a specific order to go to a particular place, i.e. transportation. It is seen that where banishment was local, the sentence of banishment tended to be the ordinary sentence, whereas if the banishment was from Britain the sentence was a mitigated death sentence. There are a number of exceptions to this observation, but a general pattern is noted.

Although a few cases refer to banishment as the only penalty, this was unusual and much more frequently some form of personal punishment was added.

As examples of banishment operating as an ordinary punishment the following may be noted -

Margaret Ramsay was scourged and banished from Edinburgh and forbidden to return without licence from the Privy Council for child murder. She had been acquitted of the charge, but the court thought that some punishment should be imposed and they gave her an adultery sentence.

For adultery, John Murdoch and Janet Douglas came into the king's will and were banished from Scotland for life. This case of a confession on the part of the accused and throwing themselves on the king's mercy, with the resultant sentence of banishment, is the same as in the cases in Part 1.²

1. F.28/9, also F.49, F.54, 55.
2. H.16, 1699, also F.292/5, 299, H.18.1704 - incest.

V. BANISHMENT (Contd.)

1. JUSTICIARY COURT.

PART 2. 1661-1747 (Contd.)

The following cases of local banishment show the sentence as a normal penalty.

For beating an old man so severely that he died, a woman was scourged and banished from the shire.¹

Convicted of rape, Matthew Foulden was scourged through Jedburgh, and banished from the town under pain of further scourging if he returned.²

David Murdoch confessed to theft and because it was his first fault and done for necessity, he was banished.³

John Rae was sentenced for theft to be branded on the cheek and banished from the Three Lothians by order of the Privy Council.⁴

The last two cases might be thought to be mitigated sentences rather than ordinary sentences, but the reports tend to suggest that the thefts were small and a death sentence was not normally imposed for "pykerie".

As examples of banishment operating as a mitigation, the following may be noted. In the record it is stated that the justice did not have power on his own to mitigate a statutory sentence, but the Privy Council could mitigate if petitioned to do so.

John Reidpeth was sentenced to death for adultery, but the Lord Advocate applied to the Privy Council for mitigation, which was granted, and he was sentenced to be scourged and banished.⁵

William Thomson and others were convicted of theft on their confessions and "their punishment (was) restricted to banishment and scourging." The Privy Council had been consulted and because the thefts were small (pyking), the Council ordered the justices to give sentences of either branding or scourging, or both, and banishment.⁶

1. H.55/6, 1713.

2. H.76/9, 1732.

3. F.10/1, but F.3 selling false money: banished Scotland.

4. F.24.

5. F.54, 55.

6. F.83, 87/8, also F.99.

V. BANISHMENT (Contd.)

I. JUSTICIARY COURT.

PART 2. 1661-1747 (Contd.)

For being an accessory to murder, James Edmonston was banished from the kingdom for life. He was warded until he found caution of 1000 merks, not to return.

In the latest period, transportation was imposed in similar circumstances to banishment.

For throwing a person downstairs and causing his death, the accused was transported for life.²

For poisoning his wife, William Bisset and Jean Currier were banished to the East or West Indies plantations. Bisset was also scourged and pilloried. Currier was to be kept in the correction house until a ship was available

A case is noted of a banished person returning unlawfully -

For forging coins, Thomas Anderson and John Weir were sentenced to be hanged, but the Privy Council commuted this to banishment. They were forbidden to return to Scotland under pain of death. They did return and the former sentence was carried out.⁴

The place from which a person was banished varied considerably:

Banished from Edinburgh,¹
Jedburgh.⁶
Sheriffdoms of Midlothian and Lanark.⁷
Three Lothians.⁸
the Shire.⁵
Scotland.⁹
the Kingdom.¹⁰

1. H.10, 1695, also slaughter H.16/7. 1699.
2. H.72, 1724, also H.79/0. 1733.
3. H.19.1705 -- also H.85/6.1739.
4. H.17,1701, also
H.57/9.1717 - no sentence.
5. F.28/9: adultery.
6. H.76/9: rape.
7. F.49 : adultery.
8. F.24 : theft.
9. H.55/6: serious assault.
10. F.292/5, 299 - adultery.
H.16 : -do-
H.18 : incest.
F. 3 : selling false money.
H.17 : forgery.
11. H.10, 16/7 : murder.
F.99 : theft.

V. BANISHMENT (Contd.)

1. JUSTICIARY COURT.

PART 2. 1661-1747 (Contd.)

In the later period, the person was ordered to go to a specific place.

- to the plantations.¹
- to the East or West Indies.²
- to America.³

From the foregoing, it can be seen that a general pattern of national banishment applied in mitigated death sentences, whereas local banishment was part of an ordinary sentence.

Personal punishment was usually added to banishment -

1. Scourging was the most frequent.⁴
2. Branding is noted.⁵

The Privy Council could leave the choice of scourging or branding to the justices and told them they could apply both if they wished.⁶

3. Pillory.⁷

The period of banishment was for life, but one case gives details of banishment for seven years.⁸

The decree of banishment was supported by the threat of death if he returned without leave⁹ and this was enforced if the person came back unlawfully.¹⁰

One case shows the decree of banishment being supported by threat of further scourging,¹¹ another case showed a cautionary obligation not to return.¹²

1. H.79/0 - murder.
H.89/91 - rape.
2. H.19, 85/6 - murder.
3. H.57/9 - forgery.
4. H.16/7, 19, 85/6 - murder.
5. H.55/6 - assault.
F.28/9, 54/5 - adultery.
H.76/9 - rape.
6. F.24 - theft.
7. F.83, 87/8, 99 - theft.
8. H.19 - murder.
9. H.89/91 - offered to go.
10. H.16/17 - 1699 etc.
11. H.17 - forgery.
12. H.76/9 - rape.
13. H.10 - murder - caution of 1000 merks not to return.

V. BANISHMENT (Contd.)

1. JUDICIARY COURT.

PART 2. 1661-1747 (Contd.)

Pending his departure, the person was detained in prison or in the correction house.

The accused could be ordered to find caution that he would actually leave.²

-
1. H.19 - murder.
 2. H.57/9 - forgery - 500 merks.

V. BANISHMENT (Contd.)

2. ARGYLL JUSTICIARY COURT. 1664-1742.

Banishment in the first half of the record meant eviction from Argyllshire.

For theft, they were scourged, branded and banished from Argyll, having to leave within three days under pain of death. They were also threatened with death if they were convicted of theft again.¹

For adultery, Fingal McCannill was scourged and her moveables were escheat. She was imprisoned till she found caution for her future good behaviour or else bound herself to leave Argyllshire.²

But in the second half of the record, the sphere of banishment widened and cases of banishment from Britain are noted.³ This was extended during the same period to transportation.⁴

The normal period of banishment was for life and it was supported by a death threat,⁵ but occasionally threats of transportation⁶ or threats of imprisonment (for a year) and scourging, are noted.⁷

One case is noted of voluntary banishment - to serve in the army abroad.⁸

1. I.106, also I.125/6.

2. I.124/5.

3. (a) Banished from the town -

Theft - J.6.1707.

" - J.8.1707 - scourged, branded and dismissed

" - J.4.1718 - scourged, nailed -do- / the town.

(b) Banished from the jurisdiction -

Theft - J.12.1710 - scourged, branded and banished.

" - J. 8.1715 - jougs & banished, also J.11.1740

" - J. 2.1740.

Fortune telling - J.10.1729 - scourged and banished.

(c) Banished from the Shire of Argyll -

Theft - J.10.1729 - scourged and banished.

" - J.12. 1735.

" - J. 1.1734.

(d) Banished furth of Scotland -

Theft - J.9. 1706.

(e) Banished from this realm -

Theft - J.11. 1705.

(f) Banished from Great Britain -

Murder - J.6.1708 - scourged, nailed, branded, banished

Adultery - J.8.1733.

Theft - J.4.1729, J.12.1731.

J.4.1730 - nailed and banished.

-do- - jougs and banished.

Killing a Horse - J.12.1710 - scourged & banished.

4. Theft - J.12.1718 - to the plantations in America.

" - J.12.1721 -do- : scourged and nailed.

" - J.10.1722

3.1726 -do-

: scourged.

5. e.g. Theft - J.4/1730.

6. Theft - J.12/1735.

7. Theft - J.2/1740, 11/1740.

8. Theft - J.4/1706.

V. BANISHMENT (Contd.)

2. ARGYLL JUSTICIARY COURT. 1664-1742 (Contd.)

Transportation did not supplant banishment -- in one case both sentences were imposed.¹

3. SHERIFF COURT. 1515-1747.

Banishment was imposed frequently but not many details are given in the entries --

For theft, he was scourged, branded and banished.²

Banishment was from the Shire,³ and the most frequent crime for which the sentence was given, was theft.

One case shows the accused agreeing to serve in the army abroad.⁴

The sentence of banishment was supported by threat of death⁵ or branding and scourging⁶ or repeating the whole of the original sentence.⁷

-
1. Adultery - J.18/1733 : woman transported to Virginia.
man banished furth of Britain.
 2. Kb.186/8, also 203 -- jouggs and banished, theft.
238 - fireraising: scourged, branded,
banished.
 3. Kb.188, 205, 245.
 4. Kb.98: theft.
 5. Kb.186.
 6. Kb.203,246.
 7. Kb.238.

V. BANISHMENT (Contd.)

4. SHETLAND COURT. 1602-04.

Banishment was given most frequently in theft cases and it appeared to operate as an alternative to a death sentence.

Escheat of goods, gear and lands was standard:-

Symond Nicolson was found guilty of the theft of a spade and a fleece of wool and he was sentenced to escheat of goods and land and to be banished from the country within one month, or at the first passage, and if he was found guilty of theft again, even to the extent of an ure, he would be hanged, to the example of others.¹

In one theft case, mutilation was added to banishment.²

A few cases showed escheat of goods and gear only, and not lands, but escheat of lands was normally included.³

Occasionally other crimes had similar penalties,⁴ and a slaughter case gives full details:-

Adam Sinclair was sentenced to banishment for assisting persons accused of slaughter to escape. He was banished the country and his goods, gear and lands were escheat. If he was found in the country after 15 days, he would be beheaded.⁵

This decree was enforced by death threat - if he was found in the area after 15 days he would be beheaded,⁶ but the standard decree did not make this threat. Death was threatened in the standard decree only if the person/^{was}convicted of the same crime again.⁷

The standard decree does not say what would happen if the person did not go into banishment, but it would seem likely that death would follow.

1. L.2. also 8, 21/2, 30, 31, 33 etc.

2. L.33.

3. L.5, 10/1, 14, 15/6 etc.

4. Deforcement: L.111.
Perjury : L. 83.

5. L.42/3.

6. L.42/3.

7. Hanging: L.2, 8, 21/2, 30 etc.
Drowning:(for women) L.3, 7/8, 12, 21/2 etc.

V. BANISHMENT (Contd.)

4. SHETLAND COURT. 1602-04 (Contd.)

A court statute prohibiting false and groundless actions imposed for the first offence - loss of the right hand and sword, and for the second offence - banishment and escheat of moveables,¹ but no case is noted.

The banishment was from "the country" but it would seem from the entries that the country was Shetland or Orkney and Shetland - it did not refer to Scotland as a whole.²

A thief had already been banished from Orkney and had arrived in Shetland. He was convicted of theft in Shetland and was banished from not only the "Country of Shetland" but also from "the Countries of Orkney and Shetland".³

The place of banishment could be specified - Norway.⁴

Two cases make reference to a banished person returning - in one case the sentence of banishment and escheat was renewed⁵ and in the other no mention is made of a penalty on the principal person, but the person who sheltered him was fined £40.⁶

The record contains a decree of the Earl of Orkney ordering

"all beggars, sornaris, vacaboundis, harlotis and their bairnis" to remove and transport themselves out of the country and all the bounds of his jurisdiction under all such penalties as may be necessary. The beggars and others had broken from their companies and clans out of the Highlands "and utheris barbarous partis" and had hoped to have liberty to live wickedly according to the appetite of their filthy flesh without regard to the law of God the common good of the country and the authority of the Church, and the noble and potent Earl was not prepared to suffer their abominations in Orkney or Yetland".⁷

1. L.47/8.
2. L.2 etc. - L.5, 10: banished the isle.
3. L.147.
4. L.30.
5. L.83.
6. L.31/2.
7. L.123/4.

V. BANISHMENT (Contd.)

5. REGALTY COURT. 1547-1706.

Banishment is infrequent in this record, but it is mentioned as a means of disposing of persistent offenders. The banishment was from the regality and theft was the standard crime.

In the earliest period, a court statute ordered "all women defameit or unonest" to pass out of the town of Melrose within 8 days and anyone in the area who received them would be fined £5.¹

In one case, it is seen that banishment could be revoked.

Barbara Ker, a notour thief, was under order of banishment when the court learnt that she wished to return. The court was prepared to rescind order provided she obtained caution to behave in an orderly fashion, but in fact she did not appear at the court when her applicator for caution was to be considered, and the court renewed the banishment. The banishment in this case was enforced by prohibiting anyone to receive her under penalty of 20 merks.²

In some theft cases, the accused had to find caution to be of good behaviour in the future under pain of banishment.³

6. BARON COURT. 1523-1747.

Banishment from the Barony is noted in certain theft cases.

- ordained to find caution for his good behaviour till next Whitsunday when he was ordered to remove himself and his family from the Barony. If he did not leave, his moveables would be escheat.⁴

1. Na.82.
2. Nb.17/8.
3. Na.200. Nb.17/8.
4. Q.191/2, also P.86/7 - remove in 3 days.
5. P.87.

V. BANISHMENT (Contd.)

7. BURGH COURT. 1398-1714.

In the Aberdeen record, banishment was imposed in a few cases and on each occasion it was banishment from Aberdeen only. The length of banishment varied, but it is noted that the period was definite in time, unlike the later records where the period was indefinite.

Mariota Fether was banished from Aberdeen for resetting thieves for two years under pain of being branded with the seal of Aberdeen on her face.¹

Elena Scotcok was banished for a hundred years and a day and if she returned to the town would be branded on her cheek. The crime in this case is not known.²

Banishment for a year and a day was imposed by a burgh law on those convicted for the third time of insulting the prepositus, bailies or king's officers.³

The latin term used in the first two cases is relegatio which under Roman law was the mildest form of banishment and which did not affect the person's civil rights. The third case refers to exsul - which was a general term of banishment and which had no legal meaning in Roman law.

Although the old laws gave an indefinite period, the other early records show a definite period which was standard at a year, or a year and a day:-

In an act controlling the price of ale, for the third contravention, the offender was expelled from the town for a year.⁴

No one shall go to Edinburgh, nor shall anyone bring goods from Edinburgh, under pain of banishment for a year (there was an outbreak of plague).⁵

-
1. V.92.
 2. V.142.
 3. V.217.
 4. Banishment for theft was imposed if the article stolen had a value of four pennies, for example a pair of shoes he ought to be put upon the cuckstool and after that led to the head of the town where he will foreswear the town - F.C. XXXIX. p.180.
 5. Z.12. 1521, but 93/4. 1599 - 3 years' banishment was threatened.
 6. X.158. 1468, also non-payment of fine - stocks for 8 days and banished for a year and a day. X.164/5. 1470. Similarly X.174. 1475, X.168, 1472.

V. BANISHMENT (Contd.)

7. BURGH COURT. 1398-1714 (Contd.)

In the later entries, however, the period of banishment was for life.

Richard Mereleis and others left the town at night contrary to a town law and abused the watch. Their freedoms were revoked and they were banished under pain of death.¹

Banishment was imposed in many different crimes, but theft is the most frequent. It is seen that the addition of personal punishment was customary in theft cases:-

William Brown and James Duncanson were banished for pykery, but before they left, their ears were cut off and nailed to the Tron.²

John Fischair was banished under pain of death, but one of his ears was cut off and he was branded on his cheek and scourged before he left.³

The inquest passed an act calling for strict enforcement of the law against pykers. They were to give caution that they would not steal again under pain of scourging and banishment. If they could not give caution they were to be branded on their cheek with an iron and then banished.⁴

For reset, two women were ordered to stand at the market cross and thereafter were banished from the town.⁵

The banishment was enforced by (1) threat of death.

Peter Dicksoun and Wille Talyour were banished from the town, never to return, under pain of hanging without doom or law if they returned.⁶

1. Z.41. 1545, also
X.347. 1572, Z.155. 1622, Z.80, 1562.
2. Z.40. 1545, also
Z.64. 1555 - under pain of hanging.
3. Z.45. 1546, also branded on the cheek and banished
Z.48. 1547, also
Z.162/3. 1629 - scourged, branded and banished for theft.
4. X.224/5. 1555.
5. Y.26. 1655,
Y.54/5. 1662 - joughs, paper - banished, theft of clothes.
Also
Y.60/1. 1664 - joughs and banished - no paper.
6. Z.34. 1528 - no crime, also
Theft - Z.162/3. 1629.
Z. 64 . 1555.
Z. 45. 1546.

V. BANISHMENT (Contd.)

7. BURGH COURT. 1398-1714 (Contd.)

Hew Black was convicted of threatening, cursing and insulting and was sentenced to the stocks for an hour, with a paper on his head. Thereafter he was to be banished under pain of death as an adulterer.¹

(2) threat of scourging -

James Finlasoun was banished from the town because he had the plague. If he returned, he would be scourged for the first offence and hanged for the second.²

(3) threat of branding.

William Allan was convicted of gaming and was banished from the town under pain of branding on his cheek.³

In the middle and later periods, banishment was used to rid the town of undesirables - frequently banishment was imposed on unfreemen who had contravened the town and laws

John Kirkwood was to be put out of the town, under pain of banishment and branding on his cheek.⁴

If an unfreeman committed any wrong, or was unable to meet a fine, banishment was imposed.

If any freeman disobeyed a bailie or officer, he would lose his freedom and if any unfreeman disobeyed he would be banished.⁵

The inquest found Makkyn in the wrong in troubling the town and because he was a vagabond he was banished.⁶

1. Y.63/4. 1665.
Theft: exposure and banished the town under threat of death,
Y.90. 1674, also Y.110.1683 and banished under pain of drowning, Z.80. 1563, also Z.162/3.1629.
2. Z.119. 1608, also
banished under pain of scourging - fraud - Z.138.1615.
striking town officer - banished under pain of scourging and hanging - Z.110.1604.
3. Y.103. 1682, also
Y.148.1694 - banished by beat of drums - branded if returned, and X.222.1555 and
Z.129.1612 - banished under pain of scourging and branding on the cheek.
Y.148 - banished for theft with beat of drums - pain of branding.
4. X.332. 1571,
X.391. 1650 - no plundering under pain of banishment.
5. X.328. 1571.
6. X.347. 1572.

V. BANISHMENT (Contd.)

7. BURGH COURT. 1398-1714 (Contd.)

James Ramsay was scourged and branded for pykerie and he and others were banished under pain of hanging and drowning. He and his family were held to be vagabonds.¹

George Haig and his family were ordered out of the town for not working and being a burden to the town.²

In some cases the threat of banishment was imposed.

James Henderson was fined £10 for disobeying the kirk and the bailies and had to make public confession of his fault. If he refused, he would be banished for three years and if he was found in the town during this period, he would be fined £10.³

For blood drawing, John Murray had the choice of being banished, or remaining in the tolbooth in ward for a year and a day.⁴

James Paterson and his family had to remove from the town for pykerie, under pain of banishment.⁵

The sentence of banishment could be cancelled later by the court but a burgh act stated that no banished person would be restored without the consent of the council or of the kirk session if it pertained to their discipline.⁶

1. Z. 162/3. 1629.

2. Y. 109, also Y. 125.

3. Z. 93/4. 1599, also

Z.39. 1545 - insulting, if again, banished.

Z. 120. 1608 - insulting bailie, had to ask forgiveness - if again, banishment.

Z. 123. 1609 -do- banishment, loss of freedom.

4. Z. 40. 1545, also X. 253/4. 1559.

5. Y. 83. 1671.

6. Z. 113. 1605.

CONCLUSIONS.

V. BANISHMENT.

1. Banishment is noted in all courts throughout the whole period, but the form changed considerably during that time.
2. (a) The area of banishment corresponded to the sphere of the particular court's jurisdiction - i.e. a baron court could banish only from the barony.
(b) The Argyll court shows a development in area - in the first half the banishment was only from Argyll, but in the second half the banishment was from Scotland and even transportation was ordered on occasions.
3. Only the justiciary courts (and privy council) could banish from Scotland and later from Britain and such a sentence had to have the king's consent. Towards the end of the middle period and in the later period, the king's consent was given by the privy council.
4. Banishment could operate as a mitigation of a death sentence or as a standard or full sentence. As a general observation it can be said that if the banishment was from Scotland or Britain (i.e. national) it was a mitigation and if it was local, i.e. only from some part of Scotland, then it was a full sentence - but there are many exceptions to this.
5. In the middle and later justiciary records, it is seen that there was a considerable element of consent on the accused's part to the sentence - he offered or consented to national banishment, or he placed himself in the king's will, which normally resulted in national banishment. The earlier period does not show the element of consent - it was a straight sentence.
6. In the final period, transportation supplanted banishment and again there was an element of consent in such sentences.
7. //

CONCLUSIONS.

V. BANISHMENT (Contd.)

7. Banishment was given in all crimes, and in almost every case some form of personal punishment was also given, usually scourging (also branding and indignities). Theft, slaughter, adultery and forgery were among the most common crimes.

8. The decree was supported by a death sentence, and while the place of banishment was not specified, until the transportation sentences were given, sometimes the person was ordered or offered to go to the wars - usually this meant the Low Countries.

9. The lower courts show that banishment was given only in notour theft entries and the records give the impression that this sentence was imposed as an alternative to a death sentence - it was easier to banish the thief than to hang him.

10. The early burgh courts show banishment for a definite period (a year and a day) - unlike the indefinite period of the other records, but the middle and later records show the normal indefinite period. Theft was the most frequent crime, and again personal punishment was normally added.

It is seen that if an unfreeman contravened a particular burgh law, he was banished, where a burgess would have been fined or would have lost his burgess freedom.

VI. ESCHEAT.

1. JUSTICIARY COURT.

PART 1. 1488-1650.

(1) Death sentence:

Escheat of the accused's moveable goods was given as a standard addition to death sentences in the middle and later periods, almost without exception. The terms of the decree were "his moveable goods were to be ingathered for the king's use". However, during the earliest period, most death sentences do not mention escheat, although this could be attributed more to reporting than the form of the actual punishment.

In one early theft case, the future standard penalty was given:-

the accused was hanged and his moveables escheat.²

However, escheat is noted in the imprisonment entries of the early period.⁷

(2) Outlawry.

Throughout the records, escheat of moveables was standard in declarations of outlawry, i.e. where the accused did not appear in court and was declared rebel and outlaw, although again in certain isolated cases of outlawry, escheat is not mentioned, but as in the case of the early death sentences, this may be due to reporting discrepancies and escheat may have followed in fact.⁵

(3) //

1. Hanging: Piracy : Aa.358, 380 etc.
Beheading, Slaughter: B. 8/9, 95, 158 etc.
Strangling: Witchcraft: B.186, 206 etc.
Drowning: Theft : C.94 etc.
Broken on wheel: parricide. B.241 etc.
2. A.173/4 - also murder: A.174.
3. In deforcement sentences, imprisonment was given as a penalty and in such cases, escheat of moveables was added - A.71.
Also A.73 - perjury.
A.165, 203 - wilful error of assize.
A.222 - forgery.
4. Aa.345 etc - see outlawry.
5. B.33 - slaughter.

VI. ESCHEAT. (Contd.)

1. JUDICIAL COURT.

PART 1. 1488-1650 (Contd.)

(3) As a punishment in itself.

Escheat is also noted in certain exceptional instances, e.g. occasionally added to banishment.¹

Also after scourging for perjury, the accused's goods were escheat² and in an assault case where the injured lost two fingers, his assailants were imprisoned until they gave assythment and their moveables escheat.³

-
1. Theft : C. 412.
Forgery : Aa. 375, 402/5.
Perjury : E. 262.

2. C. 455.

3. C. 532 - this case is similar in sentence to the early cases of deforcement and wilful error.

VI. ESCHEAT. (Contd.)

1. JUDICIARY COURT.

PART 2. 1661-1747.

The records show the same operation of escheat as in the previous periods.

(1) Death sentence.

It is noted, however, that in some death sentences, no escheat is mentioned, but it is not possible to say if this was deliberate, or whether it was an omission in reporting.

The standard sentence was that "his whole moveable goods were to be escheat to his Majesty's use".²

(2) Outlawry.

The same decree passed against a person declared outlaw for non-appearance.³

(3) As a punishment in itself:

(a) For deforcement, half the accused's goods went to the king and the other half to the creditor, whose decree was being enforced when the deforcement took place.

Imprisonment was usually added, but no period is stated.

William Watson was convicted of deforcement and was sentenced to escheat of moveables - one half to go to the king and the other half to the person who took out the letters under which the messenger was acting. He was also ordered to remain in prison till further order.⁴

(b) For usury -- the whole moveable goods were escheat to the Earl of Glencairn who held the escheat rights in usury from the king, during this period.

James Elder was found guilty of usury and he was sentenced to escheat of moveables. He was also ordered to find caution of £1000 to enter before the court or the Privy Council whenever required to undergo such further punishment as they shall think fit.⁵

No details are given regarding the further punishment.

(c) Assault.

For striking a minister, William Beaver was sentenced to be imprisoned for ten days and his moveables were escheat

1. See Hanging & Scheduling entries.
2. P. 71/2 etc. G. 98 etc.
3. H. 54. 1712 - murder. 7/8. 1687 - treason etc. See Outlawry.
4. P. 125, also P. 224. P. 307 - 2 days in prison.
G. 75/85, 199/205.
5. P. 89/0, also P. 218 - caution of 5000 merks.
P. 290 - " " 1000 "
6. H. 62/3. 1719.

VI. ESCHEAT. (Contd.)

2. ARGYLL JUSTICIARY COURT. 1664-1742.

(1) Death sentence:-

As in the other records, escheat of moveables was given in almost every capital sentence, although in two references to a sentence of hanging for theft, escheat is not mentioned, but this could be due to reporting and did not represent necessarily any change in the actual sentence.

(a) After hanging -

- and to forefault and tyne his goods and gear conform to the Acts of Parliament.²

(b) After strangling and burning for witchcraft -

- and her goods and gear to be escheat.⁷

(2) Outlawry.

Escheat was granted after a decree of outlawry.⁴

(3) As a punishment.

(a) After scourging:

John McKenich was scourged for theft and his goods escheat - with the exception of £40 of the goods which was to be paid to the person he robbed.⁴

(b) With imprisonment:

John Campbell was convicted of deforcement and was sentenced to be imprisoned during the justice's pleasure: his goods were escheat.⁴

(c) Also in a case of suicide - the woman who killed herself had her moveables escheat - but one third was given to the king and two thirds to the husband and the children.⁷

Cases occur of persons intromitting illegally with escheated property.

Golin Campbell and John Campbell were fined £100 and others £50 for taking cattle out of an escheated estate.

1. I.10/1, 13/4.
2. I. 3, 4, 6, 8 etc.
3. I.20/1.
4. I.24, 25, 26 etc.
5. I.51/2, 77, 102, 129 etc.
6. I.126/8, 154/5.
7. I.100/1, J.4. 1730.
8. I.138/9, also 71/2 - fined £40 and ordered to restore.

VI. ESCHEAT (Contd.)

3. SHERIFF COURT. 1515-1747.

In this record escheat of moveables is noted only in cases of outlawry for non-appearance.

For robbing an orchard, the accused were declared outlaws and had their moveables escheat, because they did not appear.

It was not given in the death sentences, but whether this was a reporting omission or whether it was not imposed, cannot be said.

1. Kb.41, also
Kc.151.

VI. ESCHEAT (Contd.)

4(a) SHETLAND COURT. 1602-04.

(1) Death sentence.

Such death sentences as were imposed, included escheat of "goods, gear and lands".¹

(2) Outlawry.

The record shows decrees of outlawry periodically and escheat of moveables and land was standard in such decrees.²

(3) As punishment.

(a) with banishment - theft

Many cases, particularly show a penalty of banishment and escheat of goods, gear and lands.³

In one theft case, escheat of goods and gear was in similar terms to the banishment entries - if he committed another theft he would be hanged - but no banishment is given.⁴

(b) with scourging.⁵

(c) while escheat of goods and land was standard, some cases show goods and gear only.⁶

(d) Suicide was punished by escheat of moveables.⁷

(e) A court statute prohibiting false and groundless actions imposed a penalty for the first offence, loss of the right hand and sword, and for the second offence escheat of moveables and banishment.⁸

4(b) ORKNEY & SHETLAND COURT. 1612-13.

One court statute prohibited pedlars and chapmen from dealing in stolen hides and if they were found guilty their packs would be confiscated.⁹

1. L.11, 18/9.

2. e.g. L.38.

3. L.2, 8, 21/2, 30 etc. also Slaughter : L.42/3.
Deforcement: L.111.
Perjury : L.83.

4. L.15/6.

5. L.14 - goods, gear and lands.

6. L.10/1, 15/6 etc.

7. L.18, 23.

8. L.47/8.

9. M.23.

VI. ESCHEAT (Contd.)

5. REGALTY COURT. 1547-1706.

(1) Outlawry:

Escheat was imposed in decrees of outlawry - where the person fled to avoid judgment or where he escaped from prison.¹

(2) As punishment:

Escheat of moveables is noted as a penalty in deforcement actions - where the statutory provisions of Act 150 Parl.12 James VI were enforced. Half the moveables went to the procurator fiscal and half to the officer deforced or the person who held the decree.²

6. BARON COURT. 1523-1747.

(1) Outlawry:

Escheat of moveables was imposed in a sentence of outlawry.³

(2) As punishment:

(a) In a Carnwath deforcement case, the accused suffered escheat of moveables, cancellation of their leases and imprisonment for a year at the Baron's will.⁴

(b) A poaching case brought under a National Act shows a fine of 20 merks and escheat of moveables.⁵

(c) Banishment could be enforced by a threat of escheat of moveables.⁶

1. Murder : Nb. 346.

Assault : Nb.406/7.

Theft : Nb.420, 421/2.

2. Nb. 111/2, 339/0.

3. P.107/8.

4. O.138/9 - also 68/9 etc. - breaking arrestments.

Rd.222 - £40, stocks and escheat of moveables.

5. P.100/1.

6. P.87.

VI. ESCHEAT (Contd.)

7. BURGH COURT. 1398-1714.

No escheat is mentioned in the justiciary death sentences, nor is any decree of outlawry given in the Burgh Courts. Escheat only occurs in burgh statutes where it relates to the offending article and not to the person's whole goods. e.g. A burgh act stated that if swine were permitted to roam in the town they would be escheat.

However, a few isolated cases (particularly in the later records) show escheat of moveables as a penalty combined with some form of personal punishment.

James Hall failed to put out clothes and other items from his house, having a servant woman who was suspected of having the plague and the assize ordered that he should be punished in his body and his goods and freedom be escheat in the provost's will.²

1. Z.2. 1519/20 etc.
2. Z.56.1549, also
Y.5.1652 - Dean of guild had power to escheat the goods of unfreeman trading in the burgh.
Y.125.1688 - militia deserters banished and escheat.

CONCLUSIONS.

VI. ESCHEAT.

1. Escheat of moveables was an incident of a death sentence (except where it was a treason forfeiture). Some death sentences make no reference to escheat, but it is impossible to say if the omission was a reporter's oversight - escheat being assumed, or whether it was not imposed.
2. Escheat of moveables was also an incident of a decree of outlawry.
3. Escheat could be given as a punishment in itself --
 - (a) in some scourging sentences (usually for theft) escheat was added.
 - (b) added to banishment - again in thefts - and some imprisonments.
 - (c) in deforcements following the Act of James VI the accused's goods were escheat, half to the king and half to the creditor.
 - (d) in usury the accused suffered escheat.
 - (e) in cases of suicide the dead person's goods were escheat, although it is seen that sometimes the goods were given to the family as an act of grace.

VII. FORFEITURE.

1. JUSTICIARY COURT.

PART 1. 1488-1650.

In certain cases, not only were the moveables of the accused taken, but also his land and his life.

As in the case of escheat of moveables, the decree of forfeiture was imposed as an additional penalty to the basic punishment.

But forfeiture was given for more serious cases than those which had escheat of moveables and was an incident of treason, where it was part of the standard penalty. In legal theory, it necessarily included death.

The normal sentence stated that the accused had forfeited his life, lands, offices, goods, both moveable and immoveable, and all his other possessions, to the king.

Variations occur-"sentenced to be drawn to the gallows and hanged. His body was to be quartered and his lands and possessions forfeited to the queen".²

Also - "he should be taken to the market cross of Edinburgh and there hanged until he was dead, and then quartered, drawn and demeaned as a traitor".³ The remains of his body were to be put ultimately in a common unmarked grave. All his lands, heritages, tacks, steadings and all moveable items, honours, arms and memory were to be returned to the king.⁴

While the sentence was standard for treason,⁵ it could also be imposed for other crimes, if their circumstances were //

1. B.73, 132 etc.
2. Aa.348, 480, 481/2, 491/2.
3. B.136, 142.
4. B.73, 132 etc.
C. 167/8 etc.
5. A.11, 48, 50, 60, 145, 172/3, 173, 190/1 (burnt alive).
Aa.348, 480, 481/2, 491/2.
B. 3, 73, 96, 115, 116, 128, 132, 136, 142, 182,
274, 297, 307/8, 316.
C. 21/2, 155, 168, 260, 407, 350/1.
D. 10, 40, 81, 224, 283, 318.
Dd. 365.

VII. FORFEITURE (Contd.)

1. JUSTICIARY COURT.

PART 1. 1488-1650 (Contd.)

were particularly severe or atrocious and which were, by their importance, equated with treason.¹

The form of taking life was usually hanging,² but variations occur.

The sentence could be made more severe, i.e. by burning alive,² or mitigated to beheading.⁴ Forfeiture after strangling is also noted.⁵

In exceptional cases, a dead person could receive forfeiture after death.⁶

On occasions, the forfeiture decree had to be repeated as the central government could not enforce it.⁷

It is apparent that while certain crimes were legally equated with treason in their punishment, a difference was recognised, in fact, between true treason and crimes equated with treason, and that while a death sentence followed in both instances, a true treason conviction carried forfeiture almost inevitably but this was not so with an equated treason conviction where the chances of escheat of moveables might apply equally.

- | | |
|----------------------------|---|
| 1. Murder | : D.156. |
| Murder by poison | : Aa.419/0. |
| Murder under trust | : Dd.477, E. 71/4, D.230. |
| Murder and theft | : C. 433, 562.
D. 95, 115, 233/4. |
| Murder and piracy | : D. 246/7. |
| Treasonable assault | : E. 74. |
| Adultery & Theft | : C. 424/5. |
| Theft | : C.346/7. D. 98. |
| Forgery | : Aa.440/1, B.134, C.404,448, 100,
356, 356/7, 366, 383. |
| Witchcraft | : B. 257 - burnt alive. |
| Sedition | : C. 350/1. |
| 2. Treason | : A.11, 48, 50, 100/1.
B.116, 136, 142 etc. |
| Treason & Theft | : A. 51. |
| Border raids, thefts | : A.60, 172/3, 173. |
| Forgery | : A.137. |
| 3. A.190/1 - | treason. |
| B.257. - | witchcraft. |
| 4. A.145 - | border raid. |
| B.116, C.369,407,430,580 - | treason. |
| C.484, Dd.477 - | murder. |
| 5. Forgery | : C.100,356,356/7, 366, 383. |
| 6. B.130, also C.159/168, | C.276/291, C.405/7. |
| 7. B.274, 293/7 etc. | Bothwell's case. C.88. |

VII. FORFEITURE (Contd.)

1. JUSTICIARY COURT.

PART 2. 1661-1747.

The decree of forfeiture was reserved for treason and crimes equated with treason, but in this period it is seen that only actual treason cases show forfeiture.

For treason, Captain Andrew Arnot and others were sentenced to be hanged and all their lands, heritages, goods and gear to be forfeited and escheat to his Majesty's use.'

Also for treason, Colonel James Wallace and others were first declared fugitive and then the prosecution proceeded to refer the case to Assize. The accused were convicted of treason in absence and were sentenced to be executed when caught. They were also sentenced to have their lands, heritages, tenements etc. goods and gear to be forfeited and escheat, to his Majesty's use.'

This case was new law - the normal sentence for non-appearance was outlawry - and this case imposed forfeiture. The decision was ratified by II Act Parl. 2. Charles II which stated that the previous situation was unacceptable - because a traitor who did not appear only suffered moveable escheat and outlawry - whereas if he did appear he would have suffered forfeiture of life, lands and goods, and it was wrong that a traitor should benefit by his non-appearance.

1. F. 184, 187, 189.

G. 64/6.

Not noted in treason cases: F. 188, 188/9.

2. F.240, 242, also

H.6.1681, H.6. 1685.

CONCLUSIONS.

VII. FORFEITURE.

1. Forfeiture of life, goods and lands was an incident of a full treason sentence and could be imposed in both treason sentences and in sentences for crimes equated with treason, although it was much less frequent in the latter.
2. In the later period, forfeiture is seen only in treason sentences, and even there some show only escheat of moveables.

VIII. DECLARATION OF OUTLAWRY.

1. JUSTICIARY COURT.

PART 1. 1488-1650.

The standard penalty for non-appearance was declaration of outlawry throughout the whole period of the record - the accused was declared rebel and his goods escheat.

In the later records, it was only moveable escheat, but in the earliest record the text is indefinite -

"the accused was declared rebel, put to the horn and all his goods to be escheated to the king".¹

The term "goods" is used to include both moveable and immoveable goods, but it is thought that unless land was specifically mentioned, only moveables were escheat.

Some cases make definite reference to lands - "goods, moveable and immoveable".²

Details of outlawry are given in the case of the treasonable burning of the Tower of Frendraucht which resulted in the death of Viscount Melgun and others. George Meldrum was declared and denounced rebel and put to the horn and "all his moveable goods to be escheat and in brought to our sovereign's use as a fugitive from our laws" and instructions were given to have the letters of horning proclaimed at the market cross of Edinburgh. The letters were read after three oyez being called and after reading, three blows on the horn were given.³

The process of horning could be relaxed by giving the accused the wand of peace - presumably if a remission was agreed.⁴ The declarations were not necessarily final, in fact if the accused appeared at a later date he could be acquitted or discharged.⁵

The moveable goods of the person concerned were escheat to the king (or his feudal superior - provided it was a feudal court and that the crime was not one of the four pleas //

1. A.20 etc.
2. A.171/2 etc.
3. E.151/3.
4. A.75.
5. B.3/4, 4 etc.

VIII. DECLARATION OF OUTLAWRY (Contd.)

1. JUSTICIARY COURSE.

PART 1. 1488-1650 (Contd.)

pleas of the crown) and his life could be taken by any one. His heritable estate reverted to his superior until the fugitive died or appeared in judgment. His heir could claim the estate if he died without coming to judgment or before the outlawry was recalled.²

John Mure did not appear to answer charges of murder and assault and was denounced a rebel to our sovereign lord and put to his Highness' horn. His moveable goods were escheat and he was a fugitive to his Highness' laws.²

This was invariably regardless of the actual crime and even if a person did not appear to answer treason charges he was declared rebel and his moveable goods escheat.⁴ This was in fact a lighter sentence than if he had appeared and been found guilty, when both his lands and moveables would have been escheat and the position was rectified by Charles II who confirmed a treason sentence of forfeiture in such a situation.

Admittedly to be declared rebel was serious enough as an outlaw could be killed by anyone without fear of legal process, but his heirs could succeed to his lands, which the heir of traitor could not if a decree of forfeiture had passed.

-
1. Balf. II. 551.
 2. Balf. II. 550/1.
 3. C.37, 42, 72 etc, also
Aa.345, 347 etc.
B.1, 2, 5 etc.
C.37 etc.
D.257 etc.
Dd.443 etc.
E.35 etc.
 4. B.96/7, C.64.

VIII. DECLARATION OF OUTLAWRY (Contd.)

1. JUSTICIARY COURT.

PART 2. 1661-1747.

This remained the standard sentence if the accused did not appear to answer the accusations.

To be denounced our Sovereign Lord's Rebell and ordained him to be put to the Horn, and all his moveable goods and gear to be escheat and inbrought to His Majestie's use as fugitive frae his Majestie's laws.¹

Outlawry was also given if the person escaped from prison.

For escaping from prison, Sinclair of Assairy and others were declared fugitive and their cautioners unlaed.²

The decree could be withdrawn for various reasons --

James Thomson was declared fugitive for absence but he had the sentence withdrawn when he produced a certificate testifying that he had been unable to travel.³

Declarations against Highlandmen were frequent, but in such cases, judging by the repeated declarations, there was a problem of making the court's weight felt.

If the person found caution to appear, the declaration was withdrawn.

Wm. Bettie and Alex. Bellie were declared fugitive and later obtained suspension and relaxation from the Lords of Session having obtained caution. They appeared and because the pursuer did not appear, the action was deserted.⁴

James and Alexander McIntosh and others had been declared fugitive but they now produced a cautioner to appear in court, and they obtained a Bill of Relaxation. They did not appear when they were called next, and they were declared fugitive again. They petitioned and again undertook caution to appear.⁵

It could be conditional.

Edward Byllings was absent when his case was continued. He was declared fugitive, but there was a provision that if he appeared at the next hearing, the sentence would be withdrawn.⁶

1. G.112, 285.
2. F.22, 245/6, G.303.
3. F.3/4, 4/5, but see F.52 - outlawry when abroad and not cited.
4. G.18.
5. G.206/7, 263, 264/5, also G.285, 294/5.
6. F.72.

VIII. DECLARATION OF OUTLAWRY (Contd.)

1. JUSTICIARY COURT.

PART 2. 1661-1747 (Contd.)

Detention in prison was a valid reason for not appearing -

Robert Ogilvie was one of a number of persons who did not appear in a slaughter case, but he was not declared fugitive as the others were - as he was in prison in the Tolbooth of Aberdeen.¹

The procedure was flexible and the fugitive's goods could be offered as a bribe if the circumstances warranted.

Alexander Smith accused Major George Keith for theft and robbery (Keith had taken Smith's goods) but Keith produced a warrant from the Privy Council stopping the process - Keith was a sheriff and Smith had been declared fugitive for murder. Keith offered to the fugitive's nearest friends if they would find caution to produce him. They refused and Keith was entitled to take the goods for the king's use.²

A person could be declared fugitive a number of times.³

A declaration of outlawry did not prevent the accused from appearing later - apparently with impunity.⁴

Duncan Gordon was declared fugitive for theft and later appeared. He offered himself for trial and because no one appeared to prosecute him, the charge was deserted.⁵

-
1. F.261, also F.94/5.
 2. F.156.
 3. F.95.
 4. F.276, 292/5.
 5. F.314.

VIII. DECLARATION OF OUTLAWRY (Contd.)

2. ARGYLL JUSTICIARY COURT. 1664-1742.

The same situation applied in this court as in the main justiciary court - the decree was passed if the accused failed to appear. It is seen that in some cases of non-appearance the accused was fined, and it is difficult to draw an exact dividing line between offences for which outlawry would be given and those for which fining was the appropriate penalty for non-appearance. Certainly crimes which carried capital sentences merited outlawry and minor offences like poaching, merited fining, but in this court it is likely that crimes which merited personal punishment would also imply outlawry.

He was declared fugitive and outlaw from His Majesty's laws and put to His Highness' horn. His whole moveable goods and gear were escheat and inbrought to His Majesty's use for his contemption and disobedience, and letters of denunciation were ordained to pass.'

In some cases, the procedure was given in great detail.

Messengers were instructed to summon various Macleans to appear in Inveraray to underlie the law for refusing to accept the king's law and for fortifying the house of Duart against a pointing as they had not paid taxes and duties.

The accused were to be summoned personally if that was possible, but failing personal summons the messengers had to give open proclamation at the mercat cross of Inveraray being the head burgh, ordering the accused to appear within six days or to give caution. If the accused did not appear, the messengers had power to denounce the accused rebels and outlaws. If the accused appeared, the messengers had to summon 45 persons from which the assize would be chosen.

The messengers went off and charged the accused to appear leaving a copy of the summons on the gates of the House of Duart, because they could not give it to them personally, after knocking six times. They also made public proclamation at Inveraray after "crying three several oyez". They left a copy of the summons at the mercat cross.

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1. I.39/0, 56/61 etc. - although in some cases of non-appearance a fine was imposed and not outlawry.
 2. I.24, 25, 26, 26/7 etc.

VIII. DECLARATION OF OUTLAWRY (Contd.)

2. ARGYLL JUSTICIARY COURT (Contd.)

The accused did not appear within the specified time and the Court declared them outlaws and fugitives from His Majesty's laws and to be put to His Highness' horn, and their whole moveable goods and gear to be escheat and inbrought to His Majesty's use for their contemption and disobedience and ordained letters of denunciation to pass.

The messengers were again instructed to go to the mercat cross of Inveraray and openly denounce the accused rebels and outlaws, put them to the horn and bring in their goods, which denunciation they made, after crying the three "oyez" and left a copy of the letters of denunciation on the cross. The messengers concluded the process by blowing three blasts on a horn.

While a decree of outlawry was automatic after non-appearance, the decree could be recalled if the accused appeared later or found caution to appear.²

The certificate (of denunciation) was recalled when the accused appeared late and the court freed the cautioner of the penalty of 500 merks. 7

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1. I.36/41, 56/63, 152/3.
 2. I.31 - The Laird of Appin offered himself as cautioner for a fugitive and the denunciation was recalled.
 3. I.29.

VIII. DECLARATION OF OUTLAWRY. (Contd.)

3. SHERIFF COURT. 1515-1747.

As in the justiciary records, declaration of outlawry was normal if the accused did not appear within the required time. It was granted for non-appearance in serious crimes, e.g. slaughter, serious assaults and thefts - in minor crime non-appearance was punished by fining - although again it is difficult to draw an exact line between the two. In this court, fining was by far the more common penalty.

The terms of the decree were standard - A. was denounced the king's rebel, put to the horn and declared fugitive.¹

If caution ordered by the king was not found within the specified time, a similar declaration of rebellion was passed - "if they be fugitive or refuse to find the said surety then they will be declared rebels and put to the horn and all their moveable goods will be escheat to our use".²

The form of the decree remained unchanged throughout the period.

For failing to appear to answer charges of theft and assault, the accused were declared outlaw and had their moveables escheat.³

-
1. Ka.179, 215/6, 243/4, 245, 274/5 - slaughter.
244/5 - serious assaults.
 2. Ka.274/5, 278/9, 279/0, 281/2.
 3. Kb.41. Kc.151.

VIII. DECLARATION OF OUTLAWRY (Contd.)

4. SHERLAND COURT. 1602-04.

Declarations of outlawry were made when it was found that the accused had fled rather than stand trial for serious crimes.

In a slaughter case, the assize declared the accused outlaws and stated that they had taken the guilt on them by flight. Their goods and land were escheat to the example of others.¹

Again fining was the appropriate sentence for non-appearance in minor crimes and administrative offences.

5. REGALITY COURT. 1547-1706.

If the accused did not appear to answer his summons, he was declared outlaw. It seems that the accused must have actually left or fled the area before this was imposed because fining was given in certain cases of non-appearance. The seriousness of the crime would also be taken into account. When it was found that the accused had fled, the court declared him fugitive, with escheat of his moveable goods and gear, and prohibited all from receiving him.²

Outlawry and escheat were also imposed where the person escaped from prison.³

In the later period, outlawry was passed against those who attended conventicles.⁴

The record shows that the escheat only extended to the fugitive's moveables.

-
1. L.38, also
L.143 - Royal letters under pain of rebellion and escheat of moveables.
 2. Nb.346 - murder.
406/7 - arson.
 3. Murder - Nb. 420 - theft.
Theft - Nb. 346.
Nb. 421/2.
 4. Nb. 30, 32.

VIII. DECLARATION OF OUTLAWRY (Contd.)

6. BARON COURT. 1523-1747.

In the Baron courts a sentence of outlawry could be passed if the accused fled before trial:-

P.F. --v-- John Knows - alleged that Knows was a common and notour thief and in view of his non-appearance, the Court held him guilty of the theft of some sheets and yarn, and declared him fugitive and outlaw ordering his whole goods and gear to be escheat, and ordained his person to be apprehended if found within the Barony, and brought to "condigne punishment" for the crime.'

The normal penalty for non-appearance was fining, and it is clear that outlawry would only be given if the crime was serious.

1. P.107/8, also
Rd. 232/3.

CONCLUSIONS.

VIII. OUTLAWRY.

1. In the main courts a decree of outlawry was passed if the accused did not appear - he was declared rebel and his goods were escheat.
2. In the lower courts, fining was normal for non-appearance, but on occasions they show outlawry and it is difficult to say when they fined and when they declared rebel. The severity of the crime was certainly taken into account and also the penalty - it is not true to say that outlawry only followed capital crimes - because outlawry was used much more frequently than their death sentences. The decree was linked more closely with crimes which would have merited personal punishment. It is likely that the court also noted whether or not the person had actually fled from the area or whether he was still living in the jurisdiction but had not bothered to appear.
3. If the person escaped from prison he could be declared rebel.
4. It is seen that the decree was very flexible - outlawry could be recalled and reimposed at the court's discretion - and changes are noted frequently.

IX. CAUTION.

1. JUSTICIARY COURT.

PART 1. 1488-1650.

Caution was widely used throughout the whole period - the principal purposes being (1) to guarantee appearance (2) to guarantee the sentence (3) to guarantee that a court order would be implemented and (4) lawburrows - a guarantee that A. would not injure B.

(1) Appearance. Caution was taken from the accused to appear and naturally the amounts varied widely according to the standing of the parties.

In a treason and murder case (the death of King Henry) the amounts of surety for appearance ranged between £5000 and 500 merks - £5000, 5000 merks, £4000, £3000, £2000, £1000, 1000 merks, £500, 500 merks.²

The terms are standard - A. becomes surety for B. that B. will underlie the law when the case is heard.³

Many cases describe the cautioners as being fined because their principals did not appear, but such payments were not really //

1. Norm of caution - A. 24.
2. B.35/6. G.54 - £10,000.
3. e.g. A.15,
Aa.327, 328.
B.38 etc. - the amounts are given sometimes -
Murder - Dd.428, 5000 merks.
Slaughter - A.41 - £100.
A.20, 28, 39 - £40.
A.20, 41 - £20.
A.39 - 100 merks.
Dd.436 - 2000 merks.
Rape - Dd.400 - 1000 merks.

IX. CAUTION (Contd.)

1. JUDICIARY COURT.

PART 1. 1488-1650 (Contd.)

really true fines, but rather the payments due in terms of the actual bonds.

<u>1. Murder.</u>		<u>Rape.</u>	
1000 merks - E.43/4, 126/8.		500 merks - A.60/1.	
500 merks - D.257.		<u>Incest.</u>	- B.42.
200 merks - Dd.488.			
100 merks - E.36.		<u>Theft.</u>	
<u>Attempted Murder.</u>		£10	- B.48.
500 merks - C.36.		500 merks - C.521.	
200 merks - C.36.		<u>Forgery.</u>	
100 merks - C.36.		£100	- A.76.
<u>Slaughter.</u>		1000 merks - A.76.	
£100	A.41, 83, 85, 86, 95/6, 136 etc.	<u>Fireraising.</u>	
£ 80	- A.62.	200 merks - D.258.	
£ 40	- A.20, 26, 28, 41, 53 etc.	100 merks - D.258.	
£ 20	- A.15, 20, 41.	200 merks - E.63.	
£ 10	- A.26.	<u>Wilful Error</u>	
40/-	- A.28.	<u>of Assize.</u>	
1000 merks - A.166.		£1000	- A.148.
200 merks - A.83, 84, 86.		500 merks - A.148, 169.	
100 merks - A.68, 68/9, 69, 85 etc.		300 merks - A.169.	
£200	- Aa.370.	200 merks - A.169.	
500 merks - Aa.379.		<u>Treason.</u>	
400 merks - Aa.370.		£100	- B.22, 70/1, 97.
£10,000	- B.205.	100 merks - B.21.	
£320	- B.5.	500 merks - C.64.	
£160	- B.27.	£1000	- D.257.
£100	- B.27.	<u>General band.</u>	
£ 40	- B.33, 81.	1100 merks - 522.	
600 merks - B.27.			
200 merks - B.40.			
100 merks - B.21, 69/0.			
1000 merks - C.112, 442, 445.			
500 merks - C.71, 80, 512.			
400 merks - C.442, 445.			
200 merks - C.42, 71, 98, 112, 381, 413.			
100 merks - C.80, 103, 381, 387.			
500 merks - D.122.			
500 merks - Dd.501, 540, 554.			
100 merks - Dd.540, 551, 554.			
<u>Assault.</u>			
£40	- A.37.		
200 merks - D.72.			
100 merks - Dd.491.			
<u>Hamesucken.</u>			
Landed)		
Gentleman - £100)		
Unlandit) B.26		
Gentleman - 100 merks)		
Yeoman - £40.)		
Also - 500 merks) B.390.		
200 merks)		
100 merks)		

IX. CAUTION (Contd.)

1. JUSTICIARY COURT.

PART 1. 1488-1650 (Contd.)

This form of caution also applied to appearance at continuations and to appearance of members of the assize.²

(2) To guarantee sentence. It was used to guarantee payment of a fine or assythment.³ This was particularly noticeable in the earlier periods when the process of compounding was the standard penalty.⁴

If caution was not found to guarantee the compensation, the accused could be hanged.

Robert Oliver was ordered to be imprisoned for forty days at the end of which he was to be hanged if caution had still not been found.⁵

- | | |
|--|--|
| 1. Murder | - 500 merks. E.34/5, 40,61,64,79,88, 148,303. |
| Assault | - 500 merks. E.168. |
| Adultery | - 500 merks. E.93. |
| Theft | - 4000 merks. E.281.
3000 merks. E.278.
2000 merks. E.286.
200 merks. E.197. |
| Fireraising | - 2000 merks.) E.172.
500 merks.)
100 merks.) |
| Treason/Wilful Error. | - 1000 merks. E.256. |
| 2. 1000 merks | - E.256. |
| 500 merks | - E.190. |
| 200 merks | - E.93, 163 etc. |
| 3. Assythment | - A.175, B.46. |
| Slaughter | |
| Assythment | - D.77/8, 80/1,118,120,206 etc. |
| Murder Assythment- | D.79/0 etc. |
| Satisfy king's will- | C.18/20. |
| 4. In the earliest period, if the accused placed himself in the king's will, or was convicted by the king, he was fined in addition to paying compensation to the injured. The fine was also guaranteed by caution - | |
| Murder & Theft | - 40/-, A.17 - will. |
| Assault | - £10. A.73 - will.
£5. A.57 con. A.73 - will.
£3. A.16 - will, A.57 con.
£2. A.16 - will.
40/- A.56/7 con.
15 merks - A.73 - will.
10 merks - 54, 55 con.
6 merks - 54 con.
5 merks - 24 - will, 55, 59 con.
4 merks - 54 con. |
| Hamesucken & Theft- | £4 - A.15 - will. |
| Theft | - £5 - A.25 con. 33 - 92 con. |
| Accepting Bribe | - 5 merks - A.63 - will. |
| Miscellaneous | - £5 - A.40, con.59, will.
£3 - 54 con.
40/- 59 - will. |

Note: will - having placed himself in will.
con. - convicted by court.

5. A.30/1 - also A.69. 70. 70/1.

IX. CAUTION (Contd.)

1. JUSTICIARY COURT.

PART 1. 1488-1650 (Contd.)

In the later periods, this form of sanction altered. The accused suffered a death penalty for most crimes in any event and if caution was used the obligation guaranteed did not usually involve capital issues (except in some banishment cases, where the person could be hanged if he did not find caution to leave the country within a specified period).

(3) To implement court order.

The court frequently passed orders that the accused should do or not do something and this was supported by caution.

(a) Caution not to break ward.²

(b) Caution to return to ward as and when required.³

(c) Not to commit the crime again.⁴

(d) To pursue and defend.

Sometimes when the prosecution was private, the pursuer could be ordained to find caution to proceed with the action and the defender might have to find caution that the defences he stated were of substance and not merely dilatory.

In one such case, the penalty was 500 merks, half payable to the crown and half to the defenders.⁵

-
1. B.66 - banishment, caution £1000. 46.
C.555/7 -do- 10,000 merks.
 2. Aa.336 - £10,000.
Aa.328 - 10,000 merks.
C.135 - £5000 - to remain in Edinburgh.
E.286/7- 2000 merks.
 3. Permitted home under penalty of 2000 merks - Aa.330.
-do- £10,000 - Aa.333,338.
20,000 merks-Aa.355.
 4. Adultery: banished and caution not to commit the crime again - B.78.
 5. E.87/8 - the pursuers had failed twice to follow the action.

IX. CAUTION (Contd.)

1. JUSTICIARY COURT.

PART 1. 1488-1650 (Contd.)

(4) Lawburrows.

If a person feared bodily harm from another the fearful could ask the court to restrain the other who would have to guarantee that he would not harm the injured or his dependents under a penalty.

The normal styles of bond were - A. became surety for B. that B. would keep the king's peace, good rule and quietness in the country and would not trouble, molest, harm C. or his dependents under a penalty of 1000 merks.²

A. for B. that C. would be harmless and skaithless in his body, lands and goods from B. under penalty of 300 merks.⁷

(5) Miscellaneous. Culreach. If a person was removed from the jurisdiction of one court to another, the new court gave caution that justice would be done.

Robert Anderson was accused of slaughter and procurators for the Duke of Lennox requested that Anderson be transferred to the Regality Court of Glasgow. The Justiciary court agreed provided culreach was found by the procurators for the administration of justice.⁴

When the case was dealt with by the other court, notice was given to the justiciary court, and the caution of culreach discharged:

A thief was repledged to the Duke of Lennox and notice was given later that the thief had been convicted and sentenced to death, and asked that the cautioner for the Duke of Lennox should be discharged.⁵

Caution was usually taken from the person repledged to appear at the new court.⁶

1. 5000, 2000, 1000 merks - A.164. Aa.458 - no amount.
1000 merks - B.80. £1000 - C.18/0. 5000 merks - C.40.
£1000, 500, 300 merks - D.226/7 - slaughter.
400, 200 merks - Dd.445 - slaughter.
500 merks - Dd.545, E.126 - slaughter.
2. E.40/1 - murder. E. 173 - fireraising.
3. Murder - E.304. Slaughter - E.37/41 - 1000 merks.
4. E.69/0. E.129 - adultery.
E.274/6 - murder but no culreach.
5. E.263/4.
6. E.69/0.

IX. CAUTION (Cohtd.)

1. JUSTICIARY COURT.

PART 2. 1661-1747.

The same operation of caution is noted as in the previous records.

(1) Appearance.

Robert Wrie as cautioner for James Wrie undertook under pain of £10,000 that his principal would appear when called to answer charges of adultery.¹

The records show that persons were imprisoned without trial for long periods and that such persons could petition the court for release, which was granted provided they found caution to appear when called.

William Wallace was in prison for alleged adultery, and he petitioned the Privy Council for a trial otherwise he should be released. The court released him having found caution of 12,000 merks to appear whenever called.²

Assizers and witnesses could also be ordered to find caution to appear:

George Lyon and John McNab, witnesses, were ordered to appear under pain of 800 merks. They did not appear and were fined (amerctiat) the agreed sum of 800 merks.³

Caution could also guarantee appearance for sentence --

James Elder was convicted by an assize of usury, and was sentenced to escheat of moveables. In addition, he had to find caution of £1000 to appear before the court or the Privy Council whenever required for such further sentence as they thought fit.⁴

Gilbert Vanright was convicted of assault and was obliged to find caution of £200 to appear on a stated date, to be fined for the assault.⁵

(2) To guarantee sentence.

The most frequent form was to guarantee a fine.

Alexander Baxter and George Bell were fined 100 merks for wounding and blooding. They had to find caution for the fine or else go to prison until it was paid.⁶

1. F.132, also G.23 - adultery.
2. F.67/8, also F.2/3 - adultery - 5000 merks.
F.84 - slaughter, 10,000 merks.
3. F.22, also G.158 - 200 merks.
4. F.89/0, also F.218, 5000 merks.
5. F.36, also F.106 - assault: 500 merks.
G.53/4, 55 - adultery.
6. F.50/2,
G.305 - slaughter.

IX. CAUTION (Contd.)

1. JUSTICIARY COURT.

PART 2. 1661-1747 (Contd.)

But the obligation was flexible and could cover other parts of the sentence.

Hugh Crawford, indicted for slaughter, had to find caution for assythment.¹

(3) To implement court order.

In a decree of banishment from the kingdom for life, for being an accessory to murder, the accused was warded till he found caution of 1000 merks not to return.²

In one case where a person was found to be insane, he was to be kept prisoner until someone found caution to look after him.

Robert Spence was convicted of murder but was found insane. He was to be kept prisoner by the magistrates of Edinburgh until someone found caution to keep him in sure and safe custody for the rest of his life.³

(4) Future good behaviour.

This obligation was very frequent in the lower courts, but is noted occasionally in the justiciary records. The accused was ordered to observe good behaviour in time coming under pain of death.⁴

(5) Lawburrows.

Lord George Banff stated that he feared bodily harm and oppression from Harry Gordon and craved lawburrows, which was granted.⁵

If a cautionary bond was not met, the record states that cautioner was fined, but it seems that the fine was, in fact, the amount of the agreed bond.⁶

In one case, the cautioner stated that his principal could not appear owing to sickness - this was accepted and the obligation discharged.⁷

1. F.81.

2. H.10.1695, also

H.16/7. 1699 - murder - banished - caution to leave.

H.57/9.1717 - forgery - banished - caution to leave.

3. H.98/9. 1747.

4. F.35.

5. G.128, also F.3, 23, 43, G.143, 162, 269 etc.

6. Non-appearance - G.8 - 200 merks. Lawburrows - 400 merks.

G.55 -do- 100 merks.

G.60 100 merks. G.137.

7. F.23.

IX. CAUTION (Contd.)

2. ARGYLL JUSTICIARY COURT. 1664--1742.

The purposes of caution in this record were the same as those noted in the main justiciary court.

(1) Appearance:

Duncan Smith and another became cautioners for Allan McDougall and two others, undertaking that they would appear on a specified day, under penalty of paying £100.

(2) To guarantee sentence.

In an assault case, the accused were fined £50 and they were imprisoned till they paid or found caution to guarantee payment.²

(3) To implement court order.

Neil McRob was scourged for theft and had to find caution for his departure from the shire, never to return under pain of death. He was imprisoned till he found caution.²

(4) For good behaviour.

Caution for future good behaviour was frequently ordered, particularly in theft actions where a capital sentence was not given.

John McKeynich was scourged for theft and ordered to find caution for his honest deportment in all time coming. If anyone was robbed or damaged by him, his cautioner had to pay 500 merks over and above the cost of the damage.⁴

(5) Lawburrows.

Donald McKerras swore that he feared bodily harm from John McAllen who was ordered to find lawburrows to McKerras.⁵

-
1. I.82 - also I.85 - 500 merks,
also I.16, 19/0, 23, 24 etc.
 2. I.64, also
Theft: I.71/2, 89/0, 90 etc.
 3. I.125/6.
 4. I.51/ I.75, 100, both 500 merks.
Assault - I.78.
Adultery- I.124/5, I.125.
Malicious slander - I.83.
Theft - I.35/6, 77, 89/0, 92/3, 124/5.
J.3. 1730.
 5. I.77, 98, 140/1 etc.

IX. CAUTION (Contd.)

2. ARGYLL JUSTICIARY COURT. 1664--1742 (Contd.)

The record makes frequent reference to broken cautionary obligations and the guarantor having to pay the agreed sum.

Patrick Campbell was fined (unlawed and americiat) 500 merks as cautioner for Archibald McPhaiden who did not appear.¹

In one case, the bond was called up owing to non-appearance of the principal. He appeared later and the court freed the cautioner from the penalty of 500 merks.²

In each case the term for payment of the amount of caution was "unlawed and americiat". This was the same phrasing as an actual fine, but an actual fine was not imposed and the amount payable was the agreed sum in the bond, not an arbitrary figure chosen by the justice.

In a case where a cautioner fraudulently produced a substitute for the principal, the substitute was scourged through the town and had his tongue pierced with a hot iron. The cautioner was fined 200 merks over and above the penalty of 300 merks in the bond, and two accessories were fined 100 merks and 200 merks respectively. The cautioner was ordered to present the proper person and he had to remain in prison till he produced him.³

1. I.24, 24/5 -- all 500 merks.
I.26 -- 300 merks.
I.90 -- 100 merks.
2. I.29.
3. I.26.

IX. CAUTION (Contd.)

3. SHERIFF COURT. 1515-1747.

Caution was used frequently throughout the whole period.

(1) Appearance.

A. became surety for B. that B. would appear at the justice aire of Wife on a specified day under the penalties contained in the king's letters.

In a letter from the king, the amounts for surety are stated -- \$100 for each landed gentleman, 100 merks for each unlanded gentleman and £40 for each yeoman.¹ It is also stated that if the parties do not appear or find the necessary amounts a declaration of rebellion would follow.²

These amounts are standard in such letters, but on one occasion they were reduced because of the poverty of the persons.³

The accused could also be required to find surety "to underlie the law" for the particular crime, i.e. bound to appear.⁴

(2) To guarantee sentence.

A. became surety to the sheriff for herself, her land and her goods, for fines of court for the bloodwyte in the action between A. and B. as the law of court or judgment of arbitration requires.⁵

(3) To implement court order.

Caution to guarantee departure in a decree of banishment is noted.⁶

(4) Caution for future good behaviour, was frequent.⁷

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1. Ka.58, 62, 83, 83/4, 103, 148, 233 etc.
 2. Ka.179, 215, 278/9.
 3. Ka.243/4, 245.
 4. Ka.215.
 5. Ka.52, 54, 56.
 6. Kb.246 -- 300 merks.
 7. Kb.31/4, 140/1, 144, 215, 238.
Kc.180.

IX. CAUTION (Contd.)

3. SHERIFF COURT. 1515-1747 (Contd.)

(5) Lawburrows.

A. became surety and lawburrows for B. that C. his wife and children and servants should not be harmed or injured by B. under the penalties contained in the bond.¹

The amounts were not usually stated, but £10,² 200³ merks, £100⁴ are noted.

These bonds were not usually reciprocal, but there are occasional references to double bonds.⁵

Royal letters could also be reproduced ordering lawburrows -

A. produced our sovereign lord's letters charging the sheriff to take surety and lawburrows of persons to be specified by A. as he feared bodily harm from them.⁶

In another letter from the king, the amounts of lawburrows were stated at £100 for every landed gentleman, 100 merks for every unlanded gentleman and £40 for each yeoman.⁷

One could be imprisoned until caution was found.⁸

-
1. Ka.58, 67, 76, 85 etc.
 2. Ka.104.
 3. Ka.95.
 4. Ka.83, 83/4, 95.
 5. Ka.76, 95.
 6. Ka.189, 190.
 7. Ka.279, also
Kb.218 - 100 merks.
 8. Kb.31/4.

LX. CAUTION (Contd.)

4(a) SHETLAND COURT. 1602-04.

Caution is referred to frequently and the uses of caution are similar to these seen in other records.

(1) Appearance.

The entries were in standard form and it is noted that the usual amount was £40.¹ Higher penalties are seen in a few cases.²

The penalties were enforced if the principal person did not appear.³

In one exceptional case the cautioner was fined 1000 merks but it was stated that he had helped the principal (who was accused of theft) to escape.⁴

(2) To guarantee sentence.

Bound to ask forgiveness under a penalty of £20.⁵

For troubling A. at Church on Sunday, they were fined "twyse 40/-" each and A. was fined 2 angels. All parties had to ask forgiveness of the minister and congregation at the parish church next Sunday under pain of £40.⁶

(3) To implement court order.

In insulting cases, the parties usually undertook not to repeat the slander under a penalty?⁷

(4) Future good behaviour.

For an assault the accused was imprisoned until he found caution to keep the law.⁸

(5) Lawburrows.

In certain cases the parties had to find lawburrows.⁹

In one case of lawburrows the person broke the bond and was fined £40, the amount of the agreed penalty.¹⁰

-
1. L.13, 47, 92 etc.
 2. £200 - L.74 (theft)
£100 - L.97 (theft)
£100 - L.28, 31 (slaughter). 500 merks L.119, 142.
£500 - L.137.
 3. L.92, 97.
 - 4.
 5. L.125.
 6. L.135.
 7. £40 - L.3, 19 etc.
£20 - L.73, 111 etc.
£10 - L.14, 134 etc.
 8. L.145, also £40. L.92 (witchcraft).
 9. L.24, 140.
 10. L.87 - £100. L.120.

IX. CAUTION (Contd.)

4(a) SHETLAND COURT. 1602-04 (Contd.)

(5) Miscellaneous.

Caution was also used in a civil capacity -

ordered to build stockproof dykes under pain of 40/-¹

restricting trading competition.²

forbidding ships to take people from Shetland.³

ordering Englishmen to pay fishing tolls.⁴

1. L.10.

2. 240 - L.16/7.

3100 - L.44/5.

3. 3100 - L.48.

4. 6 angels - L.106.

IX. CAUTION (Contd.)

4(b) ORRNEY & SHELLAND COURT. 1612-13.

Caution is used frequently in the record, but the uses are standard.

(1) Appearance.

The form was straightforward - A. (or A. and B.) undertakes that C. will appear in court on the due date under penalty of a sum of money.¹ Sometimes the particular cause of the action is noted.²

The amounts varied - 1200 merks,³ £100,⁴ £50,⁵ £40⁶ are noted.

(2) Future good behaviour.

A. undertook that B. would keep the peace.⁷

The amount in this bond was somewhat less than in the undertaking of lawburrows (which guaranteed that a particular person would not be disturbed) - £50, £40.⁸

(3) Lawburrows.

The standard form was - A. (or A. and B. or A.B. and C.) became cautioners for D. that E. would not be harmed and damaged in his lands and possessions, nor in his person nor dependents, under penalty of an agreed sum.⁹

The bond was usually reciprocal - E. obtained a similar number of cautioners and undertook that he would not harm D. The amount varied - the sums of 500 merks, £200, 200 merks, £100 (which was by far the commonest amount) are noted.

Normally the sums were the same on both parties if the bond was reciprocal, but in one case, one of the parties had a penalty of £100 while the other had a penalty of 200 merks.¹⁰

1. M.64, 66, 76 etc.
2. Assault - M.64, 66 etc. Theft - M.26.
3. M.92.
4. M.64, 93.
5. M.76.
6. M.66.
7. M.66, 69, 76 etc.
8. M.61, 66, 69, 76.
9. M.18/9, 19, 24 etc.
10. M.78.

IX. CAUTION (Contd.)

4(b) ORKNEY & SHETLAND COURT. 1612-15 (Contd.)

A less frequent form of bond stated that A. as cautioner for B. undertook that B. would not trouble C. nor any other of His Majesty's lieges, or subjects, in Orkney under a monetary penalty.

(4) Miscellaneous.

On occasions the purposes of the bonds could be combined - to appear and to keep the peace. In such cases sometimes separate amounts could be stated for each part, but on other occasions a cumulo figure could be stated.

In one particular bond A. was bound to remain in Kirkwall until his wife left a neighbouring island, and also to keep the peace - under a penalty of £100.

Cases alleging breach of the undertakings are noted - one half of the sum was claimed by the crown and the other half by the person injured.

1. M.61.
2. M.66, 76.
3. M.66 - £40 for each obligation.
4. M.76 - £50.
5. M.67.
6. M.74/5, 75/6, 84/6.

IX. CAUTION (Contd.)

5. REGALTY COURT. 1547-1706.

Slight variations in the use of caution are noticeable between the earliest period and the remaining periods, but the aim in all cases is the same - the control of a person's conduct enforced by a penalty, usually monetary.^{1a}

(1) Appearance.

Caution to enforce appearance in court both for first hearings and continuations was frequent throughout the whole period.

The amounts varied - 1000 marks,¹ 600 marks,^{1b} 500 marks,² 3500,³ 2200.⁴

In the religious troubles of the latest period, caution was used to ensure appearance in Church.⁵

(2) To guarantee sentence.

The most frequent form of this caution was a guarantee that the fine would be paid.⁶

(3) To implement court order - to force the return of a fugitive.⁷

(4) Future good behaviour.

Caution for good behaviour in future was imposed in certain cases and the penalty in such cases was not monetary but banishment.⁸

(5) Lawburrows.

Such cases are obligations not to trouble or molest another - an undertaking by the principal party or outside guarantors or guarantor that the principal party "sould nocht trubill G.D. nor na uther persons in Melrose in na tyme heirefter" under penalty of varying amounts.⁹

This //

1. Na.21.

1(a) but sometimes banishment - Na.200 or escheat.

1(b) Nb.36/7 enforced.

2. Na.24.

3. Na.73.

4. Na.61.

5. Na.34.

6. Na.8/9, 16 etc. Nb.28/9 etc.

7. Hc.7.

8. Theft - Na.200,267, Nb.17/8,25.

9. Na.33.

IX. CAUTION (Contd.)

5. REGALITY COURT. 1547-1706 (Contd.)

This obligation could be given either by one of the principal parties (or his guarantors) to the other principal or alternatively it could be a bilateral obligation by both parties (or their guarantors) to each other.²

The amounts vary and no mean can be drawn between cases, nor between single or bilateral obligations, although it is noticeable that the amounts stated in bilateral obligations are heavier.³

In assault cases there could be a variation on the basic obligation not to trouble another - the injured person could claim that he feared bodily harm from another. The fearful could have his fears transmuted into cash and this sum was imposed on the menacer as caution. The amounts were fairly constant - £100⁴ with one of £40⁵ and one of £20.⁶

In an early case the penalty was escheat of moveables - the assailant was required to find surety and lawburrows that the assaulted and others would not be troubled or injured in their bodies and goods by the accused in all time coming under penalty of annulment of everything he held from the convent.⁷

1. Na.3.
2. Na.3.
3. Na.3.
4. Na.181.
5. Na.159.
6. Na.49.
7. Nc.153.

IX. CAUTION (Contd.)

6. BARON COURT. 1523--1747.

Caution is used frequently in all the records, and the purposes are the same as those already noted:--

(1) Appearance.

"the which day Arthur Fisher borcht to enter Bessie Fisher, his sieter, to the next Court".¹

This form is also phrased - "John Thomson held up his hand to enter and to bring his brother with him to the next Court".²

(2) To guarantee sentence.

Caution was found to guarantee fines.

(3) To implement court order.

-- that he would leave the barony within the time limit.³

-- that the Baron's timber will not be taken.⁴

(4) Future good behaviour.

The accused could be ordered to find caution for his future good behaviour.⁵

(5) Lawburrows.

This use of caution usually required the principal parties to the assault to find a guarantor and the bond took the following form:

John Graham found lawburrows for William Graham, his brother, that John Watson should not be harmed by William Graham, under a penalty of £10. Also William Graham found security for John Graham and each of the brothers found security for their children and servants and that John Watson would not be harmed.⁶

1. O.93, 24, 49 etc.

2. O.18.

3. P.86/7.

4. P.18/9.

5. Q. 191/2.

6. O.41/2.

IX. CAUTION (Contd.)

6. BARON COURT. 1523-1747 (Contd.)

Caution to enter appearance at the next court and caution not to harm the other party to the action could be combined in the one undertaking.

The forms of the bonds are very similar in all records - the principal parties, i.e. both parties to the action, undertake not to hurt or assault each other and the obligation includes their dependents - both their family and servants. The variations follow a set pattern - in the fullest form the principal parties each find a separate guarantor¹ but in the lesser forms either the principal parties act without guarantors³ or alternatively only one of the principal parties undertakes the bond, either with or without a guarantor.⁴

1. O. 190, 190/1.
2. Q. 49.
3. Q. 35.
4. S. 78/9, 133/4.
4. Q. 31, 175.

IX. CAUTION (Contd.)

7. BURGH COURT. 1398-1714.

The old laws give details of cautionary rights to which burgesses were entitled.

If any burghess is seized for any reason by the king's bailies, he shall not be taken out of the freedom of the burgh to any castle or prison unless he is unable to give caution.'

If any burghess is accused of any crime and he is held by his accusers within the burgh and he says that he has the ability to give caution, he shall be led by his accusers through the burgh to the house in which his caution is, if he is accused during the day. If he is taken at night time with hue and cry, he shall be kept by his accusers and by the keepers of the town until morning so that his neighbours may know why he is taken, so that he may have caution if he needs it. If he does not have any caution, he shall be taken to the sergeant's house where he shall be kept by the accusers if the burgh does not have a prison.'

If a burghess was unable to find caution his life was violently disrupted:-

Burgesses of the town will keep him in ward in his own house and in chains for 15 days. If, after that period, he has still not found caution, his neighbours shall lead him to the king's bailie who will receive him from them and he shall be taken to the house of the king's sergeant if the burgesses do not have any prison, and there he will be guarded by his accusers. The sergeant will also find good and secure chains.'

The records do not show any cases of the statutes being enforced literally.

The records show the same forms of caution as have been seen in the other courts.

(1) Appearance.

The most frequent form of caution was to guarantee appearance at the court and this occurs unchanged throughout the whole period.

David de Scroggis became cautioner for David Walkar that he would appear at the next court. 4

1. L.Q.B. CXVII. p.57.
2. L.Q.B. LXXIV. p.36/7.
3. L.Q.B. LVII. p.27, also
L.Q.B. XXVI. p. 13/4.
4. V.29, also
V.43,47, 116, 127 etc.

IX. CAUTION (Contd.)

7. BURGHE COURT. 1398-1714 (Contd.)

Simon Lamb became cautioner for Michaelis de Camera that he would appear before the Justiciar at his next circuit.

If the principal or the cautioner did not appear, the cautioner was fined:

Johannis Fychet was fined because he did not come to fulfil his caution to produce Willelmus Boyle.²

While no amounts of fines are given, the reference to fining can be taken to mean the amount of the cautionary obligation - the cautioner was not fined in the ordinary sense and was not also forced to pay the amount of his guarantee over and above a fine.

The other records show the same position, but details are given regarding the amounts.

James Mathieson undertook that his brother William, accused of witchcraft, would appear to underlie the law under pain of 500 merks.³

Sometimes caution could be found to appear for sentence before the bailies.

In an action between Johannis Spront and Laurencius Cramnoch the latter was found to be at fault by the decision of an informal composition and caution was found that he would appear before the bailies for sentence.⁴

(2) To guarantee sentence.

Having been sentenced, the person might find caution that the punishment would be implemented.

If the person could not pay the fine he could find caution that he would do common work (work for the good of the community) to the value of the fine - in this case eight solidi.⁵

1. V.47.

See L.Q.B. VI. 5/6, V.78, 111 - caution to appear before the prepositus.

2. V.23, also V.24, 35, 36, 39, 40 etc.

3. X.368, 1629, also X.389. 1650, 2.32. 1528 and Y.102. 1681 - £50.

4. V.22, V.114 and also to satisfy the sentence.

5. V.219.

IX. CAUTION (Contd.)

7. BURGH COURT. 1398-1714 (Contd.)

Robertus Wan was fined for the verberacion of a certain woman and Gilbertus de Kynros became cautioner that Wan would satisfy the will of the bailies.¹

William Allan was banished for gaming and his banishment was guaranteed by his brother-in-law who consented to be banished also if Allan returned.²

The most frequent form of caution for sentence was guaranteeing the fine:-

Henri Bochan was in an unlaw to the bailies and found himself caution for the fine.³

John Iyllay was fined 20/- for deforcing and striking the sergeant. He had to find four cautioners for the fine.⁴

Thomas Murdo was fined £10 for a riot and was imprisoned until he found caution (1) to pay the fine and (2) to remove from the town.⁵

Christinus de Clunes was fined for the verberacion of Mariota, wife of Patricius and had to find caution to satisfy her (by assythment) and also to guarantee that he would not trouble (perturbabit) the town again under pain of £10.⁶

-
1. V.79.
 2. Y.103/4. 1682.
 3. X.127. 1458, also
V.111 - satisfy fine, also V.114, 118, 143.
V.130 - satisfy bludwit.
 4. X.131/2. 1459. X.132/3. 1459 - fighting, also
Z.10.1521,
Z.78. 1560/1 - caution for bloodwite and fine.
 5. Y.7/8. 1653, also
Y.128. 1689, imprisoned till he found caution for
400 merks.
 6. V.24.
V.57 - in will for verberacion of woman and caution
to satisfy.
V.130 - in will and caution to satisfy for verberacion
and bludwit.
V.79 - fined for verberacion of woman, and caution to
satisfy bailies' will.
V.111 -do- caution to satisfy will and fine.
V.118 -do- caution to satisfy (12d) and fine.
V.140 -do- caution to satisfy.

IX. CAUTION (Contd.)

7. BURGH COURT. 1398-1714 (Contd.)

(3) To implement court order.

This form of caution is common throughout all periods.

Simon de Benyn and Johannis Scherar became cautioners for Matthew Hulk that he would not forestall the town nor break the town laws under pain of £20.¹

Willie Fidler was fined for troubling Sir James Crag, a chaplain, and was ordered not to commit the like again, under pain of 40/- payable to the rood work.²

For insulting and being rebellious, he was imprisoned and had to find caution that he would not commit the like under pain of £100 for the first offence, and banished for the second.³

In a riot action, Marion Watson undertook by caution not to scold or flyte again under pain of 10 merks.⁴

John Hay undertook not to usurp the liberty of a burgess again under pain of £20.⁵

The obligation to find caution could be enforced by imprisonment -

For discharging a firearm, Ewmond was imprisoned for 24 hours and until he found caution not to use a firearm again under pain of £20.⁶

The miller was ordered to find caution that he would observe the town laws, under pain of removal from the mill. He refused and was ordered to remain in prison until he did obey.⁷

1. V.29.

V.44 - caution that he would not break regulations.

X.269. 1560 - caution not to commit adultery again.

X.328. 1571 - caution not to disobey bailie again under pain of banishment and bodily punishment.

X.357. 1605 - caution not to carry a sword under pain of £40 and loss of freedom.

2. Z.21. 1525, also

Z.55. 1549 - blood and troubling - caution not to commit the like, under pain of £10 to the town work.

3. Z.116/7. 1607, also

Z.123. 1609 - caution of £20 to the common work, insulting bailie.

Z.133. 1613 - forgiveness and warded - if again £100, banished and loss of freedom.

Y.49/50. 1661 - fined for theft and caution for future good behaviour.

Also Y.163. 1700.

4. Y.14.1653. Y.19/20.1653 - insulting official - caution not to commit the like under pain of £10.

5. Y.43.1657, also Y.104. 1682 - not to disobey the Council under pain of 500 merks and Y.130/1.1689 - to keep the law.

6. Y.160/1.1698.

7. Y.2/3. 1652.

IX. CAUTION (Contd.)

7. BURGH COURT. 1398-1714 (Contd.)

The penalty need not be money, or it could be money combined with another form of punishment.

For stealing corn, the accused were fined and imprisoned and had to find caution not to commit the like under pain of public punishment at the cross with a paper on their heads.¹

Andrew Haldine bound himself not to insult the Council under pain of loss of freedom as a burgess and £20.²

Caution not to commit theft again under pain of £20 and banishment with branding on the face for the first fault and death for the second.³

(4) To keep the peace.

Thomas Spryng and Johannis Scherar became cautioners for Mauricius Suerdsleper under pain of five merks that he would not trouble or disturb (perturbabit) the town officers or cause injury to the burgesses, other than by due legal process.⁴

Thomas, son of Johannis, found two persons as cautioners that he would not insult or be rebellious to the town officers, under pain of paying two pounds to the Glory of St. Nicholas and two pounds to the glory of the Blessed Mary.⁵

After being fined for fighting, the two accused had to find caution that they would not trouble the town again under pain of £10 and 40/- respectively.⁶

In one case, the person accused of perturbation of the town was already under caution of £100 and the penalty was enforced.⁷

This sum is by far the largest mentioned in the Aberdeen record and represented a vast amount in the values of the day.

Donaldus Ka became cautioner for Joheta Bonde that the burgesses and also the town would not be injured by her (the peace of the town would not be broken).⁸

Johannis Scherar was fined 5 merks because of his caution on behalf of Mauricius Suerdsleper guaranteeing the town and the burgesses.⁹

1. Y.57.1663.
2. Y.81.1669, also Y.91.1675 - theft, fined and caution of banishment. Y.125.1688 - deserted from militia - return otherwise banished and escheat.
3. X.222.1555, also 222 and caution under pain of fastening in irons. X.232.1556.
4. V.22/3.
5. V.68, also V.155.
6. X.132/3.1459.
7. V.124.
8. V.22, also V.22.
9. V.37.

IX. CAUTION(Contd.)

7. BURGH COURT. 1398-1714 (Contd.)

(5) Lawburrows.

Willelmus Scherol became cautioner for Willelmus de Strade that the latter would not injure (damage) Thomas Halt other than by due legal process (aliter quam per viam juris).¹

Johannus Wormot craved the bailies that he would be safe from Duncanus Fernys who had threatened him with fire and murder. Caution was duly given.²

Double bonds were frequent.

Patricius Club became cautioner for Johannis Ruthirford that the latter would not trouble Thomas Spryng, neither on his own part nor at his instigation, neither by word nor deed, other than by due legal process. Thomas, son of Willelmus, found caution for Thomas Spryng that he would not trouble Johannis Rutherford in the same terms.³

In addition, one case (A. guaranteeing that B. would not hurt C.) stated the cautionary penalty as being under pain of life and limb and 40/- to the use of the corporation, without remission.⁴

John Lyllay was fined for deforcing and striking the sergeant and he had also to find lawburrows guaranteed by four cautioners under pain of 40/-d.⁵

Duncan Smart and John Allen were cautioners that Jame Moffat would be harmless and skaithless of Thomas Allan.⁶

William Wilson swore that he dreaded bodily harm from Moses Walker and desired lawburrows. ⁷

-
1. V.22, also V.44, 48, 66, 118, 134, 156, 236.
 2. V.118.
 3. V.23, also V.30, 55, 60, 75 etc.
 4. V.30, X.129. 1458 - Thom Doby had to find lawburrows to keep Thom Robyson skaithless.
X.163.1470 - swore he was in fear and required lawburrows (detailed).
 5. X.131/2. 1459.
 6. Z.11.1521, also Z.81.1563 - 25 - to the poor hospital.
 7. Y.1.1652, also Y.128, Y.73. 1667.

IX. CAUTION (Contd.)

7. BURGH COURT. 1398-1714 (Contd.)

Thomas Govan placed himself in will for wrongfully raising lawburrows against the town council and inhabitants, but no sentence is noted.¹

The Laird of Blackbarony raised lawburrows against the burgh of Peebles - that no person in the town would damage Blackbarony and his tenants. The Town Council stated that if any person did transgress, that was his own liability and that no liability would fall on the town.²

(6) Miscellaneous.

Matheus Balram and Simon Lamb became cautioners for Johannis Swetsoun and his servants that the town would not be injured (suffer damage) on account of the English who are in his custody and that they will not be permitted to go into such houses as they may see the secrets of the town nor see the state of, nor have conversation with, the people.³

No one living in the Burgh may shelter a stranger in his house longer than a night except if he finds caution for him.⁴

Christinus de Clunes had to find caution that he would not leave prison while the Aldermannus and others investigated his deforcement of their servants.⁵

Mauricius Suerdsleper was ordered to enter prison until he found caution to indemnify the town and the people.⁶

James Chisholm refused to go to the Army and was imprisoned until he found caution of £40 that he would go, or else that his cautioner would go.⁷

John Lauder and James Johnston bound themselves to be good neighbours under pain of £10.⁸

1. Y.45. 1658.

2. Y.37. 1656. simil. Y.56.

3. V.212.

4. L.Q.B. LXXXV. p.41.

5. V.22.

6. V.22.

7. X.377.1644.

X.383.1648 - persons nominated to enlist obtained substitutes who deserted - the originals have now to serve.

8. Y.82.1670.

CONCLUSIONS.

IX. CAUTION.

1. One of the most striking features throughout the whole period is the high frequency of cautionary obligations which were used to guarantee all forms of court orders.
2. The basic forms of caution were - to guarantee appearance (at all stages of the process), to guarantee the sentence (particularly fines), to guarantee that a court order would be implemented (e.g. to go into banishment), to guarantee that the accused would observe good behaviour in the future, and to guarantee an undertaking of lawburrows. These forms are seen in all courts.
3. Caution to appear provided a simple bail system and this use is seen in a developed form even in the earliest period. Its effectiveness depended naturally on the financial standing of the cautioner, and many cases do show non-appearance of the principal and the cautioner being sued for payment of the obligation. But in such cases a decree of outlawry followed automatically (in the main courts at least) against the principal, and in addition he was presumed guilty.
4. The amount of the cautionary obligations varied greatly among the various courts -

(a) Appearance:

- (i) Justiciary courts - early - £200, £100, 500 merks,
200 merks (exceptional £1000)
middle - £1000, £500, £100, £40
(exceptional £10,000, £5000,
£4000)
1000 merks, 500 merks, 200
merks (exceptional 12,000
merks, 10,000 merks).
- (ii) Argyll court - £100, 500 merks.
- (iii) Sheriff Courts - early - £100 for landed gentlemen,
100 merks for unlanded
gentlemen, £40 for yeoman.
- (iv) Shetland Courts - earlier- £40 (exceptional £500, 1000
merks).
- later £50, £40 (exceptional
period - 1200 merks).

(v) //

CONCLUSIONS.

IX. CAUTION (Contd.)

(v) Regality court - £500, £200, 500 merks (exceptional 1000 merks).

(vi) Burgh courts - middle - 500 merks.
- later - £50.

(b) To guarantee sentence: Where the sentence was a fine or assythment and the accused could not pay immediately, caution to guarantee payment was standard. The earliest period of the justiciary records shows that caution was an integral part of compounding and remission which was the standard sentence for almost every crime - the amount of the composition was guaranteed by caution. If he did not pay or find caution within forty days of the decree, he could be hanged.

While caution to guarantee the fine or assythment was the most frequent form of guaranteed sentence - caution could also be found to guarantee that the accused would go into banishment - the cautionary obligations were high in this case - £1000, 10,000 merks.

In Argyll the obligation could be enforced under pain of death, but in the Sheriff court of the later period an obligation to go into banishment of 300 merks is seen.

(c) To implement court order:

(i) Justiciary courts - early - the amounts varied considerably depending on the order.
Caution which affected the accused's liberty not to break ward etc. was highly priced - amounts of £10,000, £500, 20,000 merks, 10,000 merks are noted.

(ii) Shetland - early - bound to ask forgiveness- £20.
- later - £100.

(iii) Burgh courts - early - £20 (exceptional £100).
- middle - £40, £20, £10.
- later - £20.

(d) //

CONCLUSIONS.

IX. CAUTION (Contd.)

(d) Lawburrows:

- (i) Justiciary courts - early - 2000 merks, 1000 merks
(exceptional 5000 merks).
 - middle- £1000.
1000 merks, 500 merks,
300 merks.
 - later - 400 merks, 200 merks,
100 merks.
- (ii) Sheriff courts - early - £100, £10, 200 merks.
also £100 for landed
gentlemen, 100 merks for
unlanded gentleman, £40
for yeoman.
- (iii) Shetland court - early - £40 (exceptional £100)
- later - £100 (exceptional 500 merks)
- (iv) Regality court - £100.
- (v) Baron courts - £10.
- (vi) Burgh courts - early - 40/-

(e) For good behaviour in future:

- (i) Justiciary courts - later
period - under pain of death.
- (ii) Argyll - 500 merks.
- (iii) Shetland - £40.

5. Exceptionally the penalty of the caution was not pecuniary but instead was guaranteed by some other form of sentence - e.g. death, banishment or public punishment.

6. It would not be an exaggeration to say that throughout the whole period the system was based on caution. A person's ability to find caution ensured that he could conduct his life normally while awaiting summons or sentence, for the whole range of crimes. It is equally true to say that if a person was unable to find caution, his life was violently disrupted. The system was based on not merely personal standing but financial standing.

X. REMISSION AND COMPOUNDING.

1. JUSTICIARY COURT.

PART 1. 1488-1650.

In the earliest period, a frequent method of determination was a payment by the accused to the injured or his representatives as compensation. This applied no matter what the crime, and no penalty was imposed apart from a fine in certain circumstances.

The accused was permitted to compound with the injured for the crime and having agreed the actual sum, the accused either found caution for payment or paid the sum outright.

Once the payment was secure, the injured gave a remission to the accused and in any subsequent proceedings the remission was produced.²

Remissions were either granted by the court or by the representatives of the dead person. The remission was granted by the court when the accused had agreed in court with the representatives of the person who had been killed, injured or wronged, the amount of the compensation to be paid and sufficient caution or security had been found to guarantee the payment.

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- | | |
|--------------------|---|
| 1. Slaughter | - A.21 ^x , 22 etc. |
| Assault | - A.24 ^x /5, 32 ^x , 32/3 etc. |
| Hamesucken & Theft | - A.15. |
| Theft | - A.18 ^x , 23 ^x etc. |
| Fireraising | - A.34 ^x . |
| Treason | - A.16 ^x , 17, 18 ^x /9, 23 ^x etc. |
| 2. A.82/3 | - general style of remission. |
| Slaughter | - A.15 ^x , 24 ^x , 26 ^x , 32 ^x , 33 ^x . |
| Slaughter & Theft | - A.18 ^x , 19 ^x , 31 ^x , 31 ^x /2. |
| Adultery | - A.19 ^x , 27 ^x . |
| Theft | - A.20 ^x , 22 ^x , 23 ^x , 25 ^x , 27 ^x , 27 ^x /8, 28 ^x . |
| Fireraising | - A.19 ^x , 23 ^x , 25 ^x , 35 ^x . |
| Treason | - A.16 ^x , 17 ^x , 28 ^x , 29/0. |
| Treason & Theft | - A.18 ^x , 19 ^x , 31 ^x . |

Note: X = caution.

X. REMISSION AND COMPOUNDING (Contd.)

1. JUDICIAL COURT.

PART 1. 1488-1650 (Contd.)

Other cases show the accused producing a remission in court - in such cases the remission had already been granted by the injured or the representatives. The court accepted this, provided suitable caution was found for any assythment which was still outstanding.

If the accused denied the charge and was convicted, he could still agree compensation after his conviction, but in such a case the court imposed a fine payable to the king, in addition to the compensation. This fine was also imposed if the accused placed himself in the king's will.²

The reporting of the cases varied between those which stated that a remission was granted and those which stated that the accused was permitted to compound with the injured (in order that the remission might be obtained).

Caution was usually found to guarantee the payments, in both remissions and in permission to compound.

If compensation was not paid or caution found to pay at a later date, the remission could be withheld and a death penalty imposed.

During the reign of Mary, remissions are still noted, even in treason cases.³ In one case, where the person was accused of a list of slaughters, thefts and fireraisings, not surprisingly he had difficulty finding sureties to guarantee the considerable assythment required. He was warded for forty days and if there were still no securities, he would be hanged.⁴

In the later periods remissions were granted⁵ but as they were dependent on payment of assythment it is more convenient to consider them under the heading of assythment.

1. A.57 - assault 25, 23.
- A.25 - Theft. 25, see also fining.
3. Reg. under 78/91. treason. 386 - slaughter. 394/5 - murder
4. Aa. 362/3.
5. C.539, E.84/6, 306/11, 239/0.

X. REMISSION AND COMPOUNDING (Contd.)

1. JUSTICIARY COURT.

PART 2. 1661-1747.

The operation of remissions is the same as in the earlier records. Remissions could be granted for most crimes, if the injured person or his representatives agreed to accept a payment in compensation for the hurt or damage or loss.

Murder:

Hugh McNeil was accused of murder, but produced a remission which was upheld by the court - provided he paid assythment fixed by the barons of Exchequer.¹

Slaughter:

Walter Drummond who was imprisoned in the Tolbooth of Lithgow for the slaughter of David Crawford, petitioned for his release because he had assythed the parties and purchased a remission.²

Hugh Crawford produced a remission for the slaughter of George Wylie. Wylie had been killed in an alehouse brawl and because he had provoked Crawford, Crawford was ordered to find caution to assyth the kin of the slain.³

For the slaughter of a seaman, a minister obtained a remission (having been condemned to be beheaded) because he was a clergyman and the church thought it unseemly that he should be beheaded.⁴

Adultery:

John Brown and Eupham Happyland were accused of adultery, but they produced a remission and the prosecution was deserted.⁵

Rape:

Nicholas) Boswell against Michael Malcolm and others for rape - but the defenders produced remission and the action was dropped.⁶

1. H.59/0, 1717.
2. F.109, also F.84, 305, 223, G.1/7, 189.
3. F.70/1, also F.81.
4. G.98.
5. F.71.
G.58, 59, 75, 127/8, 295.
6. F.303, also H.98.1747.

X. REMISSION AND COMPOUNDING (Contd.)

1. JUSTICIARY COURT.

PART 2. 1661-1747. (Contd.)

Thefts & Robbery.

Earl of Caithness and others accused of theft, robbery, convocation, depredation, fireraising, wrongful imprisonment of the lieges etc. produced a remission and the action was dropped.¹

Forgery:

Richard Murray was accused of forgery - but his agent produced a remission under the Great Seal and the action was deserted. He was of an old and honest family and had served the king faithfully and had shown much zeal in his service.²

The system had its abuses -

In an assault case, the assaulter threatened his victim saying he would kill him and he could get a remission for 50 pieces for the slaughter.³

Mention is made of the political effect on remissions.

In a slaughter case, where Sir James Home was killed by William Douglas, the accused Douglas could not obtain a remission because the Earl of Lauderdale, the king's secretary, supported the Homes. ⁴

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1. F.264, also H.295.
 2. F.255/6.
 3. F.93/4.
 4. F.200/4.

CONCLUSIONS.

X. REMISSION & COMPOUNDING.

1. In the earliest period of the justiciary records, compounding was a frequent determination and it was applied to almost every crime. The only crimes which do not appear in the remission lists at this time were forgery and unnatural crimes - witchcraft, incest etc. If the accused confessed in court or was convicted, he was fined in addition to the composition payment.
2. If the person was unable to pay composition, he did not receive the remission and could be hanged instead.
3. Remissions continued to be granted in the middle and later periods, but they became limited to slaughter, assault and adultery as a general rule. Exceptionally remissions are noted in other crimes (thefts and fireraising) but this was very rare.
4. Remissions are seen only in the justiciary courts and not in the lower courts.

XI. ASSYTHMENT.

1. JUSTICIARY COURT.

PART 1. 1488-1650.

In the earliest periods, assythment was awarded frequently. The process of compounding and remission, as has been noted, operated in most crimes, and assythment is simply the process applied to personal injuries - from murder to assaults.

The details of the amounts are not given, but the following cases show the operation of assythment in the early period.

A case which detailed a long list of slaughters, thefts and fireraisings, stated that unless the accused found assythment, he would be hanged.¹

For cutting off a person's forefinger, the assailant was ordered to find caution for assythment.²

In a slaughter case, a remission was produced but the accused had to find caution for assythment.³

While compounding and remission became unsuited to the needs of the later periods, so far as the other crimes were concerned, assythment was maintained in personal assaults as the principle of compensation was plainly acceptable to the injured.

In the later periods, the following cases may be noted -

Captain John Pentland was banished for slaughter, after he had confirmed that he had given surety for assythment to the relatives of the murdered man.⁴

In a slaughter case, where there was a dispute regarding a king's remission, the matter was settled when the accused agreed to find caution for assythment.⁵

Duhn Duncan was convicted of mutilating Robert Davidson by cutting off two fingers of his left hand and was sentenced to be imprisoned until he found caution for assythment and obtained letters of slains. His moveables were also escheat.⁶

1. Aa.362/3.
2. Aa.364, also Aa.475.
3. Aa.433.
4. B.46 - also 187/9, assault.
5. C.97, also C.105, C.18/20.
6. C.539.

XI. ASSYTHMENT (Contd.)

1. JUSTICIARY COURT.

PART 1. 1488-1650 (Contd.)

The remissions or respites were granted by the king and in every case the person prosecuting for the slaughter was supported by the Lord Advocate who maintained that such respites were null unless assythment had been paid (or guaranteed by caution) to the slain man's representatives.

The remission could not be granted without the consent of the injured or his representatives but once the remission or the letters of slains were obtained, judicial process was stopped.

Walter Jamieson was accused of slaughter, but he produced letters of slains signed by the deceased's kin and friends acknowledging that he had paid assythment, a remission by James VI discharging the crime, and a statement from his minister stating that he had made public repentance of the crime. In the face of this formidable force of evidence, the justice absolved the accused.

Lawrence Bruce petitioned the Secret Council from exile and stated that he had been banished for slaughter. The king had agreed to grant a remission on payment of assythment, but the heirs of the slain man refused to accept any offers of composition. He therefore desired that the court note his efforts and order the heirs to accept the assythment. The court ordered the case to be continued, so that both sides could be represented.

In an assault case, the matter was referred to arbitration to agree the amount of assythment.

The records rarely give details of the actual amounts.

In an assault case, where the injured suffered a broken leg, the assailant was ordered to pay assythment of 250 merks and 50 merks for the doctor's fee and had to find caution for payment.

1. Respite produced and ordered to find caution for assythment.
Slaughter: D.77/8, 80/1, 118, 120, 206, 236/7. Dd.536.
Murder : D.79/0.
2. D.81, 120, 234/5.
3. D.116, 205/6 - but it did not stop a further court order. D.234/5.
4. E.84/6.
5. E.239/0, also Dd.459 but Dd.441 - in one case the accused offered to assyth, but the court would not accept his offer and he was beheaded.
6. E.45.
7. E.168.

XI. ASSYTHMENT (Contd.)

I. JUSTICIARY COURT.

PART 2. 1661-1747.

The same operation of assythment is maintained as in the previous records - it was generated by personal crimes. Amounts are given in this period, but it is difficult to find a pattern in the awards. It is noted, however, that the assythment was greater than the fine, on some occasions more than double.

(a) Assaults:

Alexander Gordon was accused of invading George Scott and of homesucken and beating and wounding him. Gordon was cleansed of the homesucken, but ordered to pay £20 fine to the sheriff and £80 assythment.

Sir Alexander Forbes was accused of the blooding and wounding of William Innes. The magistrates refused to decern for assythment and Innes requested the court's decision. The court ordered assythment of 400 merks, with the provision that if Forbes paid half immediately, the balance would be waived.²

Advocatus and John Ross against Robert Forbes for the cruel wounding of Ross to the great effusion of his blood and for cutting off fingers on his right hand (mutilation). Forbes was acquit of the mutilation, but guilty of the wounding. He was sentenced to pay £40 assythment or to go to prison. He paid instantly.²

(b) Murder:

Hugh McNeil was accused of murder but produced a remission which was upheld by the court - provided he paid assythment fixed by the Barons of Exchequer.⁴

(c) Slaughter:

Hugh Crawford was indicted for the slaughter of George Wyllie but produced a remission from the king under the Great Seal. The case was dropped, but Crawford was ordered to find caution for assythment.⁴

1. F.41/43.
2. F.93/4.
3. F.218/21, also F.64/6 - wounding - fine 200 merks -
 assythment 300 merks.
 G.177/8 - wounding - fine £50 - assythment £100.
 H.91/5, 1745 " " Nil " £200 Stg.
4. H.59/0, also H.99 - fined 300 merks assythment, 10
 merks to sick.
5. F.81 - also 71/2, 109

XI. ASSYTHMENT (Contd.)

I, JUSTICIARY COURT.

PART 2. 1661-1747. (Contd.)

Slaughter (Contd.)

William Mason pleaded self defence to a slaughter charge, which was accepted, but the Privy Council ordered him to pay £247 to the widow of the person he killed. He had to pay £47 from prison before he would be released and thereafter the balance by three instalments at the next three terms.

(d) Rape:

Captain Douglas had to pay 300 merks, 10 to the king and the rest to the girl.

Normally a capital sentence was not imposed if assythment was paid because a remission would be demanded in exchange for the assythment but one case of slaughter shows that the accused had to pay assythment before he was beheaded.

1. G.305.
2. H.13/5. 1697, also
H.66/0, 1723 - £300 Stg. to the husband.
3. F.71/2.

XI. ASSYTHMENT (Contd.)

2. ARGYLL JUSTICIARY COURT. 1664-1742.

Payments for assythment were imposed in this record only on assaults. The assythment covered not merely compensation for injury, but also loss of earnings and reimbursement for doctors' expenses.

The awards in this record were less than the fines.

Angus McMillan and others were convicted of wounding Gilbert McLendrest to the effusion of his blood and hazard of his life. They were fined £50 for the riot and were imprisoned till they paid or gave security therefor. Two of the accused had also to pay £30 and £10 respectively as assythment to the injured for his present cure.¹

Also Ivar Charles Campbell and others threatened and wounded Donald McIlvain. They were fined £10 Sterling, of which £20 Scots was to be paid to the injured. They were imprisoned pending payment of the fine.²

Assythment could also be imposed in non-blood assaults.

Duncan Fisher was fined £50 for striking Margaret McDougall with a stick. He had to pay 20 merks assythment and find lawburrows to the injured and her husband. He was imprisoned till he satisfied the sentence.³

-
1. I.63/4, also
I.69 - fined £50 - £4 assythment.
48/- loss of wages.
40/- loss of blood.
 2. I.97/8.
 3. I.98, also
I.113 - £50 - 40 merks assythment.
I.149 - £50 - £12 for cure.

XI. ASSYTHMENT (Contd.)

3. SHERIFF COURT, 1515-1742.

Assythment was given frequently for assault in the later record, but is not noted in the early court.

It was usually less than the fine.¹

It is noted that the claim for assythment was made by the pursuer in his summons and could be accepted or rejected by the sheriff.²

1. £100 and £10 assyth. Kb.46, Kc.81/2.
£50 " £10 " Kc.81.
£10 " £20 " Kb.144.
£10 " £10 " Kb.140/1.
£10 " £ 5 " Kc.86.

2. £50 assyth. rejected - Kb.36/8.

XI. ASSYTHMENT (Contd.)

4(a) SHETLAND COURT. 1602-04.

Assythment is noted in the record, but it was given infrequently. It is seen that assythment or compensation was given in a much wider sphere than simply assaults -- it was given also in defamation and theft.

(a) Assault:

In a serious assault, where A. blinded B. in his right eye and wounded him in his hand, the assize declared that A. must pay B. £20 for the damage. There is a further reference to this case in the extracts of the fines paid and it is noted that the composition paid amounted to £13:13: 4d.¹

In a non-blood assault -- when the assaulted was "so heavily hurt that he was not able to work for a period" the assailant had to pay 5 gulyeons as recompense.²

(b) Slaughter:

In one case of accidental killing, the person responsible passed into the judge's will and assythment of £10 was agreed.³

(c) Defamation:

A form of recompense was frequently awarded in defamation cases-- two fines were imposed -- one payable to the king and the other to the person defamed.⁴ In such cases the two fines were for the same amount.

(d) Theft:

In a theft case, the accused offered composition of 10 dollars.⁵

The record gives a list of fines⁶ and in addition to the amounts of the fines the list gives an amount for composition in a number of cases. It seems very likely that the composition figure included compensation to the person injured or whose property was damaged, as in some cases the composition figure is higher than the basic fine.

1. L.35, 39, 63.
2. L.86/7 -- in a bloodyte case B. had been injured but had provoked the assault and he could not get assythment.L.111
3. L.35, 63.
4. 4 merks -- L.3, 20, 27etc.
8 merks -- L.3, 19,31 etc.
5. L.47.
6. L.51/64.

XI. ASSYTHMENT (Contd.)

4(b) ORKNEY & SHETLAND COURT. 1612-13.

No instances of assythment for personal crimes are noted,
but payments of compensation are given in some instances -

(a) Defamation:

For insulting, a court statute imposed a fine of 53/4d.
to the king and a further fine at the discretion of the
judge payable to the offended party.'

(b) Miscellaneous:

For riding another's horse without permission - 4 merks
to the king and 4 merks to owner, with provision for
increased fines depending on the distance involved.'

1. M.22.

2. M.23.

XI. ASSYTHMENT (Contd.)

5. BARON COURT. 1523-1747.

In the Carnwath record, no express mention is made of assythment, but in one blood assault, it is stated that the Baron assessed the damage on "ilk ane of thaim v ky ane codo" i.e. there was a liability to the extent of five cows and one heifer. While this may be a form of assythment it could also be a penalty exacted instead of the normal fine - the phrase "ilk ane" infers a joint liability and whereas if it was an assythment the liability should be imposed on one of the parties only. In this case the inquest found one of the parties quit of blood and found the other in blood and in the lord's will, but the report is inconclusive and the lord's assessment could be either an assythment or the penalty itself.

In the later records, however, the operation of assythment is clearly seen.

Assythment was not limited to blood assaults and is seen in non-blood assaults, defamations and also in theft cases, but the liability to make reparation for injury or damage caused is found most frequently in blood assaults. Assythment was always less than the main fine.

The operation of assythment is illustrated by the following cases -

P.F. -v- James Wise for hurting and the blooddrawing of George Caddell which charge was proven and Wise was fined £50 to be paid to the Fiscal of the Court and was decerned further to pay to Caddell the sum of £10 as assythment for curing his wound.

The entries are similar in the case of a non-blood assault - //

1. O.22.
2. P.121/4.

XI. ASSYTHMENT (Contd.)

5. BARON COURT. 1523-1747 (Contd.)

assault -

George Gairdner -v- Thomas Strachan for striking, wounding and bruising (the wounding in this case was not proven and the charge was limited to striking) Alexander Strachan; a brother of the defender was found to have been the person responsible for the assault and he was fined 28 and was ordered to pay to the complainer the sum of 40/- as an assythment.¹

In Forbes, where assythment was awarded frequently, the actual amount of assythment appeared to bear some relation to the principal fine; in the case of blood assaults, the average amount was £5 and in non-blood assaults, the sums of 40/- and 20/- were usual.²

In the Urie record, assythment in a blood assault was £10 and in a non-blood assault 40/-d.³

In Corshill, assythment was not assessed as a definite fine, but rather as an indefinite sum related to the actual loss suffered by the injured.

The Laird -v- Thomas Miller and Hugh Dyat for blood - Dyat was fined £10 for blood and bloodwyte and was further ordained to cure the wound and assyth the party (injured) for his inability to work during the time his injuries were healing.⁴

For defamation, the accused was fined £10 and £3 to be paid to the insulted.⁵

Theft cases which show a liability similar to assythment are noted -

John Mill -v- George Walker for theft, which theft was proven and the accused was fined £20, to be paid to the Baron and a firloft of meal to be given to the complainer for the damage sustained.⁶

-
1. Ra. 318/26.
 2. Ra. 260/1 - £50 - 20 merks.
269 - £40 - £5.
267 - £40 - £4.
255/6 - £30 - £5.
268. - £20 - £5.
271 - £20 - £2.
249/0 - £10 - £5.
 3. P. 121/4.
 4. P. 95.
 5. S. 86/7, also S. 134 - pay doctors' bill.
but S. 225 - £45 to injured and £5 to p.f.
 6. Q. 156/7.
 7. Ra. 289, also Q. 106, 180. P. 101/2

XI. ASSYTHMENT (Contd.)

5. BARON COURT. 1523-1747 (Contd.)

The cases give a certain amount of detail on the question of self-defence - A. strikes B. but B. provoked and threatened A. and A. retaliates, injuring B. - could B. claim assythment in these circumstances? The answer depended on the degree of self defence present.

In two cases in the Urie record, a claim for assythment was dismissed because the injured person's own actions caused the other person to use force.

P.F. -v- Robert Edward for hurting, wounding and blood drawing of David Smith and ----- Hampton, who craved assythments from Robert Edward. It was found on enquiry that Edward, while defending his master's ground, struck the intruders, one of whom cut his hand while trying to seize the halberd held by the accused, the decision was given as follows - "the baillie having considered the above confession, finds that the fact that accused endeavoured to apprehend the intruders sufficient to liberate and free him from all assythment especially since what he did was in his own defence and that the wounds the intruder received were occasioned by his own foolish and wilful trying to take the halberd from him".

A similar case is P.F. -v- John Smith for hurting, wounding and blood drawing of John and James Davidson, Alexander Davidson and William Henderson. Assythment was craved by the procurator fiscal in favour of Alexander Davidson or any other persons wounded. It was found that Smith had been insulted and provoked by the others and endeavoured to leave their company. They followed him and pursued him for his life. He was obliged to beat them in his own defence. Smith was fined for blood £50 but no assythment was due to anyone as Smith acted in his own defence.²

As was mentioned above³, a strict liability was observed for blood unlaws and self defence was not relevant to reduce the blood fine as the foregoing cases show. The degree of self defence necessary to absolve from assythment was also high and the following cases show where assythment was due notwithstanding an element of self defence on the part of the person who struck the blow.

1. P.147/8.
2. P.144/6.
3. See p.

XI. ASSYTHMENT (Contd.)

5. BARON COURT. 1523-1747 (Contd.)

Patrick Leith, in name of James Walker -v- George Anderson for violently and cruelly beating, blooding and marking Walker. The inquest found Anderson in the blood but requested the bailie to consider the provocation on the part of Walker and stated that Anderson acted in self-defence. The bailie fined Anderson £10 and ordered payment of £5 to the party wounded (Walker). In this case the elements of provocation and self-defence were not enough to annul the assythment, although they may have been taken into account in deciding the amount of the principal fine which is low for a blood unlaw.

Assythment in the Baron Courts was on the same level as bloodyte, i.e. a lesser penalty than the main fine for the assault. The main fine was imposed in the public interest if blood was shed. Assythment and bloodyte were subordinate fines but in essence diametrically opposed - bloodyte was inflicted on the person whose actions caused the assault and who may or may not be the assaulter, inflicted because his conduct provoked the fight and was a penalty payable to the Baron. Assythment, being a reparation for injury caused and payable to the injured, was imposed only on the assaulter and was imposed only if the assaulter was more to blame than the assaulted.

Assythment was quite distinct from the main fine, which was payable to the Laird and which was imposed because an assault had occurred and in the case of blood actions, by virtue of the mere fact that blood had been shed by the assaulter. Having discovered that there had been assault or that blood had been shed, the bailie, after disposing of the main fine, then considered whether or not the circumstances warranted the payment of a reparation to the injured, his decision in this respect being governed by the degree of blameworthiness present or absent in the injured person's actions and how far injury was the result of his own actions.

XI. ASSYTHMENT (Contd.)

6. BURGH COURT. 1398-1714.

References to assythment in the Aberdeen record occur throughout the range of the assault cases.

Christinus de Clunes placed himself in the will of the bailies for assaulting (verberacion) of a certain woman, and was fined by the court. Matheus Pynches became cautioner for Christinus de Clunes that he would satisfy (by assythment) Mariota, wife of Patricius for the verberacion he gave her and that he would not trouble (perturbabit) the town again under pain of £10.¹

The assythment was frequently guaranteed by caution.²

Provision for assythment is also made in the old laws.

If any gild brother strikes another with his fist, he will be fined half a merk and he will make assythment to the injured according to the will of the Alderman and the Dean and the other gild brothers. If any gild brother draws the blood of another, he will be fined 20 solidi and shall pay assythment according to the will of the Alderman and the Dean and the other gild brothers. None of their fines shall be modified or remitted by prayer or in any other manner of way.³

Reference to assythment is rare in the later records.

Following an assault by a dog which hurt and blooded Marion Williamson, the owner of the dog had to have the dog destroyed (by hanging) and give satisfaction to the injured.⁴

In a fine for riot, the accused had to pay 40/- whereof 30/- had to be paid to the injured for damage to his coat.⁵

-
1. V.24.
 2. V.57 - in will for verberacion and caution to satisfy.
V.130 -do- and caution to satisfy for verberacion and bludwit.
V.79 - fined for verberacion of woman, and caution to satisfy bailies' will.
V.111 - caution to satisfy will and fine.
V.118 - caution to satisfy (12d.) and fine.
V.140 - caution to satisfy.
 3. S.G. VII. p. 67.
 4. Y.2. 1652.
 5. Y.68.

CONCLUSIONS.

XI. ASSYTHMENT.

1. As has been noted, the process of compounding was common for most crimes in the earliest period and while in the middle and later periods compounding fell away for other crimes, it remained frequent in personal crimes - particularly in slaughter and assault.

2. The amounts varied -

- (a) Justiciary courts - early - no amounts given.
middle- 250 merks (assault)
later - 300 merks (murder)
- 247 merks (slaughter)
- £100, £80, £40, 400 merks (assault)
- £300 Stg. 300 merks (rape)
- (b) Argyll court - £30, £20, £10 (assault)
- (c) Sheriff court - later - £20, £10, £5 (assault)
- (d) Shetland courts - middle- £10 (slaughter)
- £20 (assault)
- 8 merks, 4 merks (defamation)
- (e) Baron courts - - £10, £5 (blood assault)
- £2, £1 (non-blood assault)
- £10, £3 (defamation)

3. In many cases fining was also imposed and the relationship of the fine to the amount of assythment varied.

In the Justiciary courts, assythment tended to be more than the fine, but in the Argyll, Sheriff and Baron courts, assythment was less than the fine.

4. The Baron courts show a detailed operation of assythment and it is seen that assythment was due even if there was an element of self-defence in the assault. It is also seen that the Baron courts viewed the assault fines from three points (1) the main fine or unlaw (due from the attacker), (2) bloodwyte (due from the person who provoked the assault) and (3) assythment (due from the attacker). The three forms of liability were quite separate.

5. //

CONCLUSIONS.

XI. ASSYTHMENT (Contd.)

5. While assythment was very frequent in the Burgh courts in the early period, references are rare in the middle and later periods. It is difficult to say why this change should have occurred - the burgh courts frequently had different rules from the other courts, but assythment was a standard and useful principle and one might have expected references to its use in the burgh courts.

XII. FINING.

1. JUSTICIARY COURT.

PART 1. 1488-1650.

The record shows that fining was imposed in a number of crimes during the period of compounding and remission.

Where the accused had not reached agreement with the injured person regarding composition and had either been convicted by the court, or had placed himself in the king's will, the king imposed a fine payable to the Crown in addition to the compensation which had to be paid to the injured.

The amounts varied considerably, but the average fine was £5.

Apart from the fine imposed by the king, if a person did not appear, his cautioners lost the amount of their bond; this loss is noted in the record as a fine, but while the end result is the same, the legal justification is different--cautioners making a payment under a bond of caution were implementing a contractual obligation, i.e. based on agreement and consent, whereas the amount of the fine was decided by the justice and not in any way based on consent. The amounts again varied greatly.

The fining of cautioners is noted throughout the record, but while the entries do not give the actual terms of the bonds, it seems likely that the fine was the actual amount of the agreed caution.

1. Murder & Theft	-	40/-	A.17	-	will.
Assault	-	£10	A.73	-	will.
		£5	57	-	conv. 73 will.
		£3	16	-	in will. 57 conv.
		£2	16	-	will.
		40/-	56/7	-	conv.
		15 merks		-	73 - will.
		10 merks		-	54, 55- conv.
		6 merks		-	54 conv.
		5 merks		-	24 - will, 55, 59 conv.
		4 merks		-	54 conv.
Hamesucken & Theft	-	£4	-	15	will.
		£5	-	25	conv.
		£3	-	92	conv.
Accepting Bribe	-		5 merks	-	63 will.
Miscellaneous	-	£5	-	40	conv. 59 will.
		£3	-	54	conv.
		40/-	-	59	will.

2. See Caution entries.

Note: will-placed himself in the king's will.
conv-convicted

XII. FINING (Contd.)

1. JUSTICIARY COURT.

PART 1. 1488-1650 (Contd.)

In the later records, actual fines were infrequent.

(1) There are occasional instances where fining was a penalty for a substantive crime - usually assault.

For hurting and wounding A. on his head, cutting off his ear and wounding him on his arm, B. was fined, but the amount is not stated.¹

During the middle period of James VI rule, fines were imposed by the king, if the person placed himself in will. The types of crime varied considerably and plainly were related to the wealth of the person and the state of the king's purse at the time.²

(2) More frequently fines were imposed for administrative breaches.

If a member of an assize did not appear, he could be fined.³

Also if a person failed to produce letters duly endorsed.⁴

-
1. B.7/8, also B.11.
 2. Attempted murder - 1000 merks. C.40.
Slaughter - £5000. C.146.
Assault - 1750 merks. C.358/9.
Abduction - 2500 merks and brown horse. C.339.
Carrying Pistols - 500 merks. C.129.
Absence from raid - £100. C.134/5.
Treason - 3500 merks. C.34.
 3. B.7, 11 - £40.
C.63, 393 - 100 merks.
 4. B.30, 37 - £100.
B.30, 33, 37 - 100 merks.
B.37, 38, 41 - £40.

XII. FINING (Contd.)

1. JUSTICIARY COURT.

PART 2. 1661-1747.

Fining is noted throughout the whole period and was imposed more frequently than in Part 1, but the fines divide into those imposed as sentences in substantive crimes and those imposed for contravening administrative rules of procedure.

(1) Fines imposed for substantive crimes.

(a) Assault was the most frequent, but the amounts varied considerably.

Alexander Baxter and George Bell were convicted of blood-ing and wounding and were sentenced to be amerced in 100 merks, two-thirds payable by Baxter and one-third payable by Bell. They were ordered to find caution for the fine, or else be imprisoned till they paid it.¹

For striking and wounding John Anderson, a bailie of Inverurie, William Ferguson and others were fined £50 to the king and £100 to Anderson, and to remain in prison until paid.²

For assaulting a person so that he died, Archibald Burnet was fined £100 Stg. and James Loudon £50 Stg. and were imprisoned till paid.²

(b) Adultery.

Calum Macfarlane was fined £30 by the English judges during the Commonwealth for adultery.⁴

A number of persons were accused of adultery, but produced details of conviction during the Commonwealth when they had been fined. It is noted that this sentence was lighter than that prescribed by Scots law.⁵

(c) Two cases (one of murder and one of rape) show a nominal fine to the king and a much heavier payment to the assaulted.⁶

(d) Theft. //

1. F.52, also F.64/6 - 200 merks fine - 300 merks assythment
F.36, F.140/2 - 240.
2. G.177/0, also G.52/3 - £50.
3. H.33/4, 1711.
4. G.74, also G.53/4.
5. G.53/4.
6. H.13/5 - 300 merks to the girl, 10 merks to the king.
H.99 - 300 merks to representatives, 10 merks to sick.

XII. FINING (Contd.)

1. JUSTICIARY COURT.

PART 2. 1661-1747 (Contd.)

(a) Theft.

For theft and riot, John Watson and John Auld were fined 400 merks and 100 merks. There was a reference to law-burrows in this case.¹

(?) The administrative fines covered a number of situations.

(a) Failing to report criminal letters.

Mungo Murray was americiat for not reporting (criminal) letters.²

In one case, the fine for not reporting letters was cancelled because the person was prevented from doing so by a storm.³ In another, the pursuer could not serve his summons because he could not get a messenger who was prepared to go to the highlandmen in Badenoch.⁴

(b) Absent witnesses were fined.

The absent witnesses were unawed - 100 merks.⁵

(c) Absent assizers were also fined - 200 merks.⁶
- 100 merks.⁷

An early entry states that John Cuninghame, W.S. produced a commission from the king creating him receiver of all escheats, fines, unlaws, without prejudice to the rights of the justice clerk and his deputies.⁸

1. G.137.
2. F.22, 46, 50, 53 etc.
F.112 - 31000 per baron.
100 merks per yeoman.
F.143 - 3700 merks.
3. F.84.
4. F.63/4, also G.9.
5. F.28, 95 etc. G.61, 99 etc.
6. F.120 etc.
7. F.187.
8. F.2.

XII. FINING (Contd.)

2. ARGYLL JUSTICIARY COURT. 1664-1742.

As in other records, assizers and witnesses who did not appear when required were fined. The amounts varied!

In isolated cases, fining was imposed where the accused did not appear² - the crimes in such cases would be minor as the standard penalty for non-appearance was outlawry in serious crimes.

Apart from the administrative fines on absent witnesses and assizers, fines were frequently imposed as a punishment in substantive crimes.

(a) Assault - Blood.

Duncan Mackenzie was fined £100 for striking Donald McVicar to the effusion of his blood. He was imprisoned till he paid.³

Non-Blood.

Duncan Fisher was fined £50 for striking Margaret McDougall and had to pay 20 merks assythment.⁴

The fines varied according to circumstances, but the usual fine was £50 in both blood and non-blood assaults, with a possible amount of 500 merks and also £6 for a breach of the peace.

Two cases occur of aggravated assaults - both relating to assaults in church.

Duncan McIlvernock was convicted of a riot in church and striking the minister, on a Sunday. The accused was fined £100 and imprisoned till paid.⁵

1. Absent assizers: 100 merks. I.20, 52.
£10. I.74.
Absent witnesses: £40. I.52, 131, 136.
£10. I.107/8.
2. Absent principals: £10. I.107.
£20. I.72.
100 merks. I.155.
3. I.140.
500 merks : I.143/5.
100 merks : I.27/8.
£50 : I.63/4, 68/9, 139.
£12 : I.140/1.
4. I.98.
£50 : 40 merks assythment. I.113.
£50 : £12 assythment. I.149.
£20 : I.79. £6. 140/1.
5. I.65/6 - also £40 I.78.

XII. FINING (Contd.)

2. ARGYLL JUSTICIARY COURT (Contd.)

(b) Hamesucken:

The justice fined Duncan McGrigor £50 for hamesucken and riot.¹

Ivar Campbell and others were fined for a serious hamesucken. They came to the defender's house and attacked him leaving him sorely wounded. The principals were fined £10 Stg. (the only fine in sterling in the record) of which £20 Scots was to be paid to the injured.²

(c) Deforcement:

Duncan McCauish and another were fined 500 merks for obstructing officers who wished to apprehend John McNeill. They also had to pay the pursuer's expenses and damages of 100 merks.³

(d) Adultery:

Donald McBriden was fined £40 for adultery seven years previously. He was imprisoned till he paid or found caution.⁴

(e) Rape:

Robert Duncanson was fined 100 merks for ravishing and striking.⁵

(f) Theft:

Many theft cases show fining as the penalty, but the criterion here appears to be restoration of the stolen items or payment of their value.

John McDowell McIllehawish was fined £10 for stealing a cow and a stirk. He was ordered to return the beasts or else pay £20. It is stated that the procurator fiscal passed from the criminal aspect of the libel.⁶

Angus McMillan was fined £10 for a small theft ten years before. He took some articles which he later restored.⁷

1. I.74/5, also 100 merks I.75.
2. I.97/8.
3. I.148/9, also I.46/8 - 100 merks.
I.105 - £10 and 5 merks expenses.
4. I.125.
5. I.145.
6. I.28, also I.29/0 - 100 merks and restore.
I.48/9 - 17 merks and value.
I.89/0 - £20: scourged: caution for good behaviour.
7. I.121.

XII. FINING (Contd.)

2. ARGYLL JUSTICIARY COURT. 1664-1742 (Contd.)

(f) Theft (Contd.)

Colin Campbell and another were fined £100 and others were fined £50 for taking cattle and horses from an escheated estate, the beasts being in the possession of John Campbell who did nothing to stop them, to the prejudice of the crown's interest.¹

Accessories to a theft were fined:

John McOlchalum was fined 100 merks and Neil McNeill was fined £40 for receiving a stolen horse, and were imprisoned till they paid.²

John McArthur was fined £200 and others £100 and £50 for ferrying stolen horses over the Clyde between Dunoon and Gourrock.³

(g) Many miscellaneous crimes were penalised by fining.⁴

When a bond of caution was called up, the guarantor was "unlawed and americiat" the amount of his bond. This wording is the same as that of an ordinary fine, but the amount was fixed in the bond.⁵

-
1. I.138/9, also I.71/2 - £40 and restore.
 2. I.97/8.
 3. I.139/0.
 4. Poaching: £100 - I.14.
£ 40 - I.74.
£ 20 - I.14, 15, 16 etc.
£ 10 - I.14, 15, 74, 75 etc.
£ 5 - I.15.
Moorburn: £ 5 - I.22.
Drunkness: £10. I.79.
Malicious Slander: 100 merks. I.82/3.
 5. I.26 - 300 merks.
I.24, 25, 29 - 500 merks.
I.90 - 100 merks.
for producing substitute for principal, the accessories were fined 200 merks and 100 merks. I.26.

XII. FINING (Contd.)

3. SHERIFF COURT. 1515-1747.

Fining was the standard penalty in most assault cases, but no details of the amounts are given in the early records, nor is any information given regarding the amounts of the fines for wyte nor their relation to the blood fines.

However, in the later records, the amounts are stated and a pattern can be seen.

- (a) Assaults: Fines of £200 and £100 were imposed in the most serious cases, but the standard fine was £50.²
Occasionally £10 was imposed.³

The fines in the other crimes fell within the same range -

- (b) False accusation: 100 merks and public punishment.⁴
£50 fine and public punishment.⁵
- (c) Hamesucken: £200 fine.⁶
£100 fine.⁷
- (d) Deforcing: £5 Stg. for attacking the revenue officers.⁸
£20 for mobbing customs officer.⁹
- (e) Adultery: A case shows fines of £40, £20 and £10 with £10 as the most common amount.¹⁰
- (f) Theft: Fined 500 merks and public punishment.¹¹
Fined £100 and --do--¹²
Fined £180 and to serve in the army.¹³
Theft fines are noted in the early record, but no amounts are given.
- (g) Fraud: False measures - £40.¹⁴
- (h) Miscellaneous: For refusing to accept an eldership because he was a Covenanter - fined 200 merks.¹⁵
- (i) Administrative: For absence - £10.¹⁶

1. Kb.31/4, 36/8, 46, Kc. 81, 178.
2. Kb.35/6, 38, 82. Kc. 81, 84, 112.
3. Kb.82, 140/1, 144. Kc. 86.
4. Kb. 50/6.
5. Kb.129.
6. Kb.215.
7. Kb.221.
8. Kb.89.
9. Kc.175.
10. Kb.78/9.
11. Kb.193.
12. Kb.203.
13. Kc.98.
14. Kb.190.
15. Kb.25.
16. Kb.95.
Kc.104, 175.

XII. FINING (Contd.)

4(a) SHETLAND COURT. 1602-04.

Fining was the most frequent sentence in the record, and was imposed in most crimes.

(1) Assault.

The standard penalty was fining, but the different categories of assaults show that a definite system was observed in calculating and imposing the fines.

(i) Blood Assaults:

- (a) For "bleeding above the end" the basic penalty excluding aggravations and specialties was 40/-d.¹
- (b) For "bleeding below the end" there was a similar fixed rate. The standard penalty was a fine of 4 merks.²

(c) Dounraxtering:

This resulted in an additional fine of 1 merk.

It was found that A had dounraxterit B and had bled him above the end - decerned to pay 40/- (for the blood) and 1 merk (for the dounraxter).³

In one case a fine of 5 merks was imposed for bleeding in the arm and dounraxtering, but this could be 4 merks for bleeding and 1 merk for dounraxtering, and on both counts can be held to be a standard fine.⁴

Aggravations - blood:

The aggravations are frequent and varied, but they follow a definite pattern and the invariable amount was 40/-d. per aggravation.

(1) Aggravations of place:

- (a) Assaulting another at home.

For bleeding B. beneath the end within her own hamefrie, A. is decerned to pay 4 merks for the blood and 40/- for bleeding within the hamefrie.⁵

1. L.5, 16, 17 etc.

2. L.2, 16, 29, 30 etc.

3. L.32.

4. L.18, also

L.131, 135 - two dounraxters - 2 merks.

5. L.2, also L.5, 7, 21, 28 etc.

XII. FINING (Contd.)

(4a) SHETLAND COURT. 1602-04 (Contd.)

(1) Aggravations of place (Contd.)

(b) Assaulting another between the sea and the banks.

A. bled B. between the sea and the banks - fined "twyse 40/-".

(c) In frie coupsta (in an open market place).

A. bled B. above the end within a "frie coupsta" - fined "twyse 40/-".

(d) On the sea.

A. for bleeding B. upon the sea is fined "twyse 40/-".

(e) on king's highway.

A. confessed to have bled B. on the head, with a stave on the king's highway - fined "twyse 40/-".

These cases show the basic blood fine of 40/- or 4 merks with a further fine of 40/- for each aggravation.

(2) Aggravations of time:

(a) Under silence of night.

A. bled B. above the end in a frie coupsta under silence of night - fined "thryse 40/-". (i.e. 40/- for blood, 40/- for frie coupsta and 40/- for night).

(b) On Sunday.

A. for bleeding B. on the head with a baton on a Sunday fined "twyse 40/-".

(3) Aggravations of manner:

If a weapon or stone was used this constituted an aggravation.

Bled him by casting a stone - twice 40/-

(4) General aggravations:

Pulled from his horse and bled - 80/-

Second //

1. L.130, also L.22 etc.
2. L.13, also L.89.
3. L.130, also L.132.
4. L.122, also L.33.
5. L.89.
6. L.135, also L.140.
7. L.115.
8. L.111.

XIII. FINING (Contd.)

4(a) SHELLAND COURT. 1602-04 (Contd.)

(4) General aggravations (Contd.)

Second conviction for bleeding above the end.¹

Court officer fined 80/- for bleeding above the end -
fined 40/- extra because of his position.²

Two or more aggravations occurred in the one case, and the
aggravations were added on:-

e.g. bleeding B. in his home on a Sunday - fined thryse
40/-d.³ The cases which show a fine of "thryse 40/-"
are clearly defined as 40/- for bleeding above the end,
and 40/- for each of the aggravations.

The cases show very clearly that there was a recognised
system of aggravations and that there was a definite fine
of 40/- for each aggravation.

It is noticed that the vast majority of blood assaults are
bleeding above the end - carrying as it happened a 40/-
fine, but cases of bleeding below the end, with its 4 merk
fine are referred to occasionally - in such cases the
aggravation fine is constant at 40/-d.⁴

(ii) Non-blood assaults.

Fining was the standard penalty for non-blood assaults and
again there is a consistent pattern in the basic assaults.

Where A. gave B. one blow, A. was fined 1 merk,⁵ for two
blows 2 merks,⁶ for three blows, 3 merks,⁷ for four blows
4 merks,⁸ and for five blows, 5 merks.⁹

But in a few cases, the pattern is broken and fines of 40/-
are noted.

1. L.87.
2. L.35.
3. L.30. the combined aggravations are numerous -
bleeding, casting stone, between sea and banks "thryse
40/-", L.22.
bleeding, between sea and banks in frie coupsta "thryse
40/-". L.120.
bleeding, in frie coupsta at night "thryse 40/-". L.89.
Also L.22, 89, 140.
4. L.130 - 4 merks and 40/-.
5. L.1, 5, 16, 23 etc.
6. L.16, 30, 129 etc.
7. L.3.
8. L.8.
9. L.30.

XII. FINING (Contd.)

4(a) SHEPLAND COURT. 1602-04 (Contd.)

(ii) Non-blood assaults (Contd.)

For striking B. with a cudgel, A. was fined 40/-d.¹

For the other forms of non-blood assaults, the fines appear fairly uniform, but no exact mean can be stated.

(a) troubling: A. and B. if they fail to clear themselves, are fined 2 merks for troubling.²

(b) dounraxtering: As in the case of blood assaults, this resulted in a separate fine of 1 merk in addition to the basis penalty.

A. is found to have troubled and dounraxtered B - fined 40/- (for troubling) and 1 merk (for dounraxter).³

On occasions it could form the sole charge.

A. was found to have dounraxtered B. - fined 1 merk.⁴

and A. was fined 2 merks for dounraxtering his father twice and troubling him against all equity.⁵

(c) cuffing: The fines for cuffing were heavier than the normal striking fines, but again each cuff was worth a definite value - 5 merks.

For giving B. one cuff with his open hand A. was fined 5 merks.⁶

For giving B. two cuffs on the face with her open hand, A. was fined 10 merks.⁷

Threatened assault.

The penalty for drawing a sword or pistol in a public place was standard -- 1 merk.⁸

Aggravations:

The types of aggravations are similar to those noted in the blood assaults, but the pattern of fining is not so clear.

(1) Aggravations of place: //

1. L.115, also 120.
2. L.28, also 86 - 40/-.
30 - 4 merks.
3. L.86, also 66.
4. L.86, 90, 116.
5. L.113, also 22, 29, 34 etc.
6. L.66, 151.
7. L.87.
8. L.33. sword.
L.131, 135. both dirks.
but L.88. 2 merks - dirk

XIII. FINING (Contd.)

4(a) SHELLAND COURT. 1602-04 (Contd.)

(1) Aggravations of place:

(a) troubling at home.

A. for troubling B. at home was fined 4 merks.¹

In these cases it seems plain that the striking fine and the aggravation are taken together, but it is not possible to say what is the basic fine and what the aggravation.

But some cases do show two fines -

For throwing a stone at B. within his house, A. was fined 40/- and 1 merk.²

In these cases it would appear that 40/- is the aggravation and 1 merk is the blow, as in the case where A. and B. dounraxtered others - fined 1 merk and for troubling (at home) fined 40/-d.³

(b) between sea and banks.

A. troubled B. between sea and banks and gave him a blow with a stick - fined 40/- for aggravation, 1 merk for blow.

(c) in frie coupsta.

A. gave a cuff to B. in frie coupsta - fined 5 merks for cuff and 40/- for aggravation.⁴

(d) on king's highway.⁵

(e) in church.

A.B. and C. troubled D. in Church on Sunday - each fined "twyse 40/-" and B. further fined 2 angels, all to ask the minister's forgiveness.⁷

(2) Aggravations of time:

(a) Silence of night.

There are two cases showing this aggravation, but in both cases there is more than the one aggravation and they are noted below.⁸

1. L.17, also fines of 80/-, 40/- and 2 merks.
2. L.23, also 86/7.
3. L.116.
4. L.5, 85, also 80/-, 85.
5. L.151, also L.135 "twyse 40/-".
6. L.33 - 40/-d.
7. L.135.
8. L.87. 140.

XII. FINING (Contd.)

4(a) SHEPHERD COURT. 1602-04 (Contd.)

(2) Aggravations of time: (Contd.)

(b) On Sunday.

A. gave two strokes to B. on Sunday - fined 40/- (for aggravation) and 2 merks (for striking)!

As in the blood assaults, the aggravations could be combined.

A. troubled B. at home on a Sunday and gave him a blow, fined twyse 40/- and 1 merk for the blow.²

A. troubled B. at home on Sunday, under silence of night, in a frie coupsta (B's home must have been built on or adjacent to a market place). A. was perhaps a little reckless in choosing his time and place, but this case illustrates the cumulative effect of aggravations - A. was fined four times 40/-, being 40/- for troubling and 40/- each for the three aggravations.³

From the foregoing cases it is seen that the fine for aggravation was generally 40/-d.

There are a few cases which show a different penalty - e.g. in a number of cases the accused passes into the will of the judge, but the record does not give any details of the eventual outcome.

In some cases, "troubling" itself could be treated as a basic charge and worthy of a fine of 40/- with the aggravation in addition. In others, troubling was not made the subject of a separate fine and simply one fine of 40/- covered troubling and the aggravation. Such cases were less frequent, however, and more usually two fines were imposed, the aggravation fine being constant at 40/-d.

(2) Bloodwyte.

Bloodwyte was a separate concept from the actual blood fine and represented the element of provocation - the person responsible //

1. L.129, also 2, 56.
2. L.35.
3. L.87, also L.34

XII. FINING (Contd.)

4(a) SJETLAND COURT. 1602-04 (Contd.)

(2) Bloodwyte (Contd.)

responsible for provocation had to pay half the blood fine -
20/-d.

(3) Insulting.

4 merks to the king and 4 merks to the insulted was standard
with a few instances of 8 merks. The fines payable to the
insulted applied to each of the insulted individually.

(4) Adultery.

The record gives details of the adultery fines.

(5) Theft.

2 merks was standard, with some of 1, 3 and 4 merks. 40/-
for gripstair.

(6) Witchcraft.

2 merks was standard, with some of 6 merks for second
offences.

(7) Administrative.

For failing to appear when the case called, the standard
penalty was a fine of 4 merks.²

On certain occasions the fine was £10³ - but no details are
given as to why the heavier fine was imposed.

For failing to produce a person accused of theft - the except-
:ional sum of 1000 merks was imposed, but in this case it was
stated that the person fined helped the thief to escape from
the Court's jurisdiction.

(8) Miscellaneous.

(a) for failure to perform feudal services - 40/-d.⁴

- | | |
|---------------------------------|----------------------|
| 1. 10 angels - L.22, 58. | 2. L.68, 75, 76 etc. |
| 2 angels - L.22, 58. | 3. L.27, 136. |
| 1 angel - L.20, 21, 22, 57, 58. | 4. L.25 - £10. L.17. |
| £4 - L.22, 58. | |
| 40/- - L.22, 57. | |

XII. FINING (Contd.)

4(a) SHETLAND COURT. 1602-04 (Contd.)

(8) Miscellaneous (Contd.)

(b) not burying dead - 40/-¹.

(c) alleged wrongful possession of land - 40/-².

(d) using church as byre - 40/- and ask forgiveness in sackcloth³.

(e) Animal cases:-

Injuries to animals - 2 merks, 40/-⁴, 160/-⁵

Dogs worrying sheep - 40/- and dog to be killed.⁷

Keeping dog already found guilty of worrying sheep - £10.⁸

(f) Statutes: As in other court records, various statutes are noted, but with the exception of the statute prohibiting false and groundless actions, which contained a penalty of loss of the right hand and sword, and for a second offence, escheat and banishment⁹, the normal statutory penalty was 40/-¹⁰ with some of £10.¹¹

1. L.73.

2. L.3, 26.

3. L.82.

4. L.20, 24, 33 etc.

5. L.25, 26, 32 etc.

6. L.34.

7. L.79.

8. L.31/2.

9. L.47/8.

10. L.73, 117 etc.

11. L.30, 122.

XII. FINING. (Contd.)

4(b) ORKNEY & SHETLAND COURT. 1612-13.

(1) Assault.

The standard penalty for assault was fining, but no information is available as to the amounts, except in one case of riot - £10, nor is any sum mentioned in respect of the bloodwyte.¹

(2) Insulting.

A court statute imposed a fine of 53/4d. payable to the king and a further fine at the judge's discretion to the party offended.²

(3) Theft.

A court statute gave details of fines for pulling wool from the backs of sheep.

6 merks for the first offence, 6 angels for the second and to be punished as a thief for the third.³

(4) Miscellaneous.

An act prohibited riding other people's horses and imposed a fine of 4 merks to the king and 4 merks to the owner. If the horse was found within the parish adjoining the owner's parish, the fines were increased to 8 merks, and trebled if more than two parishes away etc. If the accused was unable to pay, he would be punished in his person.⁴

-
1. M.61/2.
 2. M.22.
 3. M.20/2.
 4. M.23.

XII. FINING (Contd.)

5. REGALTY COURT. 1547-1706.

The text does not give much information regarding the amounts of fines in early periods, but throughout the middle and later periods, it is seen that the fines were standard and the exceptions were few.

(1) Assault.

In the early period, fining was the normal punishment, but the entries do not give the amounts imposed.

A court statute passed on 17th June, 1607, gives full details:-

In the first, gif the blude be drawin to incure the doubill payment useit heirtfoir, to wit fourtie pundis money: secundlie, gif thair be strakis without blude, ten pundis; gif thair injure ane ane other in wordis, in continance or drawing of wapponis, ten pundis money; and thair bodies to be punische wardit according to the fact in irnes and stokis to thair schame and disgrace.² Further provisions state that such criminals are to be avoided by honest men.

The assault cases are few and no details are given so it is not possible to say whether the statutory fines were observed or not, but towards the end of the early period, more information is available and at least for non-blood assaults the fine varied between £10 and £5.³

The only assault which may have been a blood assault in this period was absolved.⁴

The assault fines in the middle period show a clear pattern. For a blood assault the guilty person could expect to be fined £50.⁵

The exceptions are few:

Margarèt //

1. Na.31, 46, 61/2, 52, 69.

2. Na.33/4.

3. Na.148, 158, £5. 156, 157, £10.

4. Na.148.

5. Nb.22, 22/3, 30/1, 137, 203/4, 230, 233, 274/5, 400, 434 - some cases show a fine of £100 for blood and bloodwyte but this is really £50 for blood and £50 for wyte - Nb. 64, 109/0, 311 and Nb.22, 203, 230.

XII. FINING (Contd.)

5. REGALITY COURT. 1547-1706 (Contd.)

(1) Assault (Contd.)

Margaret Mertoun was fined £10 for striking and wounding Robert Fringle with stones and staffes - it seems likely that the sex of the defender was a consideration in this penalty.¹

John Bald was found guilty of blood but because he was a minor, he was put in the joughs for half an hour and not fined.²

In the cases of non-blood assault, the penalty was also constant - a fine of £10.³

Aggravations could increase the basic fine - where a person struck another under night (more fully "under cloud and silence of night") the fine was £25.⁴

Also in a serious case where the court officer was struck when going his rounds in the prison, the two persons involved received fines of £30 and £20 respectively. The aggravations in this case were considerable - apart from striking the court officer and breaking his staff, the assault was committed under "cloud of night" in prison with the alleged purpose of liberating one of the prisoners.⁵

In a dispute concerning land boundaries, one of the disputants struck and beat the horses of the other who was ploughing. The aggressor was fined £50 for the riot with £10 to the other. In comparison with the fines imposed for striking humans, this fine seems heavy, but it may have been that there was then a greater sympathy for animals struck by humans.⁶

Threatened assault was punished as a non-blood assault, with a fine of £10.⁷

(2) Defamation.

A fine of £10 was the normal sentence.⁸

(3) Deforcement.

Fines of £10, £5 and 20 merks⁹ are noted in the earliest period, but the amounts were increased greatly in the middle and later periods - £100 and £50.¹⁰

(4) Adultery. //

1. Nb.400.

2. Nb.10.

3. Nb.15, 22/3, 30/1, 33/4, 35 etc. but see Nb.14 - 10 merks.
Nb.231- £5.

4. Nb.71.

5. Na.3/4.

6. Nc.8/9.

7. Na.33/4, also Na.181 -- caution not to molest.

8. Na.164, Nb.13, 429.

9. Na.167, 159/0, 150, 358.

10. Nb.41/2, 49, 55, 116.

XII. FINING (Contd.)

5. REGALTY COURT. 1547-1706 (Contd.)

(4) Adultery.

A possible fine of £10.¹

(5) Theft.

Fines of £10 and £5 are noted.²

(6) Religious.

The Covenanted measures were enforced severely and by far the heaviest fines in the record were imposed in this sphere - £335, £200 and £100 are noted.³

(7) Miscellaneous.

(a) Poaching. The statutory penalties were 10 merks, 20 merks, 40 merks and imprisonment, but the cases show fines of £10 and 10 merks.⁴ One case, however, gives a fine of £10

(b) Boundary disputes. £10 for moving boundary stones was normal, but £20 is noted in one case. In the latest period fines of £50 were given, but all fines were increased at that time.

(c) Cutting timber and broom. The statutory penalties were £10, £20 and £40, but cases show £10 and £5. One case gives £20.

(d) Administrative. £10 and £5. It is noted that during the Covenanted period the fines for non-appearance were increased from £10 to £50, with some of £20.

1. Nb.12.

2. Nb.42/3, 150, 321.

3. Nc.4/5, 5, 13, 35.

4. Nb.59, 80, 206/7

XII. FINING (Contd.)

6. BARONCOURT. 1523-1747.

The standard punishment in the Baron courts for all crimes, almost without exception, was the imposition of a fine.

(1) Assault.

The amounts of the fines are not stated in the Carnwath record and no indication can be given as to the amount of either the principal fine or the fine for bloodwyte, but in the later records it is interesting to note that the amounts of the principal fines followed a definite pattern.

In the blood assaults, the usual fine was £50 Scots.¹

In the case of non-blood assaults, the usual fines were £10 and £5.²

Before a fine of £50 was imposed, there would have to be a considerable amount of blood shed and some cases, in which £50 was mentioned, show assaults amounting to attempted murder, with a corresponding diminution in both the severity of the assault and the amount of blood spilt in the cases where fines of £40, £30 and £20 were imposed. One case in the Forbes record is exceptional in that although the facts showed a serious assault, the assaulter was provoked and struck in his own defence. He had spilt blood and so could not be absolved, but his fine was only £10.³

-
1. P. 121/4, 144/6, 147 etc.
Q. 29, 30/1, 39 etc.
Ra. 241, 246/7, 260/1 etc.
S. 101/2, 107 etc.
- fines of £40, £30, £24, £20, £10, £5 and 50/- are noted in a few cases.
 2. P. 53, 95, 118 etc.
Q. 22, 28, 31 etc.
Ra. 235, 250/1 etc.
S. 76/7, 78/9 etc.
 3. Ra. 249/0.

XIII. FINING (Contd.)

6. BARON COURT, 1523-1747. (Contd.)

There are exceptional cases among non-blood assaults where the fine is over £10 but these cases are not frequent - but leaving these exceptions aside, the majority of the cases conform to the pattern of £50 - £10 for blood, and £10 and under for non-blood.

In the Stitchill record, fines for blood were divided into two categories - those where the fine was at "the Lord's mercy" ² i.e. where the accused placed himself in will, but little difference is seen in the sentences.

Bloodwyte fines in Stitchill are notable in that with one exception the fine for wyte is exactly half the fine for blood.³ In the exceptional case the parties are female, but it cannot be positively stated that this factor is of importance as in many other cases no special significance is attached to females as parties to assault actions.⁴

Age, however, was of importance and there is one case where two minors are found to have committed blood and their age is taken into account - "because of their present minority, pupillarity and less age" they are sentenced "to what amerciament or personal punishment the Lord pleases for the said blood".⁵

-
1. P. 112 - £50.
Q. 186 - £50.
S. 112 - £50.
S.102 - £40.
P. 118 - £20.
Ra.293 - £20.
289 - £20.
S.239/0 - £20.
S. 87/8 - £15.
 2. Q. 12, 24 etc.
 3. Q. 29 - £50 - £25, also 30/1, 48, 63, 64, 71.
Q. 9 - £24 - £12, also 22.
Q. 18 - £20 - £10.

The other records do not show such a clear pattern.

- Ra.246/7 - £50 - £5.
305 - £5 - £5.
S.143/4 - £50 - £40.
4. Q.12 - £10 - £4.
5. Q.48.

XII. FINING (Contd.)

6. BARON COURT. 1523-1747 (Contd.)

In some non-blood assaults a further penalty in addition to a fine was imposed, e.g. the infliction of the stocks during the lord's pleasure or a time limit to pay a fine under threat of corporal punishment.²

Aggravations were noted in connection with the substance of the offence, it is difficult to say how far they increased the penalty. If it is accepted that the normal non-blood fine was £10, some, but not all, of the aggravated cases show fines of £20.³

A statute passed by the Urie court, dealing with non-blood assaults is noted in full -

"In consideration of the manifold troubles and molestations which occur among neighbours and tenants in the Barony, the one oppressing the other with violence, the Laird being hindered through their daily complaints, thought it advisable to ratify and approve an act of court concerning peace and quietness within his barony dated at the Mill of Cowie on the 16th day of October, 1592, which act and ordinance of the court contains provisions to the effect that whatever tenant in the Barony invades his neighbour or any other person in the Barony, putting hands on him in violence shall incur a penalty, namely £10, to be paid to the Laird and also to satisfy the wrong done to the injured person by the offence".

but this act appears to have been directed against what is called in the Stitchill record "Riot and Straikes" and did not appear to affect the more serious penalties competent in a case of bloodshedding.

(2) Defamation: The usual fines were £10 or £5, but in the Corshill record, although some of the fines fall within the £10 and £5 range, heavier fines are noted - £50, £20 and £15. The Corshill record contained a statute which imposed a £15 fine on "flyting, scolding and scandal" and this was enforced.

1. Q.22.

2. Q.111/2.

3. P.117/8 - £20.

S.100, 239/0 - £20,
but Q.135 - £10.

4. P. 7/8.

XII. FINING (Contd.)

6. BARON COURT. 1523-1747 (Contd.)

In one case the insulted obtained compensation -- the insulte was fined £10 with £3 payable to the insulted.¹

(3) Deforcement.

The normal penalty was a fine, the amounts varying between £10 and £5.

It is noted that one of the few entries in Carnwath which shown an amount is a deforcement fine of £10.²

Corshill again shows a heavier fine than normal -- one of £20³ -- and in the Leys record a composite sentence of escheat of moveables, a fine of £40 and stocks for 24 hours is noted.⁴

(4) Theft.

Fining was the normal penalty for the vast majority of thefts.

The usual fine varied between amounts of £10 and £5, but some of £20 are noted.

Each record shows court statutes passed against particular forms of theft -- taking peats, crops etc. and the normal amounts in such cases were 40/-d.⁵

Restitution or payment of damages in lieu occurs -- for taking corn, the accused had to repay 3 fold and lie in the stocks for 24 hours.⁶

(5) Miscellaneous.

(a) Contempt of Court. Non-appearance was punished by fines of £10 or £5.

(b) //

-
1. Q.156/7.
 2. O.186.
 3. S.118.
 4. Rd.222.
 5. but see P. 101/2 -- £20.
 6. Q.139/0,
also P.101/2 -- £20 and satisfaction.
Q.105 -- £5 and damages.

XII. FINING (Contd.)

6. BARON COURT. 1523-1747 (Contd.)

(5) Miscellaneous (Contd.)

(b) Damage to property. The fines varied greatly - again £5 was frequent for breaking doors, killing a dog without cause and for dogs worrying sheep. But £40 was imposed for cutting off a horse's tail and £60 for burning heather carelessly.

(c) Poaching. A case brought under a national act (15 Jas VI. C.248) imposed £10 and confiscation of weapons and in other cases £10 and £5 are noted.

(d) Statutory offences. Breaches of the court statutes are noted frequently and the usual fine was £10, but £20 and £5 were imposed on occasions. It is seen that where reference is made to national acts, the fines are much heavier - £200 - in a sumptuary case.'

XII. FINING (Contd.)

7. BURGH COURT. 1398-1714.

Fining is by far the most frequent form of sentence throughout all records. In the earliest period the most usual amount of the fine was 8 solidi.

It must be known that the Burgess' fine is 8/- if he is convicted in an action.'

But this is by no means the maximum fine - in many cases larger amounts are stated and it can be said that 8/- was the fine for administrative contraventions and breach of trading regulations.

It is a feature of the early records (although it is not stated in Aberdeen) that the fines were applied to particular purposes in the town.

To be used to purchase wax to be burnt before St. Hobart in honour of God and the holy Kirk.'

Whoever is fined this year shall have his fine given to the bridge.'

In the later records, it is interesting to see that over a period the town councils gradually took over the fines for themselves.

In terms of an act, the council of Peebles decided that the magistrates should take a quarter of the fines for riot and blood and the treasurer should not be accountable for this part, but only for the other three quarters which are due to the town.'

1. L.Q.B. XXXIX. p. 19.

2. Z.28/9. 1526, also

Blood - fines to go to the bell.

Z. 48. 1547.

Insulting and rebellious - £40 to the common work of the town. Z. 116/7. 1607.

Blood and troubling - caution of £10 to the common work. Z. 55.1549.

Lawburrows - caution of £5 to the poor hospital. Z. 81. 1563.

Also to the rood work: Z.9. 1521, Z. 15. 1522.

3. X. 157. 1468, also

X.326. 1571 - various fines to go to the bridge.

X.350. 1572 - to the outwatch.

4. Y.46. 1658.

XII. FINING (Contd.)

7. BURGH COURT. 1398-1714 (Contd.)

By then, Stirling was already taking half:-

All fines for blood or riot were to be divided half to the treasurer for the town's account and the other half to the provost and bailies.'

In 1662 the Peebles magistrates' share was increased to one-half also, and by an act of 1681 they took the whole fine.²

In one case the magistrates of Peebles declared their aim of punishment:-

The Magistrates and Council have no delight in oppressing people by fines, yet they are still content and will make it their business to have all persons reduced to regularity and will oblige them to continue in good neighbourhood with all persons.³

If the person convicted of the fine was unable to pay, he could be made to work for the town:

Garcifer Thome de Moravia found Thomas caution that Thome de Moravia would carry out common work to the value of eight solidi - which he had been fined for his brigacion.⁴

Fines could be remitted on application to the Council.⁵

If a fine could not be met, a personal punishment was imposed.⁶

In two exceptional cases noted in the Statuta Gilde, the penalty is stated to be a cask of wine.

No Burgess shall ask any person to represent him in Court who dwells outside the court's jurisdiction to plead for him against any of the other Burgesses under forfeit of a cask of wine.⁷

Also //

1. X.368. 1627.
2. Y.54, also Y.88.1673 and Y.101.
3. Y.130/1. 1689.
4. V.219.
5. Y.137. 1691 - Ex-Provost prayed to be relieved of fines for riot.
6. Y.144. 1693.
7. S.G. XXXV. p. 80.

XIII. FINING (Contd.)

7. BURGH COURT. 1398-1714 (Contd.)

Also, if anyone makes any conspiracy against the community to divide or scatter it, he shall be sentenced to give a cask of wine as forfeit.¹

Sometimes an additional punishment was imposed, but this will be noted under the heading of the particular crime where it occurs. However, frequently imprisonment was added - the person was imprisoned till he paid his fine - in this case, imprisonment was given not having regard to the crime but rather having regard to the person's credit rating.

(1) Assault.

While fining was the standard penalty, the amounts are rarely stated.

(a) Verberacion.

Christinus de Clunes placed himself in the will of the bailies for the verberacion of a certain woman and was fined by the Court (he had to find caution also to guarantee (1) that he would satisfy her and (2) that he would not trouble the town again under pain of £10).²

(b) Percussion.

A court statute gave 8/- for armed assault and 4/- for striking.

If anyone strikes another within the burgh with a sword, axe, knife or stick, he will be fined 8 solidi.³

If anyone strikes with his fist, he will be fined 4 solidi.⁴

The cases do not usually give the amount of the fine.⁵

1. S.G. XXXVI. p. 80.
2. V. 24, also V. 49 - 140 - no will, fined.
V. 49, 66, 118, 79, 111 - will and fined.
3. V. 216.
4. V. 216.
5. Stabbing with knife - will and fined - V. 120.
Percussione and vulneravit - fined - V. 155.
Percussione usque ad sanguinem et bla - fined 8/- - V.234
Fined for threatening to strike another - V.64.

XII. FINING (Contd.)

7. BURGH COURT. 1398-1714 (Contd.)

(1) Assault (Contd.)

(b) Percussion (Contd.)

The old laws make provision for assaults within the guilds.

If any gild brother strikes another with his fist, he will be fined half a merk and he will make assythment to the injured according to the will of the Alderman and the Dean of the other gild brothers. If any gild brother draws the blood of another, he will be fined 20 solidi and shall pay assythment according to the will of the Alderman and the Dean and the other gild brothers. None of their fines shall be modified or remitted by prayer or in any other manner of way.¹

(c) Blood.

While fining was the basic penalty, the amount was seldom stated.²

In one case the woman was threatened with a fine of £10 if she offended again but this would be a higher fine than for the first offence.³

John Mitchell was fined £12 for blood and riot.⁴

(d) Non-Blood.

Fining was the standard penalty for assault and the usual fine in the early Peebles record was 10/-d.

Thom of Balcaske and Wyllem Bullem were fined 20/-d. and 10/-d. respectively, the fines going to the building of the tolbooth, for fighting.⁵

An Act provided that if anyone brawled in the town he would be fined 10/- to the common work.⁶

In Stirling, fining was certainly imposed in some non-blood cases, but it was by no means inevitable and sometimes personal punishment was imposed instead of or in addition to a fine.

1. S.G. VII. 67.

2. Z.10. 1521.

Z.40. 1545.

Z.48. 1547.

Z.78. 1560/1.

3. Z.55. 1549.

4. Y.8. 1653.

Y.58. 1664 - £3.

Y.94. 1677 - 8 merks.

5. X.132/3. 1459.

6. X.127. 1458, also whoever is found in the wyt of fighting and troubling the town shall pay 10/- to the causeway being made to the High Kirk, and if other parties are found in the wyt, they will pay 5/-d. X. 146. 1462, also 2/- to the Town Clerk. X.147. 1462. X.164/5. 1470. fine of 10/- for fighting.

XII. FINING (Contd.)

7. BURGH COURT. 1398-1714 (Contd.)

(1) Assault (Contd.)

(e) Malediction (Contd.)

But again no details are given of the amounts imposed in the cases.

Johannus Lany was fined for insulting Thomas Strang. He placed himself in will and Strang was also fined.¹

The old laws provide -

If any gild brother trespassed against another through insulting, he shall pay 40 pence for the first, second and third offences, and if he offends for the fourth time he will be condemned at the will of the Alderman, the Dean of Guild and the rest of the gild brothers and further shall make amends for his damage.²

(f) Insulting.

Again the Stirling record shows personal punishment, with some cases of fining in addition, but no amounts are given.³

The later Peebles record gives details of the amounts, which varied between 5 and 10 merks.

The provost of the time and the previous provost were fined 5 merks for their miscarriage before the council and reflecting on others.⁴

Aggravations are noted -

Insulting in court before the Bailies - an Aberdeen statute gives details:

If anyone insults (maledicit) another in the court of the Prepositus or in the Bailies' Court, he will be fined 8 solidi (the basic fine for insulting was 2 solidi).⁵

But the cases do not give any details.⁶

1. V.24.
2. S.G. V & VI. p. 66/7.
3. Z.48. 1547.
4. Y.52. 1662.
Y.95. 1678 - 5 merks in court.
Y.99. 1680 - 10 merks.
Y.110.1683 - 5 merks, also 114. 1684.
5. V.216.
6. V.48.

XII. FINING (Contd.)

7. BURGH COURT. 1398-1714 (Contd.)

(1) Assault (Contd.)

(g) Insulting Official.

While, strictly speaking, this was only an aggravation of the basic crime, the penalty in the later records was much more severe than merely an aggravation. However, in the early records, the penalty was a heavier fine.

James Stewart and Thomas Hislop were fined 5 merks - to the bridge work, for insulting a Bailie. They had also to undergo public punishment.¹

Again the Stirling record shows personal punishment, with some cases of fining. More details are given.

James Wallace was fined £5 and had to make public confession.²

Two more serious cases - one of insulting and striking the provost and another of escaping from prison and refusing to obey a bailie - had fines of £40 and imprisonment.³

In the later records, fines were imposed, but usually a further punishment was added. The normal fine was £20, but £10, 20 merks and 10 merks are noted.

John Edgear was fined 20 merks for defaming a former Provost.⁴

Imprisonment.

Andrew Haldin was fined £10 for insulting the Provost and town officers. He was imprisoned till he paid and also during the magistrates' pleasure. Also he had to find lawburrows.⁵

John Dickson was fined £20 for insulting a former treasurer and was imprisoned until he paid and also for three days and nights.⁶

Loss of freedom.

William Williamson was fined 10 merks and warded till paid for insulting the provost and also had his freedom as a burgess suspended.⁷

1. X.292/3. 1563.

2. Z.94. 1599.

3. Z.133.1613. Z.116/7.1607.

4. Y.50.1662, also Y.111.1683 - 20 merks.

Y.106.1682 - fined £20 for abusing bailie.

Y.162. 1699 - fined £10 -do-

Y.19/20.1653. Margaret Greg was fined 30/- for insulting a bailie and imprisoned till paid.

5. Y.73.1667. Y.76.1667 - fined 40 merks - imprisoned during provost's pleasure for insulting him

6. Y.84.1671, also Y.85 - 10 merks and 24 hours or till he paid the fine. Also Y.87 - £4 and 48 hours or till paid

7. Y.60.1664.

XII. FINING (Contd.)

7. BURGH COURT. 1398-1714 (Contd.)

(1) Assault (Contd.)

(h) False Accusations.

In Stirling, the usual sentence was personal punishment but one case shows fining as the sentence -- no amount is given.

Fining (£10, 20 merks, 10 merks, 5 merks) was standard in the Peebles record --

Thomas Smyth wrongly accused John Wallace of theft and was fined 20 merks of which 2 merks were to be paid to Wallace.²

Personal punishment could be added:

Thomas Moses was fined £12 for wrongfully accusing another of theft. He had also to stand at the mercat cross with a paper on his head stating his crime and was imprisoned till he paid the fine.³

(2) Crimes against Public Order.

(a) Perturbacion.

The early records show that fining was standard, but no amounts are given.

Mauricius Suerdsleper was fined for unlawfully assaulting Walterus Rede, a town officer.⁴

Willelmus de Poty placed himself in will for perturbacion of the bailies and the town watch and was fined.⁵

Fined for perturbacion of the town with A.⁶

Fines of 8/- are noted for perturbacion of court and were given in the old laws.

1. Z.13. 1521/2.
2. Y.86/7.1672, also Y.95.1678 -- 5 merks.
Y.96. 1679 -- £10.
Y.111. 1683 -- 10 merks and pardon.
Y.134 -- £20 wrongly accused of drinking King James' health.
3. Y.10/11.1653.
4. V.23, also 26, 48, 149, 160, 234.
5. V.26, also 29, 45.
6. V.26, 29, 35, 35.
V.48, 53, 55.
V.119, 125, 136.
V.140, 148.
V.155, 156.

(W. after placing himself in will).

XII. FINING (Contd.)

7. BURGH COURT. 1398-1714 (Contd.)

(2) Crimes against Public Order (Contd.)

(a) Perturbacion (Contd.)

It is ordained that in the courts no one shall dare to speak concerning an action except only the pursuer and the defender and their advocates and except also the Bailies who hold the court and that such people will only speak in connection with the action. The pursuer as well as the defender may call on anyone he likes to give counsel. If anyone contravenes this law, he will be fined 8 solidi.¹

but --

If anyone speaks out of turn in the court of the Prepositus or in the Courts of the Bailies and so disturbs the Courts, and unless he speaks with permission sought and obtained, he will be fined 12 pennies.²

For perturbacion of a house, the accused was fined but no amounts are given.³

(b) Disobeying town officers.

In terms of the court statute, the fine was 8/--

If anyone defames or insults or disobeys any town officer in the court of his duty, he will be fined 8 solidi without remission.⁴

But again the record does not give details of the amounts --

Thomas Johannis carnifex in three fines --

1. because he was rebel to the town officers in the course of their duties.
2. because he was disobedient to the bailies, being unwilling to enter prison at their order.
3. because he left prison without their permission.⁵

Thomas, son of Johannis, was fined (1) because he disturbed the town with Robertus de Angus and (2) because he was rebellious and disobedient to the bailies.⁶

(c) Being Rebellious.

Again in Stirling, fining was comined with another penalty or penalties.

1. S.G. XX. p. 73.
2. V.216.
3. V.53.
4. V.216.
5. V.134.
6. V.48, also V.49, 75, 107.

XII. FINING (Contd.)

7. BURGH COURT. 1398-1714 (Contd.)

(2) Crimes against Public Order (Contd.)

(c) Being Rebellious (Contd.)

Fined £10 for disobeying the kirk and magistrates and public confession or banishment.¹

Peebles shows fining (£10, 10 merks) and in certain cases a further penalty also.

In will for refusing to accept Council's price for meal and fined 10 merks.²

In a tumult action, the persons were fined 40/-, £4, £6, £8 for disobeying the council. They were also forbidden to trade until they petitioned the council.³

Andrew Haldine was fined £10 for disobeying a bailie and for leaving prison. He was also imprisoned for 48 hours and had his freedom as a burgess revoked.⁴

Exceptionally, the fine could be £50 -

James Thrift was fined £50 for tearing a page out of the court book and was imprisoned till he paid and found caution of 400 merks. His burgess ticket was reduced.⁵

(d) Deforcement.

Fining was standard.

Willelmus de Strade was fined for a deforcement.⁶

In one case after reference to will the fine was stated to be 8/-d.

John Lyllay was fined 20/- for deforcing the sergeant and striking him. He also had to find lawburrows.⁷

(3) Theft.

In the later records, fining was imposed for small thefts, sometimes with a further penalty added. The amounts varied £18, £12, £3, 40/-, 10 merks, 5 merks.

1. Z.93/3. 1599.

Z.116/7. 1607. £40 and imprisoned for escaping from ward and disobeying bailie.

2. Y.57/8. 1663., 180.1681 - fined 10 merks.

3. Y.105.

Y.136/7 - fined £10 and imprisoned till paid and during magistrates' pleasure.

4. Y.48. 1659.

5. Y.128.

6. V.65, V.117, 198.

7. V.209, also V.117 - will and fined.

8. X.131/2. 1459.

XII. FINING (Contd.)

7. BURGH COURT. 1398-1714 (Contd.)

(3) Theft (Contd.)

Various persons were convicted of reset and were fined 30/- and ordered to restore the articles.¹

With imprisonment added -

James Wadie and others were fined 10 merks and 40/- for stealing corn and were imprisoned for 48 hours. They had to find caution not to commit the like under pain of public punishment.²

William Eumond was fined £18 and imprisoned till he paid and for 48 hours for stealing a harrow.³

With public punishment added -

William Eumond and his father, Andrew, were fined 40/- and £12 respectively for reset. They were also to sit at the cross during the market day for two hours, bare-headed with the stolen goods around them.⁴

(4) Unlawful Detention.

In the early period, unlawful detention was punished by fining.

In the terms of the court statute -

If any Burgess of the town wilfully detains anything owned by or owing to another Burgess and permits the claimant to proceed against him before the Bailies up to the fourth day of the action and then is convicted by the Court or confesses the claim, the defender or detainer will be fined 8 solidi without remission.⁵

The amount of the fine is not given in the cases -

Thomas Halt was fined for unlawfully detaining 7/- from Willelmus Strade.⁶

Thomas Blake was fined for detaining a ring and was ordered to restore it or its value.⁷

1. Y. 26. 1655.
Y.49/50.1661 - fined £3 and 40/-, women stealing corn, caution for good behaviour.
Y.91. Fined 5 merks - caution not to commit the like under pain of banishment.
2. Y. 57. 1663.
3. Y. 88.
4. Y. 88. 1673. William was also fined £18 for stealing a harrow.
5. V. 216.
6. V.31, also V.35, 39, 40 etc.
Also V.64 - fined for taking bread.
7. V.66, also V.69, 110, 120/1 etc.
Shovel. V. 124.
Axe. V. 135.
V. 140, 164.
Z. 11. 1521 - fined but no details - withholding two cloaks.

XII. FINING (Contd.)

7. BURGH COURT, 1598-1714 (Contd.)

(5) False Weights & Measures.

Fining was also the standard penalty in the early records for fraud through using false weights and measures.

Each Burgess shall have in his house a measure to weigh his corn etc. All measures and weights will be sealed with the Seal of the Burgh and if anyone uses a false measure or weight, he will pay a full fine.'

If anyone knowingly uses false measures or weights and if he is convicted, he will pay a fine of eight solidi for his default, and also pay damages to the party and he will be punished by the Bailies by fining for the first, second and third occasions. On the fourth occasion, he will be at the King's mercy for life and limb for such fraud pertains to the King's Crown since the fine of the Burgh does not exceed 8/- and in such case the King's fine is £10.²

The cases do not give details of the amounts.³

(6) Miscellaneous.

There are a large number of miscellaneous offences - administrative, trading, security, farming provisions, all of which were punished by fining.

(a) For absence.

Towards the end of the Aberdeen record, details are given of a burgh statute which laid down penalties for various crimes:-

On 16th October, 1405, with the consent and assent of the greater part of the community gathered there, it was ordained for the common benefit of the town:-
When summoned personally to the courts or to the tribunals of the prepositus and not appearing before the final hearing, the person will be fined 4d. without remission unless he has a lawful reason.
The same fine will be imposed on persons absent before the court of the Bailies.⁴

1. L.Q.B. XLVIII. p.23.
2. L.Q.B. LXVIII. p. 33/4, also F.C. XL. p. 180/1.
3. V. 115 - in will for selling wine without proper measures and fined.
V. 41 - fined for selling flour without using official measures.
V. 115 - also wine similarly - in will and fined.
4. V. 215/6.

XII. FINING (Contd.)

7. BURGH COURT, 1398-1714 (Contd.)

(6) Miscellaneous (Contd.)

(a) For absence (Contd.)

But the standard fine according to the record for non-appearance at the hearing was 8 solidi. (The fine in the statute of 4d. appears to relate to absence at the first, second and third days of the action but appearing on the fourth day).

Thomas Halt did not appear to answer the summons of Willelmus de Strade -- and was fined 8 solidi and ordered to find caution for his appearance at the next court.'

Reference to the fine of 4d. is given in the old laws:--

Burgesses must attend the three principal Courts in the year. If he does not attend for any good reason, he shall be fined 4d. if he lives in the Burgh. If the Burgess lives in the country, he will be fined 8/-d. z

The later records show that fining for absence was standard-- there is no mention of outlawry in the Burgh court records.⁷

(b) Trading offences.

In the early and middle periods many cases occur of fining because the accused sold goods below the fixed price. The amounts of the fines are not given, but the statutory penalty for such practices in the court acts and in the old laws was a fine of 8/-. The later records do not show cases of this crime.

Instances of foristallacion and regratacion occur very frequently. In the early period the standard statutory penalty was 8/- but the actual fines varied -- 40/-, 16/8, 13/4, 10/-, 5 merks are noted in addition to fines less than 8/-.

1. V.23, also
V.23,26,27,29,34, 39,42,45,45/6,50,51,52 etc.
Caution and fining. V. 146,154, 155, 157, 161/2.
2. L.Q.B. XL. p.19.
3. X.111.1456 etc.
Y.21.1653 -- absent councillors were fined 6/8d.
Y.46.1658 -- 2/-d.

XII. FINING (Contd.)

7. BURGH COURT. 1398-1714 (Contd.)

(6) Miscellaneous (Contd.)

(c) Security.

The frequent statutes and cases in the early and middle periods relating to watches on the towngates show fines of 8/--, as do the statutes prohibiting leases to strangers, but in the later periods, the fines for taking in strangers, vagabonds and beggars increased considerably and £20 and £10 fines are noted, with one of £100.

(d) Burgessdisputes.

Fining was not the normal penalty in such cases, but occasional fines are noted - £3, 40/--, in the later period.

For taking excessive dues at the mill, the miller was fined £20 and £10.

(e) Farming and grazing provisions.

In the early and middle periods the fines were 8/--, but this was increased to £5, 40/-- and 30/--.

Taking greenwood - 40/--, peats 30/--

(f) General.

In the latest period, attendance at church was compelled under fines of £12, £10, 5 merks.

Gambling was forbidden, under fines of 10 merks.

CONCLUSIONS.

XII FINING.

1. Fining was the most frequent determination in the lower courts and it was frequent in the main courts in certain crimes - particularly assault.

2. In the earliest period of the justiciary records when compounding and remission was standard, fines (£10, £5, 10 merks) were imposed in such cases if the accused confessed or was convicted. Fines were not imposed if the accused had agreed composition before he came to court.

3. In the middle period the king imposed fines (£5000, 3500 merks, 2500 merks) in some cases where the accused came into his will, but this was not maintained.

4. Fining became more frequent in the later period -
assault - £100, £50 (exceptional £100 Stg.)
adultery- £30.
theft - 400 merks, 100 merks.

5. The references in the other courts are frequent -

(a) Argyll - assault - blood - £100, £50.
non blood - £50.
aggravated - £100.

hamesucken	- £50.
deforcement	- 500 merks, 100 merks.
adultery	- £40.
rape	- 100 merks.
theft	- £200, £100, £50, £40, £20, £10.
miscellaneous	- £10, £5.

(b) Sheriff court - middle - assault - £50 (exceptional £200, £100)

- the fines for the other crimes were similar, in the range of £100, £50, £30, £10.

(c) Shetland court - assaults - blood - 40/-, 4 merks, aggravations 40/
- non blood - 1 merks, 2 merks, 5 merks, aggravations 40/.

- adultery - 34.
- theft - 2 merks.
- witchcraft-2 merks.
- miscellaneous - 40/-

CONCLUSIONS.

XII. FINING (Contd.)

- (d) Regality courts - assaults - blood -
 early - no amounts.
 middle and later - £50.
 -- non blood -
 early - £10.
 middle and later - £10.
 aggravated - £30, £25, £20.
 -- defamation - £10.
 -- deforcement -
 early - £10, £5.
 middle - £100, £50.
 -- adultery - £10.
 -- theft - £10, £5.
 -- religious - £200, £100.
 -- miscellaneous - £50, £20, £10.
- (e) Baron courts - assault - blood - £50, £40, £30, £20.
 -- non blood - £10, £5.
 -- aggravated - £20.
 -- defamation - £10, £5.
 -- deforcement - £10, £5.
 -- theft - £10, £5.
 -- miscellaneous - £10, £5.
- (f) Burgh courts - assault - early - 8/-, 4/-
 -- middle - blood - £12, £3.
 -- early - non blood - 10/-
 -- middle - £10, £5 (exceptional
 £30)
 -- insulting - early 2/-
 -- middle - 10 merks, 5 merks.
 -- insulting
 officials - early 8/-.
 -- middle and later - £40, £20,
 £10, £5.
 -- perturbation - early 8/-
 -- rebellion - early 8/-
 -- middle £10 (exceptional £50)
 -- deforcement - early 8/-
 -- theft - middle and later £18, £12,
 £3, 10 merks.
 -- miscellaneous - early 8/-
 -- middle and later £10, £5.

CONCLUSIONS.

XII. FINING (Contd.)

6. In the earlier and middle burgh courts, it is seen that the fines were applied to particular purposes in the town - e.g. buildings, roads and bridges, but in the later period they were taken by the magistrates.

7. From the foregoing, it is seen that apart from the heavy will fines in the middle justiciary courts, the fines fall generally into the following groups in the middle and later periods.

Justiciary courts and Argyll - £200, £100, £50.

Lower courts - £100, £50.

with the usual fine around £10.

XIII. LOSS OF BURGH FREEDOM.

1. BURGH COURT. 1398-1714 (Contd.)

The burgh court records show a penalty which was peculiar to the burghs - for crimes against the burgh or its officials, the accused, if he was a burghess, could have his burghess-freedom annulled.

An act prohibited a burghess or inhabitant from raising an action before any judge other than the magistrates, under pain of 5 merks and loss of freedom within the burgh.¹

(1) Assaulting the officials.

If anyone draws a knife or weapon against a bailie or officer he will forfeit his freedom.²

James Sheill was fined £30 for assaulting the provost and imprisoned until he paid and also until he gave up his burghess ticket which was to be torn up by the town officer at the cross.³

(2) Being rebellious.

Richard Mereleis and others were discharged of their freedom for leaving the town at night and abusing the watch. They were banished under pain of death.⁴

If anyone insults the council he will lose his freedom and be prohibited from seeking office in the future.⁵

Thomas Caitcheon was sentenced, for disobeying a bailie and for striking him, to have his burghess ticket torn up by the town officer at the cross, to the beat of a drum and to be imprisoned during the magistrates' pleasure.⁶

James Thrift tore a page out of the court book and had his burghess ticket reduced for all time. He was also fined £50.⁷

(3) Miscellaneous.

The town clerk was suspended from office and was discharged of his freedom of the burgh for wrongfully giving sasine of burgh property to Lord Yester.⁸

1. Y.174.
 2. X.260.1560.
 3. Y.151/2.1695, also Y.153.1695.
 4. Z.41. 1545.
 5. X.314/5.1569, also if a freeman disobeys a town officer he will lose his freedom - X.328.1571.
 6. Y.136/7. 1691, also Y.2/3.1652.
 7. Y.128.1689.
 8. Y.2. 1652.
- Y.79. 1669 - Notary's freedom revoked for acting against the town.

XIII. LOSS OF BURGH FREEDOM (Contd.)

1. BURGH COURT. 1398-1714 (Contd.)

(3) Miscellaneous (Contd.)

The burgesses were ordered to inspect certain fields under pain of losing their freedom.¹

If anyone pursues another burgess before another judge, he will lose his freedom.²

Alexander Stevinsoun was banished for associating with Margaret Donaldson against a court order and he also lost his freedom.³

The revocation could be temporary.

William Williamson was fined 10 merks and warded till paid for defaming the provost. Also his freedom as a burgess was suspended during the council's pleasure.⁴

In a tumult action the council ordered those concerned to hand in their burgess tickets pending investigation. Some were fined and forbidden to trade in the burgh until they supplicated the council.⁵

Or could be restored in time -

Andrew Haldine was fined £10 for disobeying a bailie and for leaving prison. He was also imprisoned for 48 hours and had his burgess ticket destroyed.⁶ Three years later he successfully petitioned the council for restoration of his freedom and liberty as a burgess.⁷

William Henderson broke ward and was sentenced to lose his freedom, but the council accepted his petition that, he was truly penitent and he was restored to his liberty.

Removal of freedom could be threatened.

Troubling a bailie - fined £5 and if he offended again he would lose his freedom.⁸

1. X.213.155.
Enforcing court statute.
X.215/6. 155.
Abolishing outland burgesses.
2. X.222.1555.
X.297. 1564.
Also assist council under pain of loss of freedom,
X.318.1570.
3. Z.155.1622.
Z.17. 1522.
If an act was contravened the penalty was loss of freedom
Also Z.53. 1548.
Z.189.1646 - accepting unfreemen as tenants.
4. Y.60.1664.
5. Y.104.1682. Y. 105.1682.
6. Y.48. 1659.
7. Y.53. 1662.
8. Z.208.1653.
9. Z.88.1598. Disobeying bailie - forgiveness and if again
banishment and loss of freedom.
Z.123.1609. £100 caution and banishment and loss of
freedom.
Z.133.1613.

CONCLUSIONS.

XIII. LOSS OF BURGH FREEDOM.

1. This penalty was given frequently in the burgh courts although it is noted once in the middle period justiciary records and twice in Argyll.
2. It was given for breach of burgh rules or disobedience to burgh officials.
3. The consequences of the decree could be unpleasant as burgesses could expect to be treated more leniently in the burgh courts than non-burgesses. A burgess could receive a sentence of free ward where a non-burgess might be sentenced to close ward, and again the burgess might be fined when a non-burgess was banished. The loss of burgess-ship was also likely to affect his professional capacities.

XIV. IMPRISONMENT.

1. JUSTICIARY COURT.

PART 1. 1488-1650.

It is noted that in the earliest record, imprisonment was used both as a punishment for a definite period and also as a place of detention for an indefinite period pending a further judicial act. Prison was not imposed as a punishment in itself in the middle and later periods when it was purely custodial and the early use of prison as a definite punishment is noteworthy.

In the earliest period the time of a year and a day was standard, but it is clear that the king could order more, or less, at will.

For deforcing, Alison Cuthbert and others were sentenced to be put in sure prisons for the space of a year and a day, and their lives to be at the king's will. Their moveables were also escheat.¹

As examples of temporary detention, the following may be noted -

James Riddell was warded until he found caution to appear before the Justiciar.²

In certain cases, where the accused was unable to agree the compensation to be paid to the injured or to find security to guarantee the payment, he was sentenced to be warded for forty days and if security was still unavailable, he was to be hanged.³

A petition to the Lords of Privy Council shows that if one had sufficient means and influence, prison was nothing more than an inconvenience, and that the living conditions were no worse than outside. The petitioner complained that the
Captain //

1. A.71, also A.72/3 - wilful error.
 also A.165,203 "
 also A.222 - during king's pleasure.
 A.427/8 - queen's pleasure.
 A.158/9 - no period.
2. A.181/2 - also A.60.
 A.218/9 - in will and warded pending decision.
 A. 165 - --do--
3. A.69, 70, 70/1 etc.

XIV. IMPRISONMENT (Contd.)

1. JUSTICIARY COURT.

PART 1. 1488-1650 (Contd.)

Captain of the Castle had forbidden the petitioner's servant to attend him and in these circumstances how could he have meat and drink and other necessities.

During Mary's reign and also occasionally in the later periods, a state of free ward is noticed - i.e. the accused could be released from prison, but he was still restricted in his movements - the sanction being caution.²

Lord Glamis undertook not to escape from Edinburgh and two miles about the town, under pain of 10,000 merks.³

For deforcing and assault, various persons were ordered to enter ward on the north side of the Spey and to remain during queen's will. They were bound not to return within a year and a day.⁴

A person in ward was permitted to go home provided he returned to ward when required - caution of 2000 merks.⁵

From Mary's reign onwards, prison as a punishment in itself was not used - it was a place of interim detention.⁶

e.g. warded pending sureties for assythment.⁷

warded pending punishment.⁸

Although imprisonment was not imposed as a punishment, the attitude was "out of sight, out of mind", and prison served as a place of detention - the person was detained literally at the king's pleasure.

If imprisonment was imposed before a trial, it was competent to the prisoner to petition the king and the Secret Council and //

1. A.223.

2. Aa.419 - released from close ward into free ward.

3. Aa.328 - also seen in later cases. C.145/6. E.281.

4. Aa.439.

5. Aa.330 - also Aa.355 - 20,000 merks. E.277 - 2000 merks.

6. A.357/8.

7. Aa.362/3 - slaughter.

Aa.401/2, 402 - assault.

8. Aa.439/0 - forgery.

XIV. IMPRISONMENT (Contd.)

1. JUSTICIARY COURT.

PART 1. 1488-1650 (Contd.)

and request a trial and from the terms of the warrants added to the petitions by the Secret Council it appears that usually the requests were considered favourably.¹

There are a number of references to imprisonment prior to trial, but this was to ensure the accused's appearance at the trial² and he could also be imprisoned during a continuation.³

Some cases refer to imprisonment, but they do not give details - it is impossible to say whether prison was given as a penalty or was purely custodial.

Imprisonment was imposed on a youth, instead of hanging, but no information is available as to the length of the captivity and it is not known if this was an actual sentence or a temporary measure.⁴

A person convicted of assault was imprisoned after the decision, but he had placed himself in the king's will and it is likely that the detention was temporary - until the king gave his decision.⁵

In the later periods of James VI's reign, it is seen that prison was entirely custodial.

Persons were imprisoned for an indefinite period until they did something or until someone gave a decision.

It was not a punishment in itself, at least in theory.

The reasons for detention were many:-

(a) //

1. B.87/8, 165, slaughter.
2. B.86, 99/0, 165, 307 etc.
3. B.190/1 etc.
4. B.86, murder & theft, also B.186 simil.
5. B.99, also 159, 189, also B.11/2, although see B.13 which was temporary.

XIV. IMPRISONMENT (Contd.)

1. JUSTICIARY COURT.

PART 1. 1488-1650 (Contd.)

- (a) pending trial.¹
- (b) pending the king's decision where the accused had placed himself in will.²
- (c) pending sentence.³
- (d) until a fine was paid.⁴
- (e) until assythment paid and letters of slains obtained.⁵
- (f) until caution was found.⁶
- (g) during a continuation.⁷
- (h) until the judge discussed the case with the king⁸ or until the Privy Council were consulted.⁹
- (i) until the accused agreed to answer questions.¹⁰

In one case, a pregnant woman who was convicted of witchcraft had her death sentence postponed and was warded until her child was born. The death sentence was in fact commuted to banishment after the birth."

Occasionally free ward was still maintained although less frequently than in the earlier periods - the accused being of noble birth was ^{to remain} on the south side of Forth but not imprisoned, during a continuation.¹²

There are references to private prisons - Campbell of Glenlyon kept a McNeill of Barra in prison (Glenlyon's) and later had him killed.¹³

On one occasion the accused even offered to remain in ward until an assize was summoned, so sure was he of his innocence. But no decision is given.¹⁴

- 1. C.16, 161 etc. but see C.456 - Blackness Castle.
- 2. C.39 - Edinburgh Castle.
C.74, 410 - Tolbooth etc.
- 3. E.65, 77 etc.
- 4. C.369, D.77 etc.
- 5. C.539.
- 6. C.40.
- 7. C.53.
- 8. C.377.
- 9. E.81.
- 10. E.175.
- 11. C.52/3.
- 12. E.281, also E.286/7.
- 13. E.148, also E.491.
- 14. E.35.

XIV. IMPRISONMENT (Contd.)

1. JUSTICIARY COURT.

PART 1. 1488-1650 (Contd.)

No indication can be given as to the period of custody, but it is seen that imprisonment could be imposed for a long time before the hearing - "James Crawford, being brought forth from ward where he has been detained this long time byegone". It is also seen that the prisoner could petition the Privy Council for release or review.

The prisoner was expected to pay the expenses of his confinement. An order for banishment provided for the gaoler and keeper to be paid all expenses to them prior to the accused's departure.²

The accused was ordered to remain in sure firmance and captivity in ward within the Tolbooth, upon his own expenses until the next hearing.³

The last period contains many petitions for release from prison - it is seen that once the accused was lodged in prison there could be a considerable delay before the accuser's case was prepared and on occasions the case was never completed, with the result that the accused was left in prison.

In a fireraising case, the two accused were imprisoned for a long period before the case was heard and they petitioned the Privy Council for release. This was agreed, but the petition was dated 28th February, 1632, and they were committed after 28th July, 1631.⁴

Prison was used to keep those under sentence of banishment until a ship was available,⁵ and also for keeping army conscripts until their ship could take them.⁶

1. E.140.
2. E.142, also E.125, 483,
also no money to buy food E.225, 66/7.
imprisoned at his own expense. D.77.
3. E.306, also E.71, 221, 288, 295
4. E.175/6, also E.66, 66/7, 92, 164 - the Privy Council
banished or released on conditions.
5. D.59/0, 89 etc.
Dd. 438 etc.
E. 222, 224 etc.
6. E.74.

XIV. IMPRISONMENT (Contd.)

1. JUSTICIARY COURT.

PART 1. 1488-1650 (Contd.)

In one case, a thief was supposed to be banished, but the officer went without him. He petitioned the Privy Council for release, claiming that he had been in prison all the time and he was now confined for an indefinite period. He was released.'

Political prisoners could be confined for an indefinite period, at the order of the king.² In this case, imprisonment operated as a punishment in fact, if not at law.

1. E.224.
2. E.197, 231.
Dd.437.

XIV. IMPRISONMENT (Contd.)

1. JUSTICIARY COURT.

PART 2. 1661--1747.

The most striking feature of this period is the very great number of cases which show persons kept in prison without trial. They were imprisoned at the instance of the prosecution, who appeared to forget about them thereafter:

William Wallace, in prison in the Tolbooth of Edinburgh for adultery, petitioned the Advocate and the Privy Council for a trial. The Court stated that the Advocate should insist instantly otherwise he would be released under caution of 12,000 merks to appear whenever called. He was released under caution.¹

Patrick Wilson and another were imprisoned in the Tolbooth of Glasgow for slaughter and as no one had pursued them, petitioned for release, on caution to appear if necessary. The justices ordered the next of kin of the dead man to pursue and as they did not do so, the accused were freed and the diet deserted.²

John Couper, a poor workman, was imprisoned by the magistrates of Edinburgh for allegedly robbing the Earl of Tweeddale's coach-house. He petitioned the court stating his innocence and poverty and that he had lain five weeks in prison with no one pursuing. He was released upon caution to appear if called.³

Andrew Findlay and his wife petitioned the Justices for release from the Tolbooth of Aberdeen where they were imprisoned by order of one of the magistrates having been accused of theft. They had been in prison for six months and the magistrates had not taken caution for their pursuit. They requested that as they were willing to undergo trial the pursuers should find caution to pursue, otherwise they should be freed. The justices agreed.⁴

Torquil McNeil was imprisoned and petitioned release. He stated that he had taken lodgings with persons who transpired to be thieves. They had left and he had been apprehended. He was in the Tolbooth in Edinburgh and was in a miserable and starving condition. No one had pursued and so he craved release. The justices ordered pursuit within five weeks, failing which he would be released.⁵

1. F.67/8, also F.32 -- released and to live peaceably.
F.99 -- released -- no conditions. Also 197.
F.109,223 -- released on remission and assythment.
2. G.29, also F.3, 99.
3. G.224, also G.268/9, also F.2/3 -- caution of 5000 merks.
4. G.16, also G.127.
5. G.23/4, also G.29.

XIV. IMPRISONMENT (Contd.)

1. JUSTICIARY COURT.

PART 2. 1661-1747. (Contd.)

A similar situation could arise after the trial was heard - if for some reason the person was returned to prison -

The justices grant a warrant for the liberation of Janet Clark, prisoner in the Tolbooth of Edinburgh, for witchcraft - for which she has been long detained after she was cleansed by the verdict of assize. She undertook to abstain from the crimes in (all)time coming.¹

Grant of Kirdells petitioned the Justices to be released from prison - Tolbooth of Elgin - where he was imprisoned. He had been imprisoned pending his case being heard and the case had been deserted and he was still in prison. The justices gave warrant for his release.²

The Authorities were aware of the problem and the Lords Commissioners of Justiciary set up a committee to enquire into the position of prisoners in the Tolbooth. There were many prisoners against whom there was no proof produced and against whom no pursuers had taken action. The prisoners were starving and the magistrates were ordered not to receive any prisoner unless the persons who brought in the prisoners gave caution to pursue and to maintain the prisoner until the hearing.³

One case does show that the order was enforced:

Wm. Lauriston was imprisoned for rape and theft, but his accuser had to find caution that he would pursue and would also aliment the prisoner until the trial.⁴

It is seen that, in theory at least, if the accuser caused the defender to be imprisoned, the accuser was bound to pay the accused's expenses in prison:

James Carmure became judicially enacted to pay 40d. each day for the entertainment of Margaret Pace during her abode in prison, and that the sum should be paid each Saturday to herself or the clerk of the Tolbooth.⁵

1. F.2, also F.11.
2. G.7.
3. G.31/2.
4. G.255.
5. F.50.

XIV. IMPRISONMENT (Contd.)

1. JUSTICIARY COURT.

PART 2. 1661-1747 (Contd.)

Even in a treason trial, the Earl of Seaforth had to aliment Neil Macleod of Assynt at the rate of 6d. per day while he was imprisoned.

Matthew Mill petitioned the court from prison and stated that he was unable to entertain himself in prison. The justices appointed 2nd July for his trial and the pursuer to pay one groat per day and to be ready to pursue on the appointed day. If the case did not proceed that day, the accused was to be set at liberty.⁵

Apart from the forgotten prisoners, it is seen that prison was still used basically as a place to keep the accused until something happened.

- (1) Between hearings.³
- (2) Pending advice from Privy Council.⁴
- (3) Pending sentence.

Elizabeth Mure was convicted of adultery and she was imprisoned until the sentence was pronounced.⁵

Also pending the sentence being implemented -

For embezzlement, Robert Pringle was imprisoned till he paid back the money he had taken (£425:10/-d. Stg.). He was also pilloried with a notice on his breast describing his offence.⁶

Pending scourging, the convicted was kept in the Tolbooth of Jedburgh.⁷

- (4) Until a fine was paid.

Archibald Earnet and James Loudon were fined for assaulting a man so severely that he died, and were imprisoned till they paid their fine.⁸

- (5) Until he found caution.

In decree of banishment for being accessory to murder, the accused was warded till he found caution for 1000 merks not to return.⁹

- (6) Pending banishment.¹⁰

1. G.229, also G.296/7 - prisoner had to pay 2 merks each night for his own guard.
2. F.61.
3. F.10. G.265, 287/94 etc.
4. G.287/294.
5. F.295, also F.150, G.25, 79, 305.
6. H.19/21.1705.
7. H.79. 1732.
8. H.33/4, 66/0, 59/0. G.177/0. F. 140/2.
9. H.10, 16/7, 57/8. G.56.
10. H.19.

XIV. IMPRISONMENT (Contd.)

1. JUSTICIARY COURT.

PART 2. 1661-1747 (Contd.)

However, it is seen that prison was beginning to be used as a punishment in itself during the first half of this period. In the beginning the sentence was for an indefinite period, and definite periods were not given with any regularity until the end of the later period.

(1) Indefinite.

(a) During the Court's pleasure:-

Donald Campbell made derogatory remarks about the Justice General and was sentenced to stand for two hours with a placard on his chest declaring his fault, his tongue was to be bored by the hangman and thereafter he was to remain in prison during the court's pleasure.

For deforcement, Francis Duguid suffered escheat of moveables and was imprisoned during the court's pleasure.

Robert Forbes was convicted of blooding and wounding and was sentenced to be imprisoned during the justices' further pleasure.

(b) Until further order:-

William Watson was found guilty of deforcement and was sentenced to escheat of moveables and to remain in prison till further order.

For poinding an ox during labouring time, James Todrig and others were fined £40 and commanded to prison till further order.

Imprisonment for a definite period was a late development although there is one early case which, for its time, was exceptional.

James Welsh was accused of witchcraft but because of his youth he was not put to a trial. He was found to have defamed various lieges and to have prevaricated during the enquiry and was sentenced to be whipped and put in the correction house to be kept at work there for a year.

(2) Definite period.//

1. G.137/9.
2. G.199/205, also G.75/83.
3. F.150.
4. F.125, 224, 307, G.75/83.
5. F.142.
6. F.34/5.

XIV. IMPRISONMENT (Contd.)

1. JUSTICIARY COURT.

PART 2. 1661-1747 (Contd.)

(2) Definite period.

As an example of the later cases showing a definite period, the following may be noted:-

William Beaver was convicted of striking a minister and was sentenced to be imprisoned in the Tolbooth of Edinburgh for ten days. His moveables were escheat.¹

In two cases where the person was found to be insane, imprisonment was given in the nature of a sentence, but in both cases, the insane person was to be released when something happened -inthe one case when someone found caution to keep him, and in the other, when he was found to be cured.

Robert Spence was convicted of murder, but was proved to be insane. He was sentenced to imprisonment for life. The magistrates had to keep him prisoner till someone found caution to keep him in sure and safe custody for the rest of his life.²

James Somerville was convicted of murder, but was proved insane, and was confined to the correction house until two physicians and the magistrates certified him to be cured, and provided he paid a fine.³

Escapes from prison are noted.

The Master of Birlleigh was imprisoned for murder. He was sentenced to be beheaded on 29th November, 1709, and the sentence was to be executed on 6th January, 1710, but he escaped dressed in his sister's clothes.⁴

In one case, where the accused was being held pending trial, he escaped, but when he was recaptured he was sentenced to a further period of definite imprisonment:-

Alexander McGregor escaped from the Tolbooth of Edinburgh where he was being held, but was recaptured and was sentenced to a further period of 37 days imprisonment.⁵

If a person escaped from prison, he was declared fugitive.⁶

1. H.62/3.
2. H.98/9. 1747.
3. H.99. 1704.
4. H.24.
5. H.63/4. 1720.
6. F.245/6.

XIV. IMPRISONMENT (Contd.)

2. ARGYLL JUSTICIARY COURT. 1664-1742.

Imprisonment was used principally as a detention pending something else happening and not as a punishment in itself, although a few cases read as if imprisonment was imposed as part of the actual sentence - in such cases the punishment could be definite or indefinite.

(1) As part of the punishment.

(a) Indefinite (during court's pleasure)

Persons convicted of deforcement had their moveables escheat and were imprisoned at the justices' pleasure. This was the standard punishment for deforcement at this time and the same sentence appears in other records. In this case it seems that imprisonment was part of the sentence.

(b) Definite period.

In a blood assault, the accused was fined £50 with £4 assythment and 48/- for lost wages caused to the injured and further was ordered to remain in ward for 24 hours.

(2) Custodial.

Much more usually, however, imprisonment was a temporary and indefinite state until the accused did something, or something happened to him.

(a) Pending trial.

Ewan Cameron and another were caught with the fang (red handed) stealing cattle and were sent by the Laird of Glenorchy under guard to Inveraray, where they were imprisoned pending trial.

(b) Pending sentence.

Convicted of theft, he was imprisoned until sentence was pronounced against him. He was convicted on 28th September, 1669, and sentenced on 22nd October, 1673.

1. I. 127/8, also 154/5 - stemmed from national Act.
2. I.68/9.
3. I.10/1.
4. I.8, also I.17, 21/2 etc.

XIV. IMPRISONMENT (Contd.)

2. ARGYLL JUSTICIARY COURT. 1664-1742. (Contd.)

(2) Custodial (Contd.)

(c) Pending caution:

- (i) To appear.¹
- (ii) For good behaviour.²
- (iii) To pay a fine.³
- (iv) To find lawburrows.⁴

(d) Pending payment of a fine:

Fined for causing a riot in a church and an assault, he was fined £100 and was ordered to remain in ward until paid.⁵

(e) Pending banishment:

For theft he was scourged and imprisoned until he found caution to leave the shire, never to return under pain of death.⁶

(f) Pending execution:

Sentenced to be hanged, and until the execution he was to be taken to the Carrick where he was to remain a close prisoner.⁷

In two late cases, the threat of imprisonment and scourging supported banishment.⁸

The prisoner had to pay for his upkeep in prison, e.g. released when he paid the gaoler's expenses and dues.⁹

-
1. I.26.
 2. Theft: I.51/2, 89/0, 92/3, 95/6 etc.
Adultery: I.124/5 etc.
 3. Assault: I.64 etc.
Theft: I.71/2 etc.
 4. Assault: I.98.
 5. I.66, also I.78, 79, 89/0 etc.
 6. I.125/6, also I.124/5.
 7. I.14, also I.138, 148, 152.
 8. Theft: J2.1740.
J.11.1740 - imprisoned for a year.
 9. I.131.

XIV. IMPRISONMENT (Contd.)

2. ARGYLL JUSTICIARY COURT. 1664-1742 (Contd.)

References do occur to persons escaping from prison - sent to prison at Dunstaffnage where he broke ward, but was later apprehended.¹

In such cases, the court assumed the person was guilty; he ran away and took the blame on him.² The cases do not make any reference to outlawry in such situations, as in the other records.

The prisons were the Tolbooth of Inveraray³ and the Castles of Inveraray,⁴ Dunstaffnage⁵ and Dumbarton.⁶

-
1. I.2, 7, 20, 30 etc.
 2. I.94 - fined £20 for his contempt in escaping.
 3. I.7, 10, 30, 67, 189 etc.
 4. I.182, 183, 186 etc.
 5. I.2.
 6. I.42/3.

XIV. IMPRISONMENT (Contd.)

3. SHERIFF COURT. 1515-1747.

It is clearly seen that the purpose of imprisonment was custodial rather than punitive - for an indefinite period pending a further part of the penalty being implemented.

- (1) Pending payment of fine was the most frequent form.¹
- (2) Pending caution for future good behaviour.²
- (3) Pending public punishment.³

Only one case in the later periods shows a definite period and the sentence was not enforced - for fireraising the woman was imprisoned for a year and had to suffer personal punishment.⁴

1. Kb. 31/4, 46 etc.
2. Kb. 31/4 etc.
3. Kb. 193.
4. Kb. 238.

XIV. IMPRISONMENT (Contd.)

4. SHETLAND COURT. 1602-04.

As in previous records, imprisonment had a custodial aim and was not used as a sentence in itself, or for a definite period.

In this record, imprisonment or warding was used as an alternative penalty, if something else was not done -- if A. did not complete his contract of service with B. as he had agreed, A's person would be warded in the Castle of Scalloway.¹

Also --

(1) pending trial. A. was in ward in the Castle of Scalloway and desired now to be put to the trial of an assize.²

(2) pending caution. "incarcerat ay and quhill he fand cautioun" to underly the law for his offence (striking).³

1. L.6, 79.

2. L.21, 36, 42, 105/6.

3. L.145.

XIV. IMPRISONMENT (Contd.)

5. REGALTY COURT. 1547-1706.

References to imprisonment are frequent throughout the record. Prison as the sole punishment was very rare, and normally it was imposed until something was done - usually until a fine was paid.

Instances are noted of prison sentences for definite periods in certain statutes, but they were not enforced.

Normally prison was not the principal penalty - it was a subsidiary consideration unrelated to the offence and related only to the principal penalty. The period of imprisonment in such cases was indefinite. However, if the person was unable to meet the fine even after a period of imprisonment, presumably he would be released if the baillie thought that a sufficient period had passed.

(a) Indefinite period.

- (1) Pending payment of a fine.²
- (2) Pending caution.³
- (3) Pending obedience to a court order.⁴

While this purpose was common in other records, the court orders in this record were extended to rather more sinister uses: Imprisonment was inflicted on two persons until they agreed to conform to the established church, and a person was sent to prison until he told what he knew about the Covenanters.⁵

(b) Definite period. //

1. Nb.261.
2. Nb.13, 28/9, 274/5 etc.
3. Nb. 17/8, 28/9 etc.
4. Nb.70/1 - until refund of damage was made.
5. Nc.36.
6. Nc.44.

XIV. IMPRISONMENT (Contd.)

5. REGALTY COURT. 1547-1706 (Contd.)

(b) Definite period (Contd.)

There are occasional references which imply a different principle - imprisonment for a definite period as a punishment in itself.

This definite period of imprisonment is given in the statutory penalties, but it is doubtful if these penalties were ever enforced as the cases show much lighter sentences.

A public statute concerning weavers gives penalties of a fine of £400 and 14 days in prison; in this case, prison is in addition to and not conditional on payment of the fine. No case is quoted in the record.¹

In a court statute passed on 17th June, 1607, relating principally to assaults and injuries, the penalty for defamation is stated to be 48 hours imprisonment and Kirk censures.² No case is mentioned in the record which shows this penalty and the penalties imposed for defamation show a fine of £10³ or else an order to find caution.⁴

A court statute against poaching shows 10 merks for the first offence, 20 merks for the second, 40 merks for the third, with 48 hours imprisonment for each offence in addition;⁵ and another court statute against receiving a thief - £50 and imprisonment for eight days,⁶ but the cases do not show these sentences.

From a study of the statutory provisions concerning imprisonment, it is seen that imprisonment was not imposed conditionally, but as a penalty per se either alone or in addition to a fine, that the length of the periods of imprisonment under statute was defined and the periods were quite short - 48 hours, 8 days, 14 days, 15 days, 1 month. The periods were progressive for the most part, depending on the number of previous offences.

1. Nb. 177.
2. Na. 34.
3. Na. 164 etc.
4. Na. 16.
5. Na. 236/7.
6. Na. 267.

XIV. IMPRISONMENT (Contd.)

5. REGALTY COURT. 1547-1706 (Contd.)

The actual prison sentences shown in the cases were indefinite and depended on the prisoner doing something.

There are a number of cases which give information regarding prison itself.

Barbara Ker, in the words of the record, was a "prophaine scandalous woman" who had been imprisoned for theft and had been in prison "for a long tyme bygone" until she escaped.¹ It had transpired that Barbara Ker sought to return or had returned to Melrose and the fiscal sought the renewal of a banishment order - if she was found she was to be put in prison until caution for her good behaviour was arranged. She failed to appear at the next hearing and so the order of banishment was made. It is plain that prison in this case was used as a threat rather than a proper penalty and prison was the last alternative, all else having failed.

One case gives a surprising picture of the conditions under which a particular prisoner served his sentence.

John Halliwell who was in prison for murder, escaped and the gaoler was accused of negligence in permitting the escape. The court found that the officer committed a manifest breach of trust for permitting John Halliwell to go up and down the streets and to change houses where he pleased and for employing the delinquent in his own service....." and did entrust him with bringing his (the officer's) ale, also with the key of the prison door, and to fork Mark Blaikie's corn". The officer also permitted the stabling of a saddled horse at his house all night, on which the delinquent escaped. The officer was stated to be remiss and negligent in his duty. He was relieved of his office and to be put in the stocks during the Bailie's pleasure.²

Other escapes are noted -

The prisoner, having admitted some charges of theft, escaped from prison - the Thieves Hole of Melrose.³

The actual prison was in the Tolbooth,⁴ but whether this was the Thieves Hole⁵ or whether there were two, it is not possible to say. From a case in the latest period, it is seen that the officer locked the doors at eleven o'clock at night.⁶

1. Na.267, Nb.17/8.
2. Nb.345/6.
3. Nb.421/2.
4. Nc.3/4.
5. Nb.421/2.
6. Nc.3/4.

XIV. IMPRISONMENT (Contd.)

6. BARON COURT. 1523-1747.

There are occasional references to imprisonment - the period was usually indefinite pending satisfaction of another part of the sentence, but in the earliest period, a definite sentence of a year and a day is noted - which is similar to the justiciary sentences of the period.

(1) Pending caution: In Carnwath, where the person found in blood refused to find caution and to undertake not to commit a similar offence, the texts read - "and for that caus he (the Baron) wald put hym in fyrmans quhill he (the person in default) gat (law)borowis" and also "quhilk he refusit and wald fend nane (lawburrows) thairfor my Lord gart breng him hame and hald him quhill he fand borrowis".²

These texts show that some form of restriction of liberty could be imposed although in these cases it may have been that the defaulting party on "being led home" or "put in fyrmans" was put to work in the Baron's service.

(2) Pending payment of fine. Three assault cases in Urie state in the same terms that the Court imposed a penalty of £x as a fine and "ordains the accused to go to prison until the same shall be paid". From the third assault case, it is stated that prison is "the ordinary prison of the Barony".³

Occasional cases show imprisonment as a penalty in itself and in such cases the sentence was indefinite (during the court's pleasure) in the later periods, or definite in the earliest period.

1. O. 185, 200.

2. O.205.

3. P.156, 133, 161/2, 163/4, also S.112/3, 235.

XIV. IMPRISONMENT (Contd.)

6. BARON COURT. 1523-1747 (Contd.)

(a) Pending the Baron's pleasure. In the case where there was a breach of a weights and measures statute, the penalty inflicted was a fine of double the value of the quantity in dispute and also "incarceration of their persons at the Baron's pleasure".¹

Stitchill made no use of imprisonment as a punishment for assault cases and there is only one reference to this penalty in a court statute enforcing the terms of a national statute forbidding "fanatical disorders" and which stated that if the tenants did not accept new clauses in their leases forbidding disorders they could be evicted, and in the event of their not removing, they may be committed to prison.²

(b) Definite.

In the earliest record, imprisonment could be given for a definite period.

If an arrestment was broken, the standard penalty was that the offender "forfeited and lost to the Lord the tack and steading he held of the Lord, and also all his moveable goods and debts within the jurisdiction by reason of escheat and his person to be in prison, at the Lord's will for a year".³

1. P. 105/7.
2. Q.101/2, repeated in Corshill.
3. O.68/9, 86/8, 102/5, 130/1 etc.
deforcement O.138/9.

XIV. IMPRISONMENT (Contd.)

7. BURGH COURT. 1398-1714.

References to prison occur in the Aberdeen record, but the references show a certain amount of co-operation on the part of the prisoner -- he went to prison voluntarily.¹ This was called freeward -- but only applied to freemen who knew that they would lose their burgh freedom if they refused.

Ade, son of Thomas, and also Thomas Scherar were ordered not to leave prison until they implemented the bailies' will.²

Mauricius Suerdsleper was ordered to go to prison (ordinatus est et summonitus intrare prisonam) until he found caution to satisfy (de indemnitatem) the town and the towns people (vicini).³

In one case the prisoner refused to leave the prison and go to court:

Thomas, son of Willelmus, was in prison and would not obey the bailies' summons to be present at the court -- he refused a further order from the court officers sent by the bailies.⁴

In another case, a difficult person was fined because he refused to go to prison and then having gone, he left prematurely.

Thomas Johannis, a butcher in three fines --

1. because he was rebel to the town officers in the course of their duties.
2. because he disobeyed the order of the bailies to enter prison.
3. because he left prison without their permission.⁵

Robertus became caution for Christinus de Clunes that he would not leave the prison of the Tolbooth (pretorii) until the Alderman, Bailies and Town council (Consules) had completed their investigations regarding his deforcement.⁶

1. Intro. cxxxix.
2. V.26.
3. V.22.
4. V.51.
5. V.134.
6. V.22.
- V.131 -- Memorandum re. breaking prison -- broke out of the King's prison against the orders of the bailies.

XIV. IMPRISONMENT (Contd.)

7. BURGH COURT. 1398-1714 (Contd.)

The middle records show the difference between free and close (or fast) ward more clearly.

The conditions of imprisonment varied according to the status of person imprisoned. If he was a freeman, the easier rules applied, whereby his attendance in prison was almost voluntary, i.e. free ward. If he was an unfreeman or vagabond, he was held in close or fast ward. This distinction was of importance in the earlier records, but it became less noticeable in the 17th century.

In some cases, the freemen and the unfreemen occupied different prisons or different parts of the prison.

Free ward was a privilege which a burgess could claim. It implied trust on the part of the prisoner that he would not leave prison until the cause of his imprisonment was satisfied. If he did leave before his time, or refused to enter, then he was rebellious to the authority of the town and could suffer loss of his burgess freedom. If that happened, he could be reduced to an unfreeman and could be confined in close ward.

However, by the beginning of the 17th century, trust had become expendable and tighter rules were required:-

An act stated that the old custom of having freemen and others in free ward in the tolbooth with the doors open was abolished. Henceforth all are to be kept in sure ward, with the doors locked and closed and they will be detained until the decrees are obeyed.²

This was reflected in an earlier case.

William Donaldson was fined £40 for insulting a bailie and being rebellious - escaping from ward. He was returned to ward and put in irons, to be kept in fast ward on bread and water during the provost's and bailies' will.³

1. Murray I. 161/2 and Notes. II. 133/9.
2. Z.151. 1618.
3. Z.116/7. 1607.

XIV. IMPRISONMENT (Contd.)

7. BURGH COURT. 1398-1714 (Contd.)

The temporary period could be long enough -

Marion Chisholm was imprisoned until she found cautioners who undertook that she would appear to underlie the law, under pain of 500 merks. This took 6 months.

The references to prison in the old laws were less easy going -

If any Burgess be challenged or accused of any crime and he is unable to find caution, the Burgesses of the town will keep him in ward in his own house and in chains for 15 days. If, after that period, he has not found caution, his neighbours shall lead him to the King's Bailie who will receive him from them and he shall be taken to the house of the King's Sergeant if the Burgesses do not have any prison, and there he will be guarded by his accusers. The Sergeant will also find good and secure chains.²

If any Burgess be accused of any crime, he shall be held by his accusers within the Burgh. If he says that he can find caution he will be led by his accusers through the Burgh to the house where he says his caution can be found, if he is taken during the day.³ If he is taken at night time, with hue and cry, he shall be kept by his accusers, and by the town watch, until the morning so that his neighbours may know why he is taken, and that if he can find caution he will have an opportunity of producing it. If he cannot find caution, then he shall be led to the Sergeant's house and he shall be kept there by his accusers if the Burgh does not have a prison, until sentenced.⁴

But such provisions are not seen in the cases.

The early records show prison as a place of temporary detention, not as a punishment in itself - the person was imprisoned pending something else happening.

Anyone found fighting will be put in the tolbooth, until it is known who is at fault. The guilty person will be released when he pays 10/- or else sits in the stocks for 8 days.⁵

1. X.389. 1650 (witchcraft).
X.399. 1682 - abuse in court, imprisoned but no details.
2. L.Q.B. LVII. p. 27.
3. L.Q.B. LXXIV. p. 36/7.
4. L.Q.B. LXXIV. p. 36/7, also
L.Q.B. LXXXVI. p. 41/2.

During the peace of the Fair, no man shall be arrested within that Fair except if he breaks the peace of the Fair or except if he is a king's traitor, or if he is such an evil doer that the sanctuary of the Church ought not to save him, and if any such evil doer is found or if any person breaks the peace, he shall be seized and kept securely until the courts of that Fair are heard, and then he will be summoned forthwith to accept the sentence and law of the court.

5. X. 164/5. 1470.

XIV. IMPRISONMENT (Contd.)

7. BURGH COURT. 1398-1714 (Contd.)

But in the middle and later records imprisonment was imposed frequently and there were many variations in the forms.

The most usual form was custodial (i.e. pending satisfaction of the principal part of the sentence) and as such, was for an indefinite period.

1. Pending payment of fine. This was the most common reason throughout the whole period.

Thomas Eduein was imprisoned until he found caution for fine and bloodwite.¹

John Hope was fined £4 for riot and was ordered to remain in ward until he paid.²

James Thrift was fined £50 for tearing a page out of the Court book and was imprisoned till he paid and till he found caution of 400 merks to the Provost.³

The miller and his servants were imprisoned till they paid fines of £20 and £10 for unlawful exactions from persons coming to the mill.⁴ He also refused to find caution to keep the town laws and was ordered to remain in close prison in the steeple of the burgh until he did find caution.⁵

2. Pending further punishment.

Marion Ray was warded until an iron clasp was made for her into which she was to be locked for 24 hours.⁶

Imprisoned pending public punishment and banishment.⁷

Thomas Murdo was fined £10 for riot and imprisoned until he found caution (1) to pay the fine and (2) to remove from the town under pain of banishment.⁸

Thomas Moses was fined £12 for wrongfully accusing another of theft and was imprisoned in the steeple of Peebles until paid. He was also imprisoned until he stood for two hours at the cross with a paper on his head stating his crime.⁹

1. Z.78. 1560/1 (blood)

2. Y.4. 1652, Y.58. 1664 - £20. Y. 115. 1684 - 20/-d.

Y.19/0. 1653 - 30/-d. Y. 60. 1664.

Y.108. 1682 - £12, not going to church.

3. Y.128.1689, also Y.103.1682 - Act against gaming stated that the penalty would be 10 merks and imprisoned till paid.

4. Y.1.1652.

5. Y.3.1652.

6. Z.43.1546 - for insulting.

7. Y.90.1674 - for theft, also

Y.110 - thieves hole. Y.163.1700. banishment thieves hol

8. Y.2/8.1653.

9. Y.10/11.1653, also Y.134.1690 - £20 and imprisoned till paid or caution.

XIV. IMPRISONMENT (Contd.)

7. BURGH COURT. 1398-1714 (Contd.)

3. Pending obedience to court order.

David Creichtoun was to remain in ward in the tolbooth until he delivered scrolls to the clerk.'

If any person carries a sword in the burgh he will be warded until he finds caution under pain of £40 and loss of freedom.'

James Ghisholm was warded for refusing to go to the army until he found caution of £40 - or his cautioners went instead.'

Jonet Clerk admitted that she had borrowed two cloaks and had not returned them. She was ordered to remain in the tolbooth till she returned them.'

While the majority of prison sentences were custodial, some cases show imprisonment given as a punishment in itself and in such cases the period could be indefinite, definite, or even a mixture of both.

1. Indefinite (during magistrates' pleasure)

Helen Thoir was imprisoned for blood and troubleance during the provost's will and she had to ask forgiveness on her knees.'

For insulting and striking the provost, Adam Donaldson was fined £40 and warded during the council's will. He had to ask forgiveness.'

John Wylie, deacon of the weavers, refused to accept the council's order and was warded during the magistrates' pleasure.'

1. X. 319. 1570.
2. X.357. 1605, also provisions re. watch and gates - offenders imprisoned till they obeyed.
X. 373/4. 1637.
3. X.377. 1644, also X.377/8. 1644.
4. Z.11. 1521.
5. Z.55. 1549, also
Z.160. 1625 - warded until he satisfied provost for insulting him.
6. Z.133. 1613, also Z. 116/7. 1607, Z.117. 1607, and
Y.51. 1662 - fined 10 merks and imprisoned during pleasure for striking former provost.
Y.136/7. 1691 - for disobeying a bailie, loss of burgess-ship and imprisoned during magistrates' pleasure.
Y.75. 1667 - insulting provost - fined 40 merks and imprisoned during his pleasure.
Y.60. 1664 - warded during council's pleasure for insulting them.
7. Y. 48. 1659, also
Y.118 - fishing offence - fined and imprisoned during pleasure.
Y.43. 1657 - imprisoned during pleasure for usurping freemen's craft.

XIV. IMPRISONMENT (Contd.)

7. BURGH COURTS. 1398-1714 (Contd.)

1. Indefinite (during magistrates' pleasure) Contd.

It is seen that in certain cases the purpose of imprisonment could include two separate concepts -- it was both custodial and also punitive - i.e. pending payment of a fine and also during the magistrates' pleasure.

Alexander Williamson broke the lock of the prison and left without permission. He returned and stayed until night time and when finding the door was still open, he left again. He was fined £10 and imprisoned until paid or longer at the magistrates' pleasure.¹

Andrew Haldin was fined £10 for riot and imprisoned till he paid and also during the magistrates' pleasure (he had insulted the provost and town officers).²

2. Definite.

Sentences of definite periods were much less frequent and it is noted that they occur in the earliest period and the later period. In the earlier cases the period was a year and a day.

John Murray was fined for drawing blood and was ordered to leave the town or remain in ward in the tolbooth for a year and a day, at the will of provost and bailies.³

The middle period shows statutory sentences of short periods of 24 hours and 48 hours -

Anyone who leaps the wall will be punished by warding his body in irons for 24 hours for the first fault.⁴

Persons complaining against taxation will be imprisoned in the steeple for 48 hours.⁵

But no cases are seen of such sentences.

In the later cases, however, short sentences are noted - 48 hours was the most common period.

George Thomson was imprisoned for 48 hours for insulting a bailie.⁶

1. An example of free ward - Y. 136/7. 1691.
2. Y. 73. 1667, also Y.136/7. 1691 - £10 and imprisoned till paid and pleasure.
3. Z. 40. 1545.
4. X.347. 1572.
5. X.373. 1633.
6. Y. 38. 1656.

XIV. IMPRISONMENT (Contd.)

7. BURGH COURT. 1398-1714 (Contd.)

2. Definite (Contd.)

Andrew Haldine was convicted of disobeying a bailie and for escaping from prison. He was discharged of his freedom as a burgess, fined £10 and imprisoned for 48 hours in a close prison.

James Wadie and others were fined 10 merks and 40/- for stealing corn. They were imprisoned for 48 hours.

Adam Caitcheon and his wife were fined 10 merks for perjury and were imprisoned for 48 hours. They had also to suffer public punishment.

As in the case of indefinite periods of imprisonment, the two concepts of custodial and punitive imprisonment could be present in definite periods of imprisonment. But this had the odd result that a sentence of imprisonment could combine both the indefinite custodial aspect (e.g. pending payment of a fine) with the definite punitive aspect (e.g. 8 days). It is assumed that whichever aspect resulted in the longer period would be applied.

(a) Pending payment of fine and also definite period -

John Dickson was fined £20 for insulting a former treasurer and was put in a close prison until he paid the fine and also for three days and nights after the date of the sentence.

For theft, William Eumond was fined £18 and was imprisoned till he paid and also for 48 hours.

(b) Pending fulfilment of sentence and also definite period-

James Sheill was fined £30 for assaulting the provost and was imprisoned (1) for 8 days in a close prison and (2) until he gave up his burgess ticket and (3) until he paid his fine.

Andrew Eumond was imprisoned for discharging a firearm at two people, for 24 hours, and also until he found caution not to use firearms again.

1. Y.48.1659.

2. X.57. 1663.

3. Y.92/3. 1677, but 24 hours for riot Y.14. 1653.
4 days - theft. Y.163.

4. Y.84. 1671, also Y.85. 1671 - 10 merks and 24 hours and until he paid.

Y.87. 1673 - £4 and 48 hours and until paid.

5. Y.88. 1673.

6. Y.151/2. 1695.

7. Y.160. 1698.

XIV. IMPRISONMENT (Contd.)

7. BURGH COURT. 1398-1714 (Contd.)

3. Miscellaneous provisions.

John Hunter, one of the town officers, was notoriously drunk with the prisoners in the jail and left a light behind him by which the prisoners burnt the doors. He was suspended from office and was ordered to have the doors repaired.

1. Y.177. 1708.

CONCLUSIONS.

XIV. IMPRISONMENT.

1. There is a definite course of development seen in the imprisonment sentences and there were two types of imprisonment -

- (a) custodial - i.e. pending something happening.
- (b) punitive - as a penalty in itself and in this case the period of imprisonment could be definite or indefinite.

In addition, a state of free ward is noted - the accused agreed to restrict his liberty voluntarily. The restriction could be a wide area - to keep to the north of the Forth or a specific request - to stay at home and appear for trial when required.

The burgh courts show a state of free ward for burgesses, but in this case they had to go to prison although there is a distinct air of co-operation on the part of the accused.

2. In the earlier justiciary records, prison was (a) punitive - a standard definite period was imposed - a year and a day - and it is noteworthy that the same sentence is seen at the same time in other courts - e.g. Baron and Burgh courts, (b) (and more frequently) custodial - pending obedience to a court order. Free ward is also frequent in this period.

3. In the middle period and in the first half of the later period of the justiciary records, prison was entirely custodial - but there were great differences in the periods which prisoners spent in custody - their stay in prison was largely determined by their personal means, influence and the activity of their family and friends.

4. In the last half of the later period, prison began to be used as a form of sentence in itself, but while in the final period a few instances of a definite period (37 days, 10 days) are seen, much more usually the period was indefinite (during the court's pleasure, until further order

5. //

CONCLUSIONS..

XIV. IMPRISONMENT (Contd.)

5. In the other courts (with the exception of the burgh courts) prison was almost entirely custodial. The references are quite frequent in each record, the most usual form being pending payment of a fine, but there are many variations..

6. The exceptions are few -- (a) occasionally in the Argyll record punitive sentences are noted, but with one exception (24 hours) the periods were all indefinite (during the court's pleasure).

(b) one case is noted in the later Sheriff court of a definite punitive period (1 year) but it was not enforced.

(c) in the Regality and Baron courts definite punitive periods are mentioned in the middle periods, but such cases are repeating the terms of national acts. These provisions were not enforced and the courts passed their own acts with different penalties.

(d) in the earliest Baron court occasional reference is made to a definite punitive period - a year and a day - which is the same sentence as that given in the justiciary courts of the period.

(e) in the later Baron courts there are a few references to an indefinite punitive period - during the Baron's pleasure.

7. In the Burgh courts, however, a different pattern is seen:

(a) free ward was frequent for burgesses until c.1600.

(b) in the earliest period, prison was custodial with occasionally definite punitive sentences of a year and a day.

(c) in the middle period, prison was used for both custodial and punitive purposes, with equal frequency.

(d) //

CONCLUSIONS.

XIV. IMPRISONMENT (Contd.)

- (d) the punitive sentences could be either indefinite (during magistrates' pleasure) or less frequently, definite (48 hours, 24 hours).
- (e) the different types of sentence could be combined, with the result that some sentences were both custodial and indefinite punitive, and even a mixture of custodial, indefinite punitive and definite punitive (e.g. pending payment of a fine, during the magistrates' pleasure and for 8 days) but this was exceptional.

POLITICAL

It is difficult to assess accurately how far the sentences or acquittals were affected by political influence.

In the early and middle periods, the king took a considerable interest in the cases before the justiciary courts, but there was plainly a difference between (1) cases where the applicant petitioned the king to intervene and (2) cases where the king took a direct interest because of political considerations, e.g. in treasons, seditions and cases where his particular supporters were involved.

- (1) Where a person petitioned the Crown for justice, so far as the records go, it is seen that a genuine effort was made by the Crown to remedy any complaints.

Throughout the whole period the justiciary records show frequent warrants from the king (in the early and middle periods) and from the Privy Council (in the later period) giving instructions to the justices - to continue or stop actions, to suspend sentence or to give a particular sentence. This certainly amounted to political interference with the judiciary by present-day standards, but it cannot be said that this intervention was necessarily unjust by the standards of the period - in some cases at least the action was brought maliciously by the accusers, with evidence which although legally acceptable was untrue and the accused's only recourse was to petition the king to have the action suspended.

Other instances show the Crown suspending hearings because the parties had agreed to go to arbitration and continuing the process because the assize would have had a double journey etc. but in many cases no reason is given and it is impossible to assess the justice of such orders to stop proceedings.

Occasional cases do show surprising acquittals and it is difficult //

POLITICAL (Contd.)

difficult to resist the conclusion that some external guidance had been applied, but such cases were very infrequent.

In the later period frequent petitions to the Privy Council were made by persons committed to prison by their accusers who had done nothing further and almost without exception these petitions were treated sympathetically - the accusers had to act within a short period or else the accused would be released, and in some cases the accused was released immediately.

It could be observed however, that the means to petition was not available to everyone and the speed with which the petition was decided depended on the money and influence of the applicant, but the cases show applications from people in the most menial stations, which were dealt with in the same way.

The Crown mitigated the court's death sentences on occasions but whether justly or unjustly, cannot be said. The mitigations occur throughout the whole period, but in the last part of the middle period and in the later period the references are rather more frequent - during these periods the Privy Council exercised the king's powers in justiciary. The standard form of the mitigation was banishment.

In conclusion, it is clear that where the Crown was not directly involved, any petitions for justice were heard sympathetically and instances of political fixing were rare. Some cases show a solution reached on the grounds of expediency rather than law, but it is possible that nonetheless the decision was correct.

In a forgery case where the accused was acquitted of actually forging the coins, but guilty of assisting one of the forgers to escape, the king stated that the accused was //

POLITICAL (Contd.)

was just as guilty as the others and sentenced him to the same punishment - strangling and his body burnt.

Again in a slaughter case, which had stemmed from a feud between the Crichtons of Cluny and the Earl of Orkney the king considered that if the case proceeded, both sides would cause trouble and riots in Edinburgh and to avoid bloodshed and trouble to the people of Edinburgh he ordered the case to be dropped.

(2) Where the Crown had a direct interest, the cases show a more personal view of justice. These cases fall into two groups -

(a) cases where the king was involved personally and

(b) cases where the king was involved politically.

(a) The sedition cases against James VI show an exceptionally severe retaliation by the king and his sentences were in a class by themselves. In the same vein is the sentence against Euphame McCalzane for witchcraft - burnt alive. Such reactions are not seen in later reigns, and anti-crown cases were taken as treason if they were sufficiently serious.

(b) Cases which involved the crown politically were straightforward - in the early and middle periods the king's wishes were observed and the legal structure suitably adapted if necessary. The law was certainly not ignored by the king, but the functions of the justices were severely curtailed in such cases and the decisions were given after consultation with the king and the council. The emphasis was on political rather than legal considerations. In the later period the same principles applied - when the acquittal rate in treason cases was considerably lower than in the previous periods. This is not, of course, an indication of political manipulation, as in each case the accused might well have been guilty in terms of the law.

POLITICAL (Contd.)

Apart from the cases where a person petitioned for intervention and where the Crown intervened anyway, other situations illustrate the operation of powers outside the basic law.

1. Wilful error threats - it is seen that the assize had no hesitation in acquitting the accused if they thought he was innocent - in spite of frequent threats of proceedings for wilful error if they acquitted. Convictions are certainly noted in such cases, but it is impossible to say if they were justified. However, the high number of acquittals in the middle period is noteworthy. The number of acquittal in the early period is much less - and in that period proceedings were actually instituted, which was not the case later.

2. The records show that remissions could be a source of political trouble - on occasions remissions could be refused or held up because the applicant was in dispute with the king's party but again this was exceptional.

While the sphere of politics was related principally to the judiciary courts, a brief note is given regarding the position in the lower courts.

The steady progress of official prosecution in all courts was an indication of the importance placed on the prosecutions as a means of enforcing royal power, but it is difficult to say how far the lower courts were influenced by political considerations.

So far as the records show the courts were not influenced to any great extent and indeed they show elements of considerable independence - frequently the records mention a national statute and immediately afterwards the court passed its own statute on the same subject with much lighter penalties. //

POLITICAL (Contd.)

penalties. The full penalties of the national act were hardly ever enforced (except in some deforcements and against the covenanters).

That there was corruption and manipulation (as in the Fife Sheriff Court record) cannot be denied, but it did not appear to be widespread, and it was motivated by personal reasons rather than political.

The considerable similarity in sentencing patterns among the lower courts shows that their sentences conformed to a surprising degree and that political or non-legal influences were relatively few and far between.

GENERAL CONCLUSIONS:

1. Considering the time covered and the courts studied, there is a considerable uniformity in the sentences applied - (a) beheading for slaughter, hanging for murder and notour theft, strangling and burning for witchcraft and hanging for most of the other crimes if they were serious enough in the justiciary courts: (b) personal punishment or fining for most crimes in the lower courts:

2. The importance of cautionary obligations is possibly underestimated by writers - if one could afford to find caution, the worst consequences of the system could be avoided at all times (but especially in the earliest period) and in all courts.

3. The frequency of death sentences is possibly over emphasized - admittedly the majority of sentences in the justiciary courts resulted in death in one form or another, but a considerable number of sentences in the justiciary courts were non-capital, e.g. banishment, penalties involving personal punishment, and finings are noted. In the lower courts, death sentences were exceptional and were limited to notour thefts. For the most part, the standard sentence in the lower courts was fining, with personal punishments noted fairly frequently.

4. For the greater part of the period the degrees of dishonour were important in any sentence.

(a) In death sentences, the scale descended from beheading (the least dishonourable, and in some political cases positively honourable) through hanging and drowning (both on the same level) to strangling (for unnatural crimes) and forfeiture (for political crimes) with burning alive and breaking on the wheel quite exceptional.

(b) //

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GENERAL CONCLUSIONS (Contd.)

(b) In personal punishments dishonourable gradations applied also - although different subdivisions applied - (a) added to a death sentence personal punishments could act as marks of aggravations, e.g. mutilation, hanging in irons, and the most dishonourable - quartering: (b) as the penalty in itself - scourging, public exposure, mutilation and branding (the last two being the most dishonourable).

(c) Banishment was relatively honourable and operated in the judiciary courts as a mitigated death sentence. In the lower courts it was considered not so much a mitigation as a substitute for a death sentence which the court did not wish or was powerless to impose.

5. Taken over all, fining was the most frequent sentence of all - although it was relatively infrequent in the judiciary courts (and where fines are mentioned in these courts they are considerable) the lower courts all show that fining was their basic sentence and the amounts seldom exceeded £100, the usual amounts being between £10 and £50.

6. Imprisonment passed through distinct stages - in the earliest period it was given as a punishment for a definite period. In the middle period, prison was basically custodial i.e. pending something being done, and in the later period it became punitive again, first, for an indefinite period and latterly for a definite period.

7. The burgh courts show a distinctly different pattern in their punishments from the other courts - e.g. public indignity appears to have started as a burgh punishment and was taken up by the other courts, and trading crimes and loss of burghship again were crimes which were frequent in burgh courts, but rare in other courts. The Argyll Judiciary Court has certain similarities in its penalties to the burgh courts and it is likely that the court was influenced by the cumulative effect of its jurisdiction over the burgh of Inveraray.