

LAW AND ORDER IN STIRLINGSHIRE, 1637-1747

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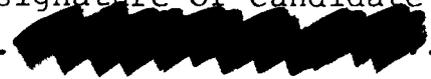
BY

STEPHEN J. DAVIES.

Abstract

Scotland in the early modern period was an overwhelmingly rural society, made of largely self-sufficient communities based upon the unit of the estate. This society had a legal system which was decentralised, had a large non-state sector, depended in the first instance upon individual initiative and had no clear distinction between criminal and civil actions. Its main purpose was the maintenance of order through the settling of conflicts, the punishment and removal from society of the incorrigible and perpetrators of atrocious crimes and the granting of redress to injured parties. The courts making up the system were of three sorts church, royal and local courts. The church courts were an active judiciary which regulated the moral life of communities by punishing acts which violated Christian morality, which were flagrant and open or were likely to lead to conflict. The punishments used and the act of prosecution were designed to lead to a 'moral reformation' of both the guilty party and society in general. In this they were partially successful by circa 1720. They were also an investigative branch of the entire system collecting information for other courts. The local courts provided a legal service for those who wished to use it rather than acting as an enforcing judicature. The central courts had a specialised role, trying serious crimes and cases which had wide implications. They depended upon the local community for support and for the 'supply' of cases through the dittay system. Changes in the structure of society and the political order led to change. Between 1651 and 1660 a thoroughgoing reform was imposed by Cromwell. The system was restored in 1660 but further reforms were made. The 1688 revolution and the crisis of the 1690s led to the Union and sweeping changes which transformed the system into a modern one and altered the nature of the law, its enforcement and the concept and pattern of crime.

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C O N T E N T S

I N T R O D U C T I O N

p 1

P A R T I

The Structure of Society And Its Legal System

<u>Chapter 1</u>	Land, Economy and People	p 15
<u>Chapter 2</u>	The Courts And The Law 1600 - 1750	p 56

P A R T II

The Legal System In Action : The Local Courts

<u>Chapter 3</u>	The Church Courts And Social Control	p 79
<u>Chapter 4</u>	The Local Courts	p233

P A R T III

The Rise Of The Centre And The Demise Of The Old Order

<u>Introduction</u>		p303
<u>Chapter 5</u>	The First Assault On The System - Revolution and Occupation 1637-1660.	p315
<u>Chapter 6</u>	The Central Courts - Growth And Development 1660-1690	p361
<u>Chapter 7</u>	The Crisis And Demise Of The Old Order 1690-1747	p443
CONCLUSION		p494

APPENDICES

No 1 :	Quantitative Analysis And The Use Of The Computer - A Waste Of Time ?	p 502
No 2 :	The Institutional Writers And Their Role	p 510
No 3 :	The Scottish Barony And Regality As Economic And Social Units	p 518
No 4 :	The Stirlingshire Valuation Roll of 1709	p 530
No 5 :	The Stirling And Alloa Witch Hunt of 1658-61	p 539
No 6 :	Witchcraft And Charming In The Seventeenth And Eighteenth Centuries	p 552
	<u>BIBLIOGRAPHY</u>	p 568

INTRODUCTION

One might say that crime, like the poor, is always with us; and it is certainly one of the most enduring topics of historical interest. Few phenomena have attracted so much attention whether in the form of the sensational account or the academic analysis. Since the late nineteenth century at least, the study of crime and the law has been a major concern of social scientists, on a par with education, religion and the theory of the state. However it is only in recent years that large numbers of historians have become interested in the study of crime and the working of legal systems. The extent of this interest and its growth in the last twenty years can be gauged by a recent critical bibliography which contains no less than 165 separate works, most of them published since 1960.¹ This increased perception of crime as an area of historical research is one aspect of the wider development of all types of social history. As historians moved increasingly away from the traditional 'histoire evenementielle' of political institutions and towards the history of social structures and the 'longue duree', so inevitably many became concerned with the study of one of the most fundamental of all such structures, the control of delinquent and deviant behaviour through the mechanism of a criminal law. This interest was undoubtedly enhanced for many by the conceptual turmoil within contemporary criminology with the rise of the 'new criminology' and radical new perspectives in such matters as the very nature of crime and law enforcement.² Inevitably the study of the present led to the search for its origins in the past.³

These concerns acted upon the well-established discipline of legal history (as once practised by Holdsworth and Maitland for example) to produce the new, specialised topic of historical criminology. This springs out of traditional legal history but has a rather different emphasis. Instead of an interest in the development of the law and the courts as an abstract system, with a practical concentration on the law as seen by legal theorists, there is rather a concern with the actual working of the courts, the nature of their function and the type of business handled by them, and the concept and reality of crime itself.

The theoretical perspectives of historical criminologists have led them to ask specific interlinked questions of the sources. In the first place they are concerned with the question of what courts actually did : what made up their business? In particular they have attempted to determine the relative importance of criminal cases as compared with other sorts of business and, following that, the composition of this body of criminal cases : what proportions were crimes against property, person and morality for example? Inevitably, the next step has been the attempt to discover changes in the level of prosecutions of various crimes and hence to establish meaningful 'crime rates'. Closely linked to this is the question of how courts functioned, i.e. their procedure both in theory and practice.

All of these are points of empirical fact, however difficult to discover. Any historical study of crime must provide answers to at least some of them if it is to be of any value at all. However that is not sufficient : the

historian must also address himself to the basic theoretical question of the nature and definition of crime. In other words, he must try to discover what was defined as a crime, how these definitions were made and how they changed. This leads to the question of whether crime has any objective existence or whether it is merely an ideological construct, the product of a socially determined consciousness.

This, in turn, raises the broad topic of the relationship between the law and its enforcing bodies and society at large. How was the law made and by whom : who manned and ran the law enforcement agencies; did the workings of the legal system reflect the interests of a particular social class or those of society in general; did it reflect (or constitute) a particular ideology; how did the functioning legal system reflect social and political circumstances and changes in these? Consideration of this topic leads in turn to the problem of the criminals, or to be more precise, those accused of crime. Who were they and what were their motives? What was their social background and was there a distinct 'criminal class' making a living from crime and having its own distinctive subculture and class-consciousness? This last question has exercised the attention of writers from the Elizabethan period, such as Greene, Harman and Dekker, onwards.⁴

Lastly, historical criminologists have had to consider the matter of the penalties imposed for crimes and offences, what their purpose was and what they show about the attitudes of society, or at least the ruling class. Here the influence of other disciplines has been most apparent, with historians much effected by the current debate amongst sociologists over the role of punishment in general and of

incarceration in particular.⁵

In fact the history of crime and criminal law is of necessity inter-disciplinary, involving input from several academic subjects besides history both in theory and methodology. The queries listed above which have been posed by historians cannot be answered adequately without extensive recourse to archival sources and the accumulation of large quantities of data. As a result most studies of crime have been quantitative in nature, relying on statistical analysis to inform theory. This approach has only become possible because of the invention of the computer but it should be remembered that such studies have their own peculiar dangers : by their very nature quantitative studies involve an element of selection, of editing, all the more insidious because it is unconscious and often due to the nature of modern computers rather than the prejudice or theory of the historian. On the positive side such studies have the virtue of precision and 'testibility' and have frequently led to discoveries at variance with the models which originally inspired the investigation.⁷

For reasons of interest and availability of sources, the study of crime in Europe has tended to focus on two particular periods : on one hand the nineteenth century and on the other the 'early modern' period between about 1600 and 1760. The issue which is increasingly coming to the fore is the one of transition from a legal system with many 'primitive' features to the state-based legal system of the nineteenth and twentieth centuries.⁸ This change involves amongst other things the 'reception' of Roman law, the creation of a central government monopoly of legislation and law enforcement, and radical changes in the nature of

crime, criminals and punishment. What is clear is that all the questions listed above yield different answers when applied to the two different periods. This naturally leads to an examination of the relationship of this change to transformations in the wider political and social sphere and in particular those changes leading up to the 'industrial revolution' and the 'modernisation' of European society.

In the great rush of studies mentioned earlier, few countries or areas have escaped scrutiny. One state that has been largely overlooked however, (at least by comparison) is Scotland. This is unfortunate as Scotland's legal history, as well as being inherently interesting in its own right, has left a rich deposit of archive material. Before 1747, when heritable jurisdictions were abolished, Scotland possessed a complex and distinctive legal system about which comparatively little is known. Although many texts are in print and the writings of the great Scots 'institutionalists' who redefined Scots law from the later seventeenth century are widely available, Scottish legal records have not received the same detailed scrutiny as their English and Continental counterparts. This is to be regretted, as such scrutiny should illuminate the questions listed above and have considerable bearing on the question of transition to a 'modern' legal system. For English-speaking historians in particular such study should provide a useful corrective to the impressions gained from investigation of the English legal system. It is of course well known that to this very day Scotland retains its own independent system of law and courts but it is not often realised how radically different the legal histories of England and Scotland were before the Union of 1707. In England there was from an early date one

sovereign law-making body, the monarch in Parliament, making law for virtually the entire country; there was a strong central government together with a well-developed and dominant network of state courts which was, by comparison with almost every other country in Europe, highly centralised. In Scotland, by contrast, the law was largely a matter of custom with several bodies sharing the legislative role. The central government was comparatively weak and, beside the State courts, there were many private courts exercising wide powers over large areas territorial and jurisdictional. Scotland's legal system was thus more decentralised, complex and locally based.

In all of this Scotland was closer to the general European model, as found for example in France, Poland, Germany and the Low Countries, than was England. England in fact was an exceptional and atypical case. On the other hand, Scotland could not fail to be influenced by her neighbour (particularly in this case during the 1650's and the years after 1707) and her development did not conform precisely to the European model either. (For example the reception of Roman Law took a rather different form in Scotland to that which it had elsewhere). Moreover, Scotland and England together formed the United Kingdom, the first nation to undergo or achieve the industrial revolution. Therefore the study of the old Scottish legal system may provide pointers to answers to the question of how the prelude to the industrial revolution effected the old order which was swept away by its impact. In particular it may cast light on the problem of whether the existence of a centralised legal system was a necessary pre-condition of the changes which culminated in the industrial revolution,

or was rather the product of those changes. As has been suggested, it also provides a 'control' for histories of England on the one hand and of Continental nations on the other. Study of the old Scottish legal order is therefore of wider significance than one might expect.

Obviously such a study should try to answer the questions posed earlier but there are also specific questions concerning Scotland's legal history which arise. From the 1580's onwards, Scotland possessed a great network of church courts which, by the 1630's, had come to cover all the Lowlands and much of the Highlands in a web of 'godly discipline' which few reprobates could escape; at least, that is the impression gained from contemporary accounts and the works of many nineteenth century historians. Yet how powerful and important were the church courts? What sort of impact did they have on the lives, outlook and morals of Scots men and women? What was their function, and what part, if any, did they play in the 'reformation of manners' which took place between the rude sixteenth and cultured eighteenth centuries? Then there is the question of private and heritable jurisdictions. Before 1747 Scotland had a multitude of such bodies, many with full regalian powers : how did they function and what was the nature of their relationship with the State courts? In the case of the State (or Royal) courts, from James VI onwards there are persistent attempts to reform and restructure these bodies and extend their power. What impact did these have? Both the Cromwellian regime in the 1650's and the government of Queen Anne after the Union of 1707 imposed reforms from 'outside' the Scots political order and these present a

particularly interesting problem. What impact did the turbulent politics of the seventeenth century have upon the practice of Scots criminal law? Another significant change in the seventeenth century was the great work of the institutional writers, such as Mackenzie and Stair, which led to the systematizing of Scots law and the 'reception' of Roman law.⁹

Clearly, any study of how Scots criminal law worked before 1747 must focus primarily on the court records. Here the picture is somewhat mixed. The Royal Courts of Session and Justiciary have left extensive records, as have most of the Sheriff courts; in fact the main problem with these records is their sheer volume and bulk. The Church courts have also left extensive records.¹⁰ By contrast, the survival of franchise court record is patchy with most baronies and regalities leaving little, if any, records of their work and few match the extensive, well-kept records produced by, for example, the regalities of Glasgow and Dunfermline. However the total amount of record these courts left is still considerable and often more interesting and enlightening than the more voluminous records of other courts. Besides all this, much has been left in the way of record by burghal courts and other Royal courts, such as the Admiralty court. Inevitably there are gaps, often serious, in the continuity of record but it is fair to say that the main problem facing the historian is the sheer quantity and physical bulk of those records which have survived.

It is important to stress the need for caution in the use of these manuscripts, both when drawing specific conclusions from them about legal history and when using

them as a source for more general social study. In the first place, there is the inherently slippery nature of legal and criminal statistics. Changes in the composition of a court's business do not necessarily reflect changes in real crime rates : they are more often the result of variations in prosecution rates or the number of arrests. On top of this there is the problem, particularly significant in the early modern period, of the 'dark figure' of unreported and hence often unrecorded crime. This is a great difficulty when studying societies and historical periods in which people were generally averse to litigation and preferred to settle disputes extra-legally : so much so that some have argued that it is impossible to use court records to determine crime rates at least before the early nineteenth century.¹¹ However this does not mean that the study of crime in a historical context is either futile or useless. As the questions posed earlier show, the main focus of interest is not so much the actual number of crimes committed but rather the working of the system of control and hence the definition of crime and the number and nature of prosecutions.

Despite the caveat entered earlier, this particular study makes extensive use of quantitative analysis. This is inevitable for two reasons : firstly, the nature of the subject requires the study of a large number of cases over long time spans to determine trends or patterns, rather than the examination of a few exemplary (but probably misleading) cases; secondly, the bulk of the record, already mentioned, makes statistical rather than individual analysis the only approach.

Because of the sheer volume of record overall it is impossible to attempt a general survey. In the first place, many of the courts have to be disregarded completely, while others can only be used selectively. This is not as serious a matter as might be supposed. Several courts (e.g. the Courts of Session and Teinds) were primarily civil judicatures while others, such as the Admiralty and Lyon courts, had specialised or limited jurisdictions. In this study the courts examined, whether extensively or selectively, are the High Court of Justiciary, the Parliament and Privy Council, the Church courts of Session and Presbytery and the local sheriff, burgh, regality and baron courts.

Moreover, it is not possible to attempt a general survey geographically (i.e. a nationwide study). Scotland was such a variegated and complex entity that any study would be unbelievably difficult. Also the geographical survival of record is patchy with large areas unrepresented : furthermore, as even a brief perusal will show, many of the records, even when voluminous, are not comprehensive or well-kept and have major omissions. This indicates that a single sample area has to be selected and, with great caution, attempts made to draw general conclusions. A possible alternative would be to take a selection of court records from around the country; however in doing this, one would lose the benefit of studying and comparing courts with a common geographical background and it would not be possible to observe the manifold personal links that existed between the courts and which formed such an important part of the old legal order. The one exception is the High Court of Justiciary which has to be studied nationally; firstly, because it was a national rather than a local court and

secondly, because of the insuperable difficulties in abstracting any one locality's cases from its records.

Obviously the local unit chosen must be a shire, the Sheriff court being one of the most important jurisdictions and the shire the basic unit of government. Moreover, it is the only unit of reasonable size which gives the opportunity of studying a variety of courts. Because of Scotland's heterogeneous nature no single geographical region can provide a truly satisfactory example. However, one can disregard the 'special' areas, such as the Borders, where peculiar circumstances apply, and concentrate on the Lowlands rather than the Highlands, while, at the same time, trying to include some Highland areas for purposes of comparison. Effectively, this leaves a choice between Dumbarton, Stirling, Perth, Angus and Aberdeen as the possibilities. The last three are eliminated by their excessive size, leaving a choice between Dumbarton and Stirling. When making this decision, Stirling was selected because it contains a large and important burgh and also had a more varied pattern of land-ownership. It also has much better survival of records, both in quantity and quality. Apart from this, it is a predominantly Lowland shire, which lies just below the Highland line but extends into them and contains a variety of terrain. What then can be said about Stirlingshire, especially during the years 1640 to 1747?

NOTES

1. L.A. Knafla : 'Crime and criminal justice : a critical bibliography' in J.S. Cockburn Crime in England 1550 - 1800 (London, 1977)
2. For example see I. Taylor, P. Walton, J. Young : The New Criminology : For A Social Theory of Deviance (London, 1973) and also the same author s'Critical Criminology (London, 1975).
3. One such attempt is M.E. Tigar : Law And The Rise Of Capitalism (New York, 1977)
4. There was in fact a vast body of 'rogue' pamphlets in Elizabethan England by authors such as Greene, Harman and Dekker, all purporting to describe a huge, organised criminal underworld of beggars and vagrants; a self aware criminal class in fact. See G. Salgado : Cony-Catchers And Bawdy Baskets : An Anthology of Elizabethan Low Life (London, 1972)
5. M. Ignatieff : A Just Measure Of Pain : The Penitentiary In The Industrial Revolution 1750 - 1850 (London, 1978).
M. Foucault : Discipline And Punish : The Birth Of The Prison (Harmondsworth, 1979)
6. Thus the format adopted when making data machine-readable largely determines the form of the output, so assumptions are built into the output before any processing has even taken place. See Appendix No.1 below for fuller discussion of this and other points.
7. Thus Dr. J.A. Sharpe has discovered that throughout the seventeenth century there was a steady fall in the number of persons convicted of capital crimes and hanged. In 1600 19 people were hanged at the Essex Assizes while by circa 1700 there were not even that number executed on the entire Home Counties circuit. This is not what one would have expected to find, giving the growing ferocity of the penal code during the same period.
I am greatly indebted to Dr. J.A. Sharpe for the above information.
8. For a discussion of this process, termed the 'judicial revolution' see B. Lenman and G. Parker 'The State, the Community and the Criminal Law in Early Modern Europe' in V.A.C. Gattrell, B. Lenman and G. Parker : Crime And The Law : The Social History Of Crime In Western Europe Since 1500 (London, 1980)pp. 11 - 48.
9. For further details about this see Appendix No. 2.

10. Unfortunately many of these records are at present unobtainable for a variety of reasons. See Bibliography for details.
11. See Lenman and Parker 'State, Community and Criminal Law' pp. 16 - 19. For an opposing view see A. Soman 'Press, pulpit and censorship in France before Richelieu' in Proceedings of the American Philosophical Society CXX (1976) p. 440.

PART I

THE STRUCTURE OF SOCIETY AND OF ITS
LEGAL SYSTEM

CHAPTER ILAND, ECONOMY AND PEOPLE

Between the Forth and the Clyde, the Highlands and the Southern Uplands, lies the midland belt or 'waist' of Scotland, an area of great topographical diversity divided between the shires of Stirling and Dunbarton. Since 1750 certain boundary changes have been made; in the case of Stirlingshire the parishes of Logie and Kippen were partly in Perthshire until 1890, while the parish of Alva - now part of Clackmannanshire - was until then a detached portion of Stirlingshire.¹ Apart from these minor alterations, the boundaries of the shire remain the same today as in the early modern period. There had been one major change at an earlier date. One of the Flemings of Kirkintilloch, in his capacity as Sheriff of Dunbarton, concluded a transaction in 1353 by which six parishes - Buchanan, Balfron, Campsie, Drymen, Fintry and Strathblane - became part of Stirlingshire in exchange for the lands of the Fleming barony which became the detached portion of Dunbartonshire.² Despite this transfer the parishes mentioned retained their separate identity as well as many links with Dunbartonshire, a matter of great importance for their social and legal history.³

Therefore, Stirlingshire's size and physical structure have not changed radically since the early modern period: its maximum dimensions are forty-three miles by twenty-one, giving an area of 288,842 acres or 451 square miles.⁴ Within this relatively small space there is a great variety of terrain, ranging from the bleak, windswept

moors of the Campsie Fells to the fertile carse of the Forth. Although the main part of the shire belongs geographically and geologically to the Central Lowlands, most of it is not Lowland in character.⁵ In the geographical heart of the shire is a great upthrust mass of rock, forming the massif of the Lennox Hills and the Campsie Fells. These attain an average height of 1250 feet, rising to 1896 feet at Earl's Seat in the parish of Campsie.⁶ Although grass-covered, these hills are almost entirely bleak moorland and present a forbidding aspect even in summer. Lying around this central, rocky core is a belt of Lowland, consisting of alluvial plain in the valleys of the Forth and its tributaries, the Allan, Bannock, Carron and Avon in the east, the Kelvin in the south and the Blane and the Endrick in the north-west, south of Loch Lomond.⁷ In the extreme north-east, alongside Loch Lomond is an outlier of the Highlands proper, culminating in the 3192 foot peak of Ben Lomond with six other peaks over 2,000 feet. Lastly, in the south-east and north-east extremities of the shire are branches of the Southern Uplands and the Ochils respectively.⁸

The soil is of mixed quality: the various upland areas have poor, thin and highly acidic soil, fit only for pasture and incapable of bearing a regular crop, while by contrast the low-lying areas are much more varied. In the carse areas in the north and east the soil is a loam, fertile and capable of bearing more than one crop per year. It is also light and easy to drain. In the south-east, round the Bonny and the Carron and further west in the

upper parts of Strathendrick, the soil is of medium quality, fertile but clayey and hence hard to drain.⁹ These areas are nowadays arable farmland but formerly were under forest. During the early mediaeval period a large portion of this shire was wooded, this forest being tentatively identified by some as the 'Silva Caledonia' of the Saxon.¹⁰ Throughout the shire's history the forest was steadily cleared and today Tor Wood is its sole remnant. This process was already far advanced by 1600 and by the time of Sibbald's description of about 1700 had reached its modern extent.¹¹

Besides forest there were also considerable areas of marsh and bog or 'moss', much of which survives to this day. Indeed the draining of these bogs proved more difficult than the clearing of woodland and as late as 1755 large parts of the shire were still 'moss' and unusable for agriculture, habitation or even transport. Fortunately, we have good evidence for this and other topographical features from the military survey of Scotland carried out by Major William Roy (as he then was) between 1748 and 1755.* Roy's draft maps of the Lowlands, from the latter date, show extensive tracts of bog in some parts of the shire: in the south around Black Loch and Bonny Loch, in the east near Airth and Elphinstone, and most notably in the north on the west side of Stirling, where the vast expanse of Flanders Moss lay, cutting off most of Stirlingshire from direct contact with the Highlands to the north.¹² As well as these great

* Roy's draft maps of the Lowlands are currently housed in the map department of the British Museum.

expanses, Roy's maps also show many small pockets and patches of uncleared bog, dotted throughout the Lowland areas of the shire.

Because of the nature of the terrain and backward technology, communications in pre-industrial Stirlingshire were generally bad: in the Old Statistical Account the minister of Kilsyth stated:

"Indeed the roads were at that time so steep, narrow and rugged, that wheel carriages must have been almost useless. The line of the roads was generally straight, or nearly so, over hill and dale; or if they deviated from this course at any time, it was only to avoid some marsh or to find a firm bottom. They seem to have thought of little else, at least they never dreamed of a level road."¹³

Similar comments are to be found in the entries for Baldernock, Balfron, Bothkennar, Campsie and Fintry.¹⁴ However, for the seventeenth century at least, the poor quality of Scottish roads in comparison with the English or Continental ones should not be over-emphasised: travellers' reports from that period, though full of bitter complaints against almost every part of Scots' life, say nothing concerning the quality of the roadways.¹⁵ Roy carefully marked roadways and paths on his maps, naming the most important. From this the number of roads and their general line can be ascertained.

Stirling was a communications centre of great importance from an early date, lying as it did athwart the main route from Highlands to Lowlands and at the first point

where a bridge might be thrown over the Forth. Not without reason was it said, "Stirling, like a huge brooch, clasps Highland and Lowland together."¹⁶ The old bridge at Stirling was the only easy route from north to south Scotland which did not require the use of a ship. As a consequence, roads converged on the town and its bridge from all points of the compass. One came from the north through Dunblane and down beside the Allan water while in the north-east another came from Perth over the Sheriffmuir; to the west, a third ran through Drymen Bridge and Buchlyvie to Dunbarton; two more came from the south-west, the one from Glasgow via Kilsyth and Carron-bridge, the other from the Endrick via Fintry. Finally a sixth road ran from Stirling to Falkirk: here it divided with one branch going to Bo'ness and the other to Linlithgow Bridge and then onto Edinburgh. One major road went from Falkirk to Airth and to Kirk O'Shotts, while the main Edinburgh to Glasgow road passed through Falkirk before going onto Kilsyth and Campsie. Lastly the 'muir road' from Linlithgow to Glasgow passed through the southern tip of the shire north of Black Loch.¹⁷ As well as these major routes, Roy points out many minor byways, although it is noticeable that these are much more in evidence in the eastern, low-lying portion of the shire.

Besides all these roads, there were several drove roads from both the North and the Borders, all converging upon Falkirk where a great 'tryst', or cattle fair was held in the Autumn before 1690 on the Stenhousemuir and later at Rough Castle.¹⁸ This was the most important market in Scotland for the huge numbers of black cattle driven south

from the Highlands and Islands and destined in the main for the London market. Many thousands of cattle would pour into this Scots Abilene, making it the largest market of its kind in Britain.¹⁹ Since drove 'roads' were like broad rights of way with grazing facilities, lack of a developed road network hardly affected this great trade.

If the roads and paths were by modern standards uniformly poor, this was particularly so in the winter, a point made as late as the 1790's in some of the OSA entries.²⁰ Communities were isolated compared with their modern counterparts and, as a result, the economic and social life of the shire was very different from that which grew out of the agricultural and industrial revolutions. In fact, although geologically unaltered, the shire has changed dramatically since 1747 both in its social life and, more fundamentally, in its physical appearance. Any present-day observer transported back in time to the seventeenth, or even early eighteenth century Stirlingshire would find a very different landscape. Instead of rectilinear, enclosed fields he would find patches of cultivated land, surrounded by heaped-up dykes, and lying in strips, interspersed with areas of bog and heath and dotted with whin and furze. This picture was regularly drawn by contemporary English observers who always commented on three aspects of the Scots landscape; the absence of hedges and enclosures; the marked absence of trees; and the generally open, empty, bleak and even desolate appearance of the countryside. Of course, one must allow for prejudice but the unanimity found is impressive.²¹ The change from this landscape to that found today was the most

visible aspect of a radical change in social structure, which took place largely after 1750 but which could not have happened without a slow process of gradual, culmulative change over the previous hundred and fifty years. Certainly the visual transformation was most dramatic. As Fenton puts it:

"The enclosing of estates, farms and fields completely changed the appearance of the landscape in the course of the eighteenth century, in a manner so sweeping and so general in all parts except the Highlands, that little trace has remained on the ground of what went on before ... The net effect ... was to give Lowland Scotland a face lift that was probably more thorough-going than in any other country in Europe."²²

But what sort of agricultural system existed in Stirlingshire and other parts of Lowland Scotland before the 'Age of Improvement' and enclosures? Recent work by Whittington, Fenton, Sanderson and Whyte has cast more light upon this subject, giving a clearer picture than that obtained from only reading the late eighteenth century sources.²³ Clearly this is a question of fundamental importance as, in a society still overwhelmingly rural, the structure of agricultural production shaped the social order and lifestyles which it supported.

The agricultural system of 'pre-improvement' Lowland Scotland was based upon two social and economic units, the 'ferme' (farm) and the estate, and upon a distinctive type of field system. The basic unit of rural

society in most of Lowland Scotland at this time was the estate: an area of land owned outright by a 'heretor', as proprietors were called. Such individuals owned the greater part of the land in Lowland Scotland: the only other major landowners were the Crown and the royal burghs.²⁴ There was however also the class of feuars or 'bonnet lairds' as they are often called. These were persons who had purchased unconditional heritable right to their land in return for a large lump sum payment to the original proprietor and a binding agreement that the land should bear a fixed rent in perpetuity. Most feuars held very small areas of land and many were originally tenants.²⁵ When the Old Statistical Account was compiled in the 1790's the parish of Campsie in Stirlingshire contained in all 108 ploughgates of land, with 73 held by 8 proprietors and 28 of the remainder held by no less than 37 feuars.²⁶ It is evident from this and earlier sources, notably the valuation roll of 1709 and the records of the regality and church courts, that in parts of Stirlingshire at least the number of feuars and small proprietors was considerable.²⁷ Thus, in 1709 the parishes of Falkirk and St. Ninians had at least 103 and 119 listed proprietors respectively.²⁸ The feuing out of lands continued throughout the seventeenth and eighteenth centuries: the Graham lands of the barony of Mugdock were feued out in the 1630's, the lands of Stirling of Keir in 1714 and those of Stirling of Glorat in 1742.²⁹ However, this phenomenon did not affect all the shire: the parish of Fintry had only three proprietors in 1709 while the Viscount of Kilsyth held 85% of the valuation of Kilsyth.³⁰ Despite

their large numbers, the amount of land held by the 'bonnet lairds' did not approach that of the major heretors when the shire is taken as a whole. In Stirlingshire, as elsewhere in Scotland at this time, the land was mostly held by a small number of people. There were no Crown lands of any importance and although the burgh of Stirling owned lands in the surrounding parishes, notably the lands of Cambuskenneth, its overall importance as a landowner was small.

In fact, in strict theory only 'heretors' and feuars had absolute heritable right to land. All others were tenants who could supposedly be evicted at any moment. However, in practice many of them held lands on a fixed lease, or as pledge for a mortgage or Wadset granted to a heretor. These practices, increasingly common from the early seventeenth century onwards, gave them a degree of security. Some tenants possessed the right of 'kindness' which enabled them to pass the land onto a close blood relative on death. This was, however, only a customary right, and with the growth of feuing and the consolidation of tenancies,* the 'kindly tenant' gradually disappeared in Lowland Scotland.³¹

The tenants held and worked the farms which made up the estate. Below them came the sub-tenants; crofters, cottars and pendiclars who has a house as well as farming their own yard. At the bottom of rural society were landless labourers, paid on a daily basis, and servants, paid mostly in kind and often living in.³² Lastly there were the outcasts and marginal members of society, beggars,

* discussed below p. 26-27

paupers and vagrants. This lowest category was constantly replenished by new recruits as fast as its numbers shrank through death and deprivation.³³

The tenants were, as Whyte describes them, the 'back-bone of rural society': they held the farms which were the basic unit of production within the larger social and economic unit of the estate.³⁴ The number of tenants on a single estate could be considerable: the surviving records of the regality of Lennox contain lists of over 100 for a single estate, all of whom would have sub-tenants and paid day labourers under them.³⁵ The tenants held their farms in return for a rent, normally payable quarterly, sometimes annually. These were made partly in kind, partly in cash. Rent paid in kind or 'ferme' was originally the more important and remained so for most of the Lowlands throughout the seventeenth century and could still be found in parts of Stirlingshire as late as the 1790's.³⁶ From the evidence of the Falkirk Regality court, 'ferme' in Stirlingshire could be paid in wheat, bere (barley) or peas, often livestock, sometimes in the form of eggs or poultry.³⁷ Besides the 'ferme', there was also 'mail' or 'meal'; i.e. rent paid in cash. As time passed, this made up an increasing proportion of the total rent and from the later seventeenth century onwards it became common for part of the 'ferme' to be commuted for cash. In Falkirk the rate at which this was done was determined yearly by the Regality court through the 'feeing of fermes', a process which also fixed the price of agricultural produce.³⁸ However, this process of commutation was not complete by 1750: it suited both landlord and tenant to have at least part of the rent paid in kind.

As well as rents the tenants were also liable for what were termed 'dewties', that is feudal dues of various sorts. The most fundamental of these was that of service in the feudal levy, demanded in Falkirk as late as the 1640's.³⁹ Other dues, which survived much longer, included labour duties of various kinds such as maintaining dykes and mill races, working of the proprietor's own directly farmed land and cutting and storing peat for his own use.⁴⁰ One very important, and much resented, 'dewtie' was 'thirlage' by which tenants were bound to have their cereal produce ground at a particular mill to which they were 'thirled': there was commonly one mill per estate, though there might be more on larger estates. This brings out one very important point: the extent to which the estate was thought of, and was, a self-sufficient community.⁴¹ The estate aspired to be a semi-closed economy with all its produce being consumed internally, no labour or goods being brought in from outside and with the whole being bound together by a network of dues and obligations. The relative self-sufficiency of many estates was enhanced by the fact that many of the tenants and sub-tenants were craftsmen as well as farmers, so that most had no economic need to resort to trade.⁴² This slowly broke down in the seventeenth and eighteenth centuries as many factors combined to change the nature of the estates' economy. The most important of these was the gradual change in the type and pattern of tenancies.

As mentioned earlier, the seventeenth century saw a move towards tenancies being held by leases, or 'tacks' as they were called.⁴³ They were broadly of two

sorts, multiple and single. In the first type of tenancy, the farm was leased jointly by several tenants who, together, provided the ploughteams and other equipment and worked the farm. The land was held by 'run-rig' tenure, whereby each tenant had several scattered strips of land interspersed with similar blocks belonging to his fellows.⁴⁴ Frequently, the various 'rigs' were doled out by lot: the aims of this system was to ensure that no single tenant could monopolise the best lands of the farm.⁴⁵ Another consequence was that all decisions affecting the entire farm - such as what crops to plant, where and when to plant them and methods of cultivation to use - had to be decided collectively by the tenants themselves. Inevitably, this discouraged innovation and investment, a point made frequently by later eighteenth century agricultural writers.⁴⁶ In the seventeenth century multiple tenant farms were the dominant form of land-holding: in Stirlingshire it survived in certain areas well into the eighteenth century.⁴⁷ However, along with the growth of tacks went a growth in the number of single tenancies and a process whereby lands held 'run-rig' were consolidated into discrete separate farms. This process was recognised and encouraged by the Scots Parliament in 1695 in the 'Act Anent Lands Lying Run-Rig'.⁴⁸ Whyte gives figures which show that in parts of the south and east of the shire this change was well-advanced by the 1690's: by that time the estates of Ballikinrain and Callander, (in Killearn and Falkirk parishes) had 44% and 66% of their farms held by single tenants.⁴⁹ On the other hand, the disappearance of multiple tenancy and run-rig was a slow and uneven process and in the first instance depended much upon the proclivities of the individual heretor.

When and where this change did occur, its effects, albeit slow, were profound and important. Single tenancies, when coupled with reasonable security of tenure, made possible innovations in agricultural practice and greater productivity. This last undermined the self-sufficient estate economy, leading as it did to the production of local surpluses which could be traded and hence ultimately to more specialisation, or refinement of the division of labour between various neighbouring estates. It also led to a change in the structure of rural society: the total number and proportion living on the land would not change but that percentage of the population who were sub-tenants or landless labourers would increase while tenants became fewer, richer and more likely (and willing) to pay their rent mainly in cash.⁵⁰ At the bottom of society, such changes, together with population growth, led to a rise in the number of mendicants and indigent; a phenomenon which so alarmed contemporaries that Fletcher of Saltoun could say in the 1690's that Scotland had 200,000 beggars.⁵¹ As Whyte points out, the growth of single tenancies also reduced the number of people who gained a "direct, basic living from the land" and marked a shift away from a subsistence economy, largely moneyless, to a market economy based on cash. It also marked a change from a social order where wealth and power were determined by the number of tenants (and fighting men) that one had, to a social order where status was largely determined by cash income and assets.⁵²

Changes in the nature of tenant land-holding alone were not enough to change the nature of Scots rural society so completely by the end of the eighteenth century.

They were a necessary, but not a sufficient, condition of radical change in the agrarian structure. For that to happen, there had to be change also in the other basic element of the 'pre-improvement' agricultural system - the field system of infield and outfield.⁵³ It was this along with the widespread multiple tenancy of farms, which produced the landscape described earlier and the distinctive Lowland Scots settlement pattern of the 'clachan' or fermtoun. In Lowland Scotland there were no nucleated villages on the English model: instead at the centre of each 'ferme' was a shapeless collection of dwellings, belonging to tenants and sub-tenants.⁵⁴ Within an estate of reasonable size there would be several such fermtouns: the one which contained the mill would be known as 'Milltoun of (estate's name)', while that which contained the proprietor's residence was usually called 'Mains of (estate's name)'. Around the fermtoun lay the arable land of the farm, surrounded by the head dyke, and divided into infield and outfield.

The infield (also known as croftland, inbyland and muckit land) consisted of those lands which lay close to the farmstead or settlement: it was never allowed to go out of cultivation and so received all the fertiliser to compensate for the absence of fallow. The infield was divided into two or three parts: if two, then one third would be ploughed three times and sown with barley or 'bere' while the other thirds were ploughed once and sown with oats, thus producing a two crop rotation over three years; if divided into three parts, the infield would be sown with bere, oats and peas, producing a three crop rotation.⁵⁵ Only the land sown with

oats and bere was mucked. Wheat was seldom grown, and when it was, it was seen as a cash crop rather than one for consumption. Interestingly, Whyte and Fenton have shown that the areas where wheat was grown were those where money rents and single tenancies were most common; in Stirlingshire the area around Stirling and Falkirk in the carse of the Forth.⁵⁶ Peas were grown throughout Stirlingshire at this time except in the extreme north-west.⁵⁷

The outfield, as the name suggests, lay further out from the farmsteads and was often of poorer quality. It lay in a rough ring of irregular patches which were broken up and cropped on a shifting basis. Cattle were penned in or 'folded' on one section during the summer nights so fertilising the soil which was then ploughed once, sown with oats and then cropped continuously until the yield was too low to produce further seed for sowing, after which the land was allowed to regenerate to natural cover. This process usually involved three to four years of cropping followed by up to five years of fallow, the purpose being to provide cattlefodder.⁵⁸

Apart from the cereal crops mentioned, vegetables were grown as garden crops, particularly kail. Turnips were grown from the end of the seventeenth century onwards but the potato did not make any great impact until the later eighteenth century, although Salaman mentions that potatoes were being grown around Kilsyth by 1728.⁵⁹ Therefore, winterfeed for cattle consisted mainly of stubble, kail and what could be gained from the cropped parts of the outfield.

Besides infield and outfield there were other, less important types of land: riverside land or 'haugh'; land which was periodically flooded or 'laigh'; and most importantly 'brunt land' found in moor areas with acidic soil and a heather based cover. A small area would be cleared, the vegetation burned and mixed with the soil and the land cropped for a few years before being abandoned. Finally, there was meadow which lay interspersed among the infield and outfield, consisting of land so boggy or so poor that it could not be cropped; instead it produced hay.⁶⁰

The ploughed land was usually tilled in the Lowlands by a heavy plough, drawn by a team of six to ten oxen. In fact, the traditional unit of land measurement in Scotland at this time was the plough-gate, the area of land one ox-team could keep under the plough. Because underground drainage was not known, the plough was used to produce the pattern known as 'ridge and furrow' whereby the plough follows the same line year after year with soil and stones heaped up to form great ridges, or 'rigs', as they were called, to provide surface drainage. They were the dominant feature of the landscape, giving it a corrugated appearance: they were from nine to thirty-six feet broad and up to five feet in height and often slightly S-shaped.⁶¹ This was found in both multiple and single tenant farms but tended to fit in with the system of multiple tenancy and run-rig tenure, with the individual tenants holding several rigs each. This clearly made enclosure impossible and with the division of land into infield and outfield, created the bleak and empty landscape of the open-fields

commented on by so many English travellers.

The infield and outfield were both surrounded by the head-dyke, made of stones or turves and often marking the boundary of the farm. Beyond it lay the 'muir' lands, providing pasture for the cattle during the spring and summer months. These lands were often 'commonty', that is common land used by several adjoining farms or estates which had grazing rights.⁶² This was of great importance since cattle were by far the most important of livestock, providing milk and almost all the meat. Their only rival, in the upland areas, were sheep but the latter were not too popular because of their tendency to crop grass very short: as a result, many estates had strict controls upon the number of sheep which might be held by any one tenant, one such being Balgair in Stirlingshire.⁶³

The typical dwelling of the period which made up the ferm-touns, was the 'but and ben'. This was a cruck-framed, two-roomed building with one room often serving as a byre. Such dwellings aroused the intense contempt of contemporary travellers and of later Scots observers. Thus, according to Patrick Graham:

"The houses of the peasantry were wretched huts, thatched with fern or straw; having two apartments only the one a kitchen.....the other a sort of room.....where strangers were occasionally received and where the heads of the family generally slept. The byre and stable were generally under the same roof and separated from the kitchen by a partition of osiers, wrought on slender wooden posts and plastered with clay.

A glass window and a chimney were esteemed a luxury and seldom to be met with."⁶⁴

In fact, in some, even many dwellings, there was no partition at all and men and beasts lived under one roof in a 'long house' type of building.⁶⁵ Such houses were warm and provided shelter at a reasonable price, given the acute shortage of timber. However there is no disguising the fact that the housing of the 'pre-improvement' farm was generally 'rude and wretched'.

By European or English standards the upper class lifestyle was generally archaic. As late as the seventeenth century many aristocrats were living in a fortified tower house designed for defence before comfort. Examples of this can be seen at Plean in St. Ninians and, on a much larger scale, at Mugdock in Strathblane. The great mansion of Callander House at Falkirk showed the way forward and by the mid-eighteenth century the aristocracy had either given their tower houses a radical face-lift and rebuilt them or else abandoned them completely for stately homes on the English model.⁶⁶ At the same time they began the process of enclosure, which was to 'take off' and transform the landscape later, by enclosing the area immediately around their houses, planting trees and hedges and creating a 'park' or 'policy'. Whyte and others think that this created nuclei from which enclosure and a new field system spread.⁶⁷

The extent of this change by 1750 can be seen on Roy's map, with enclosures marked around all the aristocratic dwellings as well as a few independent ones, almost all of them in the parishes of Airth, Falkirk and St. Ninians. On closer examination of the maps one can discern five distinct sub-regions within the shire. In the carse lands of the

east around Stirling and stretching down to Falkirk and its environs is a densely populated area, largely clear, arable farmland dotted with fermtouns and some sizeable settlements. They are interspersed with a few large areas of moorland and bog which resisted cultivation even at this date.⁶⁸ Along with the many fermtouns, aristocratic dwellings are also named by Roy. Each has its own enclosed area about it plus a small area of woodland.⁶⁹ To the south and east of Falkirk, around Slamannan and Polmont, the landscape is more patchy in appearance, with rather more uncultivated land in evidence between the various settlements and large tracts of bog around the Black Loch in the extreme south.⁷⁰ The mountainous central region of the shire is shown as an area of empty unpopulated moorland with thin strips of settled land alongside the Carron and Bonny waters; even there, the settlements are widely scattered and some seem to consist of only one dwelling and its outhouses, although caution is needed on this point.⁷¹ Lastly, there are two further settled areas in the west of the shire, divided from each other by the central massif. The north-west, comprising the parishes of Drymen, Kippen and Buchanan, shows a settlement pattern of many small fermtouns but there are no villages except for Buchlyvie and Drymen. The most densely populated area is around Drymen and south Buchanan. The straths of Blane and Endrick form the south-west region and is similar to the south-east in appearance. In these three regions enclosures are very scanty and confined entirely to the few aristocratic 'policies', while in the central area there are none to be seen at all. It would seem that, although by 1750 profound

changes had taken place in class relations (as expressed through tenancies) and in the economic life of the various estates, a radical transformation of the agricultural system was just beginning. The settlement pattern was still the small fermtoun and the only population centres of any size were the shire's eight burghs.

Scots burghs were essentially communities in possession of chartered commercial and trading privileges and it was these which defined their burghal status rather than their urban characteristics.⁷² Most were, by modern standards, little more than villages with the right to hold a fair where goods might be bought and sold and labour hired. However, they did grow in size until they were larger and more populous than any fermtoun. Burghs came in two varieties; burghs of barony and regality which were dependent upon a noble superior who held the charter, and royal burghs which held charters direct from the Crown and had the right, denied to burghs of barony and regality, to engage in foreign trade.⁷³ They also had a legislative body of their own, the Convention of Royal Burghs and, being in theory collective tenants in chief of the Crown, came directly under the Crown through the office of Chamberlain, rather than any local potentate.⁷⁴ They were in general the older creations. Although many new burghs were created during the seventeenth and eighteenth centuries, these were almost all burghs of barony and regality.

In Stirlingshire there was one burgh of great antiquity, Stirling itself, and nine others of barony and regality, the most important being Airth and Falkirk. Eight of these burghs were created after 1600 and one, Kilsyth,

was the last burgh of barony to be created in Scotland, in 1707.⁷⁵ On Roy's map, Stirling is by far the largest urban settlement with several thousand inhabitants, while Falkirk is shown as one long street, the High Street, with one main cross way and several wynds such as the present day Cow Wynd. Its population can be estimated at several hundred, in comparison with the size of Stirling as indicated on the map. Airth appears as a smaller and more compact settlement, roughly Y-shaped and lying at the end of a road. The shire's other burghs - for example, Buchlyvie and West Kerse - were still small settlements and by the time of the Old Statistical Account, Buchlyvie still only contained one hundred families.⁷⁶

The number of people living in the shire's fermtouns and burghs is difficult to determine, particularly in the seventeenth century. The first clear information comes from Webster's census of 1755.⁷⁷ His figures, which can be taken as fairly accurate, give a total population of 37,014, of which 3,951 lived in Stirling itself. Of the 21 parishes listed by Webster, 2 had a population of over 3,000 (Falkirk and Stirling), 2 of over 2,000 inhabitants (Drymen and Airth), 8 others had over 1,000 people living in them and 8 had under that amount. One parish (St.Ninians) had over 6,000 inhabitants. As Roy's map shows, by far the greater part of the shire's population was concentrated in two areas: the Carse lands in the east around Stirling and Falkirk and the Gaelic-speaking north-west.⁷⁸ These figures show that Stirlingshire was a medium-sized shire in terms of its population. Of the 32 Scots shires, 13 had a higher, and 17 a lower population than Stirling. Although a long

way behind such counties as Angus (68,883), Aberdeen (116,168) and Midlothian (90,412), Stirlingshire was still larger in population than Kirkcubright (21,205) and West Lothian (16,829).

Besides agriculture, various other forms of economic activity took place in Stirlingshire, the most important of which was the craft of weaving and, at a later date, the printing and dyeing of cloth. Weaving was particularly important to the parishes of Alva, Stirling, Falkirk, Campsie and Kilsyth. After 1700 much use was made of the water power provided by the rapid, flowing streams which drained the centre of the shire, and cloth manufacture spread to Fintry and Strathblane.⁷⁹ Two industries of some importance were salt-manufacture and coal-mining: the former being found on both sides of the Forth. In Stirlingshire it was found particularly in the parish of Airth.⁸⁰ The mining of coal was carried out by the so-called 'bell' method, where a vertical shaft was sunk to the coal seam and a bell-shaped excavation made, and was found especially in the Muiravonside parish, round the villages of Maddiston and Whitecross, and in Slammanan.⁸¹ Both of these were important industries in the seventeenth century and coal-mining at least, grew dramatically during the eighteenth century as new techniques made the exploitation of the more difficult seams possible. Workers in the salt and coal-mining industries were legally 'unfree', in a condition of serfdom, and did not lose this lowly status until 1799.⁸³

As mentioned earlier, many of the tenant class were also craftsmen of various sorts and some, such as smiths and millers, would derive most of their income from craftwork. However, the main emphasis in the rural areas was still on farming and the division of labour was not far advanced. It was chiefly in the burghs that commercial activity was found. In Stirling and Falkirk artisan manufacture employed a large part of the population: amongst the trades listed in the burgh records are cord-wainers, coopers, smiths, swordmakers, tailors, weavers, bakers, skinners and fleshers. The overwhelming majority of artisans were involved in processing agricultural products like wool, meat and leather; independent manufacture did not yet exist. In fact the main purpose of the burghs was trade.

Chronically poor land conditions in seventeenth and eighteenth century Scotland meant that such surplus produce, where it could not be moved by water, tended to be sold or bartered locally, the only real exceptions being wool and leather.⁸⁴ Perhaps the greater part of trade was simply a matter of direct exchange and barter within an individual fermtoun or estate until about 1700. As the estate was basically a self-contained unit in 1600, and remained so for some considerable time afterwards, most of its produce was consumed internally.⁸⁵ However, during the seventeenth century a clear trend towards a limited marketing of goods and surplus produce between neighbouring estates can be discerned on a local or sub-regional basis. A key institution in this development was the barony or regality, where one heretor controlled either a single large estate or several small ones. The baron could regulate economic life through his court. The result was to produce a 'local'

market economy where trade and cash transactions took place within the bounds of the barony or regality.⁸⁶ Often this process involved the erection of a burgh of barony or regality to handle the trade. The seventeenth century also saw a growth in inter-regional and inter-national trade, conducted through the periodic fairs held in the royal burghs. This trade was largely in luxury goods and products such as timber, furs and grain from the Baltic while fish and meat were exported.

In 1600 all trade was meant in theory to be conducted by way of the royal burghs, each of which had an attached hinterland and had a legal monopoly over it. This privileged position was threatened by the creation of new burghs, although they retained their monopoly of foreign trade.⁸⁷ According to Whyte the period saw not only an increase in the number of market centres, but an increase also in the total amount of local trade. This was due to the changes in agricultural organisation which had led to increased productivity and division of labour.⁸⁸

Not all the market centres created during the seventeenth century were burghs: after 1600 many were simply given the right to hold a market or fair but were not granted burghal status. Indeed many were hardly communities at all.⁸⁹ Several such centres were set up in Stirlingshire, notably at Polmaise and Balquidrock in St. Ninians, and at Drymen and Auchmar in the north-west.⁹⁰ The effect this had on Stirling, according to its burgesses, was little short of catastrophic; in the report of 1696 on the condition of royal burghs, they claimed the town no longer had any mainland trade and was losing its foreign trade to Airth because of its lack of an adequate harbour.⁹¹

These local markets and fairs handled a variety of produce. Some such as the Falkirk cattle tryst mentioned earlier, were specialised but most handled all the surplus arable and livestock produce of their hinterland, together with craft products. They were also the centres for the sale of luxury goods and for the hiring of seasonal labour for such jobs as the harvest or sheep-shearing.⁹² Inevitably, this growth in trade and market centres was one facet of a growing cash based economy but this should not be exaggerated: the trade was still almost all local and much of it did not involve cash payments.

The merchant classes, rather than the artisans, monopolised the trade, such as there was. Within the burghal community it was the merchants who formed the burgess class, which elected the burgh council and ran the affairs of the burgh. The craftsmen participated in a varying degree according to the 'set' of the burgh. At the bottom of the community were the 'in-dwellers' who provided the labour, in much the same position as the sub-tenants in the countryside.⁹³ Because each council partly elected its successor, all the burghs came to be run by a self-perpetuating elite, as in Stirling until 1788 when the corruption of local politics became so open and scandalous that the burgh lost its charter.⁹⁴ Before then, the council had consisted of fourteen merchants plus one representative from each of the seven corporate trades as well as the dean of the guild. Obviously the merchants had an absolute majority and the burgh officials - (Provost, Treasurer and four bailies or magistrates) - were always merchants. Burghs were self-governing communities but not democratic ones.

Outside the burghs the main, even the only, social group which transcended the units of farm and estate was the kin-group or 'name'. As Cowan puts it:

"Kinship constituted the main, sometimes the only, foundation on which seventeenth century Scottish society rested."⁹⁵

It is difficult to over-emphasize the importance of family ties in seventeenth century Lowland Scots society. Study of tenancies shows that in most multiple tenant leases the leasees were close relatives or shared the same surname.⁹⁶ Within each farm or estate many, if not most, of the tenants and sub-tenants would be related to each other with the family an active economic entity and social group. This was both a cause and effect of the marked lack of mobility in rural Scots society in the seventeenth century: labour was very much static and people rarely moved outside their own parish. The extent of this phenomenon can be guessed at by looking at the occurrence of surnames in Kirk and local court records: in Stirlingshire, Livingstone was by far the most common name in Falkirk, Kilsyth and Muiravonside parishes but was rare elsewhere, while the name of Graham was widespread in the six western parishes but infrequent in the east. At a less exalted level, the names of Liddell and Madrell appear to be effectively confined to St. Ninians while it would seem that in Buchanan over 60% of the inhabitants were called either Buchanan, Mcfarlane or McGregor.⁹⁷

Blood ties were also of great importance to the aristocracy and determined their political allegiances. Cowan's remarks about the relationship of the Marquis of Montrose with his lesser noble kin could equally be said

of any noble of the time who headed a name:

"They would counsel him, share their possessions, incur ruinous debts on his behalf, fight for him and die for him out of reverence and respect for the almost mystical concept of kinship....."⁹⁸

In the Highlands, the clan remained a social and political unit until 1745 but in the Lowlands it had died out before then, the 1715 rebellion being the last twitch. Earlier, although the 'name' may have declined from its sixteenth century standing, kin ties still played a major role in the events of the 1640's and 1650's.⁹⁹ An important point to remember in this connection is that Scotland had no 'county community' similar to the English model. The Scots shire was in many ways an artificial creation with boundaries which cut across demographical ones, much like the boundaries of the post-colonial African states.¹⁰⁰ In pre-industrial Scotland the upper classes belonged to political communities which were either smaller than a shire or else extended over its frontiers.

In the Stirlingshire of the seventeenth century several such 'political communities' can be made out, centred on one of the shire's great 'names'. In the west was part of the oldest, and in the mediaeval times the most important, of Stirlingshire's lordships, the Earldom of Lennox. The original line of Earls died out in 1458 and the Earldom suffered the first of several partitions with large estates passing into the hands of the Napiers of Merchiston while the remainder, and the title came to the Stewarts of Darnley. This line died out in turn in 1672 and the estates reverted to the Crown, to be granted to one of

Charles II bastard sons, the Duke of Richmond. Finally in 1703, the estates were sold to the family which replaced the Lennoxes as the major force in western Stirlingshire: the Grahams of Montrose.¹⁰¹

The connection of the Grahams with Stirlingshire was an old one, going back at least to the thirteenth century when they already held the lands which later became the barony of Mugdock. This remained the 'core' of their holdings and was a family seat of great importance as demonstrated by the massive fourteenth century castle. Throughout the sixteenth and seventeenth centuries the Grahams expanded their west Stirlingshire landholdings, despite the forfeiture of the 'great marquis' in 1645; and by 1680, when they purchased the lands of Buchanan, they had become the dominant name in that part of Scotland. Besides Mugdock, which contained just under half the area of Strathblane parish, they also owned most of Baldernock, Buchanan, Fintry, Kippen and large parts of Drymen.¹⁰² Outside Stirlingshire the main branch of the family had lands in Strathearn round Auchterarder and Kincardine, as well as the family 'caput' at Old Montrose, while minor branches held lands at Braco and Orchil in Strathearn, Inchbrakie and Balgowan elsewhere in Perthshire, Fintry and Clavershouse near Dundee and Morphie, close to Montrose.¹⁰³

The counterpart of the Grahams in the east, and for much of this period the most powerful family in the shire, were the Livingstones, the senior branch being the Livingstones of Callandar. Again their links with the shire were of great antiquity: the barony of Call^adar was acquired in 1345 - 6 and throughout the next two hundred and fifty years they extended their influence and landholdings,

largely at the expense of the Bruces and Forresters until they controlled most of the south-east of the shire.¹⁰⁴ They also acquired considerable influence in Linlithgowshire and in 1601 Alexander, 7th. Lord Livingstone was created Earl of Linlithgow. His third and youngest son, Sir James Livingstone of Brighthouse went overseas to seek his fortune, becoming a notable soldier and after his return was created in 1633 Lord Livingstone of Almond: over the next five years he brought most of the Livingstone lands in Stirlingshire from his brother, the Earl of Linlithgow, as well as several other baronies and estates.¹⁰⁵ He supported the Covenant and in 1640 became Leslie's second-in-command. After the settlement of the Second Bishop's War, he was created in 1641 Earl of Callandar. He played a leading role in the turbulent events of the 1640's and on 22nd. July 1646 his estates were erected into "ane new whole and free regality" while he became Sheriff of Stirlingshire, privileges which were forfeited after the 'enagement' but were restored to him and his heirs in 1660.¹⁰⁶ In 1695 the titles of Linlithgow and Callandar were merged but this did not last, for the Livingstones' power was abruptly terminated with the attainder of their titles and the confiscation of all their lands.¹⁰⁷

Several other great noble dynasties had lands and dependents in Stirlingshire, notably the Hamiltons, the Erskines of Mar and the Flemings of Wigton. The Hamiltons owned most of what later became Polmont parish, ruling it from their seat at Kinneil, while the Earls of Wigton held large estates in the south-western end of the shire. The Earl of Mar, who was hereditary keeper of Stirling Castle,

as well as being at various times Sheriff of Stirlingshire, owned almost all of the parish of Alva and much of the land around Stirling. However, these families were not so important locally as the Grahams and Livingstones since their main properties lay outside the shire.¹⁰⁸

Beside these political blocks formed by these great dynasties, there were lesser 'middling' families, some independent, others cadet branches of the major families, forming part of their network. A junior line of the Livingstones received the lands of Kilsyth in 1540 when they were raised into a barony. In 1661 Sir James Livingstone was created Viscount of Kilsyth and Lord Campsie and, from then until their forfeiture in 1715, the family controlled both parishes, as well as owning the barony of Herbertshire in Denny.¹⁰⁹

Amongst the independent families, the most significant were the Buchanans, the Edmonstones of Duntreath, the Napiers of Merchiston and Culcreuch, the Bruces and Elphinstones and the Stirlings. The earliest mention of the Buchanans occurs in 1274; the senior branch was Buchanan of that Ilk and held the lands of Buchanan, Salloch and Auchmar, dominating the parish of Inchalleoch (later renamed Buchanan). This main line of descent died out in the 1690's but minor branches continued.¹¹⁰ The Edmonstones of Duntreath had their earliest landholdings in Strathblane; the barony of Duntreath was created in 1432. This family had important links with Ulster after the Plantation and also with Perthshire: the latter was a result of their being heritable stewards of the Stewartry of Menteith. Unlike some of their neighbours they did not suffer violent changes

of fortune; they continue to live at Duntreath to this day.¹¹¹

The Napiers gained their estates by marriage to one of the heiresses of the Lennox and by purchase from the Galbraiths of Culcreuch in 1632. Their lands, erected into the barony of Edinbally Napier in 1509, were concentrated in Fintry and Campsie.¹¹² The Bruces and Elphinstones both had connections with the parish of Airth. The former lost Airth at an early date but retained the estate of Stenhouse throughout the period, one holder playing an important local role during the Cromwellian occupation.¹¹³ The Elphinstones moved their main seat from East Lothian to Prendreich in 1435 and, after gaining Airth, their estates in Stirlingshire and Perthshire were made into the barony of Elphinstone in 1504, and included the lands of Airth and Craigforth. The position of the family deteriorated during the seventeenth century and eventually the Stirlingshire lands were passed to a cadet line, that of Calderhall; some of the property was regained in the early eighteenth century but by 1750 all of the lands had passed elsewhere.¹¹⁴ Despite their name, the most important branch of the house of Stirling was based at Keir in Perthshire. However, it was represented in Stirlingshire by several cadet branches notably those of Craigharnet, Glorat, Muiravonside and Garden, the last being the most important.¹¹⁵

Within these family units, nobles, lairds, feuars, tenants and sub-tenants were all bound together by a web of kinship and shared name, feudal obligation and economic relations. The areas dominated and owned by these noble houses were not merely political regions ruled by aristocratic dynasties; they were also distinct economic and

geographical regions. Thus, the political domain of the Livingstones corresponded to the economic area of the south-east centred on Falkirk, the lands of the Grahams lay within the boundaries of the western region which was economically distinct from the eastern parts. In theory all Scots had a place within such a structure: it was illegal for anyone not to have a master,

There were, of course, always people who were outside this network of personal economic, family and political ties: the 'submerged' masterless men and women, vagabonds and beggars, the outcasts of society living like weeds in the interstices of its structure. These people were feared by their contemporaries, despite their normally destitute condition, seen as a threat to the social order and its stability and were regarded as the major social problem of the time, a 'dangerous class' and a source of instability, immorality and crime.¹¹⁶

In fact the economic structure of Lowland Scots life before the agricultural changes of the 'improvement', together with the material 'facts of life' and the lifestyle that went with it, produced a society considerably more integrated and psychologically intimate than that which grew out of the agricultural and industrial revolution. The methods of holding and farming land put a premium upon co-operation and joint effort while the nature of the housing and the work meant that privacy as we understand it was a scarce commodity. However, it is also clear that the years between 1600 and 1750 were years of slow transition when a whole array of changes occurred which by 1750 had cleared

the way for the sudden, seemingly abrupt transformation of the Scottish rural economy. Essentially the change was from a 'mediaeval' and feudal economy to a 'modern' and capitalist one. Obviously there were elements of capitalist modernity in the Scots economy and social order before and around 1600, just as there were (and are) feudal survivals after 1750: the point is these were only elements, not the dominant mode of activity.

Seven broad changes which took place during these 150 years can be identified and isolated. In the first place there was the change from an open-field agricultural system with frequent collective landholdings and low productivity to an agriculture which was beginning to turn to enclosure, single tenancy and modern farming techniques. Linked to this was a change in the social order of rural society, from a situation where most derived a living direct from the land via subsistence agriculture to a position where agriculture was increasingly capitalist, producing goods for sale through a smaller number of tenants and a larger number of sub-tenants and landless labourers. A consequence of this was a shift from an economy based on local self-sufficiency, barter and payments in kind rather than cash to an economy ever more dominated by cash payments, trade and the market. Another major consequence was that the population, very much immobile in the first part of the seventeenth century had become highly mobile by the eighteenth. Inevitably this all led to changes in the local political structure and the period saw a marked turnover of noble families: in Stirlingshire most of the great families of 1600 had disappeared and been replaced by newcomers by 1720 while those who survived were often much reduced.

Lastly, one can pick out two general changes in the nature of society: from a face to face, collective and hierarchic social order to a more individualistic and impersonal one and from an 'other-directed' culture to a strongly 'inner-directed' one.

These changes took place slowly and unevenly: the old order had tremendous resilience and even in 1750 it was not absolutely clear that a fundamental change was taking place. Throughout the seventeenth century Scottish society, in Stirlingshire as elsewhere, retained many of its old features with change happening piece-meal. On a national level the period saw the Union with England, the Revolution and Civil War of the years 1637 - 53, and a radical transformation in the nature and political position of the aristocracy and in the power and role of central government. Not least, it saw a fundamental transformation of Scots law. This brings us back to the issues and questions posed earlier: how did the legal system change and how was this reflected? And what was the nature of the 'old legal order' which went with the old social order and, like it, survived the seventeenth century and into the eighteenth?

NOTES

1. W.D. Simpson: Stirlingshire (Cambridge, 1928) p.3.
2. Sir W. Fraser: The Lennox (2 vols. Edinburgh, 1874) vol I pp. 26 - 31.
3. Thus for administrative matters such as the raising of militia, they were counted as bring in Dunbartonshire while the boundaries of the Presbytery of Dunbarton followed the old shire border.
4. Simpson: Stirlingshire, p.7.
5. ibid p.4.
6. ibid pp. 10 - 12.
7. ibid p.10.
8. ibid p.13.
9. ibid pp. 31 - 2. Also, Sir J. Sinclair: The Statistical Account of Scotland 1791 - 99 vol IX; Stirlingshire, Dunbartonshire and Clackmannanshire ed I.M.M. McPhail (Edinburgh, 1978) pp. 132, 145 - 6, 184, 196 - 7, 206, 281 - 2, 332, 391 - 3, 411 - 2, 512 - 3, 600 - 601, 633.
10. Royal Commission On The Ancient And Historical Monuments Of Scotland: Stirlingshire. (HMSO, 1963) p.3.
11. Sir R. Sibbald: History And Description Of Stirlingshire Ancient And Modern (Edinburgh, 1707) p.11.
12. These bogs still exist in part: Flanders Moss is still untouched and the Letham Moss still takes up a large part of Airth civil parish.
13. McPhail: Statistical Account pp. 415 - 6.
14. ibid pp. 170, 179, 189, 240 - 3, 338 - 9.
15. I. Whyte: Agriculture And Society In Seventeenth Century Scotland (Edinburgh, 1979) p.23.
16. Simpson: Stirlingshire p.2.
17. Royal Commission Report pp. 53 - 4, 423 - 4.
18. J.R.B. Haldane: The Drove Roads Of Scotland (Edinburgh, 1952) pp. 83, 99 - 101, 113 - 116, 138 - 9, 153. Although the main tryst was held in the autumn, smaller ones were held in the late spring and mid-summer.
19. McPhail: Statistical Account p.299: Haldane: Drove Roads p.138.
20. For example in the entry for Balfron. See McPhail: Statistical Account p.179.

21. Whyte: Agriculture And Society pp. 22 - 3; P.H.Brown: Early Travellers In Scotland (Edinburgh, 1891) pp. 150-53, 205, 267.
22. A. Fenton: Scottish Country Life (Edinburgh, 1976) p.16.
23. A. Fenton: 'The rural economy of East Lothian in the seventeenth and eighteenth centuries' in Transactions Of East Lothian Antiquarian And Field Naturalist Society vol IX (1963) pp. 1 - 23; A.Fenton: 'Scottish agriculture and the Union: An example of indigenous development' in T.I. Rae: The Union of 1707 (Glasgow, 1974) pp. 75 - 93; A.Fenton and T.C.Smout: 'Scottish agriculture before the improvers' in Agricultural History Review vol XIII (1965) pp. 73 - 93; G. Whittington 'Field Systems of Scotland' in A.R.H. Baker and R.A. Butlin: Studies Of Field Systems In The British Isles (Cambridge 1973) pp. 530 - 71; Whyte: Agriculture And Society passim; M.H.B.Sanderson: Scottish Rural Society In The Sixteenth Century (Edinburgh, 1982) passim.
24. Whyte: Agriculture And Society p. 29; C. Lerner: Enemies Of God: The Witch Hunt In Scotland (London, 1981) pp. 44 - 47; Sanderson: Scottish Rural Society pp. 41 - 54, 169 - 185.
25. Whyte: Agriculture And Society p. 3-; M.H.B. Sanderson 'The Feuars of Kirklands' in Scottish Historical Review vol LII (1973) pp. 117 - 48; Sanderson: Scottish Rural Society pp. 64 - 107.
26. McPhail: Statistical Account pp. 226 - 9
27. Stirlingshire Valuation Roll 1709 SRO GD 47/354.
The mortcloth and burial place registers of the Kirk session of St. Ninians give clear evidence for the existence of large numbers of small proprietors in that parish in the seventeenth century. See Records of Kirk Session of St. Ninians SRO CH2/337/3 passim.
28. Valuation Roll 1709 SRO GD 47/354 For further details see appendix 4 below.
29. McPhail: Statistical Account p. 228.
30. Valuation Roll 1709 SRO GD 47/354
31. I.F.Grant: The Economic History Of Scotland (London, 1934) p. 164; Sanderson: Scottish Rural Society pp. 56 - 63.
32. Whyte: Agriculture And Society pp. 38 - 8; A.Fenton: Scottish Country Life pp. 181 - 3; T.C.Smout: A History Of The Scottish People 1560 - 1830 (London, 1970) pp. 133 - 4.
33. Whyte: Agriculture And Society pp. 39 - 40.
34. ibid pp. 137 - 168; T.C.Smout: History Of Scottish People p. 128.

35. Records Of Regality Of Lennox (Ross Estate Paper) SRO GD 47/350.
36. Records Of Regality Of Falkirk SRO SC 67/2/1 - 4 passim; McPhail: Statistical Account p.135 says about Airth parish 'The rents are paid chiefly in meal and barley at the rate of ten firlots per acre.'
37. Whyte: Agriculture And Society pp. 33 - 6 describes the various types of rent; Sanderson: Scottish Rural Society pp. 25 - 37. See Records Of Regality Of Falkirk SRO 67/2/1; Records Of Barony Of Cambuskenneth SRO B 66/24/1.
38. Whyte: Agriculture And Society pp. 192 - 4; Records of Regality Of Falkirk SRO SC 67/2/1 for 25th. January and 28th. November 1650 are very good examples.
39. Records Of Regality Of Falkirk SRO SC 67/2/1 for 5th. March 1644 contain an Act of Court that "all tenants within the bounds" were to supply themselves with "armes ball and powder" under pain of £5 while on 16th. December 1651 Thomas Badestone, Baxter in Falkirk was fined under the terms of the said Act.
40. Whyte: Agriculture And Society pp. 35 - 6; Sanderson: Scottish Rural Society pp. 182 - 5.
41. Whyte: Agriculture And Society pp. 36 - 7; Sanderson: Scottish Rural Society pp. 182 - 5.
42. Whyte: Agriculture And Society pp. 178 - 9.
43. ibid pp. 152 - 162; Sanderson: Scottish Rural Society pp. 45 - 51, 53 - 4.
44. R.A. Dodgshon: 'Runrig and the communal origins of property in land' in Juridical Review vol XX (1975) pp. 189 - 209; Fenton: 'Rural economy' p.11; Whittington: 'Field systems' pp. 536 - 8; Whyte: Agriculture And Society pp. 145 - 52.
45. Whyte: Agriculture And Society p.151 At Auchindrain in Argyll this practice survived into the 1920's: in the Lowlands (including Stirlingshire) it seems to have died out by the early seventeenth century, if not earlier.
46. Fenton and Smout: 'Scottish agriculture' pp. 75 - 7.
47. McPhail: Statistical Account pp. 229 - 239.
48. Acts Of Parliament Of Scotland vol IX 1695 p.421. The Act and its significance is discussed in Whyte: Agriculture And Society pp. 106 - 9.
49. ibid p.144
50. ibid p.152, 145
51. Grant: Economic History p.165.
52. Whyte: Agriculture And Society p.138

53. Whittington: 'Field Systems' pp. 532 - 3; Fenton: 'Agricultural economy' pp. 3 - 9.
54. Whittington: 'Field Systems' pp. 536 - 7; Fenton: 'Agricultural economy' pp. 9 - 11; I.F. Grant: Highland Folk Ways (London, 1961) p.45
55. Fenton: 'Agricultural economy' pp. 6 - 8; Whittington: 'Field systems' p. 533.
56. Whyte: Agriculture And Society pp. 63 - 4.
57. ibid pp. 64 - 66
58. Whittington: 'Field systems' pp. 533 - 4.
59. R. Salaman: The History And Social Influence Of The Potato (Cambridge, 1949) p. 390.
60. Whittington: 'Field systems' p. 535.
61. Fenton: 'Agricultural economy' pp. 9 - 10.
62. Whyte: Agriculture And Society pp. 99 - 100, 106 - 7, 213 - 4.
63. J. Dunlop (ed): Court Minutes Of Balgair 1706 - 1736 (Scottish Record Society, Edinburgh, 1957) pp. 18, 21.
64. P. Graham: General View Of The Agriculture of Stirling-Shire (Edinburgh, 1812) pp. 47 - 9.
65. Whyte: Agriculture And Society pp. 162 - 8.
66. Royal Commission Report pp. 45 - 7, 223 - 69, 315 - 98.
67. Whyte: Agriculture And Society pp. 113 - 33.
68. On the maps, rigs are represented by a hatching of straight lines while bogs and 'moss' are shown by darker shading. Enclosures are clearly marked, with one attached to every noble residence, all of which are shown and named.
69. Roy's maps show Callandar House with its extensive 'policies' as well as smaller ones around Edmondstone Castle, Gargunnoch House and Powfoulis.
70. A large tract lies north of Black Loch and another westwards towards Kilsyth and Bonnymuir.
71. Thus at Bonhill and Kirkton of Fintry only one house is marked but this is almost certainly not accurate.
72. A. Ballard: 'The theory of the Scottish Burgh' in Scottish Historical Review vol XIII (1916) pp. 16 - 30; G.S.Pryde (ed): Court Book Of The Burgh Of Kirkintilloch 1658 - 1684 (Scottish History Society, Edinburgh, 1936).

73. ibid pp. xxxviii - lxxxix.
74. T. Pagan: The Convention Of The Royal Burgh Of Scotland (Glasgow, 1926) passim and especially pp. 20 - 47.
75. The burghs and their dates of erection were: Airth (1597); Falkirk (1600); Polmont (1611); West Kerse (1643); Buchlyvie (1672); Elphinstone (1673); Gargunnoch (1677); Mugdock (1680); Kilsyth (1707); See G.S.Pryde: The Burghs Of Scotland : A Critical List (Glasgow, 1965).
76. McPhail: Statistical Account p. 534.
77. J.G.Kyd (ed): Scottish Population Statistics (Scottish History Society, Edinburgh, 1952).
78. ibid pp. 36 - 7.
79. McPhail: Statistical Account pp. 151 - 2, 247, 435 - 40; Simpson: Stirlingshire p.5.
80. I.H. Adams: 'The salt industry in the Forth basin' in Scottish Geographical Magazine vol LXXXI (1965) pp. 153 - 62.
81. Sir R. Sibbald: History pp. 47 - 9, 55. Mentions it at Quarrell, Kinnaird, Bannockburn, Airth, Auchenbowie, Callandar and Maddistoun.
82. McPhail: Statistical Account pp. 156 - 61, 218 - 26, 432 - 5.
83. Anon: 'Slavery in Scotland' in Edinburgh Review vol CLXXXIX (1899) pp. 119 - 48; T.C. Smout: History Of Scottish People pp. 180 - 3.
84. Whyte: Agriculture And Society p. 174.
85. ibid pp. 32 - 6, 179.
86. Thus Records Of Regality Of Falkirk SRO SC 67/2/1 4th. December 1638 contains a list of Acts of Court which regulated all aspects of trade and production and forbade any trade with the area outside the regality. See Appendix 3 below.
87. Smout: History Of The Scottish People pp. 146 - 8; Pagan: Convention pp. 120 - 4, 150 - 8.
88. Whyte: Agriculture And Society pp. 178 - 92.
89. ibid pp. 182, 188.
90. ibid p. 186.
91. J.D. Marwick (ed): Register Containing The State And Condition Of Every Burgh Within The Kingdom Of Scotland In The Year 1692 (Miscellany of Scottish Burgh Records Society, Edinburgh, 1881) pp. 56 - 156 but especially pp. 66 - 8.

92. Fenton: Country Life pp. 51 - 2.
93. Pagan: Convention pp. 74 - 119.
94. Marwick: Register pp. 167, 269 gives the original 'sett' of the burgh and that which replaced it in 1788.
95. E.J. Cowan: Montrose: For Covenant And King (Edinburgh, 1977) pp. 5, 9.
96. Whyte: Agriculture And Society pp. 139 - 40; E.R. Cregeen (ed): Inhabitants Of The Argyll Estate 1779 (Scottish Record Society, Edinburgh, 1963).
97. See Records Of Kirk Session Of Buchanan SRO CH2/606/3 - 6.
98. Cowan: Montrose p. 9.
99. Thus Records Of Kirk Session Of Falkirk SRO CH2/400/2 contain a long list of persons rebuked by the session for "taking part in the late unlawfull engagement" from which it is clear that the Earl of Callandar had called out all the Livingstone lairds in south-east Stirlingshire.
100. So for example the Bakongo nation, a well-defined political entity, is split between the territorial states of Congo, Zaire and Angola.
101. Fraser: The Lennox passim; Royal Commission Report p.10.
102. ibid p.11; J.B.Paul: The Scots Peerage (9 vols, Edinburgh, 1904 - 14) vol VI pp. 191 - 274.
103. Gowan: Montrose p.3.
104. Royal Commission Report pp. 12 - 13; Paul: Scots Peerage vol V pp. 421 - 51; E.B. Livingstone: The Livingstones Of Callandar And Their Principal Cadets (Edinburgh, 1920) pp. 5 - 150.
105. ibid pp. 144 - 75.
106. Royal Commission Report p. 17.
107. ibid p.13; Livingstone: Livingstones Of Callandar pp. 132 - 4.
108. Paul: Scots Peerage vol V pp. 590 - 635.
109. ibid pp. 183 - 194; Livingstone: Livingstones Of Callandar pp. 157 - 72.
110. J.Guthrie Smith: Strathendrick And Its Inhabitants (Glasgow, 1896) pp. 283 - 6.
111. Royal Commission Report pp. 11 - 12.
112. Paul: Scots Peerage vol VI pp. 402 - 433; Smith: Strathendrick pp. 175 - 7.

113. W.B. Armstrong: The Bruces Of Airth And Their Principal Cadets (Edinburgh, 1892) passim and pp. 93 - 110.
114. Royal Commission Report pp. 13 - 14.
115. ibid p. 14.
116. For the idea of the 'dangerous class' as found in Elizabethan England see G. Salgado: Conv-Catchers And Bawdy Baskets: An Anthology Of Elizabethan Low Life (London, 1972).

CHAPTER 2THE COURTS AND THE LAW: 1600 - 1750

Almost every society known to historians and anthropologists has had a legal system: that is, a system of rules designed to impose certain norms of behaviour together with mechanisms for enforcing those rules by imposing penalties for breaches of them.¹ Such systems are distinguished from mores or social customs by their more abstract and formal character and by their connection to institutions which enforce them: a legal system consists of both law and courts which interpret and apply it while mores are enforced by the great court of public opinion.² However, legal systems take widely varying forms in different times and places, their particular pattern being determined by the history and material circumstances of society. The more 'primitive' the legal system the closer it is to custom and mores, unsystematic and lacking formal structure and institutions, yet at the same time complex and subtle. The legal system of pre-industrial Scotland had many features of 'primitive' law, survivals of the past, like so much of the economic structure, yet during this period it was slowly transformed to become a 'modern' one, with the most radical transformation taking place in the criminal law.³

The most fundamental question that can be asked when studying law and legal systems is: what is law and what is its origin? Historically, three answers can be given. The first is that law is the direct creation of God, who is held to have prescribed it through some form of supernatural revelation. This is the view taken by orthodox Jews of the Torah and Talmud, by strict Moslems of the legal elements of

the Koran: Al-Ghazali states firmly that:

"there is no true or valid law but that enjoined
⁴
 by Allah through his Prophet."

Perhaps the best example of law based on such a concept is the classical Hindu code, the laws of Manu, held by devout Hindus to have been created by Vishnu before the present world came into being.⁵ The second answer to the question of the nature of law and its origins is that it derives ultimately from custom and usage which in turn reflect the natural order of the world. Whether that order be divinely created or not is ultimately not significant in this view. So, according to this theory, law is somehow inherent in the fabric of nature rather than being man's invention. In other words, law is not made or created by men but rather found or uncovered by them.⁶ In this scheme of things law will be found much the same in all times and places, reflecting the essential likeness of men and the uniformity of natural order throughout time and space. It is for this reason that such law was known in seventeenth century Scotland as the 'common law' being common to all men and nations.⁷ Law based on this theory will be unsystematic or rather, uncodified and (in Weber's sense of the term) 'unrationalised'.

In marked contrast is the third answer, given by most present day legal theoreticians. They hold that law has no natural existence but is rather the product of conscious human will and is an artefact just as much as a machine is. Law is thus the product of legislation, of prescription by those with political power.⁸ The classical formulation of this theory is the great system of Roman Law, as compiled by Tribonian and his helpers in the Corpus of Justinian: in the Digest, Tribonian says very clearly that law is the creation

of the 'princeps' or ruler and owes nothing to any body of custom, which may be overridden or reshaped by legislative decree.⁹ This theory of law thus gives a central role to the ruler or state as its interpreter or enforcer. This concept of 'positive law' came to dominate legal philosophy during the seventeenth and eighteen centuries and triumphed throughout continental Europe during the nineteenth century following the example of Napoleon Bonaparte in France.¹⁰

In pre-industrial Scotland the law was held to derive from all three sources; Balfour lists all of them in the first entry of his 'Practicks' saying that law comes from God, as revealed in Scripture, from that natural reason which "writes in the heart of man" and lastly from legislation.¹¹ In practice, however, the second was thought to be most important. Since the world was seen as divinely created, the product of natural order was equal in authority to Scripture while legislation was thought to be distinctly inferior to custom in authority. In fact, it is clear that the main purpose of legislation in seventeenth century Scotland was the clarification of an already existing law rather than the creation of law out of whole cloth.¹² The idea of a sovereign legislature, found in England at this time, was alien to Scotland. There was of course a Parliament which met and passed Acts, but its powers were limited and restricted.¹³ Acts which went against the grain of tradition and local circumstances were simply disregarded, a fact recognised by Stair himself who stated:

"We are fortunate in having so few and clear statutes.

Our law is most part consuetudinary where what is found inconvenient is obliterated and forgot."¹⁴

Scottish Parliamentary legislation was intended to clarify confused matters and to act as a guide for other legal bodies. For example, when the Parliament, at the behest of the Kirk, passed Acts making witchcraft and adultery capital crimes it was declaring what the nature of these offences was and instructing other bodies (many of them independent) to act in a particular fashion when trying them.¹⁵ It is this which explains the exhortatory nature and tone of so much of the Parliament's output.

The Parliament was also limited in two other ways: its Acts did not have force throughout the entire kingdom as they did not apply to lands held 'in regalitatem' and it did not have a legislative monopoly. It was "an assembly which was only one of a number of rivals for the exercise of executive and even legislative authority."¹⁶ Amongst those rivals, the Privy Council retained a legislative function throughout its history, legislating on important matters through Acts in Council: thus the abolition of Norse Law in Orkney and Shetland in 1611 and the first measure concerning parochial schooling in 1616 were both effected through orders in council.¹⁷ The Privy Council could in fact determine law in any field and there was no clear limit to its competence. Besides the Privy Council there were other central bodies with legislative powers. The Convention of Royal Burghs legislated on all matters affecting the royal burghs, most notably trade and manufacture and it retained this power throughout the period concerned.¹⁸ The General Assembly of the Kirk after the Reformation legislated in the fields of church law, morality, heresy, such matters as marriage and divorce and the properties and tēds of the Kirk.¹⁹ The Acts of Sederunt

of the Court of Session also had legal force, as did the promulgations of the Admiralty and Constabulary Courts.

In fact all of the courts of pre-industrial Scotland had legislative powers: they all made law as well as enforcing it. Some did this only in small, circumscribed and specialised areas of law but with no territorial limitations: others could range over a wide field of law but had their jurisdiction limited to a particular area of land. Examples of the first sort were the Lyon Court which enforced heraldic law, and the Admiralty Court, concerned with naval affairs and such business as customs. In the second category were baron, burgh, regality, stewartry and baillerie, and Sheriff courts: all of these held 'head courts' thrice yearly when the freeholders of the lands covered by that court's jurisdiction met together with the holder of the Court and in their capacity as 'members' of the court could pass Acts with the force of law.²⁰ The procedure of many of these courts was Parliamentary or more accurately, they and Parliament had common procedures which rose out of their common nature as head courts of a feudal superior (or his representative) and the tenants-in-chief. It is true that such 'head courts' were Parliament writ small: it is also true that Parliament was such a court writ large.²¹

So the law of pre-industrial Scotland derived primarily from custom and practice and was established by many different bodies rather than one, with Parliament acting as the ultimate authority which clarified obscure points, recognised and advised changes in customs and usage and gave traditional practice permanence. The Privy Council linked this process to the world of politics and government, trimming

custom and local usage to national circumstances: it also acted as a short cut for urgent legislation. Other central bodies made law in specialised areas while much of the law in the locality was determined by the local courts. The law was created by those whose duty it was to enforce it at a local or national level. This process produced a law which was localised and very unsystematic: the early Scots legal writers such as Balfour, Skene and Hope all wrote 'Practicks', that is handbooks describing traditional usage, rather than schematic accounts of a coherent, synthetic system.²² However, during the seventeenth and eighteenth centuries the so-called 'Institutional' writers, from MacKenzie through Stair to Bankton and Erskine, cast Scots law into a regular and systematic form.²³ This involved, amongst other things, a 'reception' of Roman law whereby the body of Roman law was identified with the 'natural legal order' so that traditional Scots legal practice was moulded to fit a Roman model, acquiring in the process many of the features of that system, including its highly structured organisation.²⁴ Certainly the law which Erskine wrote about was very different from that which Balfour had practised: if the second was like a wild wood then the first was a landscaped park. This transformation involved changes not only in the theory and creation of Scots Law but also in its practice and nowhere more than in the field of the criminal law.

In most modern legal systems a clear distinction is made between civil and criminal law: according to one present-day textbook:

"The civil law is primarily concerned with the rights and duties of individuals amongst

themselves, whereas the criminal law defines the duties a person owes to society."²⁵

This theory thus posits a distinction between private wrongs or torts on the one hand and public wrongs or crimes on the other. This distinction is not found so clearly in 'primitive' legal systems where many acts which a present day lawyer would see as crimes are handled as torts: as Maine puts it:

"The penal law of ancient communities is not the law of crimes, it is the law of wrongs or ... of torts."²⁶

The question is, how are certain acts defined as public wrongs and hence crimes? Under modern law, as Jones and Cross judiciously but firmly declare:

"a crime or offence is an illegal act, omission or event, whether or not it is also a tort, a breach of contract or a breach of trust, the principal consequence of which is that the offender, if he is detected and the police decide to prosecute, is prosecuted by or in the name of the state, and if he is found guilty is liable to be punished whether or not he is also ordered to compensate his victim."²⁷

Harris' Criminal Law is blunter, saying:

"The distinguishing feature of a criminal offence is that it entails a liability to punishment by the state and not payment of damages to the injured party."²⁸

Several points should be made here. In the first place this definition of crime is circular: acts are crimes because they are treated in a certain way because they are

crimes. The initial definition of particular acts as criminal is a function of the state and is completely arbitrary: any act may become a crime under this definition.²⁹ Moreover, by this definition if no state exists then there is no crime: a theory flatly contradicted by the existence of stateless societies with a well-developed criminal law, such as classical Ireland and the Nuer.³⁰ The second point is, crimes are seen as offences against the state, breaches of state-made law rather than as injuries done to the individual or breaches of custom: this makes possible 'victimless' crime such as drug abuse. In the third place, as a consequence of this, prosecutions are carried out by the state through full time professional agents or employees, whether police, magistrates, lawyers or public prosecutors. The prosecution is not initiated by any victim and decisions on whether or not to prosecute, and hence the general level and pattern of prosecution, are determined by the policy and interests of the state and its agents. Lastly, as Harris declares, the penalty for crime is not compensation or redress but a punishment, whether execution, incarceration or fine, which is imposed by the state and reflects the interests and ideology of the political elite.³¹

By contrast, in a 'primitive' legal system none of the above applies. The old Scots legal system was essentially 'primitive' as is apparent when this question of the nature and definition of crime is studied. A crime was an act which was seen as being inherently delinquent by its very nature: in this view all actions which harmed either another person or the King rendered the perpetrator liable to a penalty, normally a compensation made to the victim together with a

fine paid to the court. In some cases, however, the penalty was one of blood, life or limb, and these offences were classed as criminal. As Balfour puts it:

"A criminall actioun or cause is that quilk
tuichis ane pane of blude, of life or limb."³²

In other words crimes were delinquent acts carrying a certain penalty: however, it was primarily custom that determined which actions were so punished and this distinction was thought of as reflecting a natural prohibition rather than one imposed by Crown or Parliament.³³ In fact the distinction was not as clear as might at first seem: for many crimes the penalty could be commuted to a monetary compensation paid to the victim or their kin.³⁴ This was true even for slaughter (a killing done in public) when the compensation was known as 'assythment'. Balfour states:

"Be the law and consuctude of this realm,
the assythment or kinbut maid or adjudgit
to be payit be the committaris of slauchter,
to the kin, bairnis and freindis of any
person that is slane, is gevin to thame in
contentatioun of the hurt dammage and skaith
incurrit be thame there-throw, and for
pacifying of their rancour."³⁵

This idea of compensation was of fundamental importance in old Scots law. As Wormald puts it:

"So deeply embedded was the principle of
compensation in the fabric of Scottish
justice that it could as well be invoked,
if for diplomatic reasons, for a king as
for the lowest of the gentry; for anyone,
in fact, who had the means to compensate,

and who had kin and friends to support him."³⁶

The term 'assythment' first appeared in the late fourteenth century and was originally an Anglo-Saxon term, derived from the word 'assythe', meaning to assess or value. The term 'kin-but', which Balfour also uses, was again of Saxon derivation (Old English cynebot) where it meant the sum paid to a kin-group for the killing of its chieftain.³⁷ The procedure for settling a dispute and obtaining 'assythment' is clearly described by Balfour: a request was made by the offender to the kin of the dead person who would agree upon the amount and upon receipt would present the offender with a 'letter of slanis'. This was a document containing a formal statement by the kin that they had been compensated, the term 'slanis' being derived from the Irish 'slainte' which meant freedom from responsibility.³⁸ So in old Scots law, as in 'primitive' law, the distinction between crime and tort was blurred and somewhat vague, even to the extent of treating manslaughter as a form of 'damage'.

However, there were some crimes for which no compensation could be made, corresponding to the 'bootless crimes' of the Anglo-Saxons and the 'atrocious crimes' of the Castillians. These were treason, heresy, including witchcraft, robbery, arson, rape and murder, defined by Balfour as a killing "done privatlie, na man seand nor knawand the samen bot allanerlie the slayer and his complices."³⁹ These particular crimes were held to be offences against not only an individual but also the King, in his capacity as the head of the folk; they were therefore in theory reserved to his jurisdiction and known as the 'Pleas of the Crown.'⁴⁰

The practical reason for this was simple: at an early date the basic mechanism through which the criminal law was enforced was the blood feud and 'assythment' was a 'face-price' which prevented the mechanism of the feud from going into action.⁴¹ However, the crimes mentioned (including witchcraft) were all secret or concealed crimes, involving premeditation and conspiracy: in such circumstances the blood feud broke down as no person could be definitely named as the perpetrator and there was the ever-present risk of 'rancour' and suspicion leading to violence. The solution was to make the entire community the injured party with the King pursuing the case as its head through his court.

The question of feud raises another point where old Scots law differed from the modern criminal law described by Jones and Cross. In criminal cases the prosecution was brought in the first instance by the injured party or their kin and only if they did not pursue the case could the King or his agents intervene. This was true even for murder, which although usually prosecuted in the King's court was pursued by the victim's kin: according to Balfour and Skene:

"In accusation of murther, na persoun may be admittit to accuse, except he be of kin and blude to him that is murtherit; and he that is narrest of blude to him, or to the stok, sall exclude him quha is of farder degree fra accusation."⁴²

So the primary responsibility for the prosecution of crime lay with the injured party, helped by the local community through the institution of the 'hue and cry' whereby all

were obliged to assist in the apprehension of a criminal.⁴³ As no police force existed there were in practice only two ways in which criminals might be detected: by being caught 'red-handed' (in the act) or by accusation of a 'fama clamosa' or the 'voice of the country' i.e. by general suspicion.⁴⁴ This meant that reputation was of fundamental importance as a person of 'mala fama' or 'ill repute' was much more likely to be accused.⁴⁵ This explains the great stress placed on character witnesses in Scots criminal trials which in Shetland extended to the continued use of the procedure of oath-helping or compurgation.⁴⁶

Moreover the enforcement of law was not primarily in the hands of full-time servants of the state or even in the hands of the Crown.⁴⁷ Besides those courts directly dependent upon the Crown there was a vast array of other courts, most of them held by private individuals. There were church courts, exercising a wide jurisdiction over what we would now call 'moral' offences while every locality contained feudal courts, many of barony and regality, held by the feudal superior. Other courts supposedly dependent upon the crown such as burghal courts in royal burghs and Sheriff courts whose sheriff was hereditary were in practice independent. So the criminal law of early modern Scotland was by no means 'modern': the definition of crime lay mainly with custom rather than legislation, the penalty was not a state exacted punishment except in special cases and the enforcement of the law was mainly performed by private individuals, either as accusers or as holders of courts.

In theory, or at least in that legal theory favoured by the Crown, all rights of criminal jurisdiction came from

the King and any jurisdiction exercised by a private individual was a delegated one.⁴⁸ In practice any person holding land by freehold had the right to hold a court for those lands and during the Middle Ages many exercised all the rights of criminal justice in their courts.⁴⁹ During the fifteenth century this was recognised by the Crown which gave most such landholders formal permission to hold a court with criminal jurisdiction, accepting and regularising the inherited situation.⁵⁰ Most were granted rights 'in baroniam' giving them jurisdiction over all crimes except the 'Pleas of the Crown' but some were given, or recognised to have, rights 'in regalitatem' whereby they had the power to try all crimes except treason.⁵¹ All private courts had the right to remove a person under their jurisdiction out of a royal court : this was known as 'repledgiatoun'. Upon 'repledgiatoun' a written promise to prosecute the crime, known as a 'culreach', had to be left in the hands of the royal judge, the theory being that if it was not carried out the case would revert to the royal court.⁵² In practice this does not seem to have happened very often.

The court structure of the old Scots legal system was essentially feudal, springing out of feudal land tenure. At every level, from a small barony to the entire kingdom, the same pattern of organisation appeared. In the first place, all jurisdictions other than ecclesiastical held a 'head court' thrice yearly. This was attended by all those who held 'suit' to the court by holding land within its territorial jurisdiction, whether or not they also had courts of their own. The 'suits' determined the law, formed the jury or 'assize' and were obliged to attend under pain of fine.⁵³ As mentioned earlier

Parliament was such a court: it was in fact simply the King's head court, consisting as it did of royal officials, tenants-in-chief, crown freeholders and representatives of the royal burghs.⁵⁴ Besides the head court, each jurisdiction had several other courts, the exact number depending upon its size and powers. As far as the Crown Courts were concerned each of the great officers held a court i.e. there were courts for the Justiciar, Admiral, Constable and Chamberlain as well as other, more specialised courts and a prerogative court in the shape of the Privy Council which, in addition to its legislative capacity, exercised an overriding judicial function with the power to terminate any case in another royal court or impose a verdict or sentence.⁵⁵ Of the other major central courts, the Justiciary court tried all criminal cases, including 'Pleas of the Crown' while the Court of Session, originally a committee of the Parliament, tried all civil cases.⁵⁶ Below the central courts the Sheriff courts exercised a local jurisdiction over Crown tenants and in-dwellers of baronies.⁵⁷ It, and also the baron court, tried all civil cases and all criminal cases except for the four 'Pleas of the Crown'.⁵⁸ The Sheriff court was also a court of appeal from baron courts within its jurisdiction while appeals could be made from it to the Justiciary court for criminal and the Court of Session for civil cases.⁵⁹ Feudal jurisdictions with regality rights could try all cases except treason and normally had at least two courts: one with the same powers as a Sheriff court and a Justiciary court which tried serious crimes.⁶⁰ Some of the larger and better organised ones, such as Dunfermline or Glasgow had Chamberlain, Constabulary and even Admiralty courts as well.⁶¹ For

in-dwellers of a regality the only court of Appeal was to the court to which the holder held suit i.e. to Parliament. Burgh courts had power similar to those of a Sheriff court but more limited, in the case of royal burghs by the terms of the royal charter and by the terms of the 'sett' or constitution in burghs of barony.⁶² In practice there were three levels of jurisdiction: a 'regalian' level, exercised by the Crown and holders of regalities; a 'shrieval' level exercised by Sheriff courts and some baronies and a baronial level, exercised by most baronies and all other proprietary courts. At the very bottom of the court system was the 'boorlaw' or neighbourhood court: there was one in every estate consisting of certain tenants and its main purpose was the maintenance of good relations among the tenants by arbitration and agreement.⁶³

There were gradual but profound changes in this system of law and courts between 1600 and 1715. Under James VI the power of the royal courts was increasing by limiting the right of repledging and by establishing the right of the Crown to prosecute even when the kin or injured party had failed to do so.⁶⁴ At the same time the organisation of the royal courts was refined and improved, a process which continued in the later seventeenth century and culminated in the Act of 1672 which created the modern High Court of Justiciary.⁶⁵ The period also saw persistent attempts by James VI, Charles I and Cromwell to introduce Justice of the Peace Courts on English lines: these were finally successful in 1709.⁶⁶ In fact, the years immediately after the Union, up to about 1710, saw such radical changes in the legal system, in both its structure and administration that they can be said to have seen the demise of the old order.

The Scots Parliament and Privy Council were abolished in 1707 and 1708 while fundamental changes were made in the procedure and powers of the central criminal courts which effectively limited the powers of the heritable jurisdictions and marked the end of 'private' or extra judicial law as an integral part of the legal system.⁶⁷ The private courts survived the Union in truncated form by just forty years, as they were swept away by the Act of 1747 abolishing heritable jurisdictions.⁶⁸

In essence, what took place in Scotland between about 1600 and 1747 was a fundamental shift from one kind of law and one kind of legal system to another. This was one of several radical changes in Scotland's economy, polity and society which took place during the period and certainly was not the least significant. Two sorts of change can be made out during this period. One was slow, gradual and 'home grown', arising directly out of change in the structure of Scots society. The other was rapid, 'catastrophic' and sprang out of the relations between Scotland and England and came partly from pressures originating outside Scotland. So far as the legal system was concerned, the most visible change was from a system based in the locality to one dominated by the centre. Before the Union at least the Scottish legal system was very localised: it was the local courts which made and enforced much of the law and which had the greatest impact on the everyday life of Scots men and women. These local courts are the point where any study of the law and its workings must start, rather than at the centre. The great array of local courts can be divided first into two clearly distinct categories; the secular and the ecclesiastical. On

the one hand are the sheriff, burgh and franchise courts, at first sight widely disparate, on further examination much more homogeneous. On the other side are the church courts, the long arm of 'godly discipline', and by far the most active branch of the whole system. It was these courts which undoubtedly had most contact with ordinary people and for that, if for no other reason, are clearly the place where any examination should begin.

NOTES

1. J.W. Jones: Historical Introduction To The Theory Of Law (New Jersey, 1969); J.D.M. Derret (ed): An Introduction To Legal Systems (London, 1968) contains studies of the Islamic, Hindu, Jewish and English systems; C. Turnbull: The Mountain People (London, 1978) gives a chilling picture of a social order which lacks a legal system.
2. L. Mair: Primitive Government (London, 1977) pp. 18 - 19; D. Lloyd: The Ideas Of Law (London, 1981) pp. 227-33.
3. Sir H. Maine: Primitive Law (London, 1917); A.S. Diamond: Primitive Law Past And Present (London, 1971) passim and particularly pp. 260 - 70, 328 - 64, 395 - 400; G.Parker and B.Lenman: 'The state, the community and the criminal law' in V.A.C. Gattrell, B. Lenman and G. Parker (eds): Crime And The Law : The Social History Of Crime In Western Europe Since 1500 pp. 11 - 48 describes a shift from one type of legal system to another which the authors term a 'judicial revolution'.
4. A.A.A. Fyzee: Outlines Of Muhammadan Law (London, 1974) pp. 14 - 17.
5. F.M. Muller (ed): Sacred Books Of The East vol 25 : The Laws Of Manu (Oxford, 1886).
6. Lloyd: Idea Of Law pp. 68 - 80; Jones: Historical Introduction pp. 98 - 138.
7. Derret: Legal System pp. vii; P.G.B. McNeill (ed): The Practicks Of Sir James Balfour Of Pittendreich (2 vols, Stair Society, Edinburgh, 1962/63) p.2.
8. Lloyd: Idea Of Law pp. 170 - 98; Jones: Historical Introduction pp. 79 - 97; During the Renaissance this theory was stated most forcefully and comprehensively by Bodin, particularly in his 'Republic' where he argued that the power to make binding law was the essential feature of a sovereign prince or state. See J. Bodin: Six Books Of The Commonwealth ed. M.J.Tooley (Oxford, 1955) pp. 42 - 48.
9. T.C. Sandars (ed): The Institutes Of Justinian (London, 1962) pp. 5 - 13 but particularly p.10 where we have the famous statement "Sed et quod principi placuit, legis habet vigorem".
10. Parker and Lenman: 'State, community and criminal law' pp. 28 - 34 discuss the reception in general; J.D. Wilson: 'The reception of Roman Law in Scotland' in Juridical Review vol IX (1897) pp. 361 - 94 describes the process in Scotland.
11. McNeill: Practicks pp. 1 - 3.

12. P. Rayner, G. Parker and B. Lenman: Records For The Study Of Crime In Scotland (SRO cyclostyled manuscript, now published by British List and Bibliography Society. 1982).
13. R.S. Rait: The Parliaments Of Scotland (Glasgow, 1924) passim and pp. 195 - 237.
14. Various: An Introductory Survey Of The Sources And Literature Of Scots Law (Stair Society, Edinburgh, 1936) p. 12.
15. Acts Of Parliament Of Scotland vol III pp. 25, 26, 38, 54. (1563, 1563, 1567).
16. Rait: Parliaments Of Scotland p. 9; G. Donaldson: Scotland, James V - James VII (Edinburgh, 1971) pp. 276 - 88.
17. ibid p. 289.
18. T. Pagan: The Convention Of The Royal Burghs Of Scotland (Glasgow, 1926) passim.
19. Donaldson: Scotland p. 294; J.Kirk (ed): The Second Book Of Discipline (Edinburgh, 1980) pp. 163-4, 169-72.
20. This legislative power of all head courts is clear from even a glance at court records which contain lists of detailed Acts passed at the head court by the 'members' of the court. For a good example of this see Records Of Regality Of Falkirk SRO SC 67/2/1 4th. December 1638.
21. C.S. Terry: The Scottish Parliament 1603 - 1707 (Glasgow, 1905) pp. 142 - 55; For Parliament's role as a court of law see W.B. Gray: 'The judicial proceedings of the Scottish Parliaments' in Juridical Review vol XXXVI (1924) pp. 135 - 51.
22. As the works of Balfour, Hope and Skene show, practices were just what their name suggests, hand-books or guides to practice, consisting of citations of Acts of Parliament, court cases and general appeals to tradition and old authority, all given equal weight and organised simply by subject without anything like the clear, coherent theoretical structure found in Stair and MacKenzie. See J.A. Clyde (ed): Hope's Major Practicks 1608 - 33 (2 vols, Stair Society, Edinburgh, 1937/38); P.G.B. McNeill (ed): The Practicks Of Sir James Balfour Of Pittendreich (2 vols, Stair Society, Edinburgh, 1962/63).
23. J. Dalrymple, Lord Stair: Institution Of The Laws Of Scotland (4 vols, Edinburgh, 1693); G. MacKenzie: The Institutions Of The Laws Of Scotland (Edinburgh, 1684).
24. Wilson: 'Reception' passim.
25. R. Card (ed): Jones And Cross Introduction To Criminal Law (London, 1980) p.2.
26. Maine: Ancient Law p. 217.
27. Card: Jones And Cross p. 1.

28. J. McLean and P. Morrish (eds): Harris's Criminal Law (London, 1973) p. 3.
29. One consequence of this is that the number of acts which may lead to prosecution and punishment by the state, and hence are (by this definition) crimes, has grown immensely and in present day England stands at 6,708.
30. J.R. Peden: 'Stateless societies : ancient Ireland' in Libertarian Forum vol III (1971) pp. 3 - 8; Mair: Primitive Government pp. 33 - 54.
31. Card: Jones And Cross pp. 4 - 6.
32. McNeill: Practicks p. 503.
33. Thus adultery, fornication, witchcraft and even slander were all held to be natural crimes since they were prohibited by the (divine) Mosaic law while Balfour's ultimate authority for murder being a crime is an appeal to custom.
34. J. Wormald: 'Bloodfeud, kindred and government in early modern Scotland' in Past And Present no. LXXXVII (1980) pp. 54 - 97.
35. ibid p. 62; McNeill Practicks p. 516.
36. Wormald: 'Bloodfeud, kindred and government' p. 54.
37. ibid p. 62.
38. McNeill: Practicks pp. 516 - 8.
39. ibid p. 512; Clyde: Hopes Practicks pp. 297 - 99; Parker and Lenman: 'State, community and criminal law' pp. 14 - 15 describes the concept of the 'bootless' crime as found in Europe.
40. McNeill: Practicks p. 503.
41. As anthropologists have found, the institution of bloodfeud works to sustain the peace and to check violence. See Mair: Primitive Government pp. 38 - 42. This fact was recognised in Scotland, where bloodfeud and private law were recognised as useful and integral parts of the legal system. See Wormald: 'Bloodfeud, kindred and government' passim. See also J.M. Brown: 'The exercise of power' in J.M. Brown (ed): Scottish Society In The Fifteenth Century (London, 1977) pp. 33 - 64 and particularly pp. 62 - 4.
42. McNeill: Practicks p. 513.
43. Records Of Regality Of Falkirk SRO SC 67/2/1 18th. July 1648 where seven people were charged with failing to answer a hue and cry and help capture a runaway - they were all fined 50/-.

44. Justiciary Court Records : Dittay Rolls, Circuits SRO JC 17/1 1708 gives detailed instructions on how to collect information on possible offenders with a view to indictment.
45. This is true of any legal system, including present day ones. The words 'of ill repute' are not used but the concept still exists and still influences police and judicial activity. See S. Cohen: Folk Devils And Moral Panics (London, 1972).
46. G. Donaldson (ed): The Court Book Of Shetland 1602 - 1604 (Scottish Records Society, Edinburgh, 1954) pp. iv - v.
47. G. Donaldson: 'The legal profession in Scottish society in the sixteenth and seventeenth centuries' in Juridical Review vol XXI (1976) pp. 1 - 19.
48. W.C. Dickinson (ed): Court Book Of The Barony Of Carnwath (Scottish History Society, Edinburgh, 1937) p. XII.
49. I. Whyte: Agriculture And Society In Seventeenth Century Scotland (Edinburgh, 1979) pp. 44 - 6.
50. For the political background to this process see Brown: 'The exercise of power' passim.
51. Various: An Introduction To Scottish Legal History (Stair Society, Edinburgh, 1958) p. 378.
52. McNeill: Practicks pp. 338 - 40; Wormald: 'Bloodfeud, kindred and government' p. 62; W.C. Dickinson (ed): Sheriff Court Book Of Fife 1515 - 1522 (Scottish History Society, Edinburgh, 1928) pp. 344 - 6.
53. P.J. Hamilton-Grierson: 'The suitors of the Sheriff Court' in Scottish Historical Review vol XIV (1916) pp. 1 - 19; Dickinson: Sheriff Court Book Of Fife pp. LXXII - LXXXIV.
54. Rait: Parliament Of Scotland pp. 165 - 282.
55. Clyde: Hope's Practicks pp. 1 - 46; Hamilton-Grierson: 'Suitors Of Sheriff Court' p. 1.
56. See R.K. Hannay: The College Of Justice (Edinburgh, 1933)
57. Dickinson: Sheriff Court Book Of Fife passim.
58. ibid pp. 325 - 338.
59. Hamilton-Grierson: 'Suitors of Sheriff Court' pp. 1 - 2.
60. For example the Regality of Montrose which had three courts exercising a 'shrieval' jurisdiction over Old Montrose, Auchterarder and Mugdock and a single justiciary court which went on eyre from Old Montrose to try serious criminal cases. See Records Of Regality Of Montrose SRO GD 220/6/1 - 6.

61. For example see J.M. Webster and A.A.M. Duncan (eds): Regality Of Dunfermline Court Book 1531 - 38 (Dunfermline, 1953).
62. G.S. Pryde (ed): The Court Book Of The Burgh Of Kirkintilloch 1658 - 1694 (Scottish History Society, Edinburgh, 1963) pp. LXVII - LXXI.
63. One good example which has survived of the laws enforced by a birlaw court can be found in Marquis of Tweeddale (ed): 'Boorlaw book of Yester and Gifford' in Transactions Of East Lothian Antiquaries And Field Naturalists Society vol VII (1958) pp. 9 - 17.
64. Acts Of Parliaments Of Scotland vol III pp. 445 - 6, 458 - 61. (1587).
65. ibid vol VIII pp. 86 - 8 (1672).
66. ibid vol IV p. 434 (1609); see also C.A.Malcolm (ed): The Minutes Of The Justices Of Peace For Lanarkshire 1707 - 1723 (Scottish History Society, Edinburgh, 1931).
67. For fuller analysis of the impact of the Union and the associated reforms see below pp.453-77.

PART II

THE LEGAL SYSTEM IN ACTION : THE LOCAL COURTS.

CHAPTER 3THE CHURCH COURTS AND SOCIAL CONTROL

Today the central activities of the Church of Scotland are the preaching of the Word and administration of the sacraments. The focal point of the worship is the pulpit, font or communion table. Yet in the past congregations were just as likely to concentrate their attention on the place of public repentance. This reflected the more varied function of the Kirk: it was not concerned only with the celebration of divine worship but also with education, poor relief and, not least, the exercise of 'Godly Discipline'. The Kirk of the sixteenth and seventeenth centuries was as much a legal as a religious institution and its governing bodies courts of law as powerful and active as any other part of the legal system. Indeed, in terms of the numbers of people tried and sentenced, the church courts were by far the most active jurisdiction. Sixteenth century reformers shared the conviction of their medieval predecessors that the Kirk had a complete and independent jurisdiction over matters of religion and morality which was derived directly from Christ without any recourse to temporal power.¹ In the words of the Second Book of Discipline:

"This power ecclesiasticall is ane authoritie grantit be God the Fader throcht the mediatour Jesus Chryst unto his Kirk gadderit and having ground in the word of God, to be put in executioun be thame, unto quhom the spirituall government of the lauchfull calling is comittit."²

It was in no way subordinate to the civil power of the state, of Kings and Magistrates. The Second Book of Discipline explained:

"For this power ecclesiasticall flowis immediatlle frome God and the mediatour Chryst Jesus, and is spirituall, not having ane temporall heid in eirth bot onlie Chryst, the onlie spirituall King and governour of his Kirk."³

In the ideology of the reformers then, the Kirk was the institution or form through which God's laws, as laid down in the Decalogue and elsewhere, were promulgated, interpreted and enforced. The term 'the Kirk' was applied to, and described, three different things: the total community of professed Christians; the godly and elect alone and last,

"thame quho exerce the spirituall function among the congegation of thame that profes the trweth."⁴

It was held that the second, the community of the elect had the power, right and duty to use the third, the institutional Kirk for the discipline, correction and chastisement of the erring and the reprobate.⁵ In practical terms this took the form of the exercise of 'Godly Discipline' over the parishioners by the governing bodies of the Kirk, the Kirk sessions, presbyteries and synods.

There were, of course, church courts in Scotland before the Reformation with a commitment to moral discipline but surviving records are few and what has survived gives the impression that their business was mainly to do with testaments, contracts and property disputes.⁶ The parochial

structure of the medieval Kirk was notoriously weak and reformed congregations were functioning even before the Reformation Revolution of 1560. After that date the Reformed ecclesiastical order spread gradually over the face of the land.⁷ The basic ecclesiastical court was the Kirk session, the body consisting of the Minister and all the elders of a parish. It was responsible for administering the Kirk's affairs, handling poor relief and for trying and punishing certain types of offence.⁸ The earliest Kirk session records are those of St. Andrews which date from 1559 but it took until the 1620's to achieve this uniformly, at least in the Lowlands. Stirlingshire had 24 parishes some of which had a session from a comparatively early date : the oldest surviving records of the Stirling Kirk session date from the 1590's.⁹ The idea of the presbytery, a meeting of the ministers from a group of neighbouring parishes, was first put forward in the Second Book of Discipline in 1578. The first presbyteries (including Stirling) were created in 1581 but real progress was only made after 1586.¹⁰ The presbyteries were in turn grouped into several provincial synods and by 1638 66 presbyteries and 10 synods had been created. This scheme had gained statutory backing with the 'golden act' of 1592 and thereafter it remained the basic form of Church government, despite bitter disputes over the question of bishops and their role.¹¹ The session soon became the basic administrative unit rather than the presbytery and it was the main institution through which church discipline was enforced.

What then was the divine law enforced by the Church courts? In practice nobody was very clear about the status of Mosaic Law. Knox tended to support its continuing

validity, but others disagreed, and of course Canon Law had technically never been abolished apart from a few sections relating to Mass and Papal authority. This ambiguous heritage was in due course supplemented by the Acts of the General Assembly of the Kirk and its provincial synods. At an early date, in 1587, the Scots Parliament declared that certain offences against this law, notably fornication and adultery, were criminal and worthy of a civil as well as an ecclesiastical penalty and therefore gave the Church courts the power to impose civil penalties.¹² These measures, and subsequent ones, also meant that persons tried by a church court could also be brought before a secular court if needs be: the ecclesiastical jurisdiction though independent, was thus fully supported by the secular powers.

To revert to the questions posed in the introduction to this thesis, what then did these church courts do? What was their disciplinary business composed of? The reader of the church records is very soon struck by the constant, standard, and, after a time, monotonous nature of their content. As mentioned earlier church courts were often very active. Thus, in Stirlingshire, Muiravonside session tried 163 cases involving 252 defendants between 1667 and 1688 while the session of Kilsyth tried 245 cases and 425 defendants between 1692 and 1725.¹³ It should be noted that these were not large parishes. However, even with such a large number of cases most of the business was of a standard and regular type which can be easily divided into four broad categories. This division is applicable not just to Stirlingshire but to the whole of Scotland.¹⁴ All of these types of offence were tried in the first instance by Kirk Sessions; presbyteries, as shown later, were in essence 'back-up' courts.

In first place in session business both in numbers and, so far as the Kirk was concerned, in gravity, were sexual offences; that is, breaches of orthodox Christian sexual morality and of the seventh commandment in particular. Over the entire period of this study sexual offences made up on average 60% of the business of Kirk sessions.¹⁵ As will be shown later, this overall figure does conceal a marked shift in the composition of session business after about 1695. The commonest sexual offence by far, making up almost 90% of all such cases, was fornication. It was the offence which took up most of the sessions' time and often provided the largest part of their total disciplinary work: for example, of the 89 cases tried by Killearn session between 1694 and 1716, 47 were cases of fornication, while between 1711 and 1746 Strathblane session tried 54 cases, 24 of which were of fornication.¹⁶ Of the fourteen sessions studied for this thesis, fornication was the largest single category of offence in eleven.¹⁷ Quite simply, fornication was sexual intercourse between two single people. In practice cases of fornication which came before the church courts had certain particular features which can be easily recognised in the record. Firstly, and most importantly, such cases almost invariably involved a pregnancy. Of the 1951 cases of fornication in the records studied for this thesis, only 26 did not involve a pregnancy. The course of events recorded in the session minute books was the same in almost every case. An unmarried girl or woman would become manifestly pregnant, whereupon she would be summoned before her parish's session: they would then formally ask if she were with child, and if so who the father was. The woman, being pregnant was hardly in a position to deny her guilt:

as the session of Killearn smugly observed of one of its parishioners in 1733:

"it is obvious that she has sinned, be
the father who it will." ¹⁸

The woman involved in these cases almost always gave the man's name quite freely but if she did not the session could be quite brisk in extracting it: in St. Ninians in 1656 when Agnes Mayne refused to name the father of her still-born child she was straightaway put in the bellhouse on bread and water for a week. She named the father after two days.¹⁹ Again in Muiravonside in 1698 Margaret Cornwell at first refused to name any father, then named a man (Alexander Garshore of that ilk) who had not "had any converse with her". The session ordered the Justices of Peace to incarcerate her and in 1700 she finally named the true father.²⁰ Once the father's name was known he would be summoned by the session to its next meeting along with the woman. Most men in this position appeared promptly and confessed: however a small proportion did not and denied all guilt. If he persisted in denying his guilt after being confronted with the woman before the session witnesses would be called to give sworn testimony, usually of what was called 'too great familiarity'. This brings us to the second major feature of prosecuted fornications: they were almost always notorious and well-known to the parties' friends and neighbours. There are two possible explanations for this, neither of which excludes the other. It may be that the living conditions meant that privacy, in sexual as other matters, was almost impossible to maintain or it may have reflected a general acceptance of non-marital sex amongst the majority of the population as opposed to the elite, godly or otherwise, which controlled the

Kirk sessions. It is not possible to decide which of the two explanations has greater validity merely from study of session records: a more general study of a Scottish rural community would be needed, outside the scope of this thesis. However, evidence from other parts of the courts' business, discussed later, tends to give weight to the second as opposed to the first.²¹

Most men, faced with the evidence of sworn witnesses, submitted to the inevitable and accepted church censure. However, if they still persisted they, like all church court defendants in early modern Scotland, had the opportunity to clear themselves by taking an oath of purgation. This was a formal oath, sworn in God's name, denying all guilt which was taken before the entire congregation.²² If a defendant took such an oath he was accounted as completely cleared and could no longer be charged with, or pursued for, the offence - unless he subsequently admitted perjury.²³ However, often a defendant, faced with the fearsome tone of the oath and fearing damnation for perjury would confess. The sessions' practice of giving the oath to defendants 'for consideration' before they were due to take it assisted this.²⁴ There were other factors which could give pause to a man considering taking such an oath: if a man who was known by all the congregation to be guilty solemnly swore he was innocent, his credibility and good name would be damaged beyond repair. Thus, in the parish of Campsie in 1703, Malcolm Wilson, named as father by Isobell Boyd in a case of fornication, asked to take an oath but then changed his mind

"because such who in the like case had given their oaths, tho' ever so innocent were by the most part

reputed guilty and so their credit for
ever broke."²⁵

Even if, despite all these considerations the man was still willing to swear, the kirk session could refuse to let him do so: for example Kilsyth session, when James Baird in Craigstoun offered to purge himself of guilt with Janet Graham, refused

"becos of pregnant presumptions of his guilt
and his known laziness."²⁶

As a consequence of all these elements the actual taking of oaths of purgation were rare: of the 1,951 defendants in fornication cases studied only 13 purged themselves by oath (see table p. 104 below).

Very few cases of fornication did not have at least one of the features mentioned earlier. There were two reasons for this. In the first place, the rules of evidence applied by church courts were very strict and this meant that in the absence of pregnancy it was very difficult to prove fornication, even when circumstantial evidence was very strong: in Airth in 1661 John Campbell, miller, and Margaret Horne were found naked together in bed and Campbell "did grant he was in bed playinge" but both denied fornication and in the event were only convicted of the lesser offence of scandalous carriage.*²⁷ Secondly it is clear that one of the main motives for prosecuting fornications was the need to provide support for the child and to prevent its death through neglect or its becoming a burden upon the parish. This is clear both from the text of sentences, which prescribe support be given by the father, and from the cases where the mother or the session pursue a father for not

* For which see below pp. 90-91

giving support.²⁸ In the absence of a pregnancy the pressure or need to prosecute was less. The few cases which were prosecuted without a pregnancy occurring all derived from either a voluntary confession or from the parties being found "in the verie act of uncleanness" as one session put it. Voluntary confessions, sometimes by the woman alone, sometimes by both parties, only appear after the 1690's and probably reflect a growth in lay piety at the start of the eighteenth century. In a few cases however the confession was motivated by spleen on the part of a jilted lover. Thus in 1698 Sarah Nimow confessed fornication with her master William Binny in an attempt to stop his marriage, while in 1668 in Airth Margaret Gray was successful in stopping Alexander Miller's marriage by a similar ploy.²⁹ Cases of people being caught 'in flagrante' usually involved long, detailed and precise testimony by the witnesses in order to prove actual copulation: so St. Ninian's Kirk Session records for 1672 contain the case of Marion Brown and Alexander Smith where William Ray deponed

"he saw the said Alexander in the barn lying on his back and Marion Brown lying above him, both of them in penetratio."³⁰

In Falkirk in 1706 two persons were "seen in the act through ane window" by several persons who all gave descriptions of what they had seen.³¹

Often a couple would marry before the pregnancy became obvious and led to prosecution. Their offence would then be discovered when the child was born early and they would be charged with the second main type of sexual offence, fornication ante-nuptial. Prosecutions for this were nowhere near as common as for pure fornication, as the tables show.

Given the proportion of brides who were pregnant in seventeenth century England, and assuming that similar circumstances occurred in Scotland, it would seem that many cases were never prosecuted. Evidence from session records supports this: thus in the record for 1647 the Falkirk session noted:

"in an affair of that kind (i.e. a child born early) they took the persons and laid the matter seriously home to their consciences, if they still persisted in their innocency it was done away with without further trouble."³²

The reasons for this reluctance to prosecute were clear, the difficulty of proof when a child was only slightly early and the absence of the pressing need to establish fatherhood and support for the child which applied in cases of fornication. It is probable therefore that only births which were markedly premature would lead to a prosecution and the testimony of the midwife was of great importance: in a case in St. Ninians in 1669 the midwife testified that the child had "come earlie and lacked nayles" whereupon the case was dropped.³³ Refusal to admit guilt was almost unknown in prosecuted cases of fornication ante-nuptial: of the 386 defendants named in the records not one chose to take an oath and only 7 denied the charge. The definition of fornication ante-nuptial was more wide-ranging than one might expect: so long as the couple were "proclaimed in order to marriage", i.e. banns had been read, a pregnancy would lead to charges of fornication ante-nuptial only. Also if cases of fornication were not prosecuted due to a vacancy in a parish any who had married by the time a new

minister was appointed would be charged with this rather than fornication.³⁴

The third main sexual offence, and the most serious by far, was adultery. This was defined, by various authors, as sexual intercourse between two people either or both of whom were married.³⁵ This was seen as a very serious matter indeed as it threatened the family and the inheritance of property. In fact, adultery cases which had certain features counted as 'manifest' or 'notour' adultery and were capital offences.³⁶ Such cases were rare however and, when they were prosecuted, were tried by civil courts, particularly the High Court of Justiciary. One reason for their rarity was that the points made in connection with the proof of fornication also applied to adultery: pregnancy or open and notorious relations had to exist before a conviction could be obtained. For this reason all but a handful of adultery cases involved a married man and a single woman: married women could claim any child was their husband's progeny. Where no child had been conceived but there were pregnant presumptions of guilt and clear evidence from witnesses the normal procedure was to forbid the couple to 'haunt each other's company' under pain of punishment as adulterers ipso facto.³⁷ As with fornication, being caught 'in the act' or voluntary confession would lead to prosecution but there was also another small group of cases which did not involve pregnancy but were prosecuted: these were cases where a woman had been deserted by her husband but could not prove that he had died. So, when in 1711 Joan Kilpatrick confessed to the minister and session of Buchanan that she was pregnant by Thomas Wilson, she was ordered to be punished as an adulteress.

"In regard the said Joan could produce noe certane documents of her husband's death."³⁸

This rule could work in the other direction: in 1702 Jean Buchanan in Falkirk gave birth to a child ten months after her husband had left for Virginia so she was charged with adultery. Then, six months later, news arrived of her husband's death on the voyage and her charge was reduced to fornication only.³⁹

Cases where fornication or adultery could not be proved but sexual misdemeanour was clear, together with a whole range of minor breaches of sexual morality, formed the last important form of sexual offence tried by church courts - scandalous carriage. This term covered a multitude of sins, from being alone with a member of the other sex overnight to walking around naked in broad daylight.⁴⁰ The commonest offences under this heading were actions which gave rise to a strong suspicion of fornication, such as the one described above, or being found together in bed.⁴¹ A small number, however, were cases arising out of complaints brought by women against men, accusing them of what would now be called 'sexual harrassment'. One of the best examples of this type of case took place in St. Ninians in 1699. The relevant item in the session minutes reads as follows:

"Janet Browne spouse to Robert Stevensone in Cambusbarron being summoned upon her complaint to the minister and compearing declared she was assaulted by one William Dowglas, a married man there, to ly with him three severall times and that he offered her a dollar and a plaid and entreated her to ly with him for Christ's sake and she

replying that it was a sin he answered
we shall pray to God for pardon.⁴²

This pattern, of women being sexually molested or harrassed and then complaining to the session and bringing a charge against the man, was also found elsewhere: the case of James Elis and Margaret Mclay at Campsie in 1709 followed an identical pattern while seven years earlier the Campsie session found one James Graham guilty of this charge by putting his hands up Janet Kincaid's petticoats.⁴³

Interestingly, in all such cases the man was convicted.

There were other sexual offences which came before the church courts but these were very rare and unusual. Incest, almost invariably meaning sexual relations between persons in the prohibited degrees, bestiality and sodomy did sometimes occur (though there were no recorded cases of sodomy in the Stirlingshire records examined for this thesis) but when they did they were almost always automatically referred to the civil magistrates for trial, as capital crimes.⁴⁴ Sometimes rather unusual and peculiar sexual offences came up, related often to the marriage customs which were only slowly dying out at this time. For example, the session records of Kilsyth for 1696 contain a clear case of wife-exchange and purchase, the minutes reading:

"that the said William Thomson told he had
exchanged his wife for the said James
Wallace his wife and had offered a black
mare in boot and vowed that night to lie
carnally with her at his fire."⁴⁵

There were also cases where events led to charges, or at least strong suspicions, of infanticide. Thus for example,

in Slamannan session's records for 1706 - 7 we have the case of Margaret Easton and William Binny. On 18th. October 1706 Margaret Easton was summoned before the session: she denied pregnancy and fled the parish, going to New Monkland. Then, on 22nd. January 1707 a dead child was found floating in the Eden river, messages were sent to get the woman and two days later she was handed over by the Sheriff of Hamilton. She then confessed adultery with Binny and to having given birth secretly to a still-born child which she had put into the water - after "she had used physick to make her part with the child." Both were sent for trial before the regality court at Falkirk.⁴⁶ Besides clear cut cases such as this there were others where a strong suspicion but no more existed.⁴⁷ These seldom produced a decisive result, but the church records, by refusing to 'lift the scandal' from such people and refusing them testificates could cause them at the very least great inconvenience.

Closely following sexual offences as an item of church court business were a range of related misdemeanours best classified as 'disorderly conduct' that is, conduct other than sexual wrongdoing which either violated Christian morality or gave offence to some principle of moral social order. The main varieties were sabbath breach, drunkenness and cursing and swearing: as the tables show the first of these, sabbath breach, was numerically the most important. The commonest form of sabbath breach found in the records studied was 'drinking in time of sermon' but almost any kind of activity on the sabbath other than divine worship, could

lead to prosecution.⁴⁸ Thus in Falkirk in 1704 seventeen people were charged with

"unnecessarily walking abroad in the fields
in company on the Lord's day."

while in 1706 the session of Baldernock noted that people

"between the first and second sermons do gether
together in twos and threes and entertain one
another with carnal and worldly discourse."⁴⁹

In fact the Kirk consistently enforced the biblical prohibition of journeys of more than half a mile except to worship on the sabbath.⁵⁰ Work of any sort clearly led to prosecution but so did playing games, fishing and even kissing one's wife.⁵¹ Acts of petty violence which took place on the sabbath also came under the sessions' jurisdiction as breaches of the sabbath: in Airth in 1661 one man was rebuked

"for his beating of his neighbour's heid on
the sabbath day."⁵²

In fact the session of Airth had several cases of violent affray of this sort to deal with during the 1660's, most of which took place in the kirk during service and one of which involved throwing a dog out of a prayer loft during the sermon!⁵³

The offence of drunkenness was much easier to define: as prosecuted by the church courts it meant manifest, public intoxication on a day other than Sunday.⁵⁴ (If a person became drunk on Sunday then the more serious charge of sabbath-breach took precedence). Cases of this sort were normally very brief as the person involved could not deny or resist the charge: if they did witnesses would be called and sworn who would most invariably give evidence which extracted a conviction. Sometimes a description of the

drunkard's state was given but this also was not common.⁵⁵ As mentioned later, the rate of prosecution for both sabbath breach and drunkenness tended to fluctuate quite markedly, as the modular tables show: this reflected the way in which prosecutions for these offences were often brought, as the result of investigative moves by the session elders which formed part of periodic moral 'purgings'.⁵⁶ The contrast with sexual offences was thus marked. There a pregnancy automatically led to prosecution by the courts but sabbath breach and drunkenness only led to the courtroom if a positive decision to prosecute was made by the Kirk, and if the act had been manifest and public, not private and concealed.

As well as sabbath breach and drunkenness the term 'disorderly conduct' has been used to describe various other offences, some of them rare, others exceptional, 'one-off' cases. An example of the latter occurred at St. Ninians in 1669 when John Robertsons's son was beaten before the session for playing with the Kirk's bible and breaking its clasps.⁵⁷ The most important of the 'rare' varieties of disorderly conduct were blasphemy and wife-beating. Blasphemy meant any assertion which denied God's existence, his attributes or put forward a heretical proposition.⁵⁸ The statement had to be made publicly but did not have to be said with serious intent: in Airth in 1662 a woman parishioner was charged for saying

"it was never a good world since there were
so many godlie folk in it."⁵⁹

The same session's records contain an example of the more serious type in 1668 when one John Penman was arraigned for

holding and arguing that women had no souls.⁶⁰ Wife-beating, for its part, was regarded as a serious offence and could arise out of either a complaint by the wife or reporting of the misbehaviour by neighbours.⁶¹ Perhaps to be accurate we should speak of spouse-beating for there are cases, from Stirlingshire and elsewhere of wives beating their husbands.⁶²

The third common form of 'disordely conduct' was cursing and swearing. This is a difficult offence to categorise as the distinction between it and blasphemy or slander was vague. In this thesis the only cases categorised as cursing were those so described by the sessions. The term cursing usually meant personal abuse of some kind or, as sessions often put it:

"filthie and abominable imprecations."⁶³

These cases often rose out of complaints made to the session by the abused party but they could also derive from reports made by bystanders or elders. In either case conviction could only be obtained through either a confession or sworn testimony so, again, most cases arose as a result of public acts. In most such cases the session records do not actually record the content of the abuse and foul language which had led to the charge but when they do we get both a vivid picture of the force and quality of popular speech and some idea of the variety concealed by the simple term 'cursing and swearing'. Sometimes it meant cursing in the literal sense, i.e. of wishing some ill fortune upon another person out of spleen.⁶⁴ This was serious because of the widespread belief that such curses had effect and so a reconciliation and recantation was important from the viewpoint of the victim. Sometimes the term was used to cover abusive and obscene language: thus in Falkirk in 1705 Katherine Jervey

complained against Margaret Johnstone there for saying

"Go in ye bugging bitch and eat your
turds awa from honest folk."⁶⁵

(This piece of vernacular demotic earned Margaret Johnstone a public appearance). If the accused party had directed their foul language at a member of their family, particularly a parent, then they were in extremely serious trouble: under Scots law cursing one's parents was a capital offence and such cases could be handed over directly to the civil magistrates.⁶⁶ For example four teenagers convicted in Kilsyth in 1707 of cursing their mother were told

"if they persisted in that wickednesse they
would be delivered up to the civil
magistrates, their offence being criminal
and capital."⁶⁷

One thing which did not however come under the rubric of cursing and swearing was calling people offensive names, such as thief, whore or witch, all seemingly common terms of abuse in Scotland at this time. Because of the implied element of accusation contained in such name-calling persons guilty of it found themselves charged instead with the third major category of offence, slander.

As the tables show, cases of slander were a frequent and regular item of church court business, though not as common as sexual offences or disorderly conduct. In Scotland the term slander was very wide-ranging, extending from detailed and specific accusations of wrongdoing to mere abuse and insult. In general anything spoken, and heard by bystanders, which could harm the good name or public image of a person could count as slander.⁶⁸ Given the type of society described earlier maintaining one's good name was of

great importance and rumour could damage it very severely. Even a casual accusation of wrongdoing, of theft or adultery for example could be picked up and amplified by the 'vox populi' if the slandered did not seek redress and restoration of their good name. This was true even of accusations made in the heat of argument. Unchecked rumour could lead to the emergence of what was called a 'fama clamosa' which would then lead the victim into appearances before courts, their loss of livelihood and even their expulsion from the community, whether barony or parish.⁶⁹ One case which shows how this could happen very clearly is recorded in the minutes of Buchanan session for 1714 and is worth quoting in full. On 21st. November 1714 Alexander Graham alias McGregor came to the session and told them that sometime earlier Robert McFarlane in Blaebochy had come to him and said that there was a fama clamosa that he (Alexander McGregor) was sleeping with his (Robert McFarlane's) wife. Robert McFarlane then told the session that he had heard the story from Katherine McFarlane who had heard it in turn from Ffinlay Kerr but believed that the person responsible for the slander was his own sister Janet McFarlane and her husband Gregor McFarlane.⁷⁰ Further investigation confirmed this and also implicated a neighbour.⁷¹ All three were made to publicly withdraw their accusation before the congregation as the three victims were all liable to be cited before both the Buchanan session and the Buchanan baron court, this being mentioned in the minutes. Session records almost always give details of the slander, often in detail and from this it is clear that the three commonest slanders by far were of sexual

wrongdoing, theft and of the use of spells. A typical slander entry is one from the records of Campsie for 1707 which reads:

"Comperit William Morissone for slander, by sayand that Mary Buchanan wife to John Reid in Milntoun could not be satisfied with three times as able men as were in all Kincaidland and that she was ane adulterous bitch and that her cuckold husband John Reid durst not pursue him for it."⁷²

Many similar examples could be given.⁷³ Sometimes the person accused of making the slander would reply that far from being a slander it was only a statement of fact.⁷⁴ They were then obliged to prove the truth of that assertion by calling witnesses while both they and the original pursuer for slander put down a 'deposit' of 40 shillings. The person who lost the case forfeited the 'deposit'.⁷⁵ It was rare for the accused to be able to prove the truth of their assertion - in fact there were only a few cases of this from the entire period studied.⁷⁶

It was not only the church courts which tried cases of slander - they often came before local baron and regality courts as well. In fact an aggrieved person had the option of taking his case in the first instance to either his landlord's court or the session of his parish. Session records often mention slander cases as having been referred from a local franchise court and often they were handed to the session straightaway by the civil magistrates. Evidence for this can also be found in civil court records: in 1682 the regality of Falkirk referred a case of slander

to the Falkirk session without coming to any conclusion on the matter.⁷⁷ Sometimes however the franchise court is recorded as having tried the case and come to a verdict before referring it to the session. Thus in 1706 William Graham appeared before the session of Kilsyth with an extracted verdict from the baron court of Kilsyth finding one John Marshall guilty of slandering him by saying he had beaten his wife to death with iron tongs: the session imposed an ecclesiastical censure upon Marshall.⁷⁸ Again sessions would sometimes refer a slander case to the civil court: Falkirk session did this in one case in 1650.⁷⁹ It seems that in such cases, in the event of a conviction, a civil penalty (a fine or a flogging) would be imposed by the civil court as punishment for the slander while the church court would impose an ecclesiastical penalty, the main effect of which would be to restore the pursuers good name before the entire congregation.⁸⁰ Why were some cases of slander tried in this co-operative fashion between civil and ecclesiastical courts while others were purely reserved to church courts? Examination of the details reveals the answer: all the cases which could be tried by a civil magistrate involved a serious and detailed accusation of some kind of criminal offence, such as theft, robbery or witchcraft. They thus came within the purview of civil courts as, in effect, accusations of crime rather than mere slander.⁸¹ Some such cases were tried simply by the sessions and did not involve a civil magistrate in his official capacity: as local magistrates were invariably session elders this was not always necessary. On the other hand there are no cases in the records of non-criminal slanders being tried by civil magistrates to a conclusion.

The fourth major type of church court business were cases which arose out of another case, involving a recalcitrant or troublesome offender. These have been described as enforcement and contumacy. Cases of enforcement arose when a session would be asked to enforce the decision of another court, often another session but sometimes a civil court. The commonest variety was cases where one session would be asked by another to make a parishioner return to the second session's parish to satisfy for an offence.⁸² Sometimes, where distance made this impracticable, they would be asked to carry out the sentence themselves.

Contumacy cases were more common. These were cases where a defendant proved recalcitrant and either refused to obey the session or persistently disobeyed its edicts. In such a case, as the table of results shows, the session had three main options open to it: referral to a civil magistrate, referral to the presbytery and banishment. As the table shows, the first was by far the most common, and it was also the most effective.⁸³ The third option also involved recourse to the civil power as it was they who would actually enforce the edict of banishment.⁸⁴ Such edicts could be enforced by recourse to one of the system's most powerful weapons: the testificate.⁸⁵ This was a note, drawn up by the minister and session of a parish, given to a person who wished to move out of the parish and containing a description of their life and carriage while they had been residents within the parish. This included accounts of any appearances they might have made before the session and their outcome. No-one who was under process before a session or had not complied with a verdict could be given a testificate. The other side of the coin was that without such a document

you could not reside within any other parish.⁸⁶ So to be banished without being given a testificate was to be condemned to a life of vagabondage and an early death. Also, sessions were not obliged to accept a testificate - thus in 1719 Slamannan session refused to accept a testificate produced by one John Tyler from Muiravonside which stated he was under a 'fama clamosa' of stealing sheep.⁸⁷ The general question of the way in which civil magistrates supported sessions against obdurate offenders is discussed in greater detail below pp. 138-41.

The second option, of referral to the local presbytery, was also much used, and provided one of that body's main functions. Presbyteries, as they evolved, came to have three main functions: the maintenance of orthodoxy among ministers and elders, running much of the administration of the Kirk where religious matters such as fasts, the holding of communion and teaching and preaching were concerned and the carrying out of certain aspects of godly discipline. In their early days, before sessions were widespread, they carried out most of the actual discipline but gradually became confined to serious cases and contumacy.⁸⁸ All cases which carried a maximum penalty of excommunication were automatically referred to the presbytery, which then actually imposed whatever sentence was given. Only presbyteries could impose the sentence of excommunication, a power which as the tables show, they used very sparingly after 1640, in Stirlingshire at least.⁸⁹ Apart from grave cases the session would sometimes refer cases which were singular or awkward in some way, such as the case of Janet Dick in Airth, a seemingly clear cut case of a virgin birth.⁹⁰

These two types of case made up most of the

presbyteries disciplinary business, as the table shows. In cases where a defender was proving contumacious, the presbytery was also resorted to, to bring its greater moral and actual authority to bear. It was usually effective as people seem to have found the experience of an appearance before a presbytery intimidating: defenders who had resisted pressure from sessions for a long time would cave in swiftly after such an experience.⁹¹ Above the presbytery there was yet another church court, the synod but these were used only for very exceptional cases (such as that of Janet Dick) and cases involving people of the highest social rank.

Besides these four main categories, of sexual offences, disorderly conduct, slander and enforcement and contumacy, the church courts did try other types of offences which were not deemed common or important enough to warrant a separate category and have therefore simply been combined under the heading 'other'. These were, inevitably, very variegated. There was irregular marriage, meaning that the parties had been married without going through the proper procedure. This was very rare before 1690 (only 6 cases) but common thereafter, due to the existence of numbers of dispossessed Episcopalian clergy willing and able to perform such marriages.⁹² A related offence was backgone marriage, that is breach of promise to marry after the banns had been read.⁹³ Another, important, offence was harbouring vagrants and sturdy beggars, a matter which concerned church courts as much as any other jurisdiction.⁹⁴ During the 1640's and 1650's in particular, but at other times as well, there were attacks upon folk customs and certain aspects of popular culture, in particular the penny wedding. This was a form of

celebration where all the guests gave a small sum of money to the couple, nominally a penny, and where according to the session of Gargunock "manifold sins and abuses" took place.⁹⁵ Acts were passed against penny weddings by both the Gargunock and Falkirk sessions during the 1640's, both sessions being particularly concerned to stamp out the use of pipers.⁹⁶ Another aspect of folk belief which sessions attacked with great vigour was the practice of resorting to 'fairy wells' and other places haunted by the 'fair folk' for the purpose of curing sickness.⁹⁷ Linked to this was the peculiar and interesting offence of charming. This meant resorting to a wizard or white witch to procure spells or charms.⁹⁸ People could also be charged with providing charms and such charges could, and often did, lead to a full-fledged charge of witchcraft.⁹⁹ Study of cases of charming casts some light on the question of folk beliefs and their relation to the concept of witchcraft, as well as some idea of how and why some people rather than others came to be charged as witches.*

What then were the verdicts and sentences handed down by church courts for all these offences? As the tables show, only a few defendants were ever acquitted. This reflected the nature of the church courts' business and the way cases arose. In sexual cases conviction was almost universal for the reasons given, of pregnancy and notoriety. The offences of slander and disorderly conduct were only prosecuted when public and flagrant, so that conviction was easy and the same was true of most of the 'other' offences. People were normally only brought before a church court when their guilt was manifest. Once convicted, defendants faced

* The subject of witchcraft and charming is discussed at greater length below in Appendix number 6.

Fornication

<u>Result Of Case</u>	<u>Number Of Defendants</u>
Three Sabbaths Appearance	1317
Six Sabbaths Appearance	142
No Recorded Result	138
Referred To Other Kirk Session	78
Diet Deserted	68
Referred To Presbytery	58
Acquitted/Not Proven	29
Nine Sabbaths Appearance	28
One Sabbaths Appearance	24
Purged By Oath	13
Indefinite Appearance	12
Other	12
Sessional Rebuke	9
Bound Over	7
Banished	5
Referred To Civil Judge	4
Public Rebuke	3
Put In Jougs	2
	———
<u>TOTAL</u>	1951
	———

Fornication Ante-Nuptual

<u>Result Of Case</u>	<u>Number Of Defendants</u>
One Sabbaths Appearance	296
Three Sabbaths Appearance	48
Sessional Rebuke	8
Acquitted	6
No Recorded Result	6
Diet Deserted	5
Referred To Presbytery	5
Public Rebuke	3
Six Sabbaths Appearance	3
Referred To Civil Judge	2
Referred To Other Kirk Session	2
Fined	1
Other	1
	—
<u>TOTAL</u>	386
	—

Adultery (Kirk session cases only)

<u>Result Of Case</u>	<u>Number Of Defendants</u>
Indefinite Appearance	106
No Recorded Result	53
Referred To Presbytery	28
Diet Deserted	11
Nine Sabbaths Appearance	9
Excommunicated	6
Acquitted	5
Purged By Oath	4
Referred To Kirk Session	4
Referred To Civil Judge *	3
Three Sabbaths Appearance	3
Banished	2
Other	2
Six Sabbaths Appearance	2
One Sabbaths Appearance	1
	—
<u>TOTAL</u>	239
	—

* This figure only refers to those cases where the final decision in the church court was to send the case to the civil authorities. Many cases where a verdict was reached by session and presbytery were later delated to the High Court.

Scandalous Carriage

<u>Result Of Case</u>	<u>Number Of Defendants</u>
Sessional Rebuke	80
One Sabbaths Appearance	33
Public Rebuke	31
No Recorded Result	21
Bound Over	12
Acquitted	12
Diet Deserted	10
Other	8
Banished	6
Referred To Other Kirk Session	6
Referred To Civil Judge	6
Referred To Presbytery	3
Three Sabbaths Appearance	3
Not Proven	3
Purged By Oath	3
Put In Jougs	1
Six Sabbaths Appearance	1
Fined	1
	—
<u>TOTAL</u>	240
	—

Incest

<u>Result Of Case</u>	<u>Number Of Defendants</u>
Referred To Civil Judge	6
Referred To Presbytery	4
Indefinite Appearance	3
Three Sabbaths Appearance	2
No Recorded Result	1
	—
<u>TOTAL</u>	16
	—

Wife Beating*

<u>Result Of Case</u>	<u>Number Of Defendants</u>
Public Rebuke	9
Sessional Rebuke	6
Other	2
Referred To Civil Judge	1
One Sabbaths Appearance	1
	—
<u>TOTAL</u>	19
	—

* One of these was actually a case of 'husband beating' - see Records Of Kirk Session Of Muiravonside SRO CH2/712/1 12th. September 1697. Case of Janet Murehead.

Cursing & Swearing

<u>Result Of Case</u>	<u>Number Of Defendants</u>
Sessional Rebuke	128
Public Rebuke	74
No Recorded Result	10
Acquitted/Not Proven	9
Arbitration Arranged	9
Bound Over	4
Referred To Civil Judge	4
Other	4
Fined	2
Indefinite Appearance	2
Put In Jougs	2
Excommunicated	1
One Sabbaths Appearance	1
Referred To Presbytery	1
	—
<u>TOTAL</u>	251
	—

Drunkenness

<u>Result Of Case</u>	<u>Number Of Defendants</u>
Sessional Rebuke	206
Public Rebuke	82
Acquitted/Not Proven	15
No Recorded Result	7
Diet Deserted	5
Put In Jougs	3
Bound Over	2
Excommunicated	2
Fined	1
One Sabbaths Appearance	1
Referred To Civil Judge	1
Referred To Presbytery	1
	—
<u>TOTAL</u>	326
	—

Sabbath Breach

<u>Result Of Case</u>	<u>Number Of Defendants</u>
Sessional Rebuke	224
Public Rebuke	189
Acquitted/Not Proven	41
Bound Over	24
No Recorded Result	21
Put In Jougs	14
Diet Deserted	8
Referred To Civil Judge	6
Referred To Other Kirk Session	6
Fined	2
Other	2
One Sabbaths Appearance	1
Purged By Oath	1
	—
<u>TOTAL</u>	539
	—

Disorderly Behaviour

<u>Result Of Case</u>	<u>Number Of Defendants</u>
Sessional Rebuke	39
Public Rebuke	30
Bound Over	3
Referred To Presbytery	3
Acquitted	1
Diet Deserted	1
One Sabbaths Appearance	1
Referred To Civil Judge	1
No Recorded Result	1
	—
<u>TOTAL</u>	80
	—

Slander (Kirk session cases only)

<u>Result Of Case</u>	<u>Number Of Defendants</u>
Public Rebuke	107
Sessional Rebuke	77
No Recorded Result	26
Acquitted/Not Proven	23
Referred To Civil Judge *	16
Arbitration Arranged	8
Fined	7
Diet Deserted	6
Put In Jougs	5
Bound Over	3
Referred To Other Kirk Session	3
Referred To Presbytery	3
One Sabbaths Appearance	2
Banished	1
Three Sabbaths Appearance	1
Indefinite Appearance	1
Other	1
	—
<u>TOTAL</u>	<u>288</u>

* There were 14 cases of slander sent by secular courts to the church courts.

Contumacy (Kirk session cases only)

<u>Result Of Case</u>	<u>Number Of Defendants</u>
Referred To Civil Judge	141
Referred To Presbytery	52
Referred To Other Kirk Session	20
Banished	14
Other	14
Public Rebuke	9
Excommunicated	6
Bound Over	6
Sessional Rebuke	4
No Recorded Result	3
Three Sabbaths Appearance	1
	—
<u>TOTAL</u>	270
	—

Enforcement

<u>Result Of Case</u>	<u>Number Of Defendants</u>
Referred To Civil Judge	14
Referred To Other Kirk Session	11
Banished	9
Other	6
Public Rebuke	5
Bound Over	2
Excommunicated	1
Indefinite Appearance	1
Purged By Oath	1
No Recorded Result	1
Sessional Rebuke	1
Six Sabbaths Appearance	1
	—
<u>TOTAL</u>	53
	—

Irregular Marriage

<u>Result Of Case</u>	<u>Number Of Defendants</u>
Sessional Rebuke	98
Public Rebuke	28
One Sabbaths Appearance	10
No Recorded Result	5
Referred To Presbytery	4
Fined	4
Other	3
Acquitted	2
Referred To Other Kirk Session	1
Referred To Civil Judge	1
	—
<u>TOTAL</u>	156
	—

Harbouring Vagrants

<u>Result Of Case</u>	<u>Number Of Defendants</u>
Sessional Rebuke	32
Fined	19
Acquitted/Not Proven	5
Bound Over	4
Diet Deserted	3
Public Rebuke	3
Other	3
Referred To Other Kirk Session	2
Referred To Civil Judge	1
No Recorded Result	1
	—
<u>TOTAL</u>	73
	—

Charming (Kirk session cases only)

<u>Result Of Case</u>	<u>Number Of Defendants</u>
Sessional Rebuke	20
Public Rebuke	6
Referred To Presbytery	4
No Recorded Result	3
Referred To Civil Judge	2
Diet Deserted	2
Banished	1
	—
<u>TOTAL</u>	38
	—

Blasphemy

<u>Result Of Case</u>	<u>Number Of Defendants</u>
Public Rebuke	7
Indefinite Appearance	2
No Recorded Result	2
Sessional Rebuke	2
Put In Jougs	1
One Sabbaths Appearance	1
	—
<u>TOTAL</u>	<u>15</u>
	—

Dishanting Ordinances

<u>Result Of Case</u>	<u>Number Of Defendants</u>
Sessional Rebuke	35
No Recorded Result	14
Public Rebuke	8
Acquitted	3
Excommunicated	3
Referred To Presbytery	3
Bound Over	2
Others	5
	—
<u>TOTAL</u>	<u>73</u>
	—

Back-Gone Marriage

<u>Result Of Case</u>	<u>Number Of Defendants</u>
Fined	19
Other	5
Referred To Other Kirk Session	5
Acquitted	4
No Recorded Result	2
Referred To Presbytery	1
Sessional Rebuke	1
Compensation Paid	1
	—
<u>TOTAL</u>	38
	—

N.B. This total undoubtedly grossly underestimates the number of people brought before sessions for this offence. Many sessions did not record such items in their minute books yet other entries show that they were happening. They may have been recorded elsewhere.

the possibility of any of severe sentences but in practice only a few were used. The pattern of use and relation of punishment to crime was standardised amongst the sessions and did not vary much over time after 1660. There may well have been however a clear change in the pattern of sentences at that time, from a harsh to a more lenient policy.

During the period of this thesis there were four main ecclesiastical punishments. The mildest was the sessional rebuke, meaning a severe warning and lecture delivered to the guilty party in private before the session.¹⁰⁰ This was used for mild cases of slander, first instances of disorderly conduct and minor cases generally. So for example, of the 240 persons charged with scandalous carriage at this time, 80 received a sessional rebuke. This penalty was also used where there were extenuating circumstances such as extreme youth or unsound mind. The second level of punishment was the public rebuke. This was a lecture and reproof like the sessional rebuke, but was delivered in public, during divine worship. The offender had to receive it sitting on a special bench at the front of the congregation or, more often, standing up in front of the pulpit.¹⁰¹ According to eighteenth century accounts these rebukes could be very long and vitriolic and the event was popularly known as the 'wee sermon.' The party, having taken the rebuke, had to ask the minister and congregation for pardon and forgiveness. This punishment was given for the more serious cases of disorderly conduct, recidivist cases, most cases of scandalous carriage and for the larger part of slander cases. This last was because public rebuke restored the pursuer's good name in a more complete way. There was no real difference as to the sentences given for men and women. For all offences

the proportion of each sex sentenced to the various penalties was the same. There was thus no tendency to punish women more lightly than men, or, conversely, to treat them more harshly. Nor does there appear to have been any received idea that certain offences (such as intoxication) were particularly reprehensible in women.

However, the most commonly used punishment was public repentance. This meant appearing before the congregation on the place or stool of public repentance - often a stool designed to fall over if the penitent did not sit upright, sometimes a stone pillar. This was the practice also used by English church courts but it seems from the evidence to have been much less effective there. For scandalous carriage bordering upon fornication or for fornication ante-nuptial one sabbath's appearance on the place of repentance was normal. For a fornication three appearances was the norm with relapses appearing six times, tri-lapses nine times. Quadrilapses and adulterers appeared an indefinite number of times. They, and tri-lapses also, appeared dressed in sackcloth and were forced to stand barefoot in the church door from the second to the third bell, while the congregation went past them into the Kirk, before entering the full Kirk to take up their position. As with the other sentences, this was applied even-handedly as regards men and women. The most serious penalty, excommunication, was applied very rarely and with great reluctance, to a few very grave cases (such as a seventy year old man in Killearn who had committed at least five fornications, though he could not be sure)¹⁰² or to particularly recalcitrant people. It came in two forms, the lesser which meant exclusion from

communion and the greater which, in theory, excluded one from all civil society.

As well as rebukes and public repentance, church courts had the power to impose civil penalties, meaning in most cases fines. The extent and way in which this power was used varied considerably. For sexual offences the level of fines was fixed by parliamentary statute at £5 for a single fornication, £10 for a relapse and so on to £40 for a quadrilapse or adultery. For cases of disorderly conduct or slander, a sum up to 50/- could be levied at the discretion of the session. In theory all miscreants had to satisfy 'in penalty and repentance' and could not be absolved until this was done but in actual fact sessions found it impossible to enforce this and tended to vary the level of the fine or even omit it entirely to make the penalty fit the ability to pay.¹⁰³ Thus in one fornication case the Kilsyth session recorded that the woman "paid nothing in respect of her povertie."¹⁰⁴ This problem of poor people being unable to pay eventually led the session of St. Ninians to abolish the requirment to pay a fine.¹⁰⁵ Other parishes such as Campsie and Killearn however continued to levy fines right up to 1750. This difference in attitude sprang from the differing financial position of the parishes. In places like Campsie and Killearn the fines were the main source of money for the poor-box while St. Ninians, a large and wealthy parish, had large sources of income from other areas, such as the leasing of mort-cloths.¹⁰⁶

There were yet other penalties which church courts could impose but these were very seldom used during the period of this study. They could make people stand in the kirk door chained to the joughs, rings set in the stone doorway.¹⁰⁷ Alternatively offenders could be made to stand in public at the local mercat cross wearing a placard setting

out the details of their offence. As mentioned earlier, they could banish obdurate persons and they could also impose other civil penalties such as imprisonment and corporal punishment.¹⁰⁸ As the tables show, these sentences were almost never used and in fact all but a few of the cases where they were used came from the 1640's and 1650's. During that period a policy of harsh sentencing was followed, if the minutes of Falkirk session are any guide: in 1642 they sentenced one man to imprisonment for sabbath breach, imprisoned a woman for 'mocking of pietie' six years later and in 1649:

"ordeaned that all those who wer awand penaltie
yt after the bailyies had made requisition
thereof if they did not pay they should be
incarcerat till they did make payment thereof"¹⁰⁹

This rigorous policy reflected in part the influence of militant covenanters at the time of the Scottish revolution but it seems to have also been the last expression of a more militant approach by the Kirk. The published records of the earliest presbyteries and sessions show that in the years just after 1587 such harsh and severe sentencing was normal rather than otherwise and there does seem to have been a clear shift away from this by 1660 at the latest.¹¹⁰ When the shift took place is not clear and further research is needed to establish the facts of this matter.

What though was the purpose of these sentences particularly the mainstream ones used after 1660? A clue is provided by the terminology of the church courts with their persistent use of the terms like penance, contrition and confession. The system of rebukes and public appearances

was a public, protestant version of the confessional and served the same purpose - that of purging the party of sin while strengthening certain mental attitudes and modes of behaviour in them.¹¹¹ The important difference was the public nature of most church court sentences, performed as they were before the congregation. Their purpose was to control certain aspects of popular behaviour, by encouraging some types of behaviour and positively discouraging others not just in the guilty individuals but among the community at large. Their purpose was in the immediate term to control and check, in the long term to reform and change, popular lifestyles. At first sight it would appear that the main agent was shame rather than guilt and, indeed, the shame of the public appearance or rebuke was undoubtedly a powerful force. Yet close examination of the records reveals that the main purpose of the exercise was the inculcation of a sense not of shame but of guilt, in both the offender and the audience. The main concern of the sessions and presbyteries was that the penitent should be just that and should have what was called a 'sense of their sin'. If the offender was thought to lack this they would not be allowed to go through the rebuke or appearance but would rather be left 'lying under scandal'. As Henderson puts it the Church courts thought they were doing offenders a favour by making them appear in public.¹¹² Certainly it was no favour to be left 'under scandal': such persons could not get a testificate, take oaths or, most importantly, get any sort of poor relief. Thus in Gargunnock in the case of one Thomas Turnbull in 1654:

"in regard of his ignorance and stupidity the Minister was appointed to confer with him that he might bring him to some sense of his sin before he were put to the publick repentance"¹¹³

While in Muiravonside in 1707 the session refused to absolve William Makellrae because of his "lacking any sense of his sin"¹¹⁴ Persons who went to public appearance but then either refused to admit guilt or treated the matter with levity also brought down the courts' wrath on themselves.¹¹⁵ At St. Ninians in 1669 Isobell Madrell on her public appearance for slander denied her fault and insulted the witnesses. As a result "she was for a considerable time kept in prison" and made to stand at the church door with a placard for several sabbaths.¹¹⁶ Again, in Falkirk in 1701, a woman was refused absolution because she refused to speak and confess her guilt while appearing for fornication.¹¹⁷ The aim of all this was clearly to awaken a sense of guilt in the convicted person and to prod the consciences of the audience.

One group however who escaped lightly where punishment was concerned were the upper classes. Even a cursory study of church court records shows that aristocrats, when charged at all, were often treated very leniently. Sometimes they would simply not be pursued by the session but allowed to escape scatheless, so for example in fornication cases an aristocrat might be named by a woman but no further mention would be made of him. On the other hand most sessions did try to prosecute delinquent members of the upper class but they were often forced to accept that these people should get a lighter penalty.¹¹⁸ For example in St.

Ninians in 1673 Robert Rollo of Powhous was convicted by his own confession of fornication. He persistently refused to appear in public and eventually in 1680 satisfied by paying £40 and receiving a private rebuke.¹¹⁹ In Killearn John Grahame of Killearn was let off making a public appearance in return for a large contribution to the poor box.¹²⁰ This type of thing is hardly surprising, indeed some would be more impressed by the fact any sort of penalty was imposed. The one time when aristocrats were forced to accept treatment like that meted out to their inferiors was during the covenanter revolution of the 1640's, as is clear from the records of Falkirk session for that time.¹²¹

In fact aristocrats were distinctly less likely to be charged with several classes of offence anyway and the examination of the records reveal a clear class bias to the operations of these courts. This raises the question of what sort of people were being brought before church courts - were they a representative cross-section of Scots society? The answer must be no. Unfortunately, most sessions were irregular when it came to recording the social status and occupation of defendants but some sessions, notably Killearn and Muiravonside, were more scrupulous. Moreover lairds were always described as such and landowners are instantly recognisable when they occur in the records by being described as 'of (place name)' rather than 'in'. Examination shows that a surprising number of gentry and aristocracy were arraigned before church courts but after 1660 this was invariably for sexual offences, normally getting their maidservants pregnant. There are no cases after 1660 of gentry or aristocrats being charged with disorderly conduct or slander. Apart from gentry, the social group which made

up the largest number of sexual offenders were servants: in Killearn 70% of sexual offenders were described as 'servant to...' Given that the overwhelming majority of servants were young and the ban on their marrying while servants this is hardly surprising. What it does point up is the way in which not all sexual misdemeanours were prosecuted but only those leading to pregnancy in an unmarried woman or those few 'public' cases. Adultery cases seem to have had a much more mixed bag of defendants but because of the smaller number of cases and paucity of records of status a definite analysis could not be made. The defendants in cases of slander, disorderly conduct and 'others' were almost all distinctly lower class i.e. tenants, sub-tenants and artisans or craftsmen. In Muiravonside over 80% of the defendants in such cases were described as 'tenant' or as being craftsmen of some kind.¹²² Again there is difficulty in assessing how typical this was because of the uneven quality of records but a subjective impression is that this sort of proportion was found generally. It would appear therefore that the church courts were mainly concerned to control the behaviour of the poorer majority rather than of society in general.

So far as the sexual composition of the defendants was concerned a clear distinction can be drawn between various types of offence. In sexual cases and irregular marriage, for obvious reasons, there were almost equal numbers of male and female defendants. On the other hand the picture was very different for most kinds of disorderly conduct (see tables). As may be seen, sabbath breach was very much a male offence: in Airth of the 91 persons charged with this offence 75 were men and only 16 women.¹²³ The same can be said of

drunkenness and, overall, of cursing and swearing, though there were some sessions where women were more likely to be charged with this. In slander cases the division was more equal but there were still more male than female defendants. Why this pattern should occur is hard to say: it might be due to men and women having different lifestyles or on the other hand it may be due to a policy of not prosecuting married women, their husbands being seen as responsible for them. Unfortunately there is no way of telling what proportion of women defendants in non-sexual cases were single and so testing the second proposition.¹²⁴ But that such a difference exists there is no doubt. Whether it reflects a real difference in the behaviour of men and women or only a different prosecution policy by the courts cannot be determined at this stage.

One very important question is that of recidivism. What proportion of church court defenders were repeaters, multiple offenders? Again it is difficult to answer this question. In the first place the courts themselves may not have known if a defendant had committed an offence in another parish. Secondly there is a difficulty in interpreting the records: because there were so few personal names available in early modern Scotland many people had the same name and were distinguished by reference to their place of residence or their occupation. So for example a man would be described as "Alexander Henderson, cordoner in Jaw." Unfortunately sessions did not always record this information and even when it is given, it is very difficult to check. However by using computer technology some tentative conclusions can be made.¹²⁵ Firstly, as the crime and results tables suggest, recidivism in sexual offences was rare and mostly confined to women -

for the simple reason that they were the more liable to be caught. However people convicted of sexual offences were often also charged with other misdemeanours while some persons appeared regularly for offences of disorderly conduct. The general picture which may be gained from the records is this: most defendants were single offenders but there was a small, delinquent minority who were multiple offenders particularly for offences such as sabbath breach and drunkenness rather than sexual offences.

How were these people rather than others brought to trial? As the modular tables show, the rate of prosecutions in sexual cases was roughly constant and the main cause of marked increase was the presence of soldiers. There was a slight decline in the number of sexual cases per capita but, as argued later, this was due more to changes in the religious allegiance of parishioners rather than in the actual incidence of such offenders. In sexual cases, as mentioned above, the main cause of indictment was the physical evidence of pregnancy which always led to trial. For other types of offence two factors were important: The offence had to be committed openly, in front of other people and it had to be taken note of by the local session. In other words only blatant offences were prosecuted in the first place and even then the rate of prosecution varied according to the will of the session. Looking at the rates of prosecution over time, periods of severity and laxity can be distinguished, with the periods of severity marked by 'purges' when elders would go out and search out cases of disorderly conduct and slander producing a sharp increase in prosecutions.¹²⁶

As stated above, the 1640's and 1650's were a period of severity with very high levels of prosecution: the records

of Falkirk session show this, with more people prosecuted in 1640 than in several years together after 1700. During the period before 1652 the Kirk was controlled by militants, backed by the full power of most of Scotland's ruling class, with Parliament giving statutory force to a campaign of moral renewal.¹²⁷ After the disasters of Dunbar and Worcester this all changed and for some years during the Cromwellian occupation the church courts were in an invidious position.¹²⁸ The English authorities blamed the presbyterian clergy for much of the turmoil of 1647 - 52 and were resolved to break their political power. In line with this aim, and as part of their general programme of legal reform, the Justices of Peace were given jurisdiction over many moral offences which sessions would have tried and the power to impose civil penalties for such offences was taken away from the sessions and presbyteries and given to the J.P.'s.¹²⁹ The records of Gargunnock and Falkirk sessions show that the new practice was for the session to try a person first and impose an ecclesiastical penalty before referring them to the Justices who would then collect the civil punishment.¹³⁰ The records of Gargunnock explicitly state that they had not imposed fines or civil penalties since those powers were given to the Justices.¹³¹ The Justice of Peace court records which have survived show that they were indeed mostly concerned with the same kind of business as church courts.¹³² In theory this competition together with the transfer of power and the granting of religious toleration should have had a disastrous effect upon the sessions. Yet the evidence, from Stirlingshire and elsewhere, is that this did not happen. Certainly in Falkirk, there was a very sharp fall in the total volume of business conducted by the session after 1652 but this was

probably due to circumstances peculiar to Falkirk such as the loss of over half the session through death, exile and resignation. In Stirling, Gargunnoch and St. Ninians the sessions went on much as before, a pattern found in all other parts of Scotland as well. Perhaps the decline would have taken place if the occupation had been prolonged but on balance this seems unlikely. As Smith has pointed out in a recent work, the sessions in particular were an essential part of the machinery of government, for an alien regime such as Cromwell's even more than for a native government.¹³³ The church courts were the only institutions through which a national policy could be applied at grass roots level with a reasonable degree of uniformity. The Kirk sessions were essential for purposes of social control, being the only effective institution which was both national and local. Given this, and the perceived need to conciliate the traditional rulers described earlier, there was no way that the English administration could afford to attack the church courts in a serious fashion. The clergy were indeed excluded rigidly from political power but were otherwise allowed to look after their own affairs and to come to amicable arrangements with local J.P.'s.¹³⁴

Following the restoration of the monarchy came the introduction of episcopacy, marking the start of a period of intense and bitter struggles to gain control of the Kirk which culminated in open civil war during the 'killing time' of the 1670's and 1680's.¹³⁵ At first however the episcopal system worked very well and efficiently with strong support from the ruling class, and hence the civil power. The period of about 1660 to 1665 was marked by a sharp increase in prosecutions, as the records of Airth, St. Ninians and Stirling

presbytery show.¹³⁶ Interestingly, this was also the period which saw the last great nationwide witch-hunt, suggesting that the link found by Soman between increased prosecution for moral offences and witch-hunts can be found in Scotland as well as France.¹³⁷ However as the 1670's went by opposition to the established Kirk grew and the effectiveness of the church courts was correspondingly diminished. The records of St. Ninians session for the 1670's contain a series of prosecutions for 'dishanting of ordinances' (i.e. refusing to attend church services) and for attending conventicles.¹³⁸ By the 1680's parishioners were increasingly reluctant to accept the authority of the session and recourse to the civil magistrates to enforce the Kirk's will became more and more frequent. The number of people referred by St. Ninians to the civil magistrates between 1678 and 1688 was three times what it had been for the previous ten years. Then, in 1688 the revolution took place and presbyterians set up a rival session which met in a meeting house at Bannockburn. Between then and the final end of Episcopacy in 1690 the authority of the church courts virtually collapsed: as the Episcopalian session sadly observed in 1689:

"none almost now give obedience in respect of the division in the Kirk and troubles in the land."¹³⁹

Then, in 1690 and 1691, a massive purge of episcopalian ministers took place: in Stirlingshire 21 out of 24 were removed and in the presbytery of Dunblane only one minister survived. The vacancies which resulted often lasted for many years, in Airth, for example, for eleven years and the disruption was considerable everywhere: often the episcopalian ministers removed the session records and kept them when

purged, so greatly hindering their presbyterian successors. Moreover, public opinion did not always support the presbyterian purge; in Alva and Kilsyth there was strong opposition.¹⁴⁰ These disaffected episcopalians remained a substantial minority in many parishes after 1690, ministered to by ex-clerics such as Gilbert Muschet, ignoring the established Kirk while attending their own meeting houses and forming what contemporaries called 'the Kirk invisible'.¹⁴¹ Many of these episcopalians were gentry and aristocrats and the events of 1688 - 91 opened up a rift between the Kirk and a large part of the upper class which was never healed. This inevitably weakened the links with the civil power and generally reduced the power of the Kirk, a position recognised by the Toleration Act in 1712.

However, at first sight this weakening of the Kirk and its courts were not apparent. The period from 1695 to about 1705 saw a serious, and partly successful, attempt to restore the position of the church courts by way of another great crackdown. This was particularly noticeable where sabbath breach was concerned.¹⁴² This period also saw an increase in lay piety and 'godliness', if contemporary accounts are to be believed and there is some evidence for this in the session records.¹⁴³ Then, as the modular tables show, there was a dramatic fall in the total volume of church court business, caused by the virtual disappearance of non-sexual cases. There was thus sudden and dramatic shift from a situation where sexual and disorderly conduct cases were roughly equal in number, to one where the former were overwhelmingly predominant. The only parish studied where this did not happen was Kilsyth, though why this should be so is

not clear. The exact date of this change varied from one parish to another but took place between 1703 and 1709, with 1705 the crucial year. Along with this change in the composition of business went a general decline in effectiveness, particularly in the populous parishes of the eastern half of the shire such as St. Ninians, Falkirk and Muiravonside. This showed itself in the increasing difficulties these sessions had in enforcing penalties in sexual cases where the male defendant was concerned.

Why though should these two changes have taken place when they did? Two sets of reasons may be given, not mutually exclusive. In the first place the whole position of the church courts was gravely weakened by various changes which took place in the years after 1690, in society at large and the rest of the legal system in particular. As mentioned earlier, the events of the 1680's had weakened the links with the ruling class and the cultural development of that class after 1690 increased the distance between Kirk and ruling elite. This period also saw a sharp change in the relationship between local franchise and central royal courts which aggrandized the second at the expense of the first.¹⁴⁴ Since, as argued later, it was the private courts which provided most of the backing for the church courts this could not but fail to have serious consequences. At the same time there was a growth in the power and importance of J.P.'s who increasingly did come to handle cases which had formerly gone before sessions. Moreover, the civil courts generally became much less exercised by moral offences of all kinds and after one last great 'cleaning-up' operation in 1708 - 9 took no further interest in them. This sharp, and quite conscious, shift of policy both removed a back-up from church court prosecutions

and meant that the pressure to prosecute many offences disappeared. Finally under this heading, the church courts lost their power to impose civil penalties in 1696 and this may have eventually affected the composition of their business by removing a major incentive to prosecute non-sexual cases.

The second set of reasons may be described as the problems of success. Arguably the years after 1695 saw a 'reformation of manners' with a marked increase in lay piety and sharp changes in the general pattern of behaviour which reduced the actual and perceived need to prosecute persons for such offences as sabbath breach, cursing and drunkenness. That there was an increase in lay piety during this period seems clear but this paradoxically weakened the Kirk rather than strengthening it. It led to a series of secessions from the established Kirk and the setting up of rival congregations. Increasing numbers of people did not accept the monopoly position of the Kirk and it lost that position, at first de facto, later de jure. So for example in Falkirk in 1712 Michael Livingstone of Bantaskin, charged with fornication confessed fatherhood

"but told him (an Elder) that he was not of our communion and therefore declined to appear before the session."¹⁴⁵

Along with this increase in piety there was, by contemporary accounts, a growth of decorous orderly behaviour and a corresponding decline in the actual incidence of such offences as disorderly conduct and slander. There was also a growing feeling on the part of the ruling elite that the prosecution of such cases was no longer necessary even when they did occur. This derived partly from the increasingly secular

and irreligious ideology of the ruling class and also from a feeling that church courts had largely served their purpose (this point is discussed in more detail below). However, there does not seem to have been any change in the sexual habits of the people and the practical reason for prosecuting sexual offenders still applied. In fact, Kirk sessions continued to prosecute such cases well into the nineteenth century but after the 1720's in most areas this discipline was exercised only upon members of the Kirk's own communion, rather than society at large.¹⁴⁶

The last point raises two further questions: who were the people who made up church courts and how were these courts related to other parts of the legal system? Because minutes of Kirk session meetings always start with a list of the Elders an accurate picture of the membership of sessions can be built up and it is also possible to discover who the active members of the sessions were. In every parish before 1690 the lairds and heretors were all members of the session and some of them at least were active, regular attenders. In St. Ninians the lairds of Touch, Touchadam, Bannockburn and Plean were all Elders who regularly attended the session while in Falkirk the same was true of the lairds of Westquater and Kerse.¹⁴⁷ In Stirling the Provost and Dean of Guild were both regular attenders and there were always at least two bailies on the session for every meeting.¹⁴⁸ However, even during the episcopalian period the majority of heretors were not regular attenders and only put in an appearance when a matter touching their pockets was being discussed. After 1690 the number of heretors who actually sat as members declined dramatically: the four lairds mentioned from St.

Ninians all withdrew from the session and two of them, Bannockburn and Touch, are mentioned in 1708 as haunting an episcopalian meeting house in the parish.¹⁴⁹ The other session members were all either tenants or feuars and these were the people who did most of the work and provided the backbone of the sessions. After 1690 this predominance became more marked: in Killearn and Strathblane not one regular member of the sessions did not come from this type of background.¹⁵⁰ Conspicuous by their absence were sub-tenants and labourers: the sessions were thus dominated by 'middling' people with some support from a section of the landowners, at least before 1690.

The internal organisation of the sessions can also be made out and is both interesting and revealing. Elders were attached to specific areas, which they then inspected like policemen on a regular 'beat'. These areas were normally baronies and the entire internal organisation of the sessions was based on the barony, reflecting the fact mentioned in an earlier chapter that this was the basic unit of social and economic life in Lowland Scotland. For example the records of Muiravonside for 1697 contain an entry beginning:

"The Session having appointed the Elders in their respective baronies....."¹⁵¹

What this does is to point up the close, even intimate, relationship between church and secular courts in pre-industrial Scotland. Despite the concept of there being two independent and separate jurisdictions, in practice the church courts were an integral part of the general legal system, at least until the early eighteenth century. As stated earlier there was an overlap of membership: the laird of Westquater

was both ruling Elder of Falkirk session and chief baillie of the regality of Falkirk while two of the regality's other baillies were members of the sessions of Muiravonside and Slamannan. In St. Ninians the four lairds mentioned all had baron courts, as did other heretors who were occasional members of the session, such as the lairds of Polmaise, Greenyards and Powhouse. Moreover, these people and other session members, were also Justices of Peace for the entire shire while the Earls of Callandar and Mar, session Elders in Falkirk and Alva respectively, were both at various times Sheriff Principal. The two sets of courts could thus co-operate very closely, as they did over slander cases, and the church courts provided the holders of secular courts with an institution through which they could control the behaviour of their tenants, direct the flow of poor relief and propogate and spread a particular ideology. For their part the secular courts provided the sessions and presbyteries with muscle, acting as back-up enforcement bodies.

At its most basic level this simply involved the session asking one of its members to put pressure on a defendant, particularly if he or she was a tenant or sub-tenant of an elder.¹⁵² There are literally dozens of references to this sort of thing and it must have often happened without its being minuted. Sometimes a person would be formally referred to the civil magistrates, as for example occurred in Buchanan in 1726 where the session stated the

"minister was to make application to Dugal Cameron Bayly deput in Buchanan to cause apprehend both and oblidge thame to satisfie

..... and obey the session."¹⁵³

Often the entry does not state which secular court was being called upon and merely says that the party was referred to the civil judge. Sometimes, as in the example quoted, the court is named. The types of civil court mentioned most often are franchise courts and Justice of Peace courts but there are also references to the Sheriff court and, between 1660 and 1688, the Stirling commissary court.¹⁵⁴ So for example, between 1660 and 1688 the session of St. Ninians referred offenders to the Justice of Peace court and the baron courts of Montrose, Kilsyth, Carnock, Callandar, Touch, Polmaise, Plean and Bannockburn as well as the sheriff and commissary courts.¹⁵⁵ The factors which determined which jurisdiction the offender was referred to seem to have been convenience and the status of the person. If they were tenants of a laird they would come under the jurisdiction of his baron court and would be sent there while if they were crown tenants or hailed from outside the parish the Justices or the sheriff would be resorted to. Since the J.P.'s and barons were often the same people the decision was simply which 'hat' to put on in a particular case. During the episcopal period the commissary court seems to have been used for serious cases of slander and grave cases generally. After 1690 the pattern of references became more straightforward with the great majority of such cases going to the J.P.'s. Only in Falkirk and Kilsyth were the franchise courts still used to any great extent and even here this stopped with the attainder of the Livingstones in 1715. In general, secular courts would still support sessions after 1690 as they had before but the intimate relationship derived from shared membership ceased to exist making inter-court relations more

formal and, ultimately, less effective.¹⁵⁶

The question which comes to the mind of anyone who has studied church court records is quite simply what were they for? Why did so many Scots spend so much time and effort on running these courts and prosecuting so many people? What function did they serve? In the minds of the men who drew up the Books of Discipline the answer was clear: to punish the reprobate, check the wayward and ultimately to create a 'godly commonwealth', a reformed state. This was to be done by punishing sinful acts, acts which violated divine law, and by encouraging the development of christian conscience as a means of shaping the lives and moral codes of the people. In modern terminology this meant the establishment and nurturing of an 'inner directed culture' based on guilt but supported by discipline. Looking backwards from our own position we can expand this model and give four interlinked reasons for the active existence of church courts.

In the first place, they were intended by their activities to encourage certain forms of behaviour among the mass of the public: in particular they were meant to promote values of self-control, self-discipline and sobriety. These were values essential to the working of the market orientated economy which was emerging in the seventeenth century and, unlike their English counterparts, the Scots reformers had a great and effective engine of reform at their disposal. The net effect, as said earlier, was to nurture the values typical of an 'inner-directed' culture, indeed to help create such a culture. The second discernable purpose of these courts was to handle and alleviate tensions within the local community, by punishing those guilty of acts which were seen as anti-social and by settling disputes between individuals.

This was the main practical reason (besides the question of money) for prosecuting the parents of illegitimate children: it alleviated the tensions which could otherwise have arisen, over support for the child. The work of the church courts in Scotland can also be seen as one example of the Europe-wide process of 'christianisation' by which popular culture and morality were transformed as part of the creation of an unprecedented degree of ideological conformity. The culture and way of life of the populace, in Scotland as elsewhere, were reshaped to make them conform to a model developed higher up the social scale: the new state which emerged during the sixteenth and seventeenth centuries could not tolerate the degree of cultural and ideological diversity which was characteristic of medieval, feudal society. In the process of obtaining widespread ideological commitment or "winning the hearts and minds" of the mass of the people, church courts played a vital role, particularly in Scotland. Lastly, and following on from what has been said, the activity of the church courts helped to ease the transformation from one type of society to another and from one mode of social control to another, by encouraging and supporting a new 'inner-directed' morality and by helping to create ideological hegemony. In other words they helped the social order to absorb the tensions created by the changes which flowed from the transformation of a largely non-commercial society to a highly commercialised, capitalist one.

In general then, the church courts created at the time of the reformation were an integral part of the legal system and, in terms of the number of people tried, its most active part. They were, as other authors have said, an unsurpassed instrument of social control, until their

disruption during the 1690's and by 1709 or thereabouts had achieved a remarkable success. Success that is, in effecting social reform, a revolution of manners and in creating an ideological commitment to the established order during the time of rapid change. They were, as another person has said:

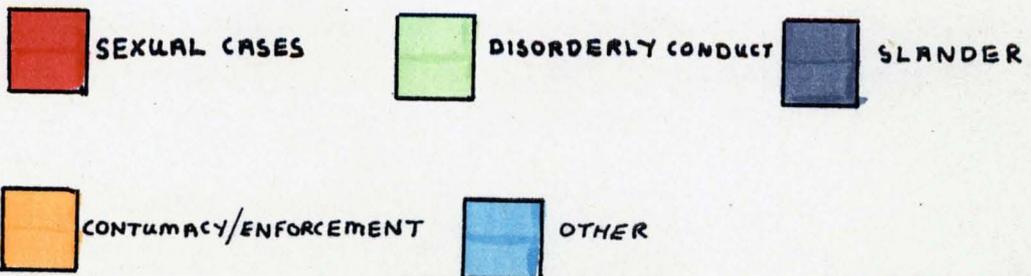
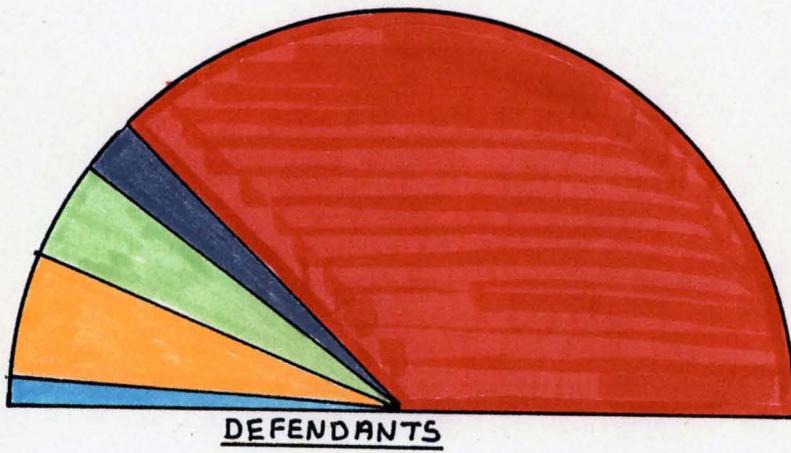
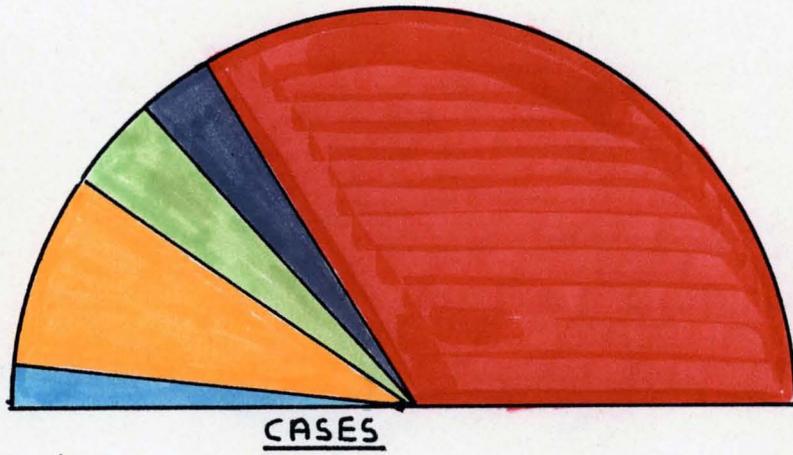
"an instrument of social and moral control without equal."¹⁵⁷

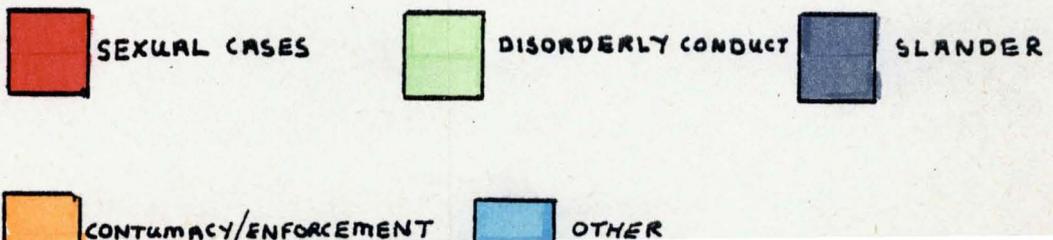
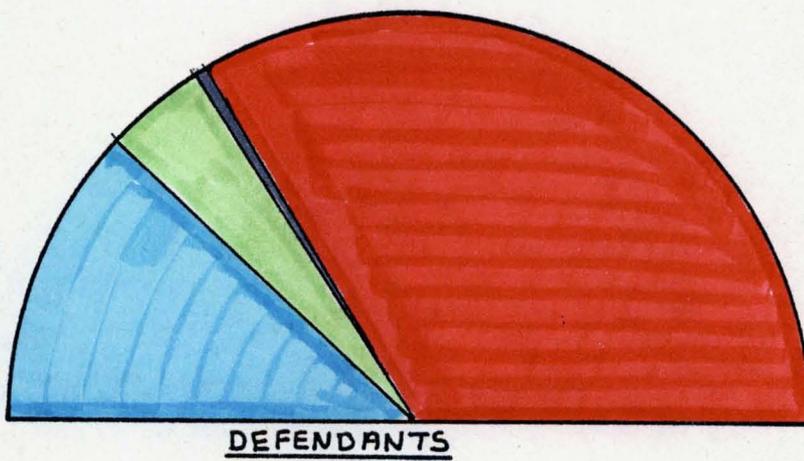
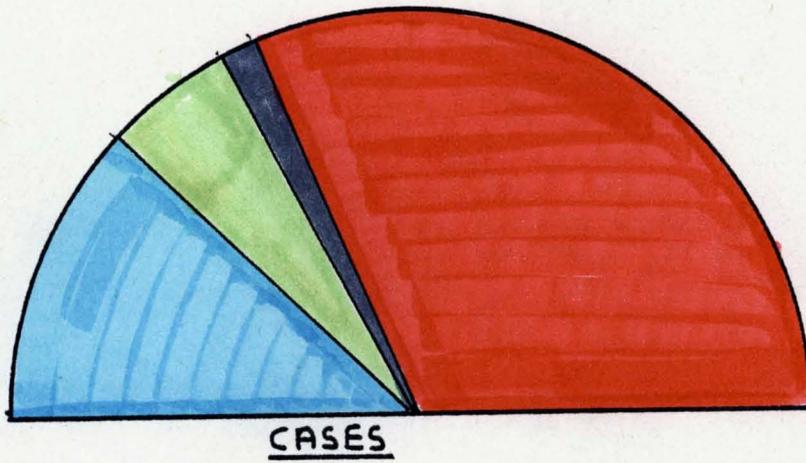
KILLEARN KIRK SESSION 1694 - 1716.

TYPES OF CRIMES	NUMBER OF CASES	NUMBER OF PERSONS		
		M	F	T
FORNICATION	28	28	28	56
F.A.N.	3	3	2	5
ADULTERY	2	2	2	4
SCANDALOUS CARRIAGE	1	1	1	2
SABBATH BREACH	2	2	1	3
CURSING & SWEARING	2	2	2	4
SLANDER	3	1	3	4
ENFORCEMENT	3	2	1	3
CONTUMACY	5	4	2	6
DISHAUNTING ORDINANCES	2	2	-	2
TOTAL	51	47	42	89

KILLEARN KIRK SESSION 1727 - 1743.

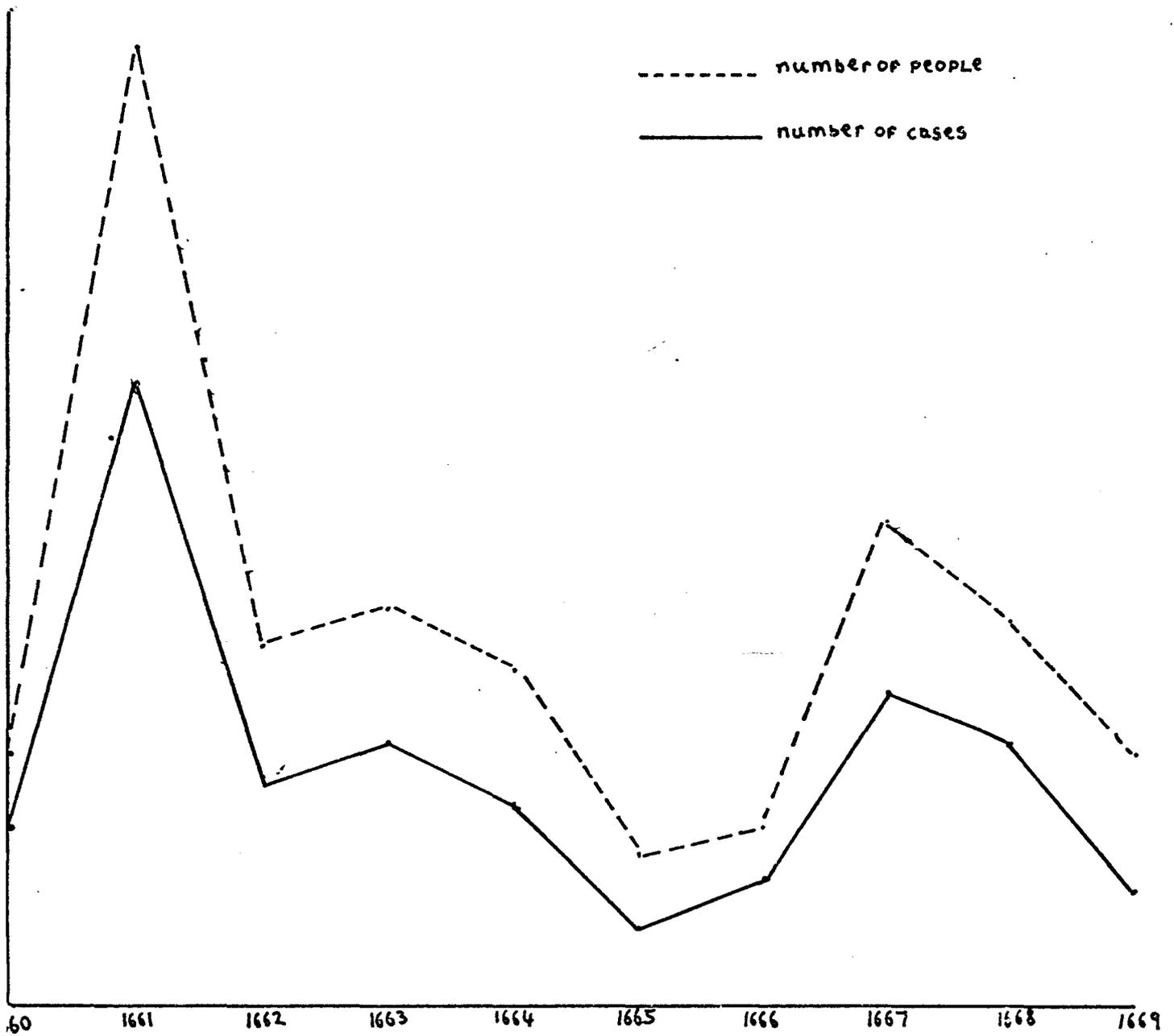
TYPES OF CRIMES	NUMBER OF CASES	NUMBER OF PERSONS		
		M	F	T
FORNICATION	19	19	19	38
F.A.N.	2	2	2	4
ADULTERY	1	1	1	2
SCANDALOUS CARRIAGE	2	2	1	3
SABBATH BREACH	3	4	-	4
DRUNKENNESS	1	1	-	1
SLANDER	1	1	-	1
IRREGULAR MARRIAGE	4	4	3	7
BIGAMY	1	1	1	2
INFANTICIDE (SUSPECTED)	1	-	1	1
DEFORCEMENT	1	4	-	4
MISCELLANEOUS	2	2	1	3
TOTAL	38	41	29	70





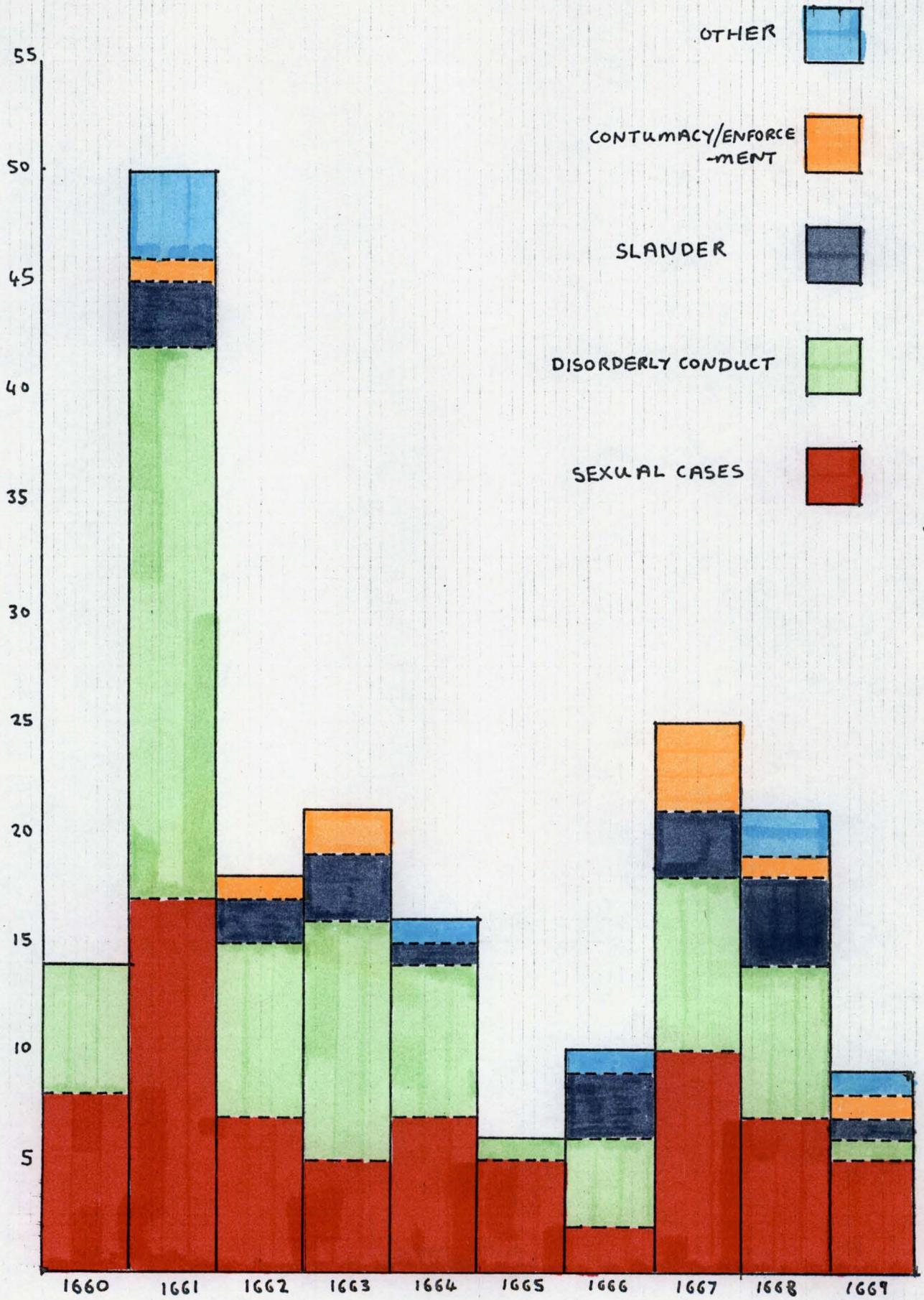
AIRTH KIRK SESSION 1660 - 1669.

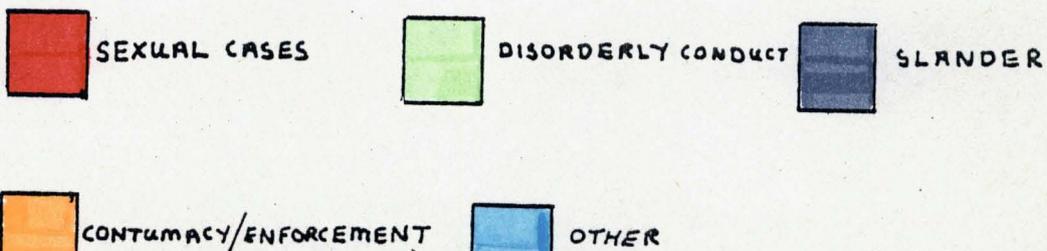
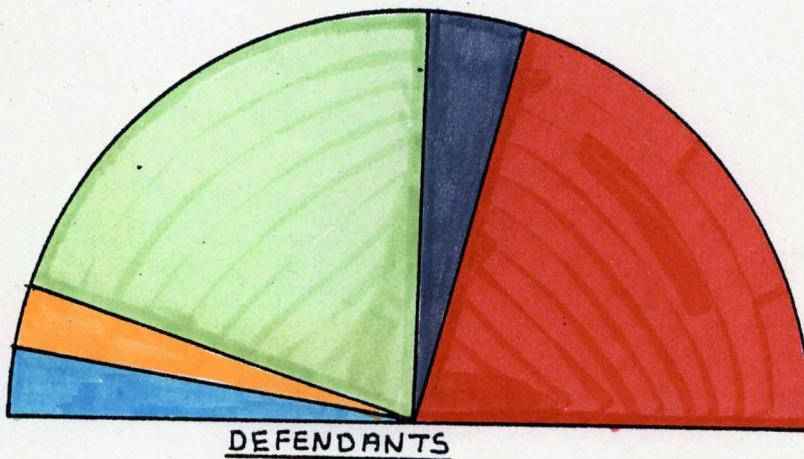
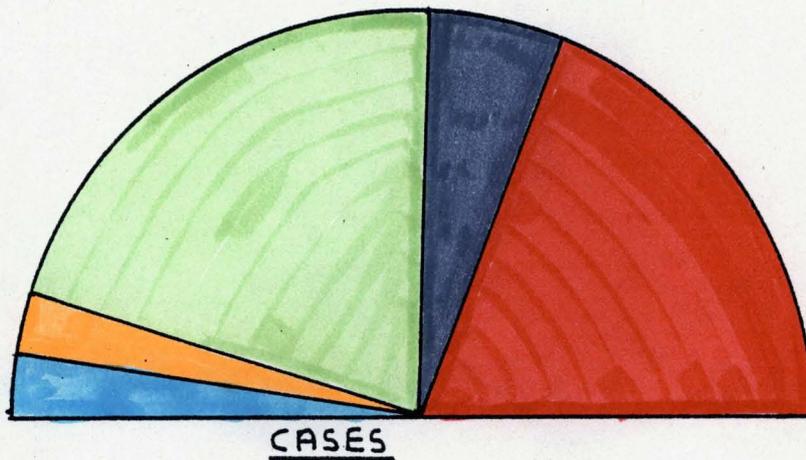
TYPES OF CRIMES	NUMBER OF CASES	NUMBER OF PERSONS		
		M	F	T
FORNICATION	50	44	46	90
F.A.N.	14	9	10	19
ADULTERY	1	1	1	2
SCANDALOUS CARRIAGE	7	6	7	12
BESTIALITY	1	1	-	1
SABBATH BREACH	51	75	16	91
DRUNKENNESS	8	4	5	9
CURSING & SWEARING	8	1	9	10
BLASPHEMY	4	2	2	4
WIFE BEATING	1	1	-	1
DISORDERLY CONDUCT	6	8	-	8
SLANDER	20	9	15	24
CONTUMACY	7	9	2	11
ENFORCEMENT	3	-	3	3
IRREGULAR MARRIAGE	1	1	1	2
DISHAUNTING ORDINANCES	2	2	-	2
CHARMING	2	3	3	6
OTHERS	4	6	-	6
TOTAL	190	182	120	302

AIRTH KIRK SESSION 1660-1669: NUMBER OF CASES / PERSONS.

AIRTH KIRK SESSION 1660-1669.

150

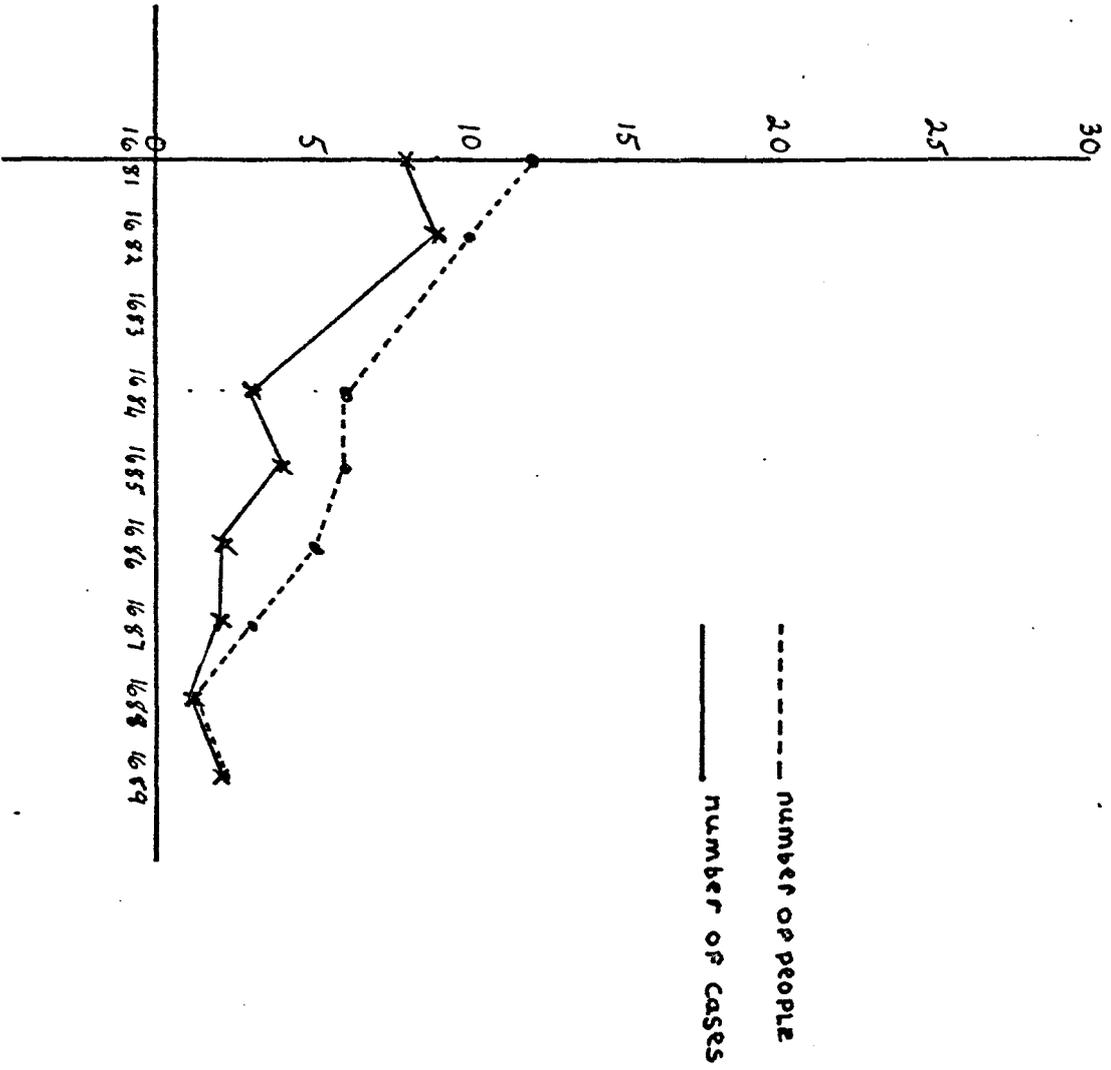




ALVA KIRK SESSION 1681 - 1689.

TYPE OF CASES	NUMBER OF CASES	NUMBER OF PEOPLE		
		M	F	T
FORNICATION	2	2	2	4
F.A.N.	2	2	2	4
ADULTERY	1	0	1	1
SCANDALOUS CARRIAGE	2	1	2	3
SABBATH BREACH	4	6	1	7
DRUNKENNESS	4	6	1	7
CURSING AND SWEARING	1	0	2	2
WIFE BEATING	1	1	0	1
BLASPHEMY	1	1	0	1
DISORDERLY CONDUCT	3	3	2	5
SLANDER	4	2	2	4
CONTUMACY	5	2	3	5
ENFORCEMENT	1	0	1	1
TOTAL	31	26	19	45

ALVA KIRK SESSION 1681-1689.





KEY



:- SEXUAL CASES



:- SLANDER



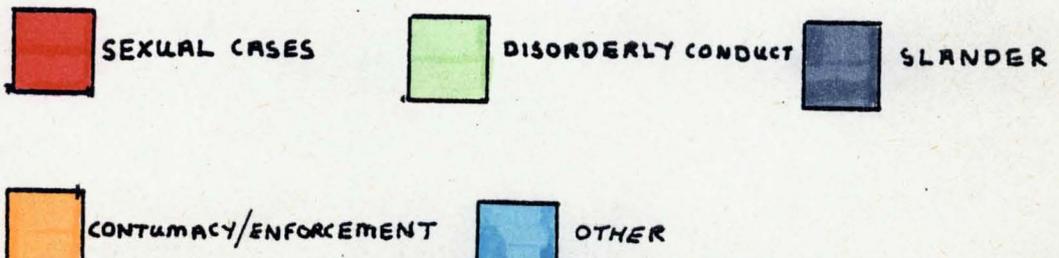
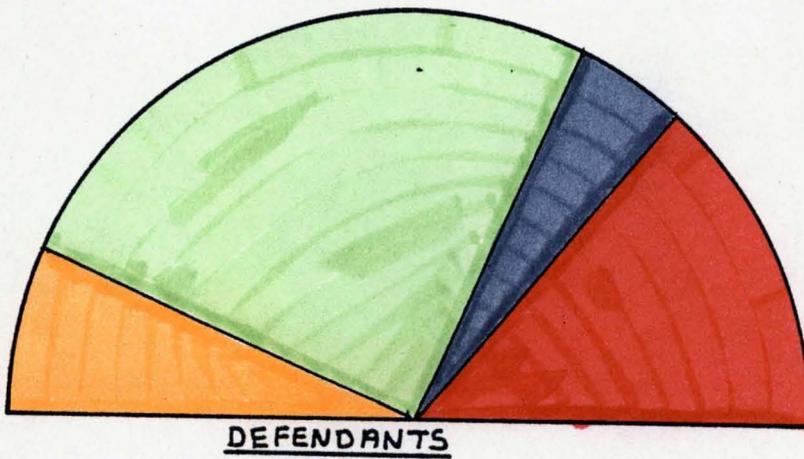
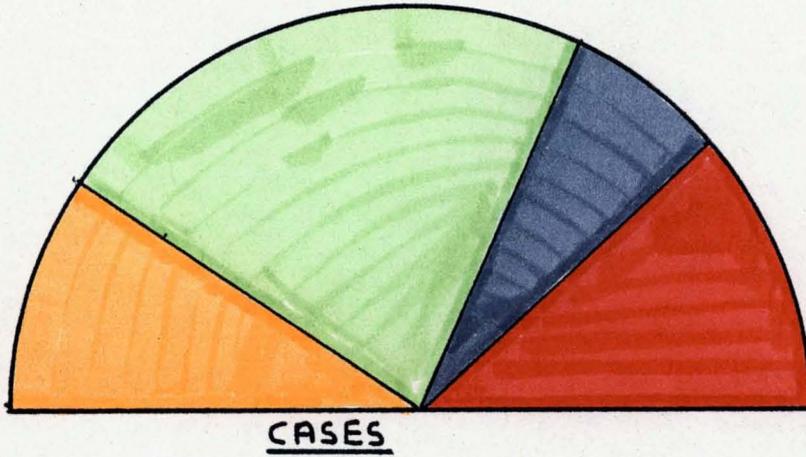
:- OTHERS.



:- DISORDERLY CONDUCT



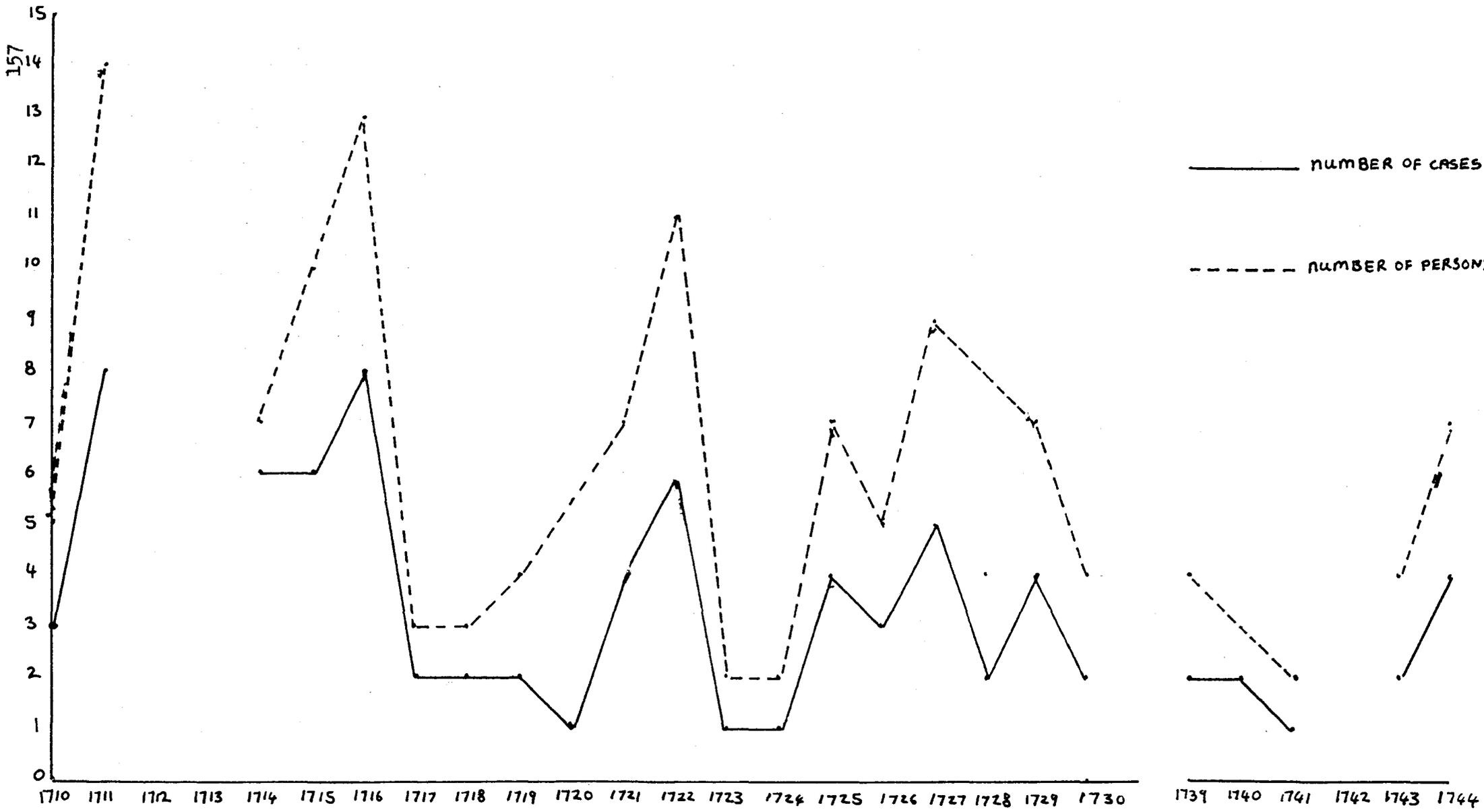
:- CONTUMACY ENFORCEMENT



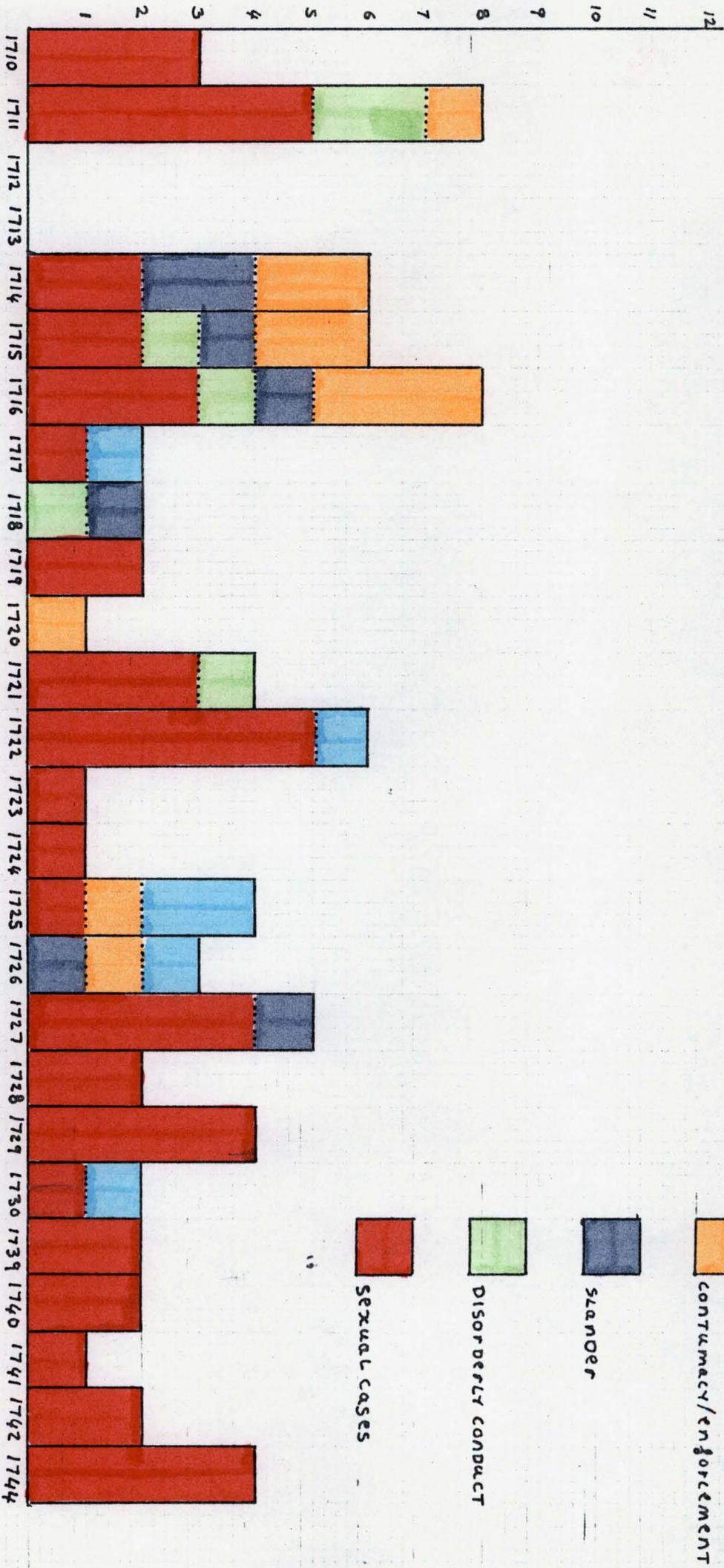
BUCHANAN KIRK SESSION 1710 - 30; 1739 - 44.

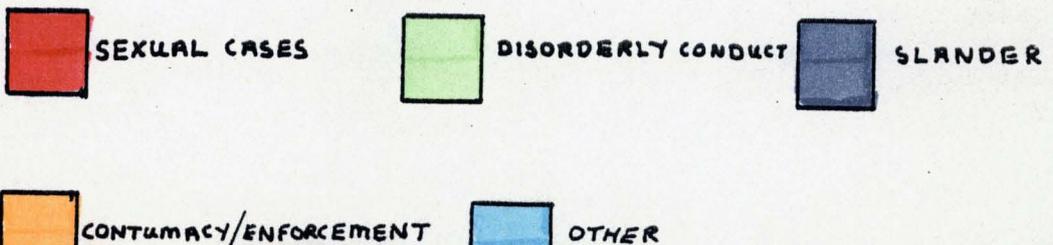
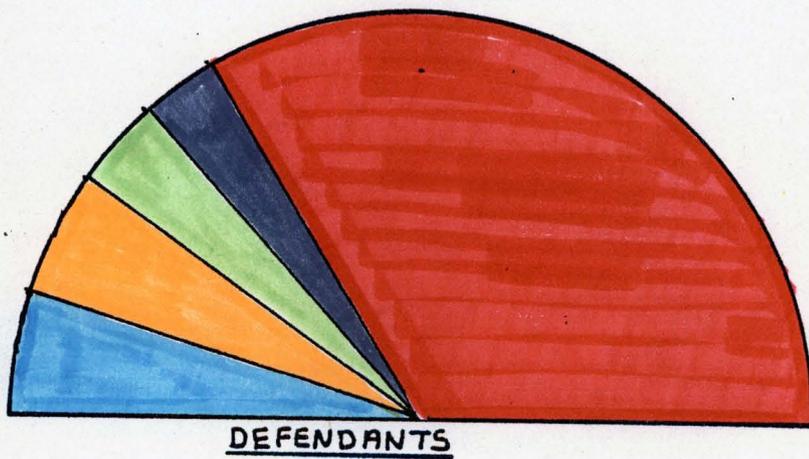
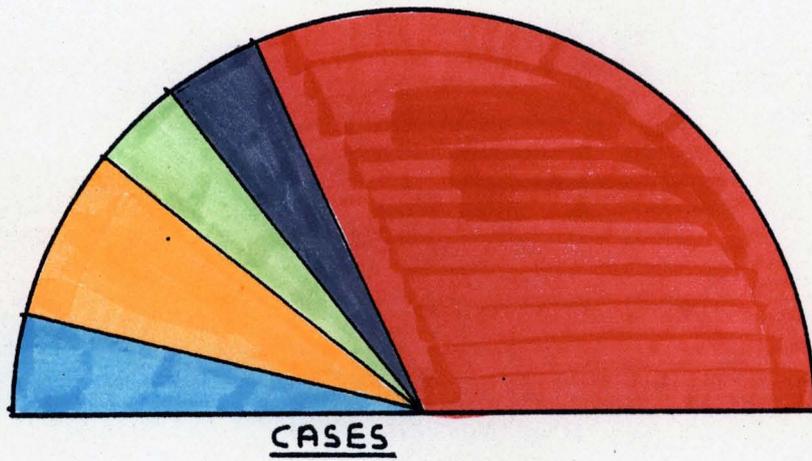
TYPES OF CRIMES	NUMBER OF CASES	NUMBER OF PERSONS		
		M	F	T
FORNICATION	37	35	36	71
F.A.N.	8	7	7	14
ADULTERY	3	2	3	5
SCANDALOUS CARRIAGE	3	1	3	4
SABBATH BREACH	3	4	1	5
DRUNKENNESS	2	2	-	2
CURSING & SWEARING	1	2	1	3
SLANDER	7	3	5	8
CONTUMACY	9	10	2	12
ENFORCEMENT	2	1	1	2
IRREGULAR MARRIAGE	5	5	5	10
MISCELLANEOUS	1	1	1	2
			*	
TOTAL	81	73	65	138

BUCHANAN KIRK SESSION 1710-1730, NUMBER OF CASES / NUMBER OF PERSONS



BUCHANAN KIRK SESSION 1710-1730 1739-1744





FALKIRK KIRK SESSION 1640 - 1642.

TYPES OF CRIMES	NUMBER OF CASES	NUMBER OF PERSONS		
		M	F	T
FORNICATION	26	26	25	51
ADULTERY	2	2	2	4
SCANDALOUS CARRIAGE	4	3	3	6
SLANDER	4	3	1	4
SABBATH BREACH	28	37	6	43
CONTUMACY	6	6	-	6
IRREGULAR MARRIAGE	1	1	-	1
DISHAUNTING ORDINANCES	2	1	1	2
OTHERS	2	2	-	2
TOTAL	75	81	38	119

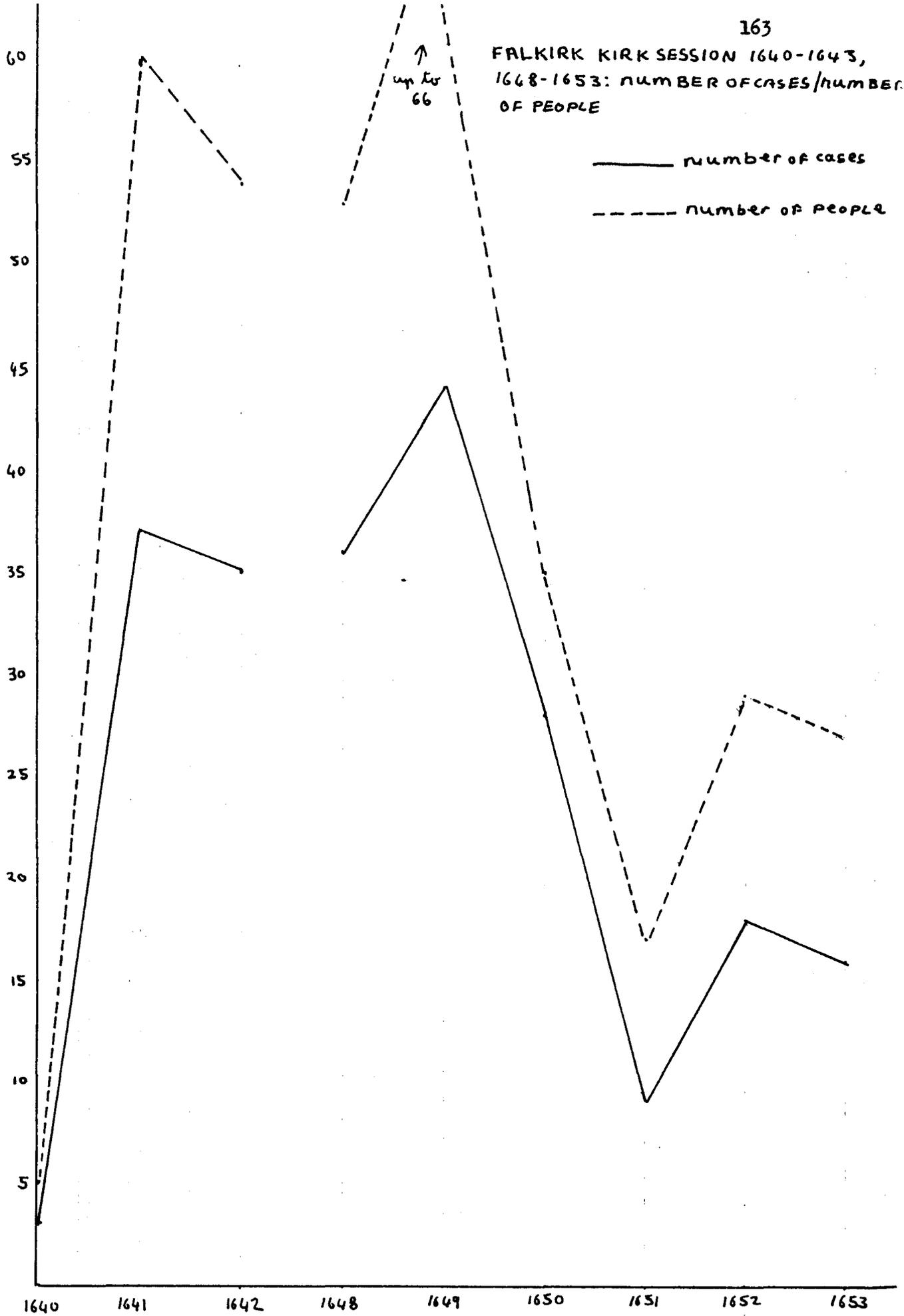
FALKIRK KIRK SESSION 1648 - 1653.

TYPE OF CRIMES	NUMBER OF CASES	NUMBER OF PERSONS		
		M	F	T
FORNICATION	43	41	43	84
F.A.N.	4	4	3	7
ADULTERY	2	2	2	4
SCANDALOUS CARRIAGE	10	9	10	19
SLANDER	18	11	9	20
SABBATH BREACH	15	19	2	21
DRUNKENNESS	18	20	3	23
CURSING & SWEARING	14	5	11	16
BLASPHEMY	2	-	2	2
DISORDERLY BEHAVIOUR	6	4	5	9
CONTUMACY	8	7	2	9
ENFORCEMENT	1	1	1	2
HARBOURING VAGRANTS	5	2	3	5
DISHAUNTING ORDINANCES	2	3	-	3
WITCHCRAFT	1	-	1	1
OTHER	2	2	-	2
TOTAL	151	130	97	227

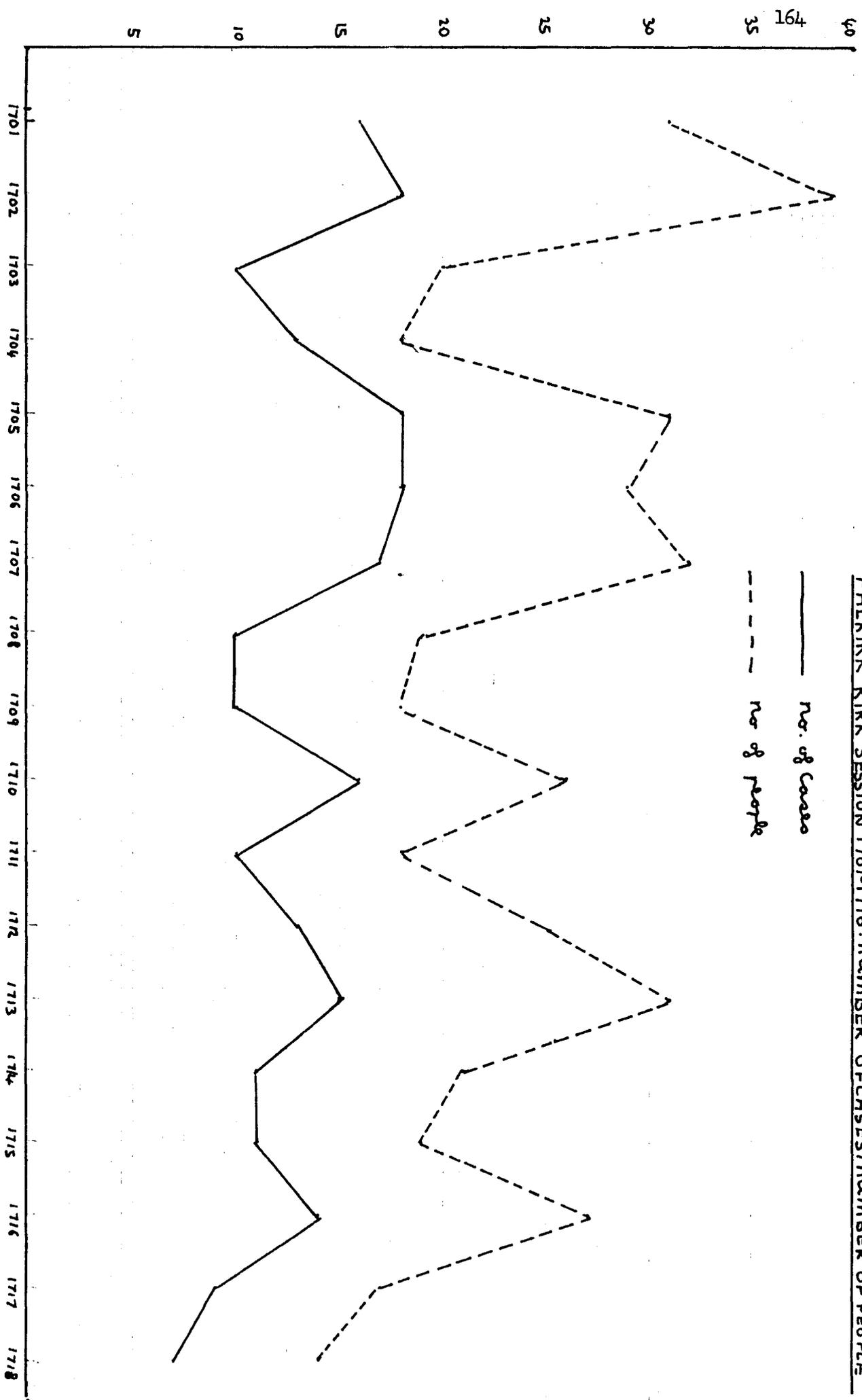
FALKIRK KIRK SESSION 1701 - 1718.

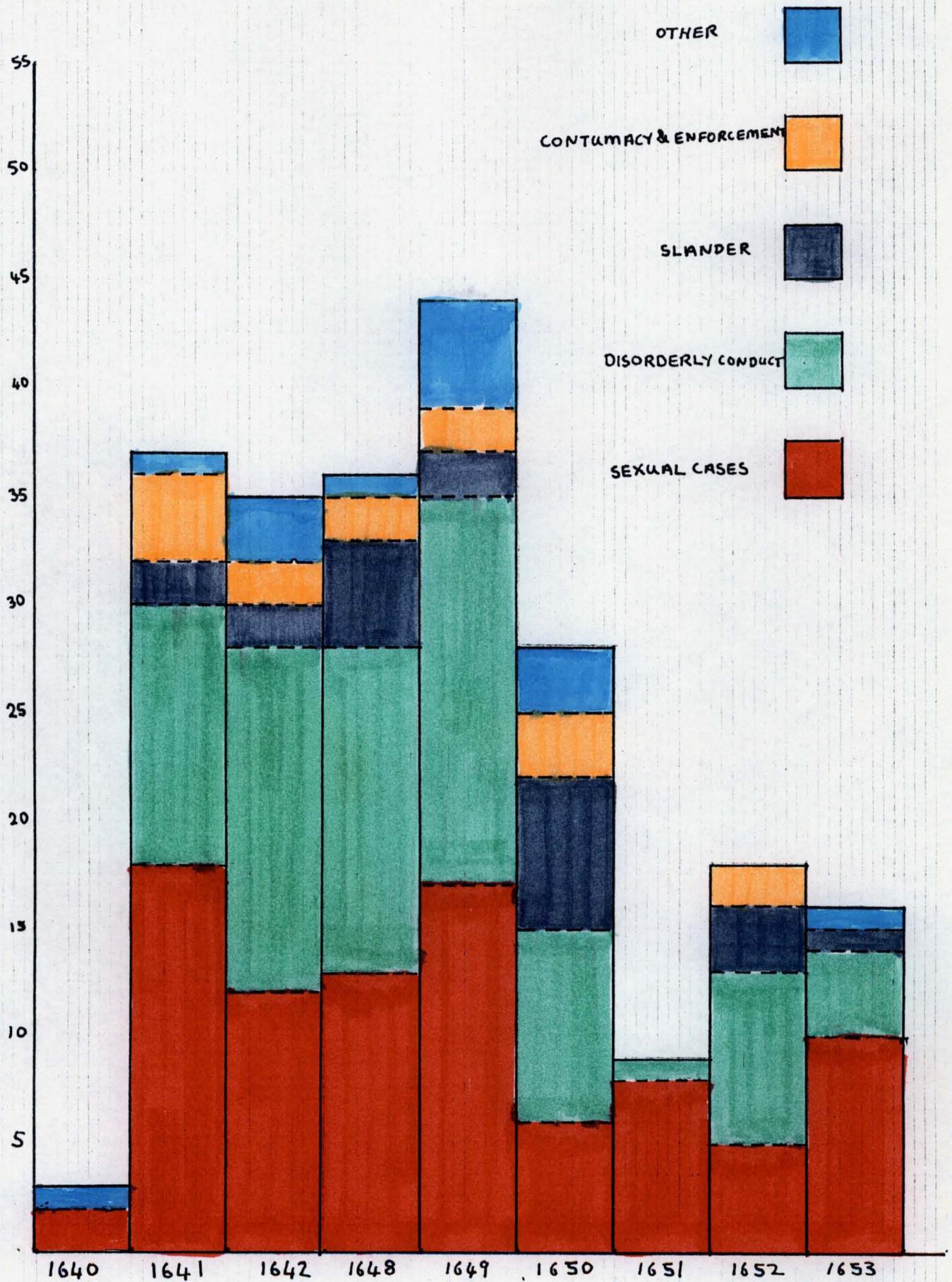
TYPES OF CRIMES	NUMBER OF CASES	NUMBER OF PERSONS		
		M	F	T
FORNICATION	95	93	95	188
F.A.N.	33	33	33	66
ADULTERY	9	9	9	18
SCANDALOUS CARRIAGE	8	8	8	16
INFANTICIDE	1	-	1	1
INCEST	2	2	2	4
SLANDER	3	1	3	4
SABBATH BREACH	13	15	3	18
DRUNKENNESS	1	1	-	1
CURSING & SWEARING	5	4	4	8
DISORDERLY BEHAVIOUR	1	7	-	7
WIFE BEATING	1	1	-	1
CONTUMACY	23	10	19	29
ENFORCEMENT	4	1	4	5
HARBOURING VAGRANTS	5	3	2	5
IRREGULAR MARRIAGE	32	32	32	64
TOTAL	236	220	215	435

FALKIRK KIRK SESSION 1640-1643,
1648-1653: NUMBER OF CASES/NUMBER
OF PEOPLE



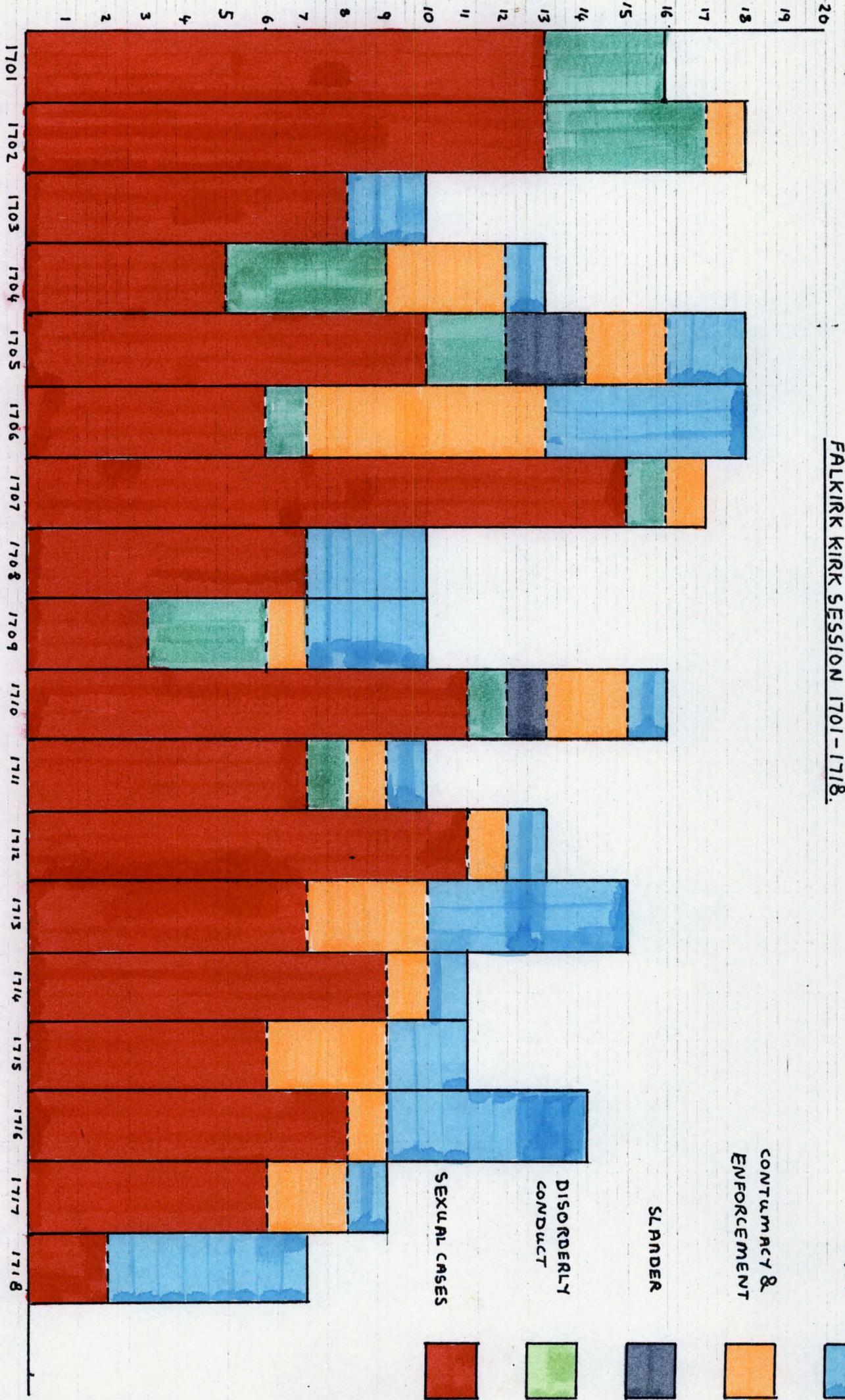
FALKIRK KIRK SESSION 1701-1718: NUMBER OF CASES/NUMBER OF PEOPLE

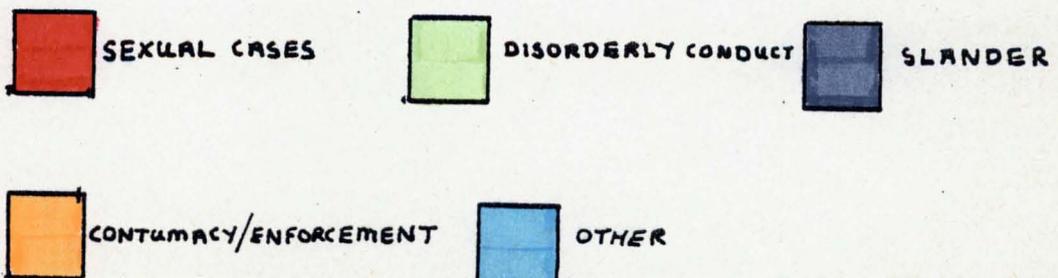
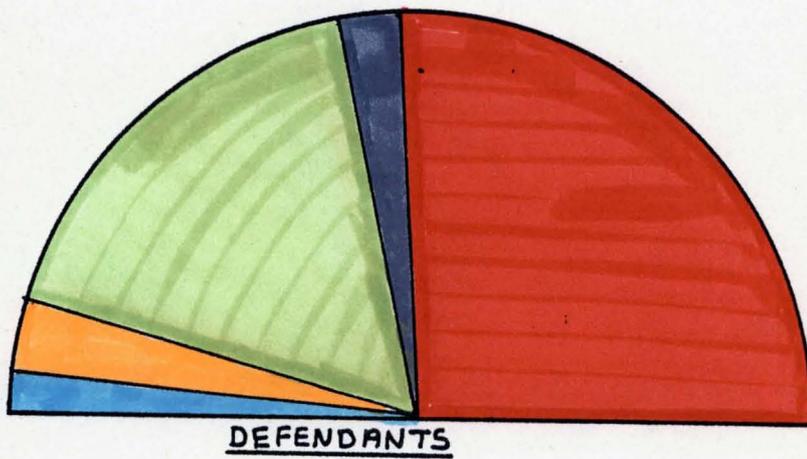
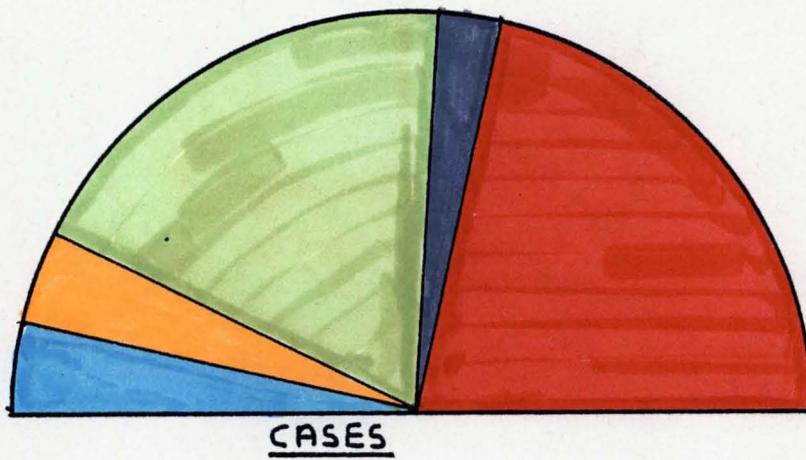


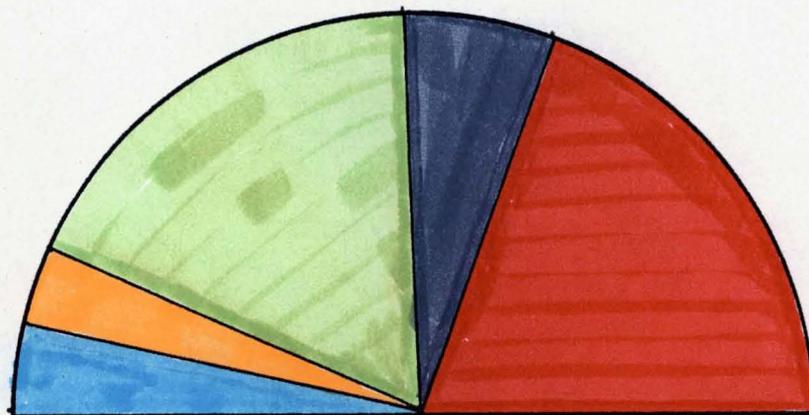


n.B. 1640 records are incomplete.

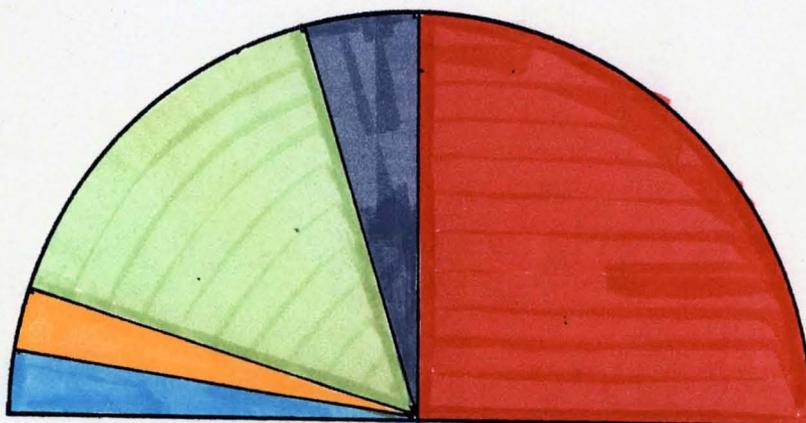
FALKIRK KIRK SESSION 1701-1718.







CASES



DEFENDANTS



SEXUAL CASES



DISORDERLY CONDUCT



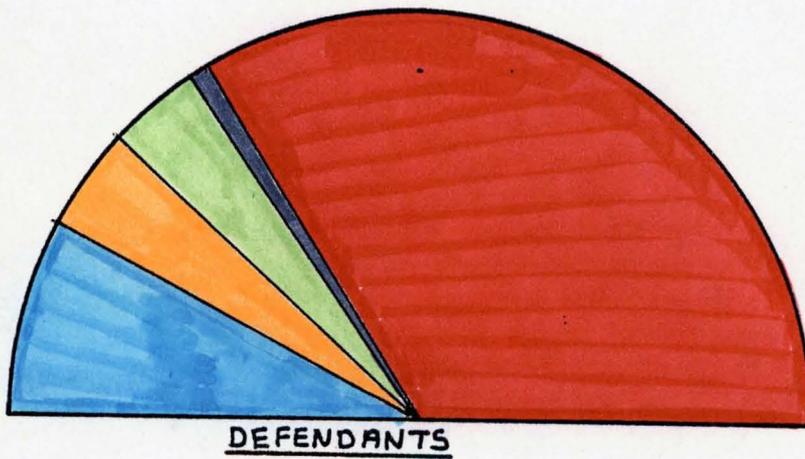
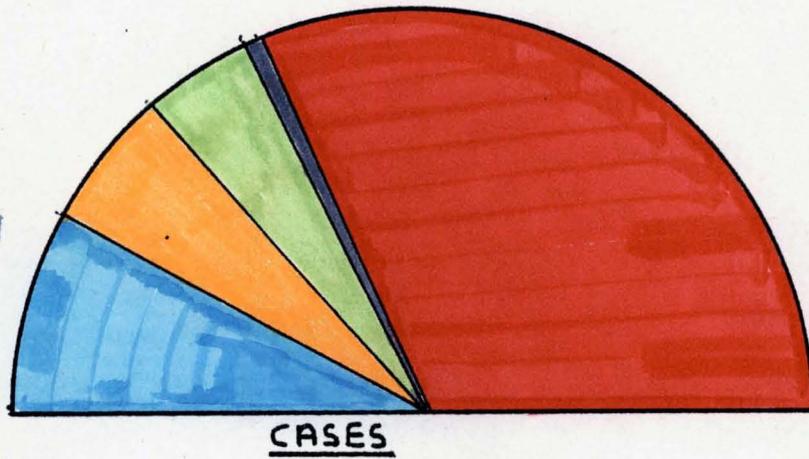
SLANDER



CONTUMACY/ENFORCEMENT



OTHER



SEXUAL CASES



DISORDERLY CONDUCT



SLANDER



CONTUMACY/ENFORCEMENT

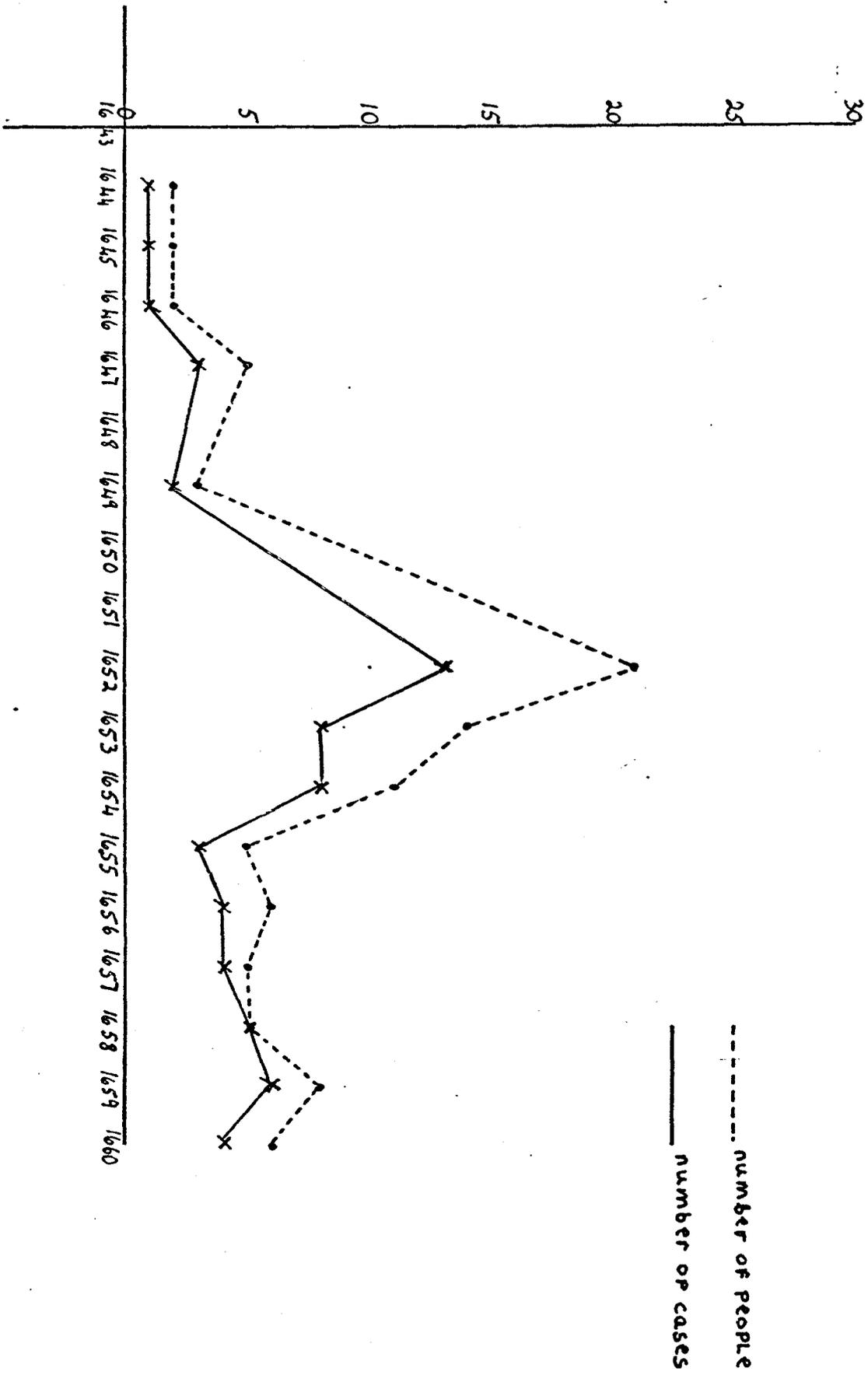


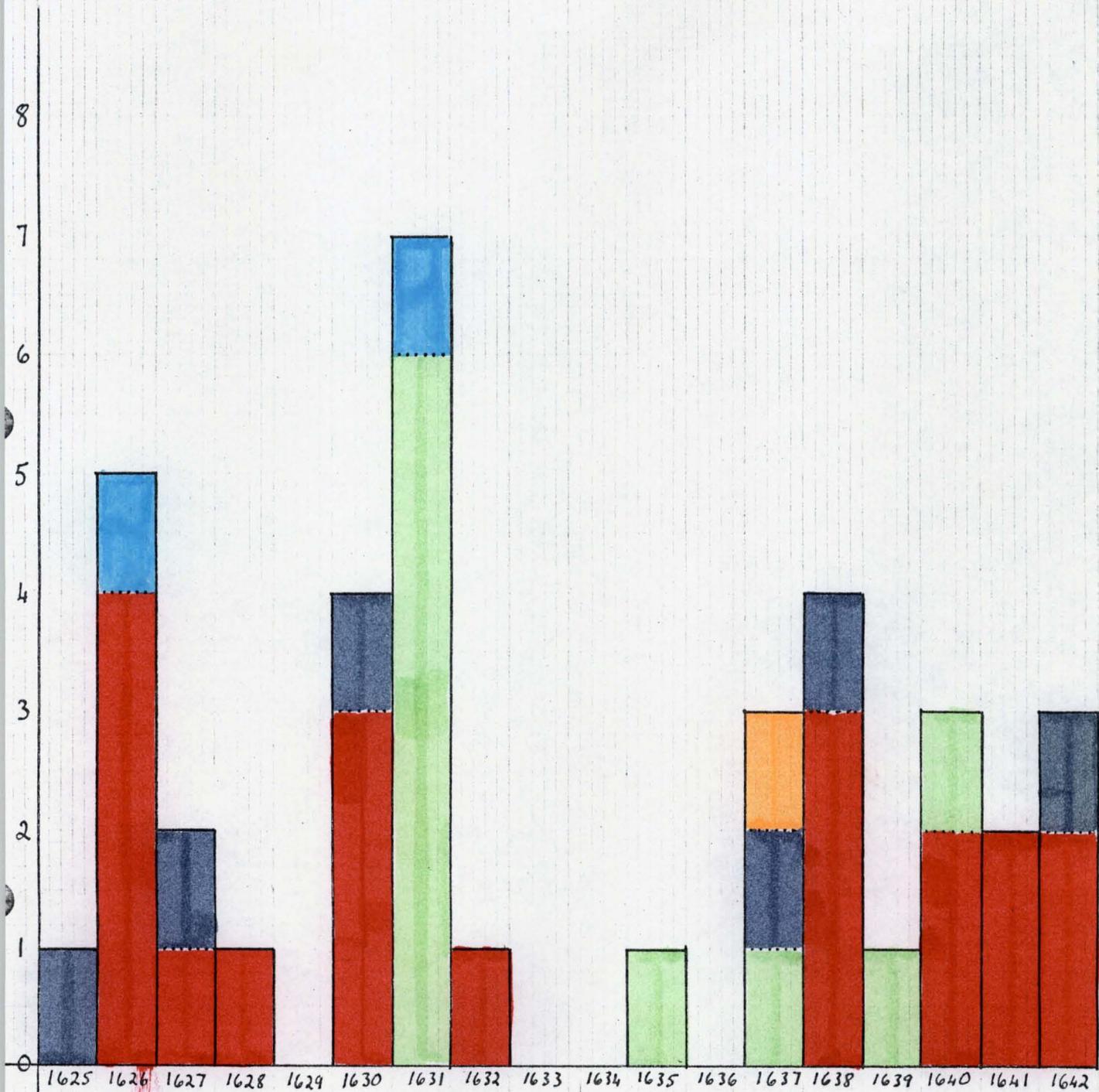
OTHER

GARGUNNOCK KIRK SESSION.

TYPE OF CRIME	NUMBER OF CASES	NUMBER OF PERSONS		
		M	F	T
FORNICATION	26	24	26	50
F.A.N.	2	2	2	4
ADULTERY	2	2	2	4
SCANDALOUS CARRIAGE	2	2	1	3
INCEST	2	2	2	4
SABBATH BREACH	24	34	3	37
DRUNKENNESS	9	11	3	14
CURSING AND SWEARING	14	10	6	16
SLANDER	13	11	5	16
CONTUMACY	2	1	1	2
ENFORCEMENT	1	1	0	1
WITCHCRAFT	2	0	2	2
PARRICIDE	1	1	0	1
HARBOURING VAGRANTS	1	1	0	1
TOTAL	101	102	53	155

GARGUNNOCK KIRK SESSION 1643-1660.





KEY:-



- SEXUAL CASES



- CONTUMACY/ENFORCEMENT



- DISORDERLY CONDUCT

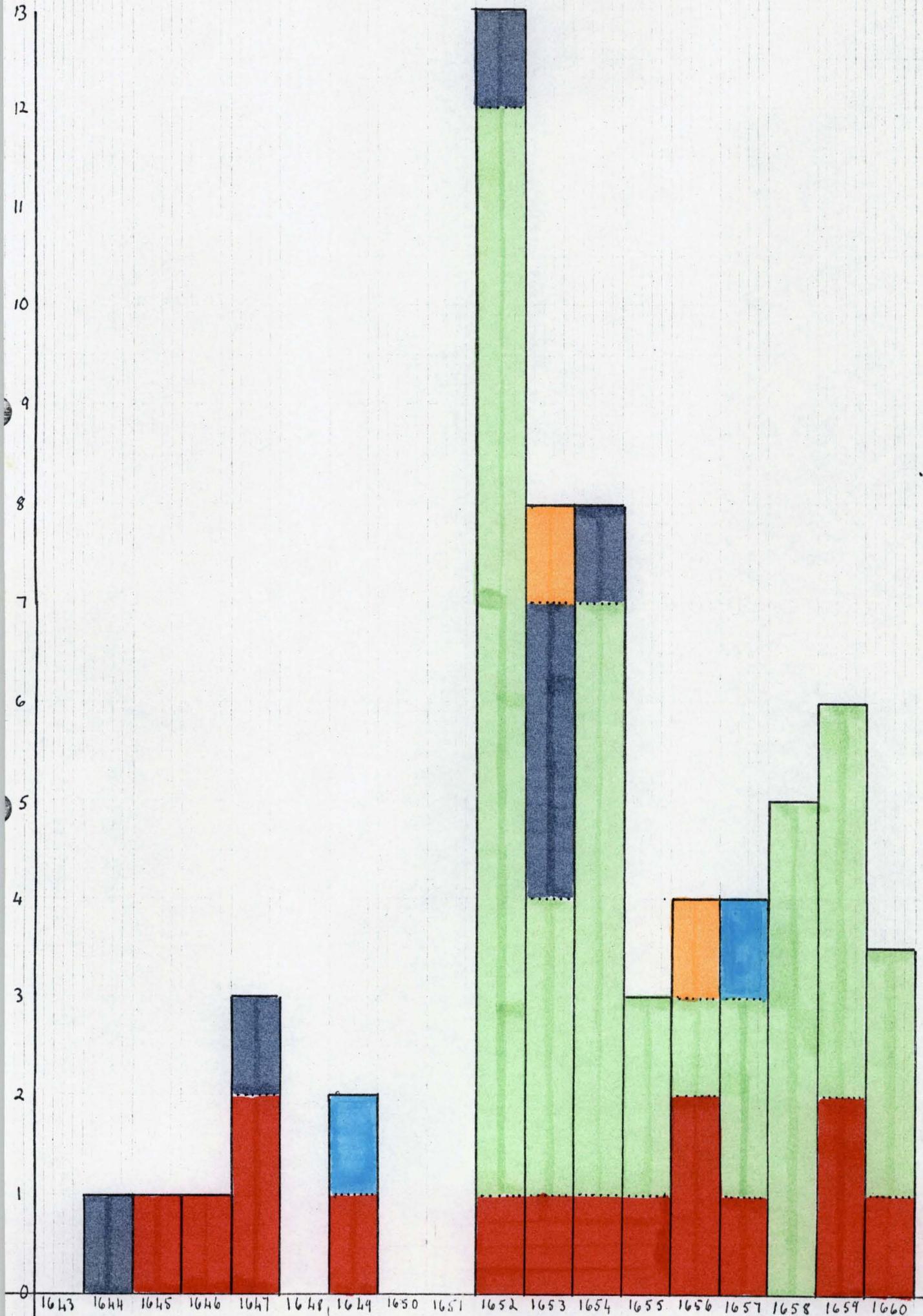


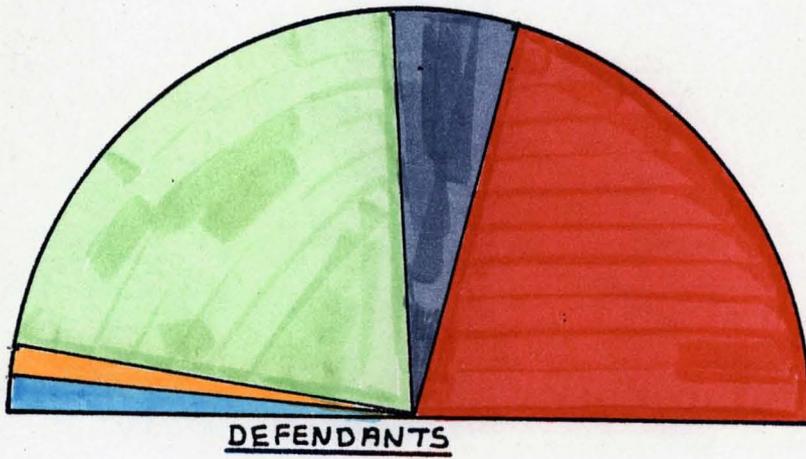
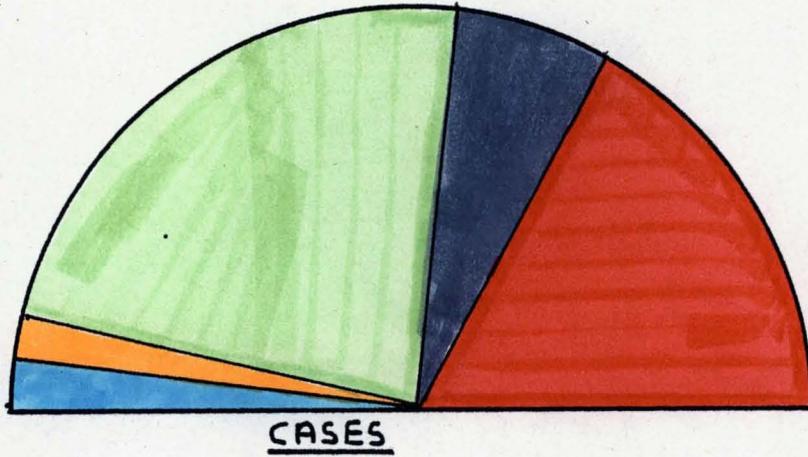
- OTHERS.



- SLANDER

GARGUNNOCK KIRK SESSION 1643-1660





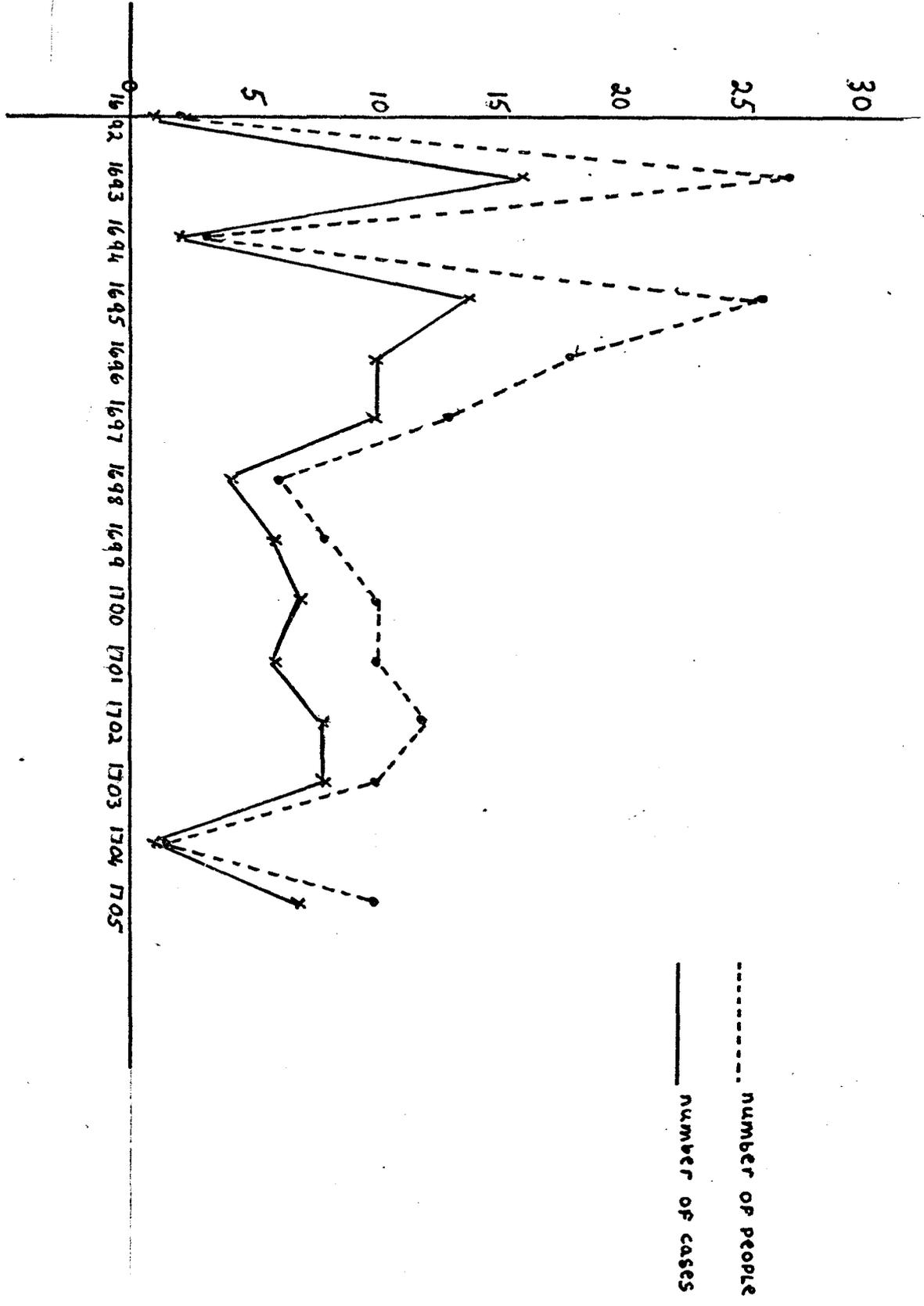
SEXUAL CASES DISORDERLY CONDUCT SLANDER

CONTUMACY/ENFORCEMENT OTHER

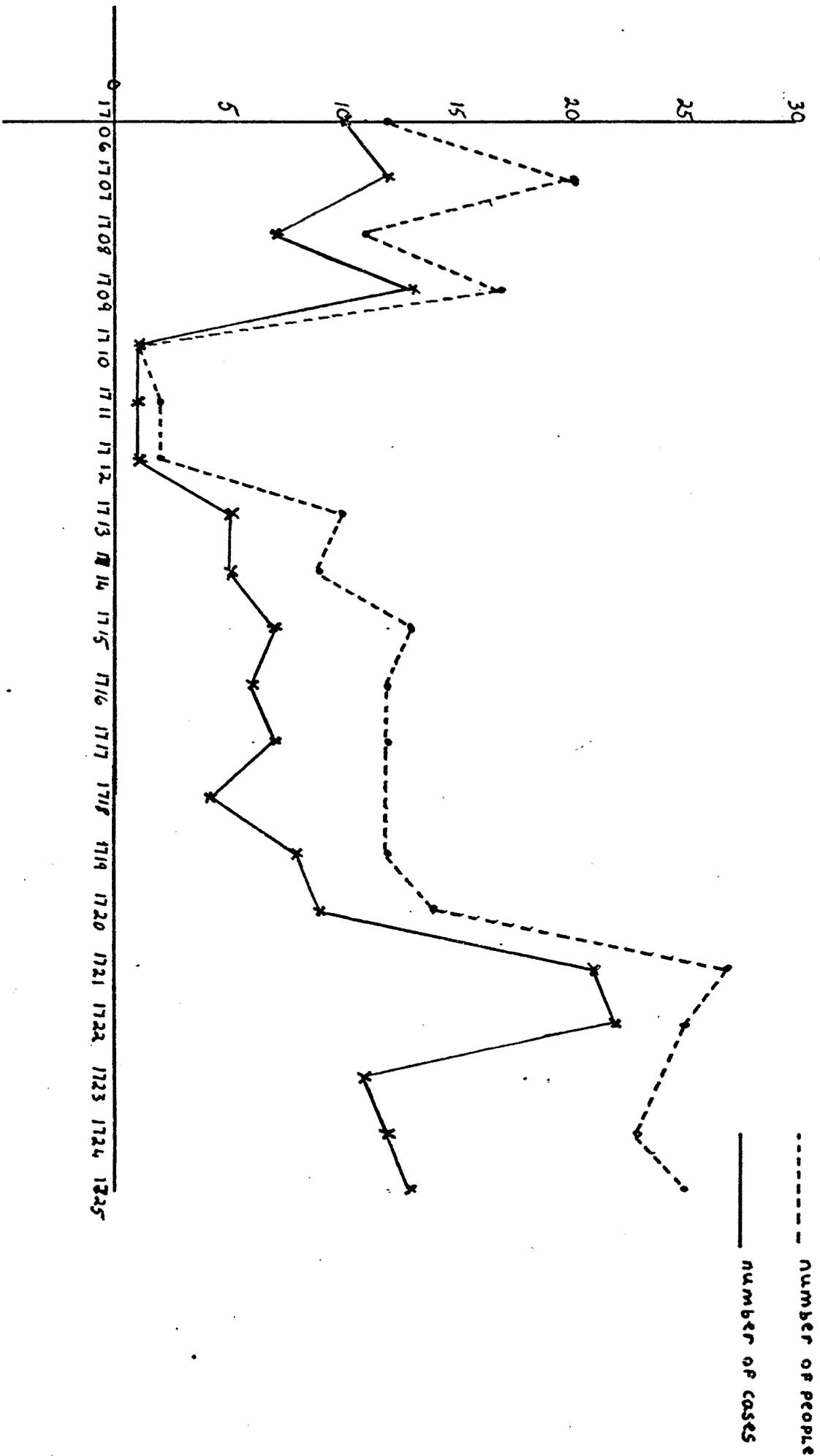
KILSYTH KIRK SESSION 1692 - 1725.

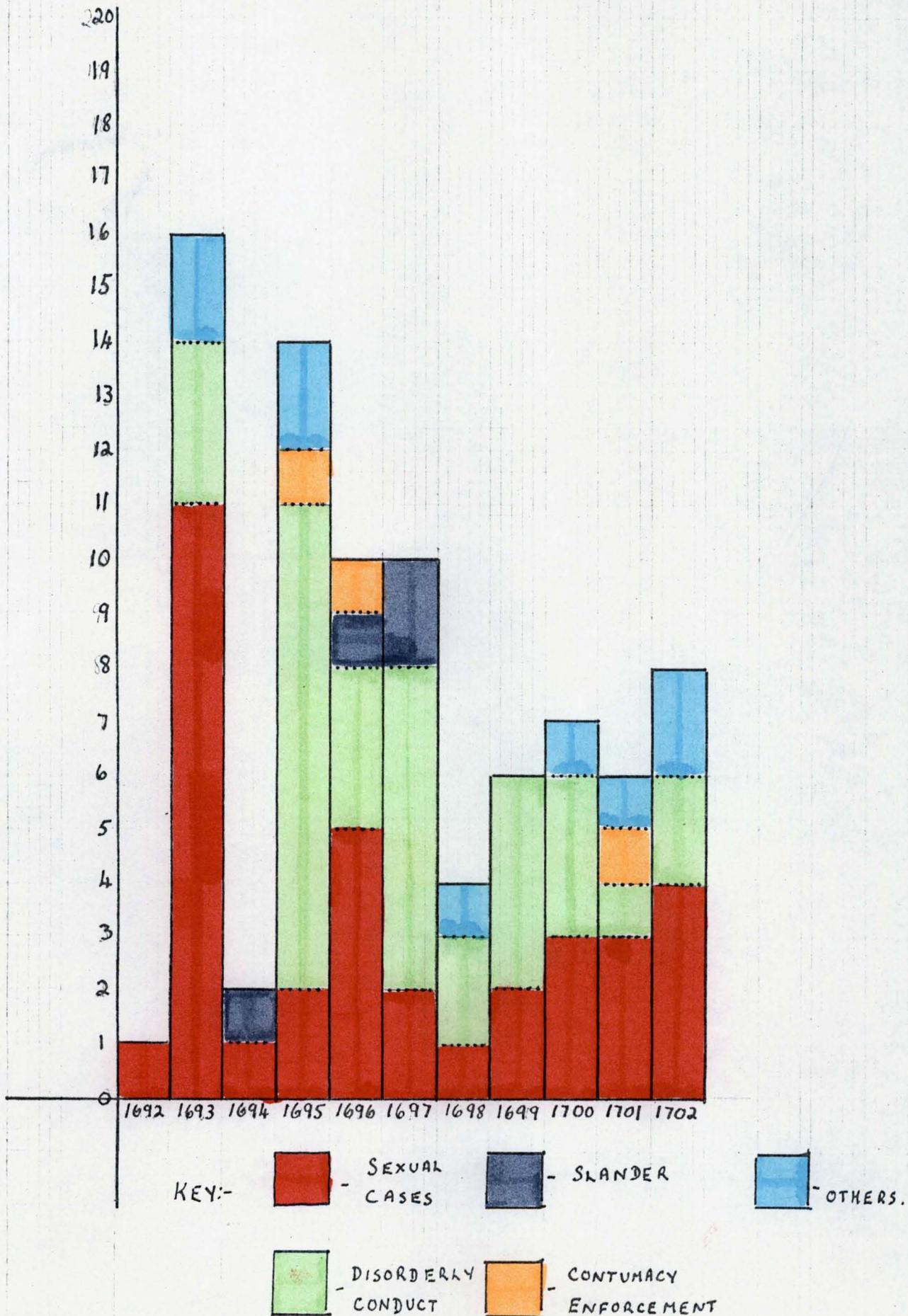
TYPES OF CRIMES	NUMBER OF CASES	NUMBER OF PERSONS		
		M	F	T
FORNICATION	79	77	79	156
F.A.N.	9	9	8	17
ADULTERY	8	8	8	16
BESTIALITY	1	1	0	1
INFANTICIDE	1	0	1	1
SCANDALOUS CARRIAGE	8	8	8	16
SLANDER	20	11	14	25
SABBATH BREACH	26	17	11	28
DRUNKENNESS	27	38	8	46
CURSING AND SWEARING	41	30	22	52
DISORDERLY BEHAVIOUR	3	3	2	5
WIFE BEATING	1	1	0	1
BLASPHEMY	3	2	1	3
CONTUMACY	12	10	7	17
HARBOURING VAGRANTS	1	1	0	1
DISHAUNTING ORDINANCES	12	15	5	20
IRREGULAR MARRIAGE	4	4	3	7
CHARMING	6	4	6	10
MISCELLANEOUS	3	2	1	3
TOTAL	235	241	184	425

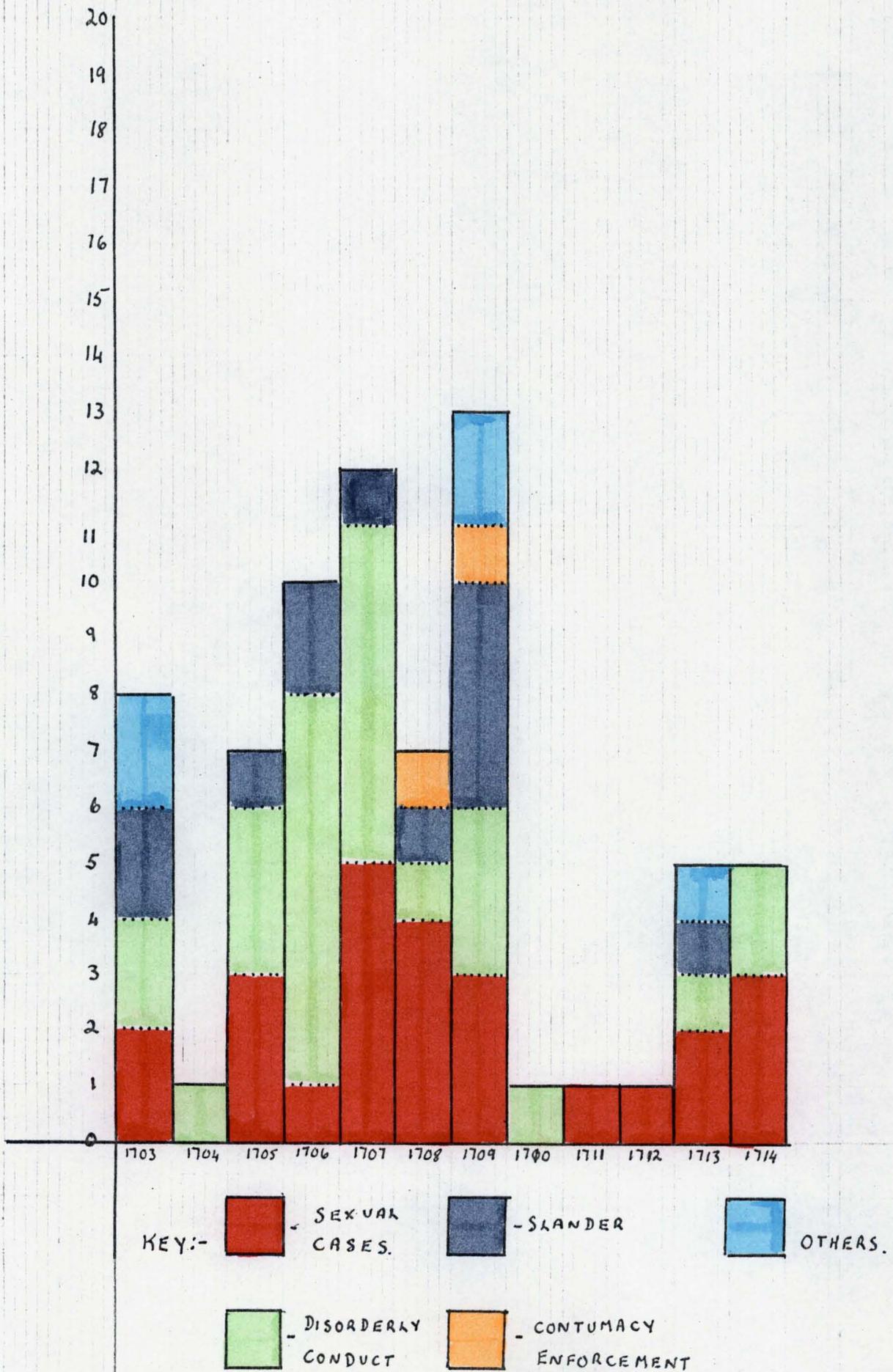
KILSYTH KIRK SESSION 1692 - 1705



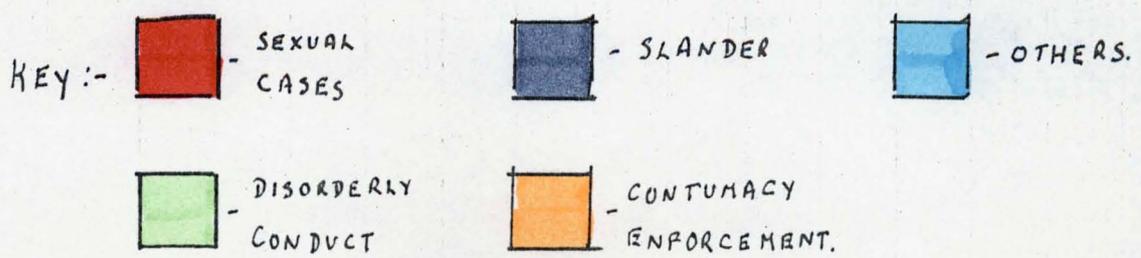
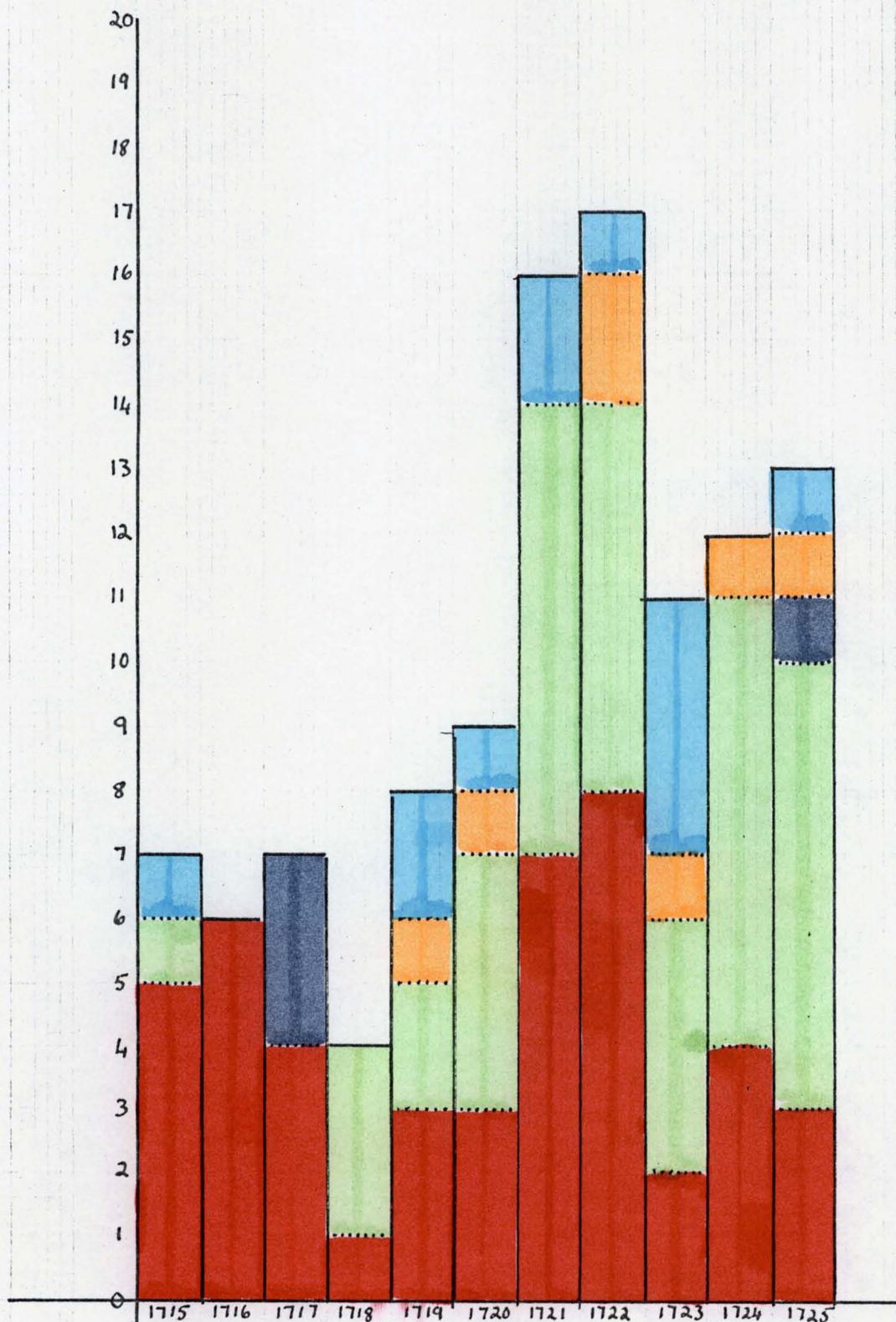
KASSYTH KIRK SESSION 1706 - 1725

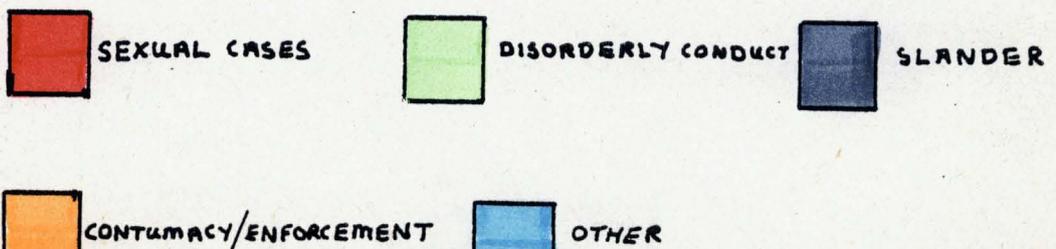
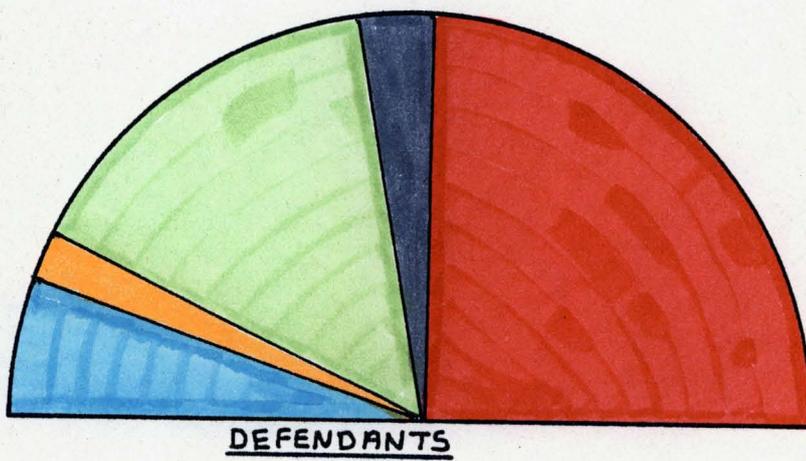
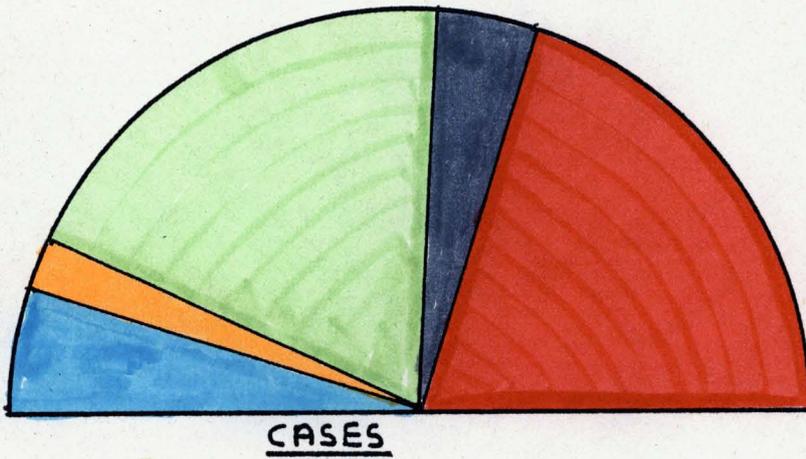






KILSYTH KIRK SESSION 1715-1725





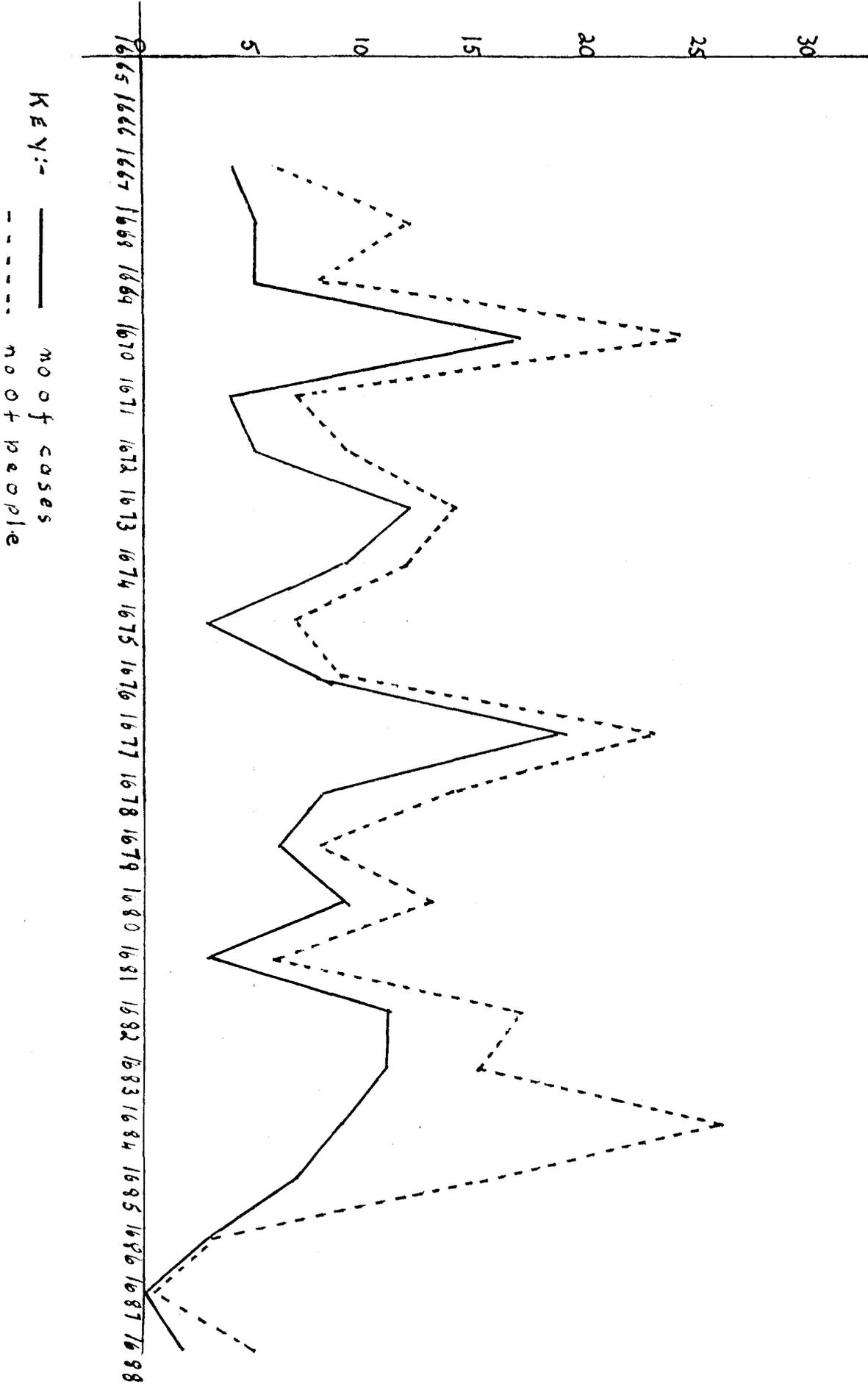
MUIRAVONSIDE KIRK SESSION 1667 - 1688.

TYPES OF CRIME	NUMBER OF CRIMES	NUMBER OF PERSONS		
		M	F	T
FORNICATION	26	24	26	50
ADULTERY	4	4	4	8
F.A.N.	11	11	10	21
SCANDALOUS CARRIAGE	5	4	5	9
SLANDER	33	16	24	20
SABBATH BREACH	30	41	15	56
DRUNKENNESS	13	14	0	14
CURSING & SWEARING	11	4	12	16
WIFE BEATING	2	2	0	2
CONTUMACY	11	11	3	14
ENFORCEMENT	3	1	2	3
HARBOURING VAGRANTS	4	1	4	5
KEEPING CONVENTICLES	2	4	0	4
DISHAUNTING ORDINANCES	2	2	0	2
IRREGULAR MARRIAGE	1	1	1	2
BACK ONE MARRIAGE	1	1	0	1
CHARMING	1	1	2	3
MISCELLANEOUS	2	2	1	3
TOTAL	162	144	109	253

MUIRAVONSIDE 1692 - 1721.

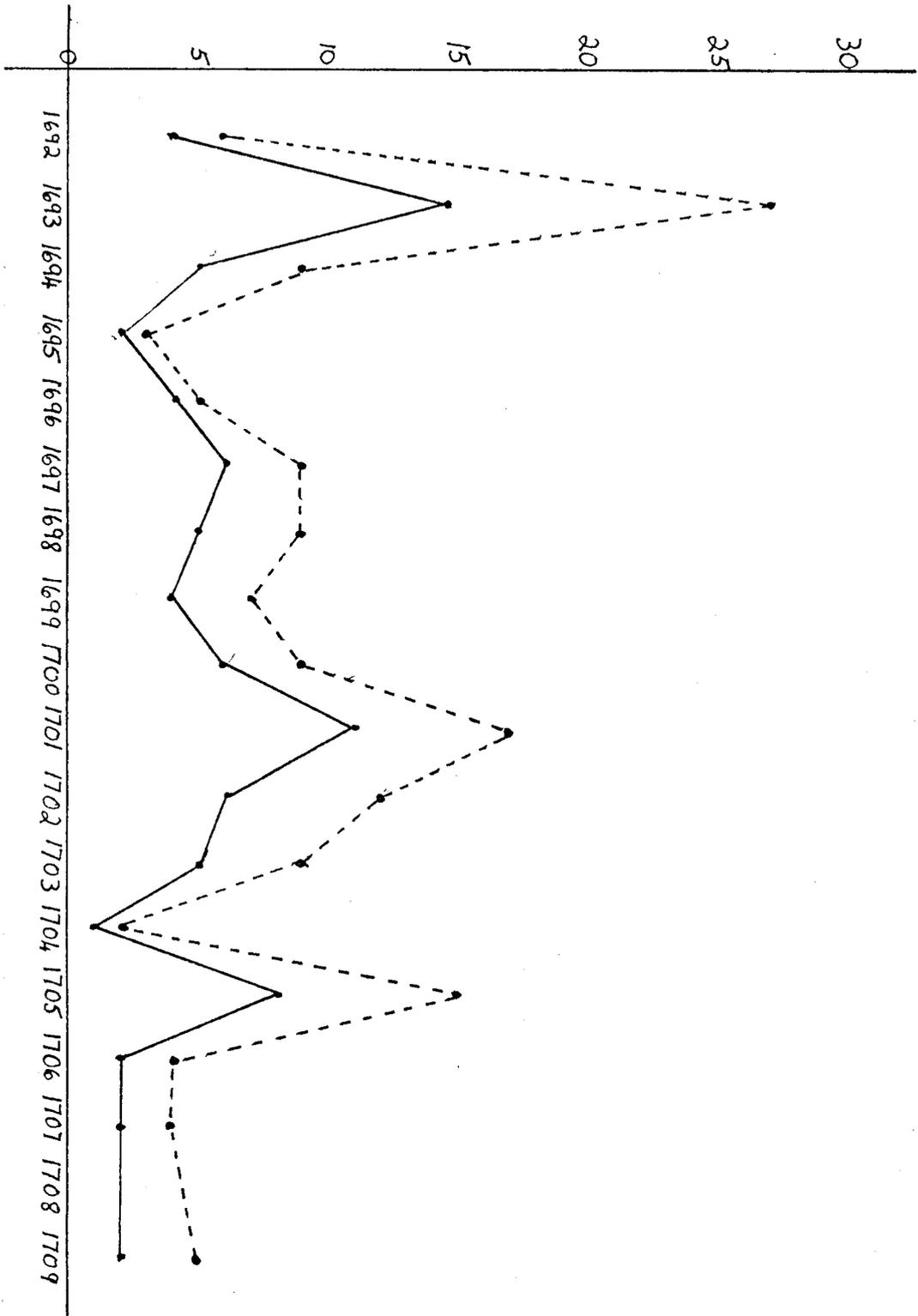
TYPES OF CRIME	NUMBER OF CRIMES	NUMBER OF PERSONS		
		M	F	T
FORNICATION	25	25	24	49
F.A.N.	16	16	13	29
ADULTERY	9	9	9	18
SCANDALOUS CARRIAGE	2	2	2	4
SLANDER	2	1	2	3
DRUNKENNESS	15	22	0	22
CURSING & SWEARING	4	2	7	9
DISORDERLY BEHAVIOUR	2	5	0	5
'WIFE' BEATING (SFOUSE)	1	0	1	1
CONTUMACY	5	4	2	6
ENFORCEMENT	3	2	1	3
HARBOURING VAGRANTS	5	5	0	5
DISHAUNTING ORDINANCES	5	6	1	7
BACK GONE MARRIAGE	2	1	2	3
MISCELLANEOUS	4	5	2	7
TOTAL	111	117	77	194

MURRAYONSIDE 1667-1688
NUMBER OF CASES / NUMBER OF PEOPLE



MURAVONSID E 1692 - 1710

NUMBER OF CASES / NUMBER OF PEOPLE



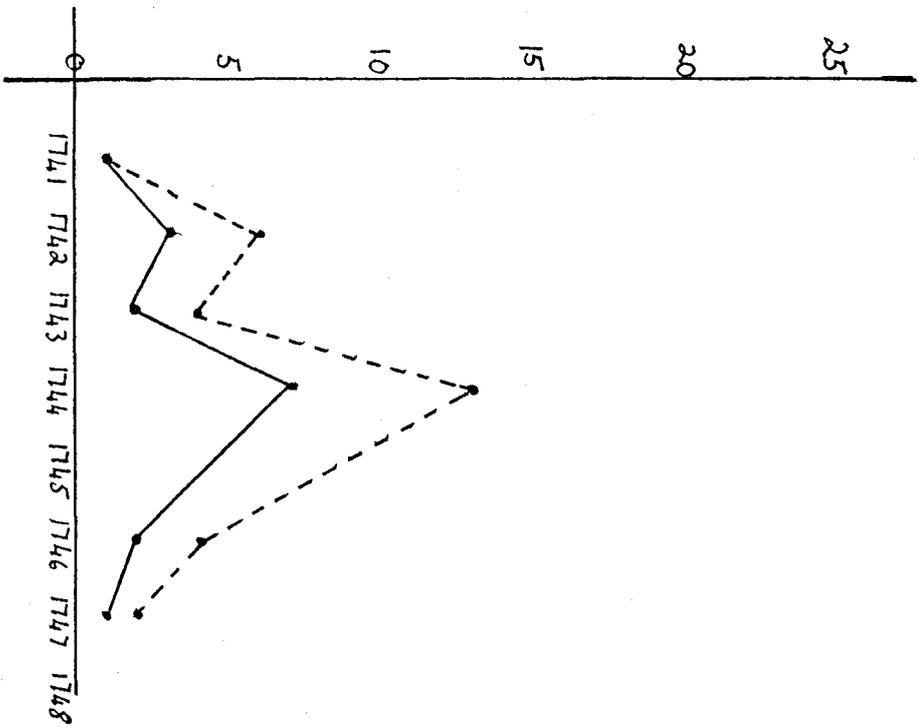
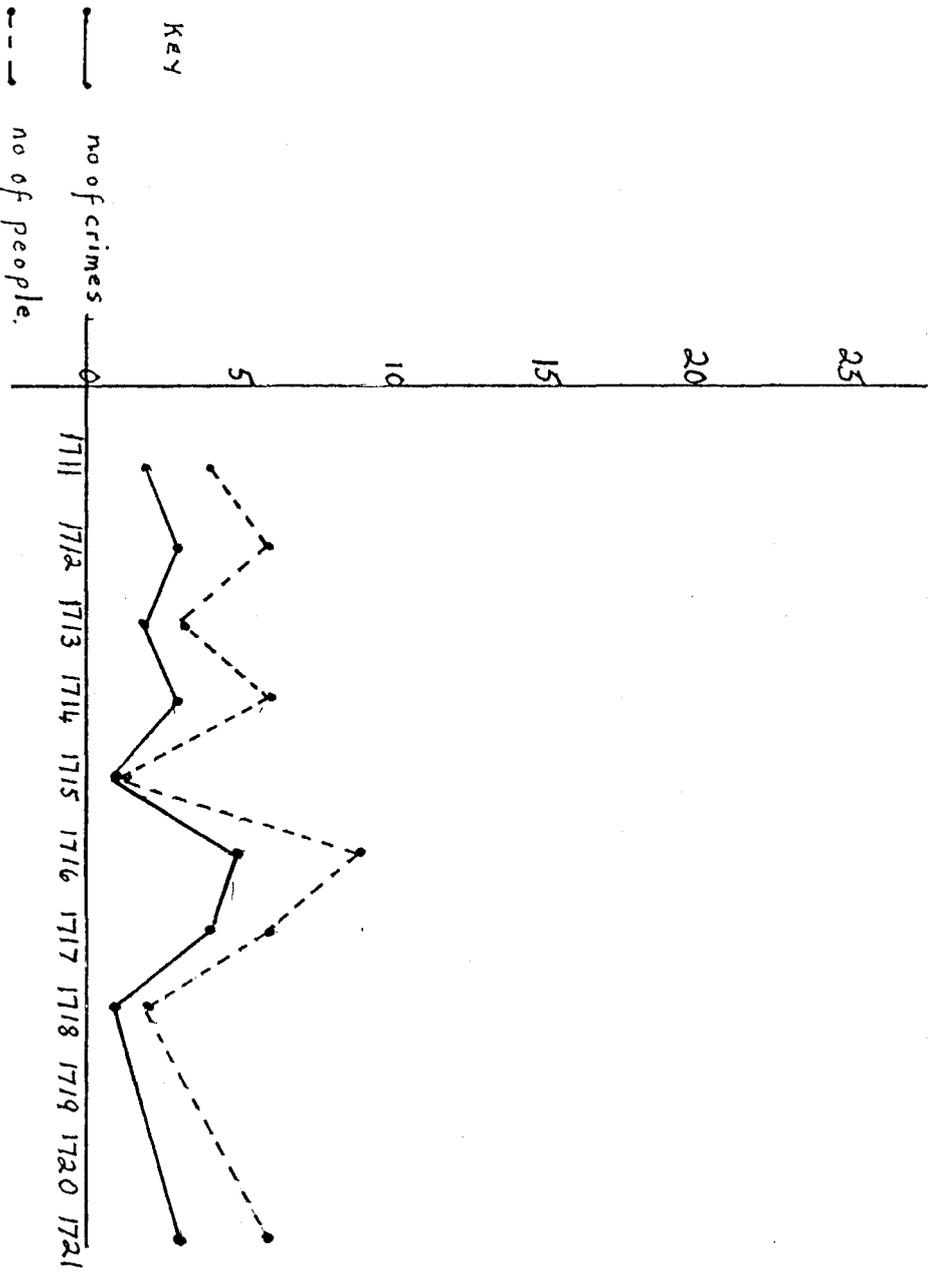
KEY

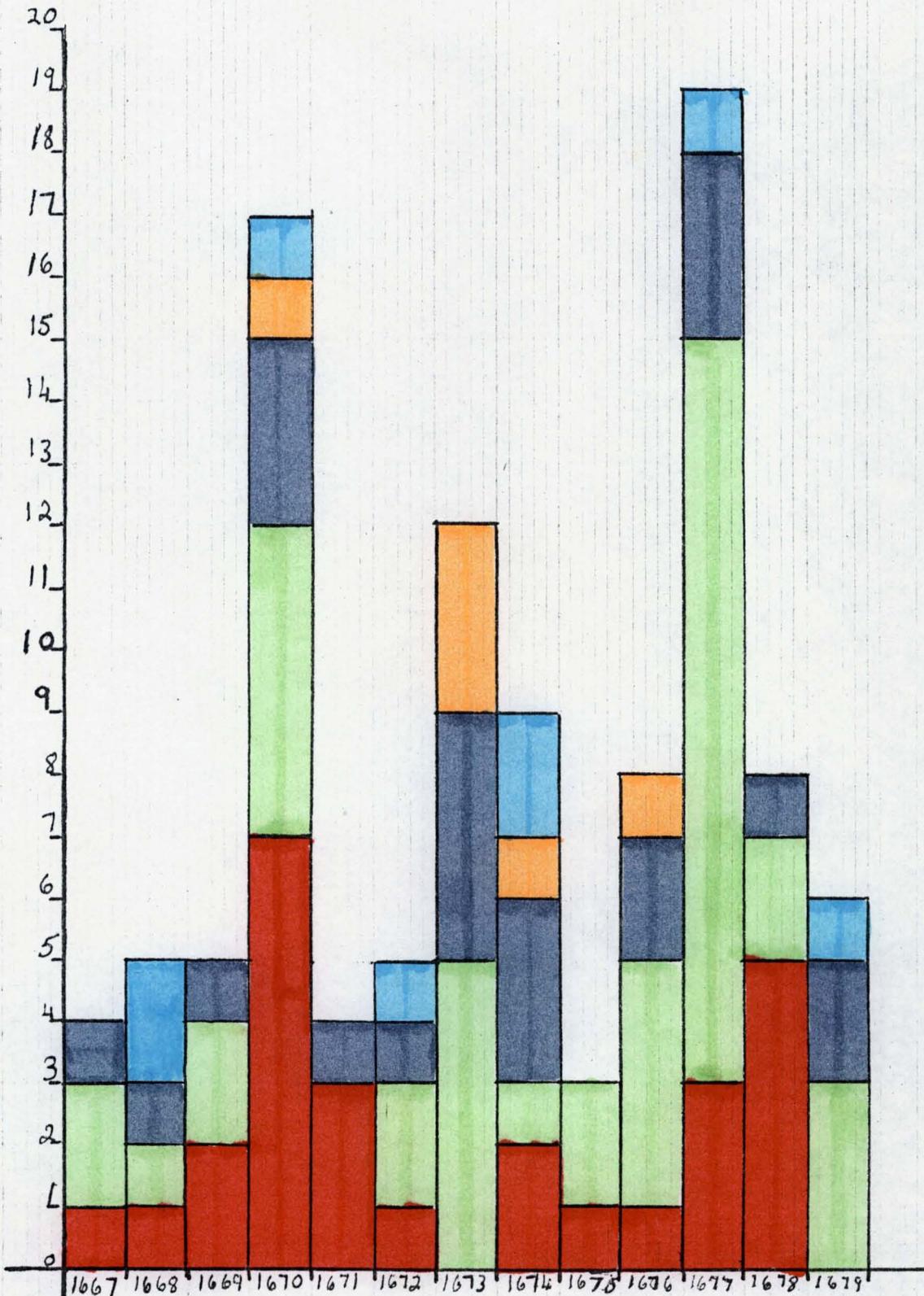
—•— no of cases

- - -•- - no of people

MURRAYONSIDE 1711-1721 and 1741-1748

NUMBER OF CASES / NUMBER OF PEOPLE.

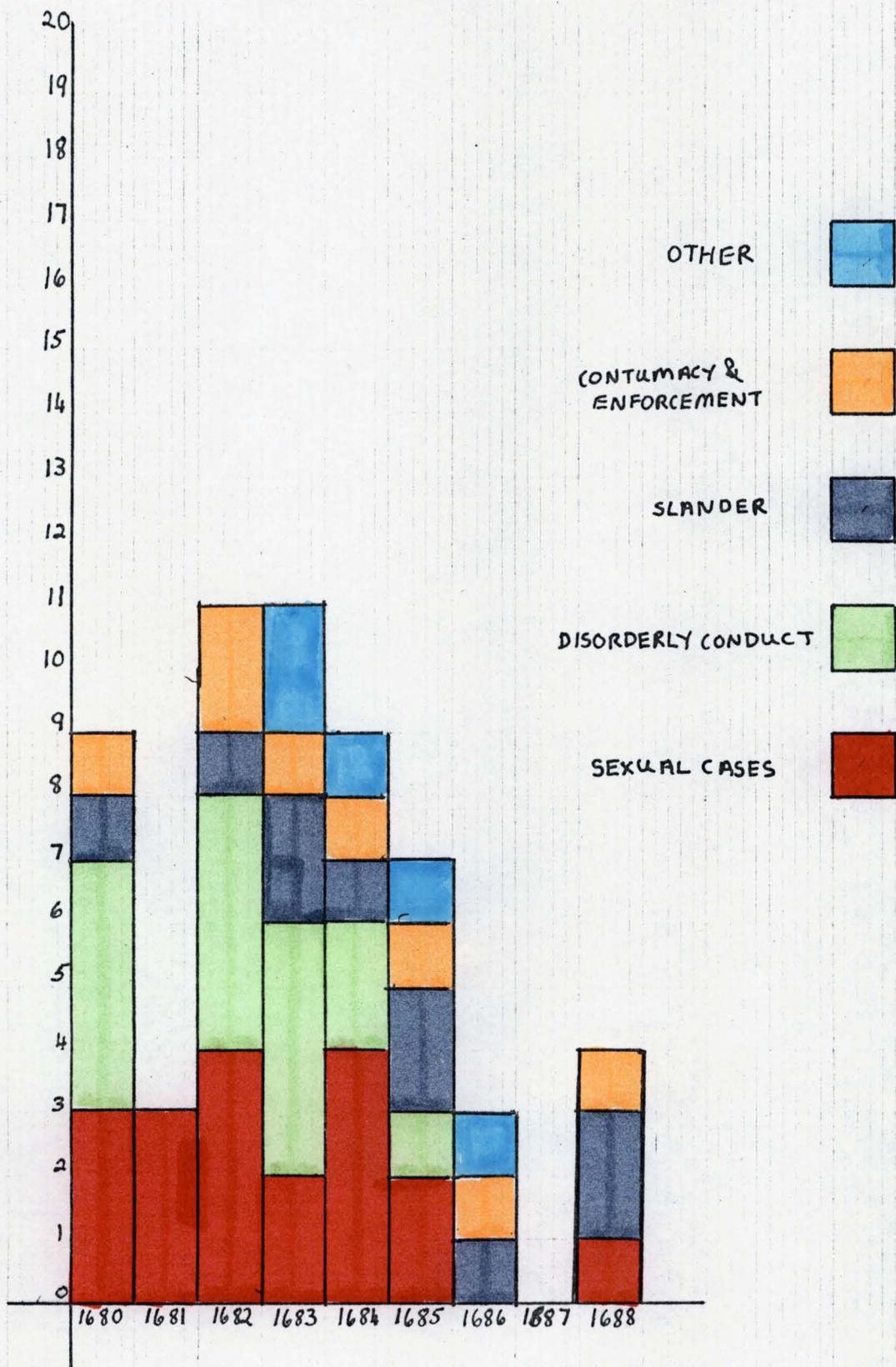




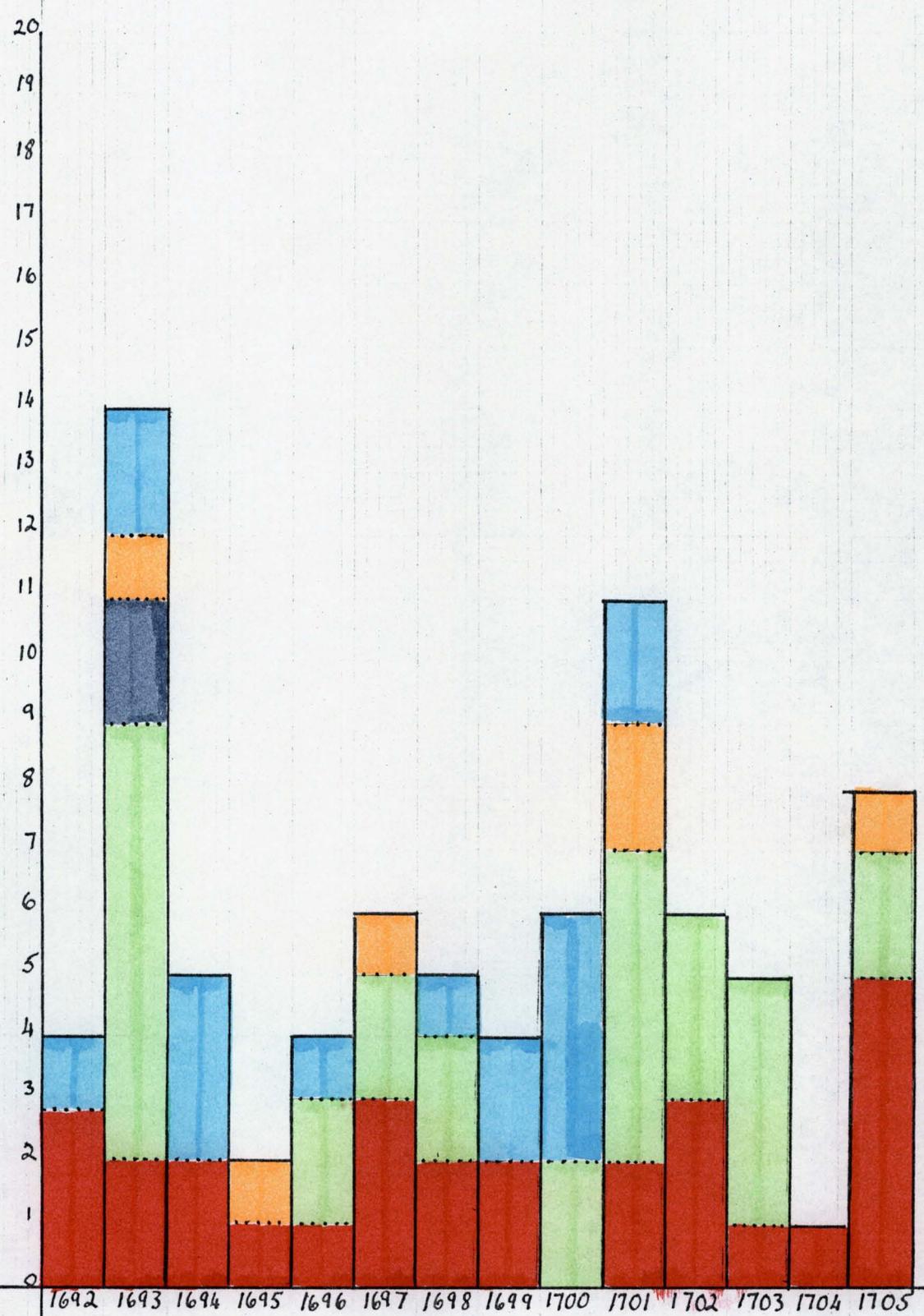
KEY:-

- SEXUAL CASES
- SLANDER
- OTHERS
- DISORDERLY CONDUCT
- CONTUMACY ENFORCEMENT

MUIRAYONSIDE KIRK SESSION 1680-1688.



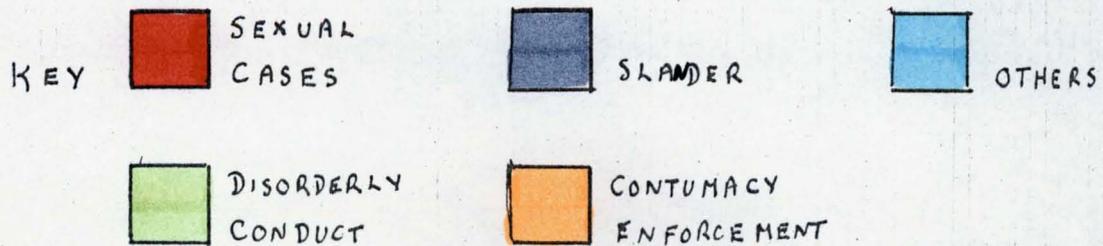
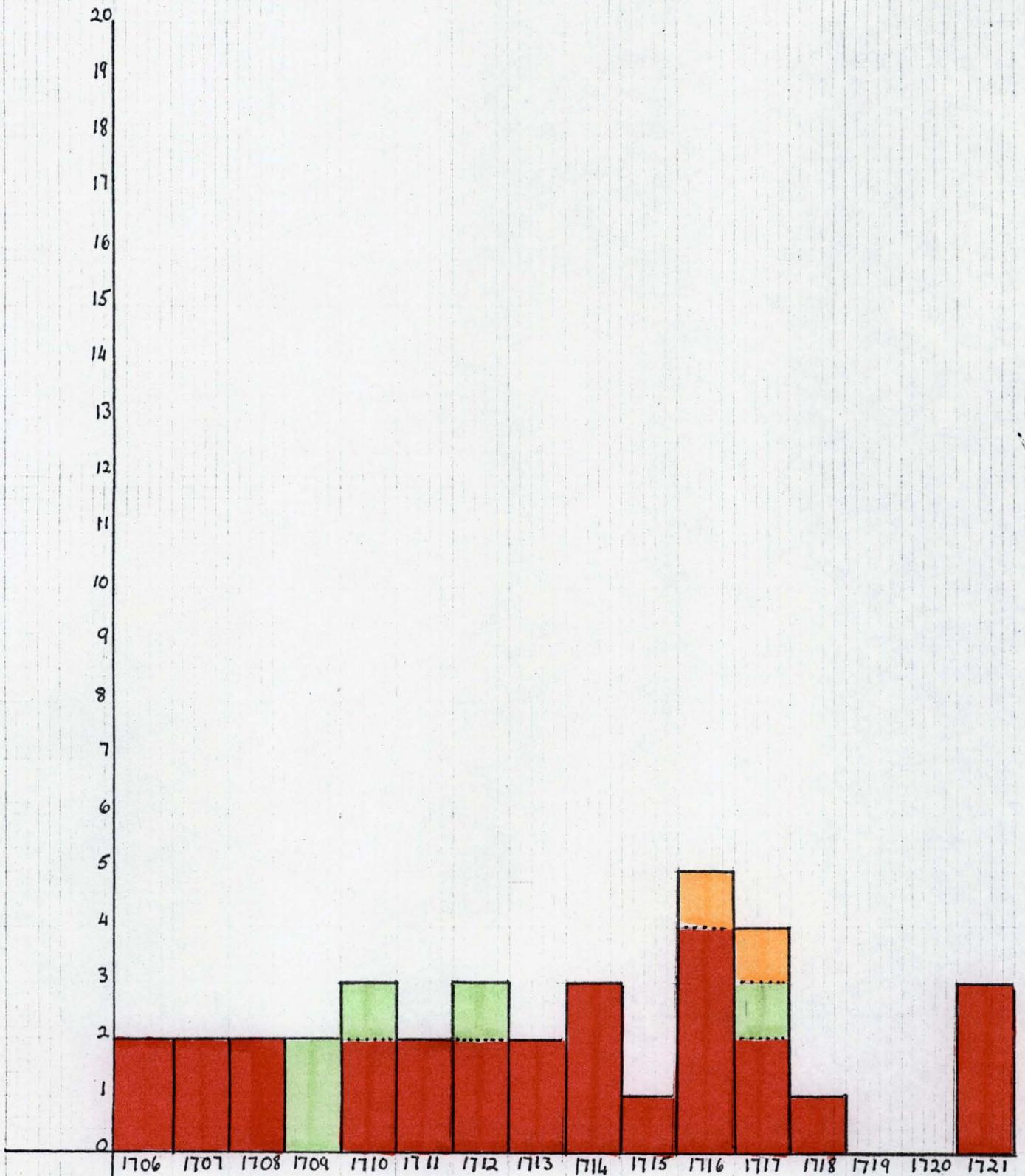
MURAVONSIDE KIRK SESSION 1692-1705



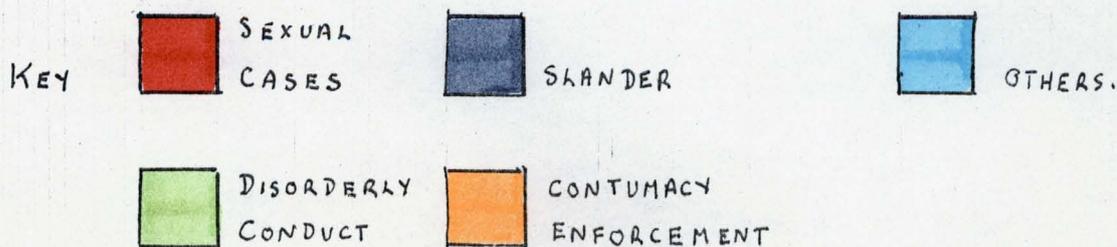
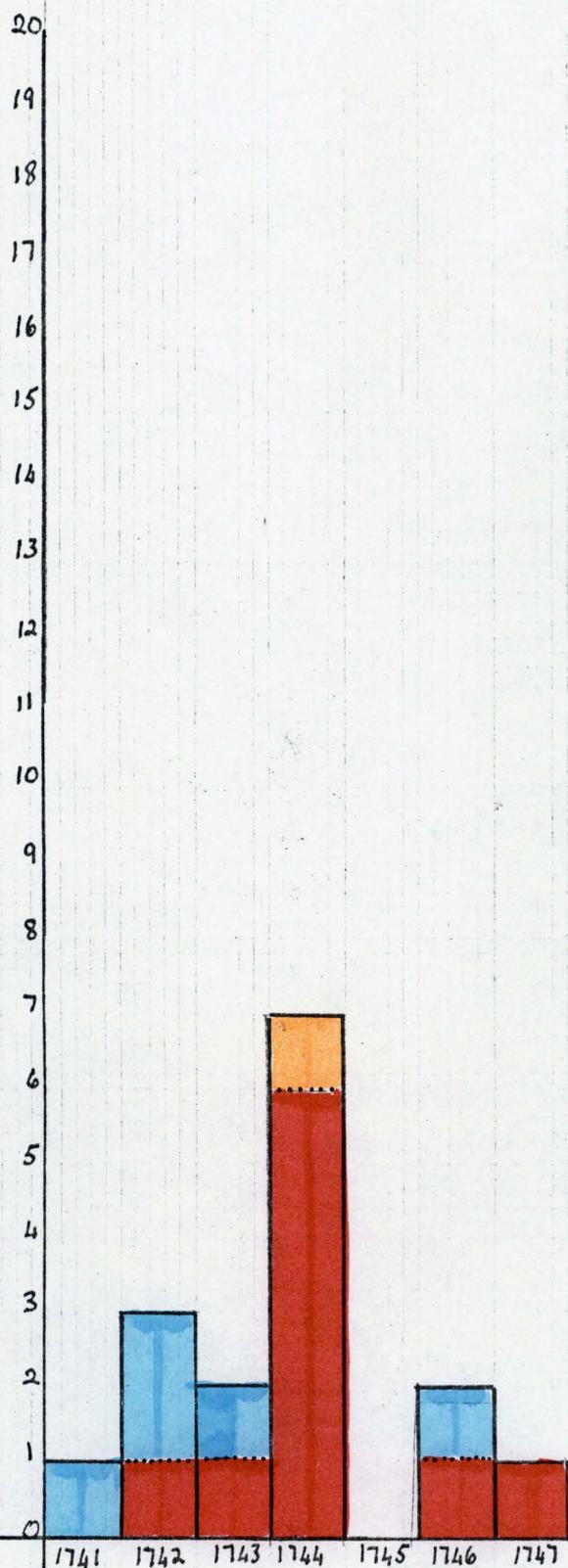
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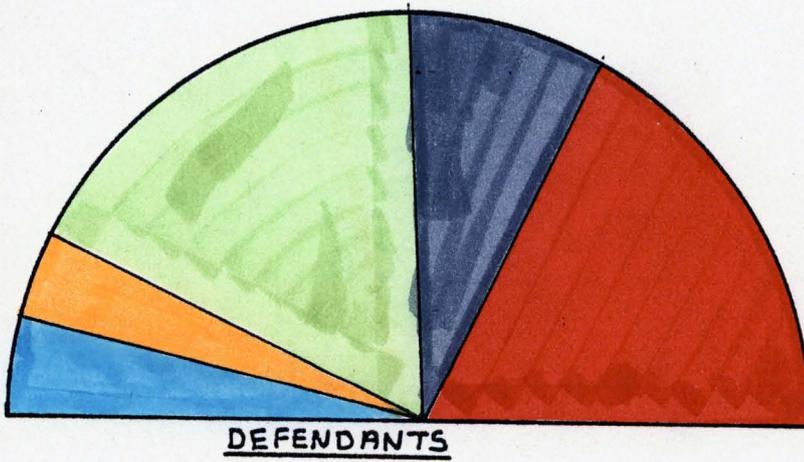
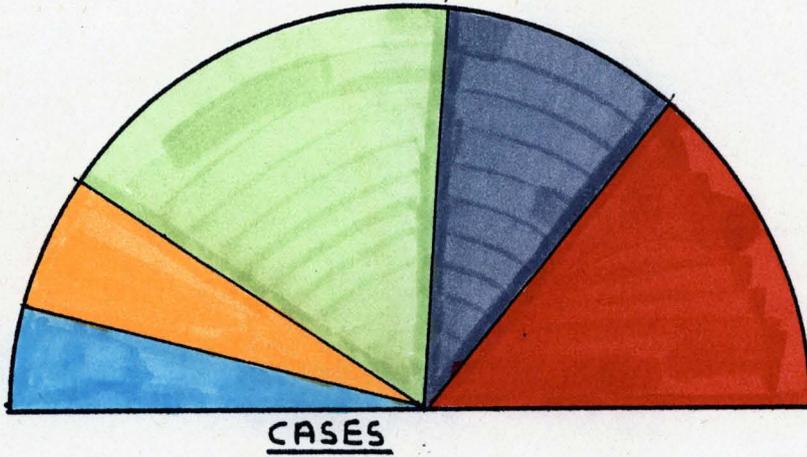
 SEXUAL CASES	 SLANDER	 OTHERS
 DISORDERLY CONDUCT	 CONTUMACY ENFORCEMENT.	

MUIRAVONSIDE KIRK SESSION 1706-1721



MUIRAVONSIDE KIRK SESSION 1741-1747





SEXUAL CASES



DISORDERLY CONDUCT



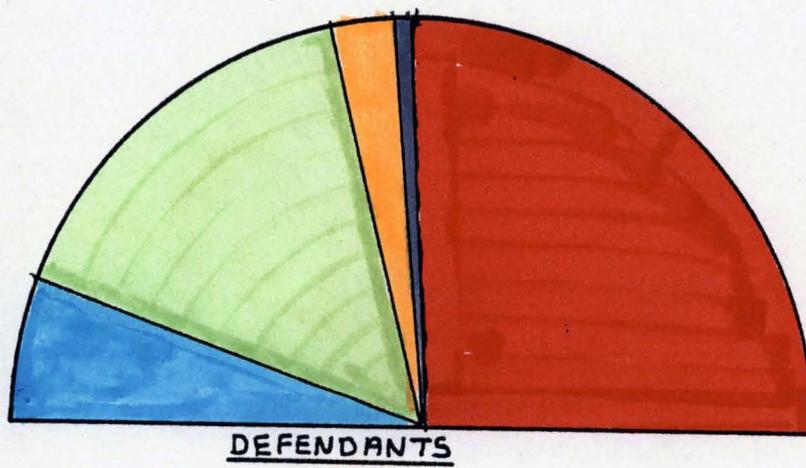
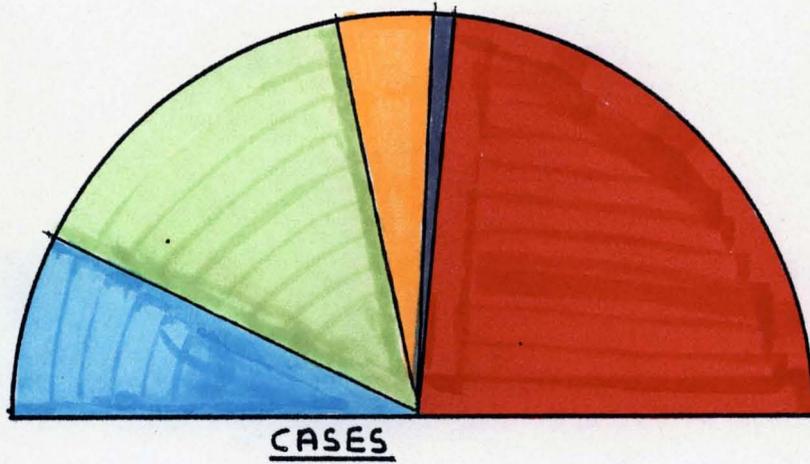
SLANDER



CONTUMACY/ENFORCEMENT



OTHER



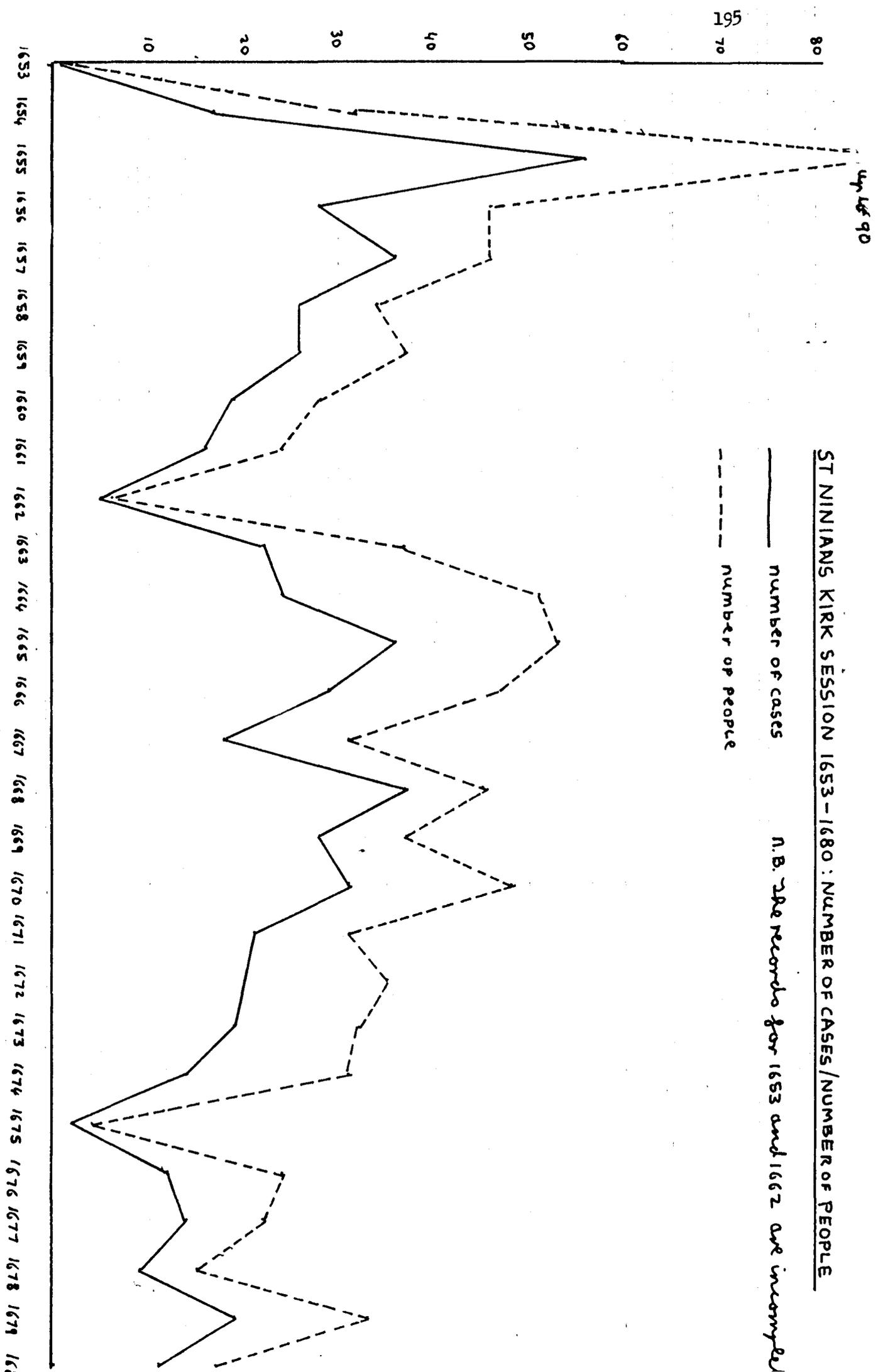
■ SEXUAL CASES ■ DISORDERLY CONDUCT ■ SLANDER

■ CONTUMACY/ENFORCEMENT ■ OTHER

ST NINIANS KIRK SESSION 1653 - 1680 : NUMBER OF CASES / NUMBER OF PEOPLE

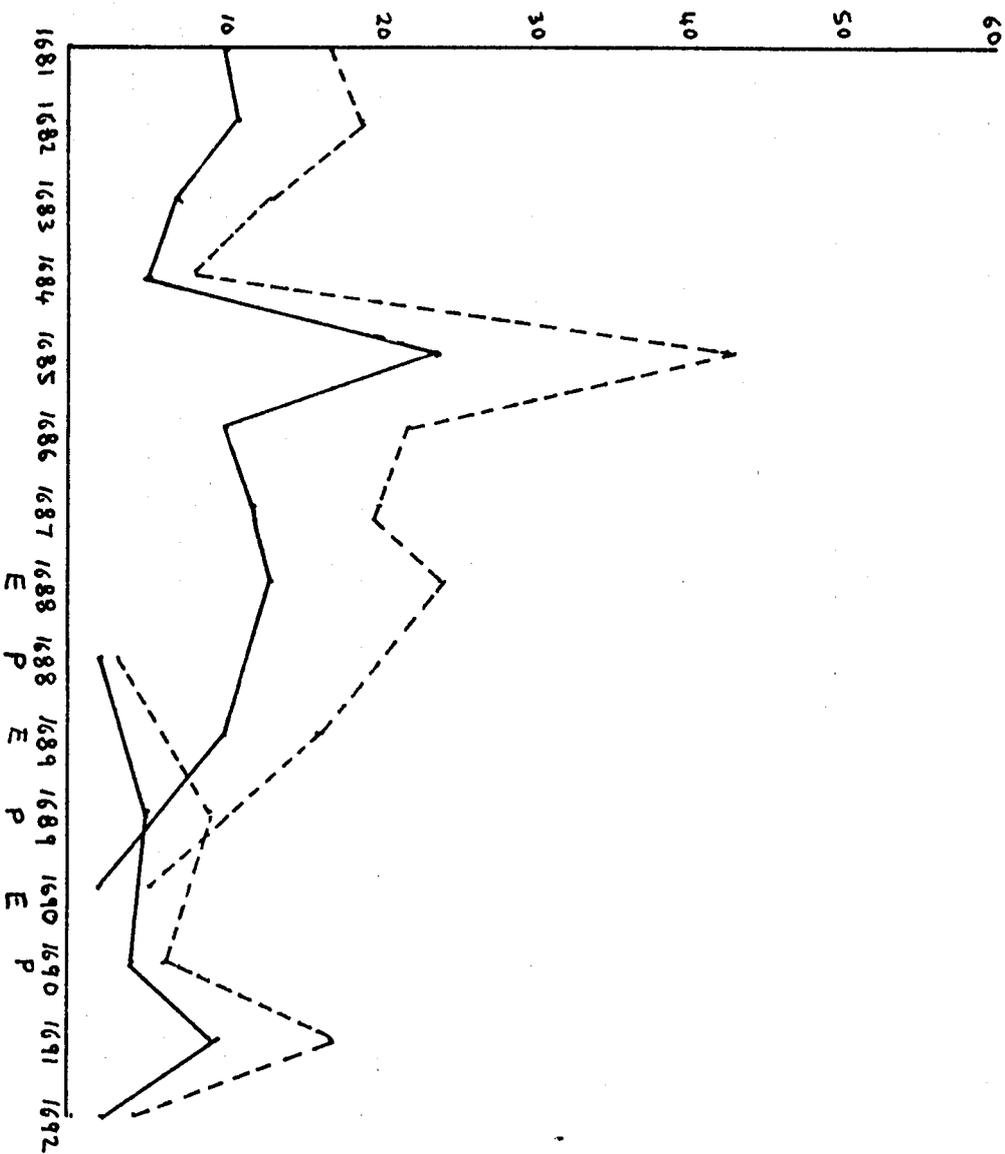
N.B. The records for 1653 and 1662 are incomplete

— number of cases
 - - - - - number of people

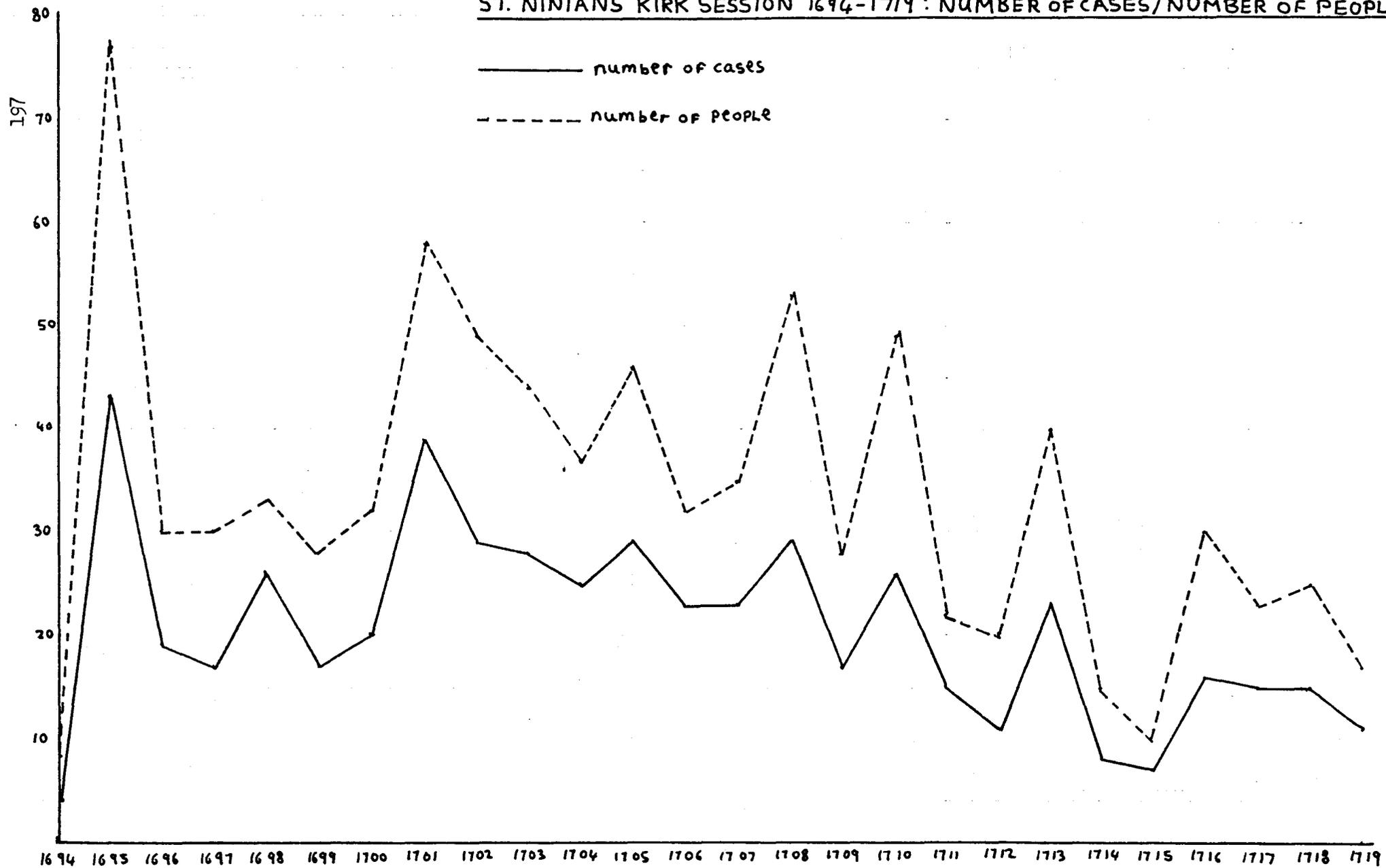


ST. NINIANS KIRK SESSION 1681-1692: NUMBER OF CASES/NUMBER OF PEOPLE

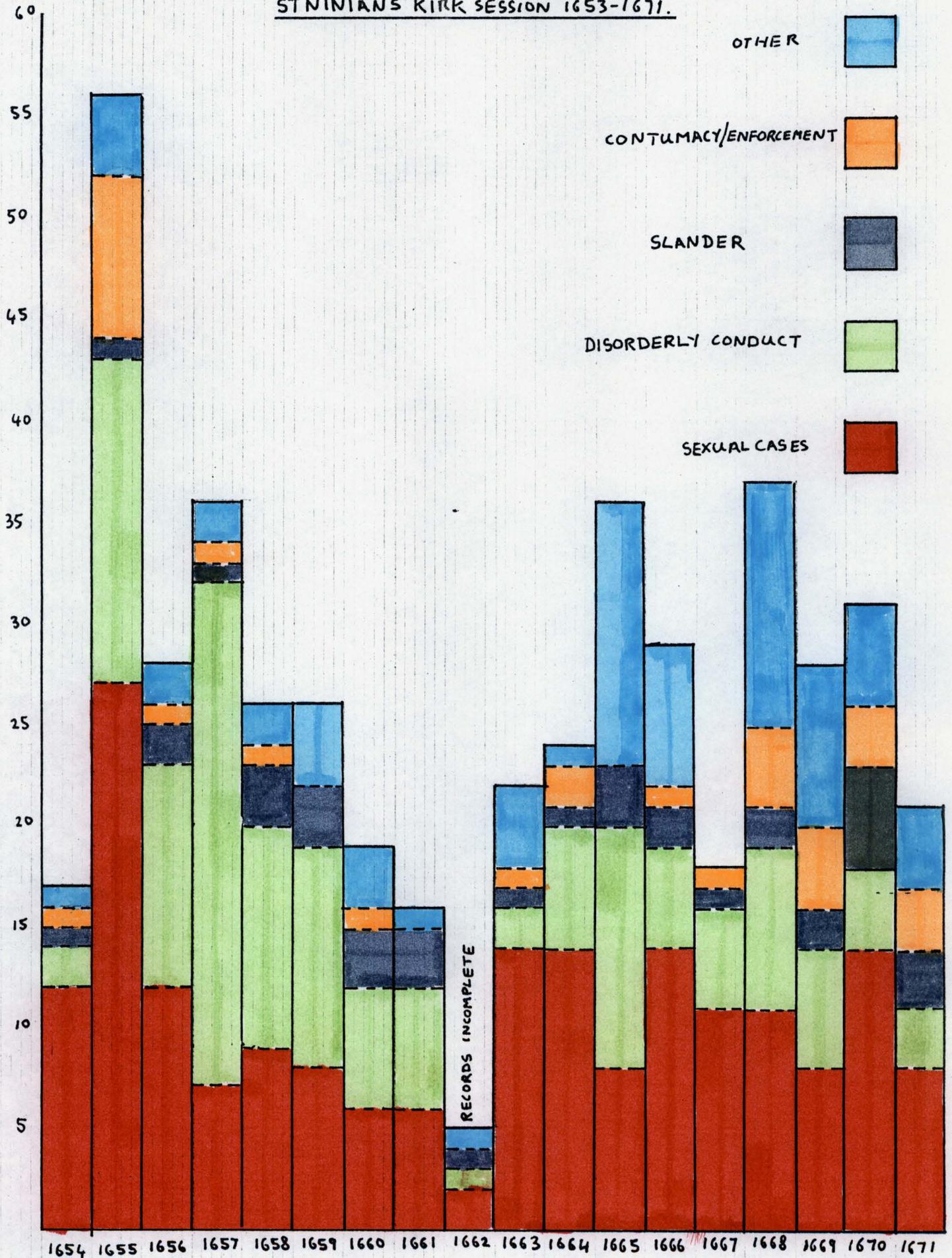
_____ NUMBER OF CASES
 E = EPISCOPALIAN SESSION
 P = PRESBYTERIAN SESSION
 - - - - - NUMBER OF PEOPLE

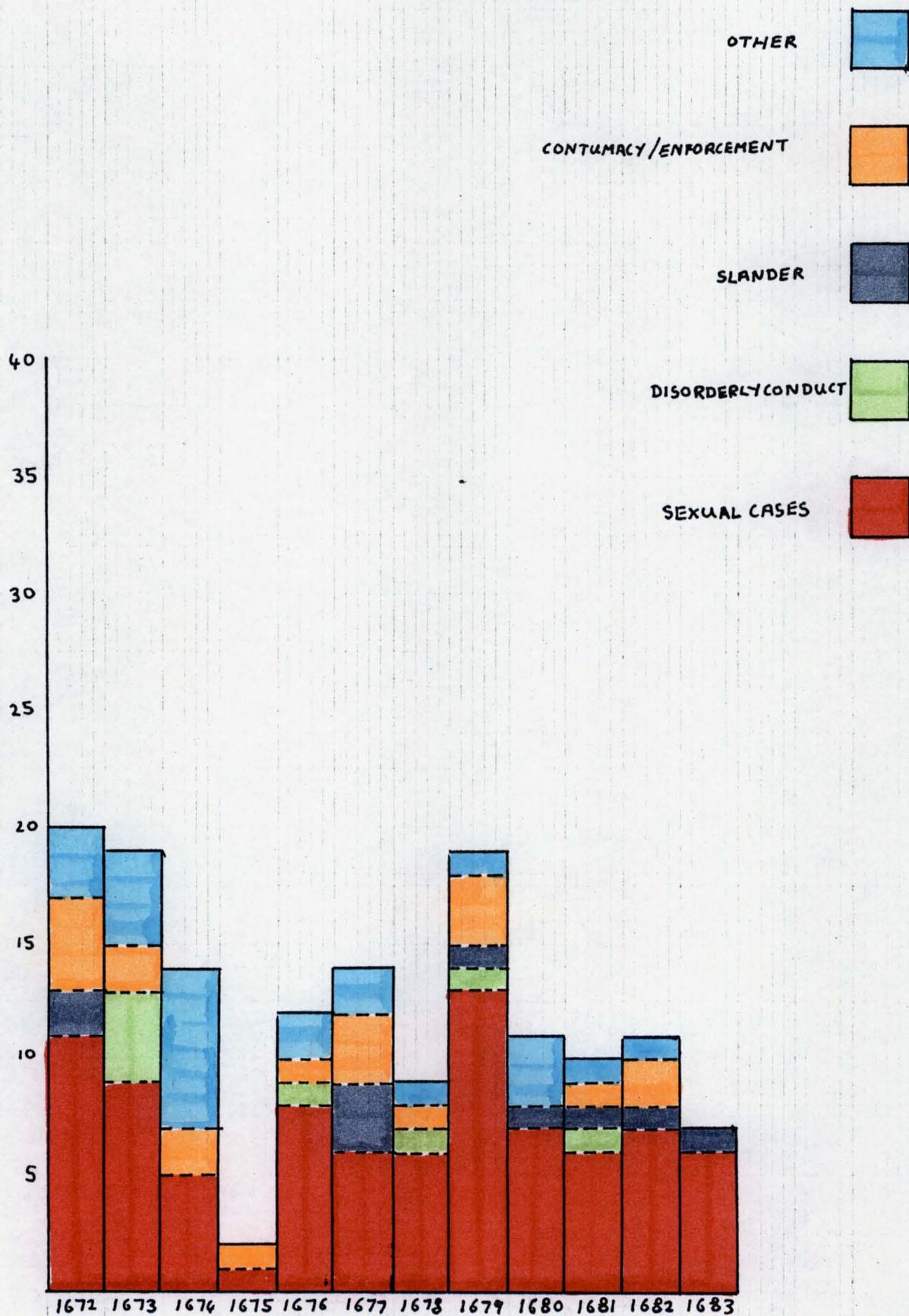


ST. NINIANS KIRK SESSION 1694-1719 : NUMBER OF CASES/NUMBER OF PEOPLE

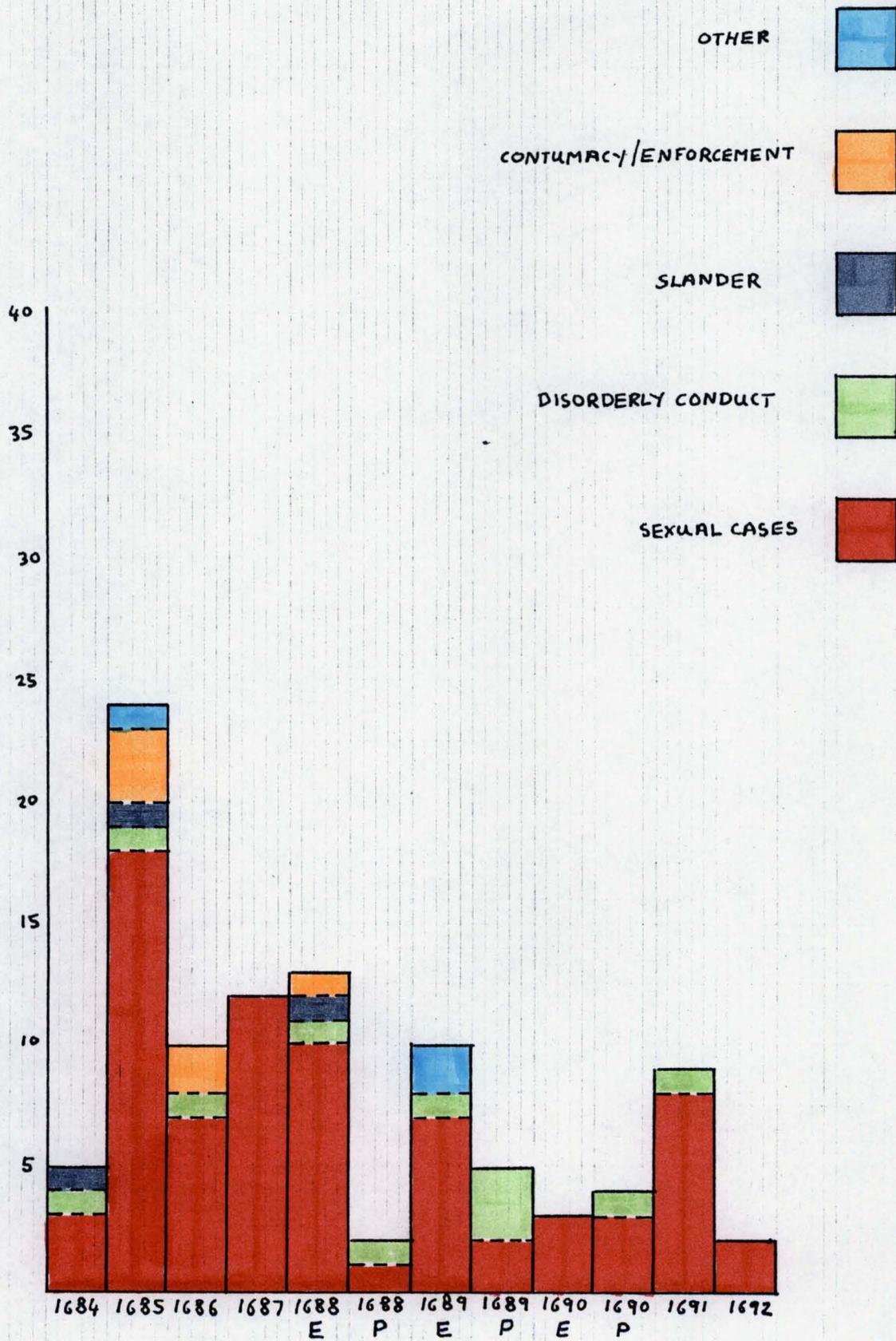


STNINIANS KIRK SESSION 1653-1671.





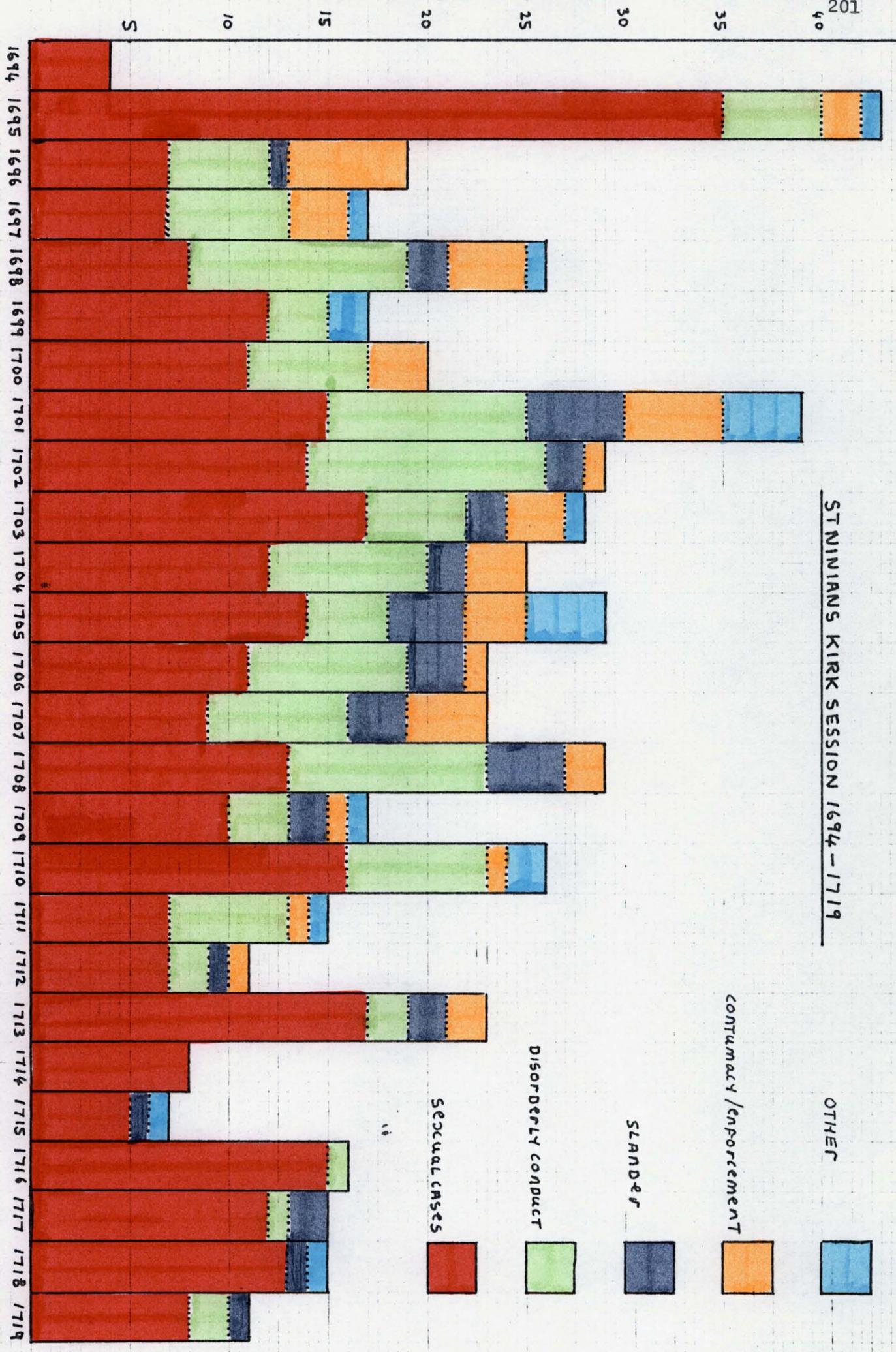
ST. NINIANS KIRK SESSION 1684-1692



E = episcopalian session

P = presbyterian session

STININIANS KIRK SESSION 1694 - 1719



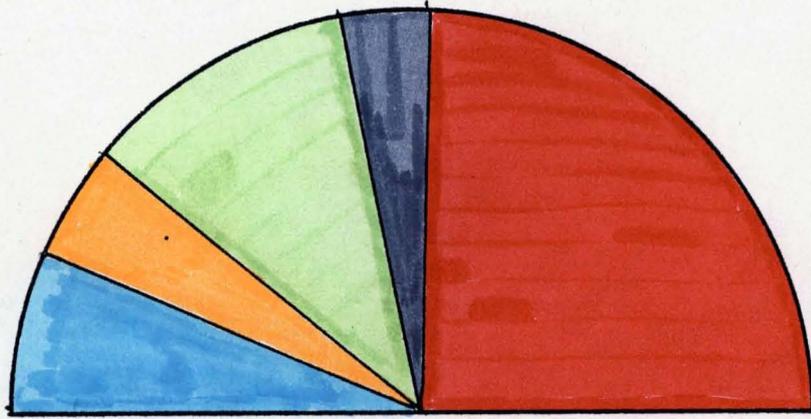
OTHER

CONTUMACY/ENFORCEMENT

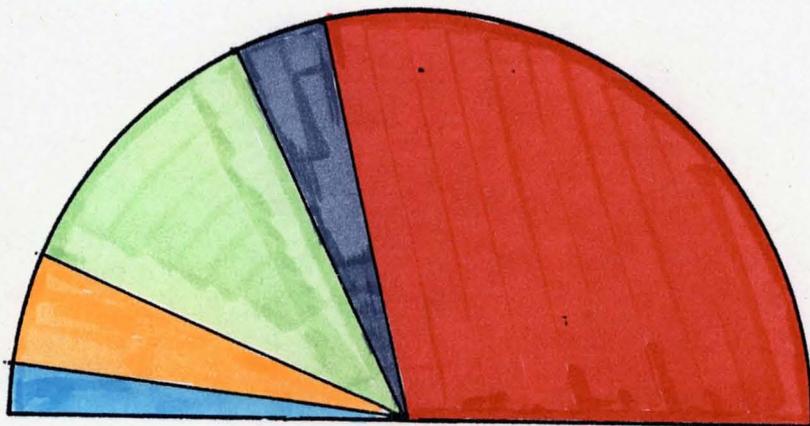
SLANDER

DISORDERLY CONDUCT

SEXUAL CASES



1653-1688



1692-1719

NB. Cases only



SEXUAL CASES



DISORDERLY CONDUCT



SLANDER



CONTUMACY/ENFORCEMENT



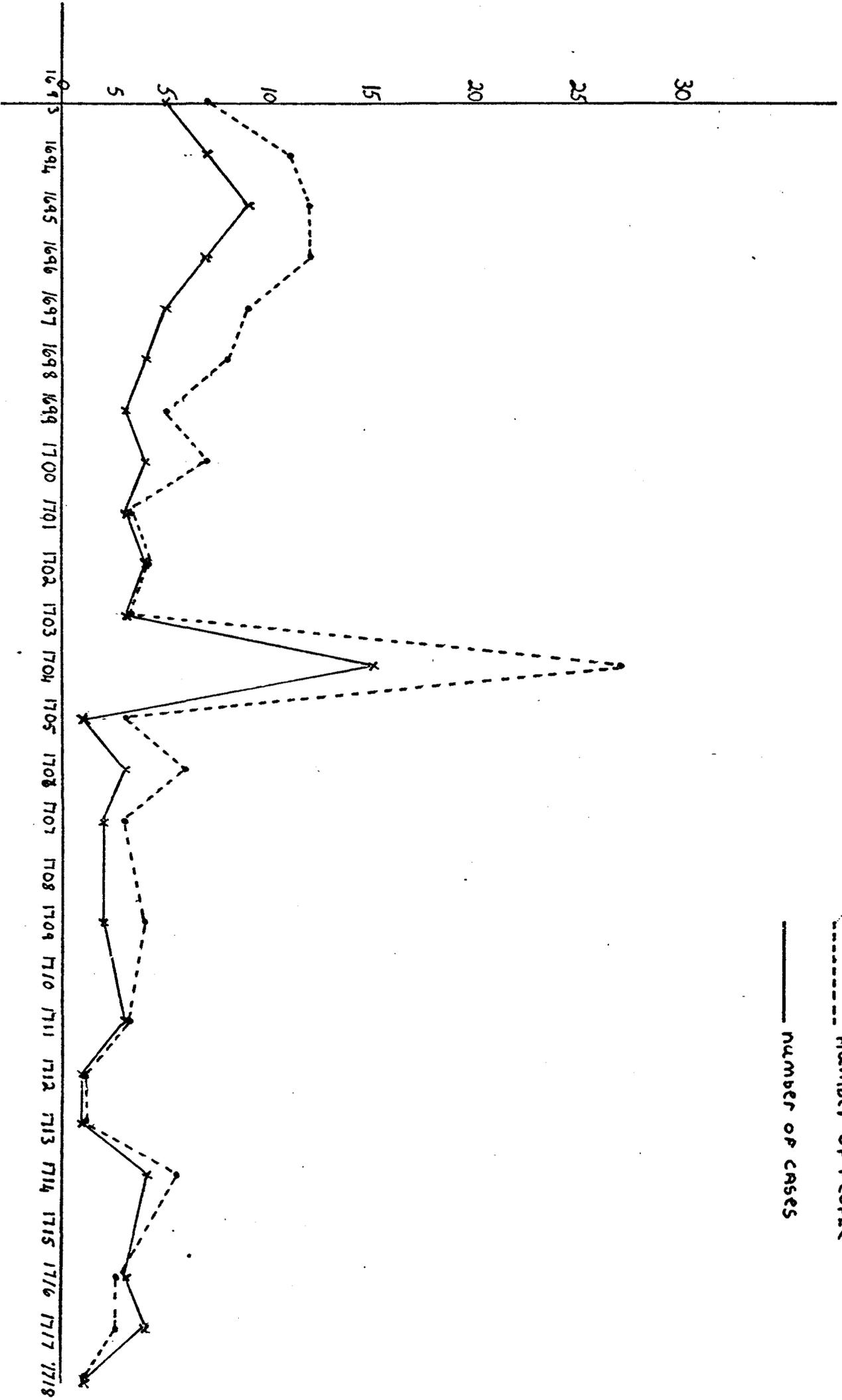
OTHER

SLAMANNAN KIRK SESSION 1693 -- 1745.

TYPE OF CRIME	NUMBER OF CASES	NUMBER OF PERSONS		
		M	F	T
FORNICATION	43	38	43	81
F.A.N.	14	14	14	28
ADULTERY	3	3	3	6
SCANDALOUS CARRIAGE	5	7	3	10
INFANTICIDE	1	0	1	1
SLANDER	3	1	2	3
SABBATH BREACH	8	10	1	11
CURSING AND SWEARING	16	15	9	24
DRUNKENESS	6	6	1	7
DISORDERLY BEHAVIOUR	4	5	2	7
CONTUMACY	6	2	4	6
ENFORCEMENT	4	8	7	15
DISHAUNTING ORDINANCES	3	2	2	4
IRREGULAR MARRIAGE	12	12	11	23
MISCELLANEOUS	7	5	3	8
HARBOURING VAGRANTS	3	3	1	4
THEFT	1	1	0	1
PERJURY	1	1	0	1
TOTAL	140	133	107	240

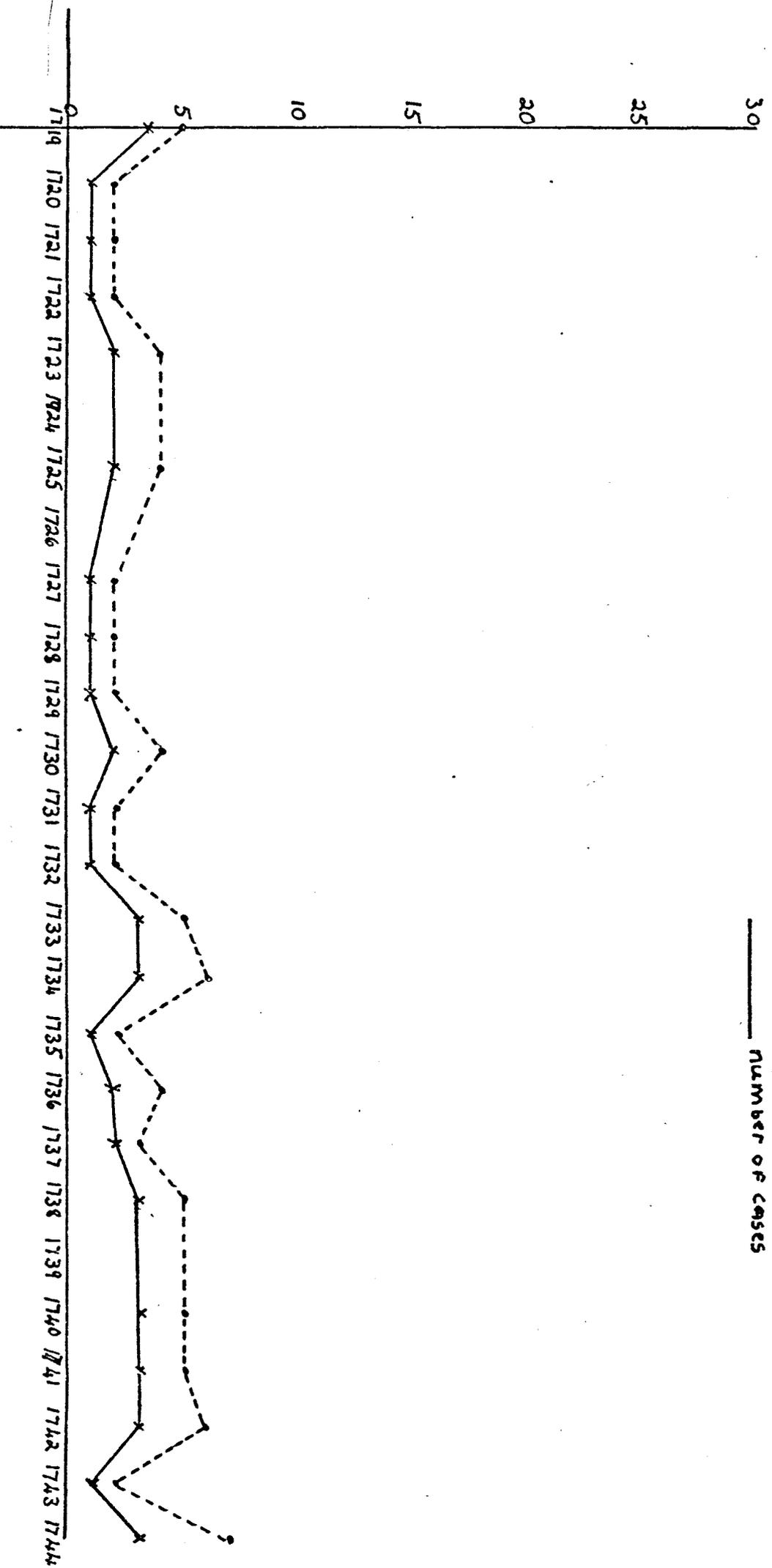
SKAMANNAN KIRK SESSION 1693-1718

----- NUMBER OF PEOPLE
 _____ NUMBER OF CASES



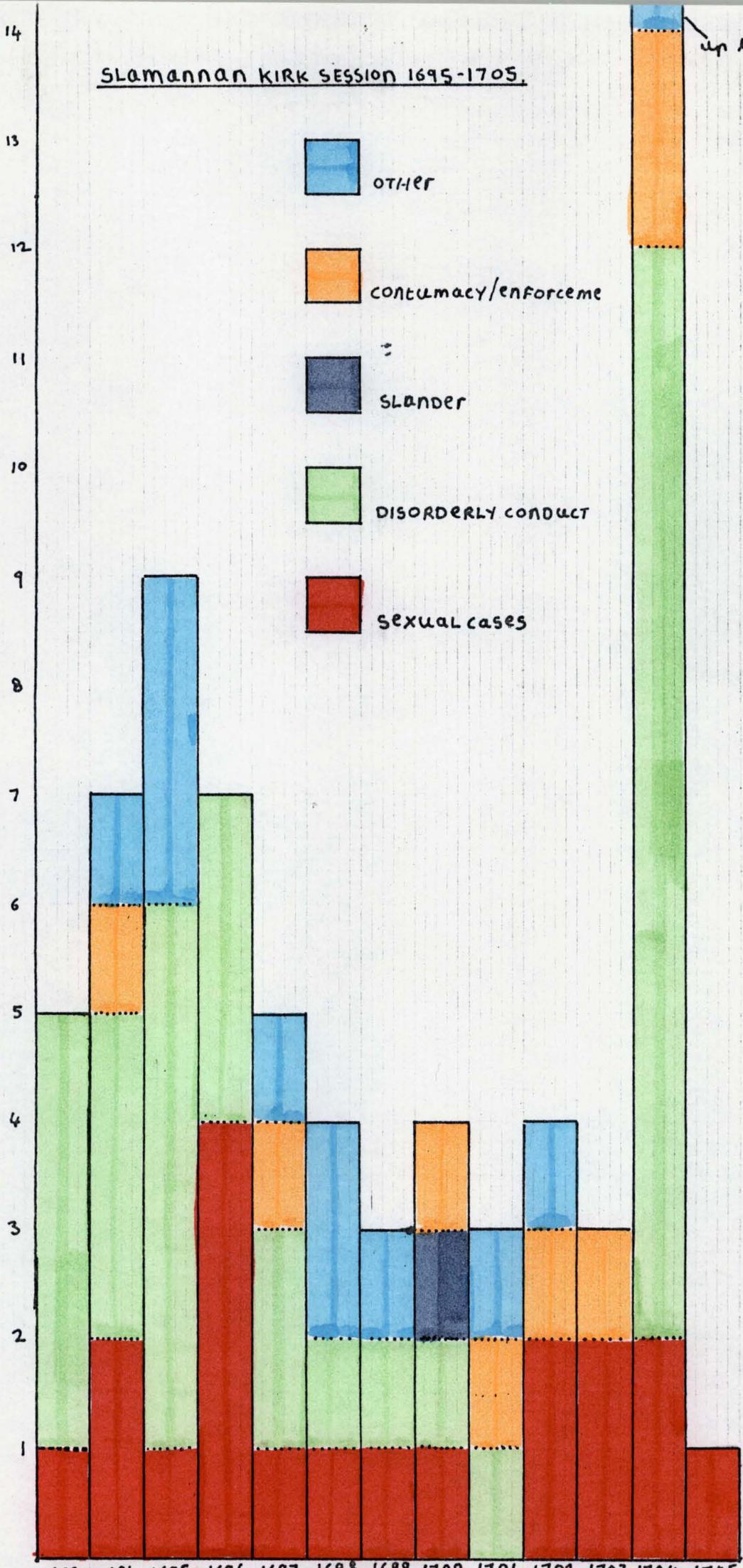
SLAMANNAN KIRK SESSION 1719-1744

..... NUMBER OF PEOPLE
 _____ NUMBER OF CASES



SLAMANNAN KIRK SESSION 1695-1705

up to 15. 206.



SLAMMANON KIRK SESSION 1706-1721

5
4
3
2
1
0

1706 1707 1708 1709 1710 1711 1712 1713 1714 1715 1716 1717 1718 1719 1720 1721

KEY:-



- SEXUAL CASES



- CONTUMACY/ ENFORCEMENT



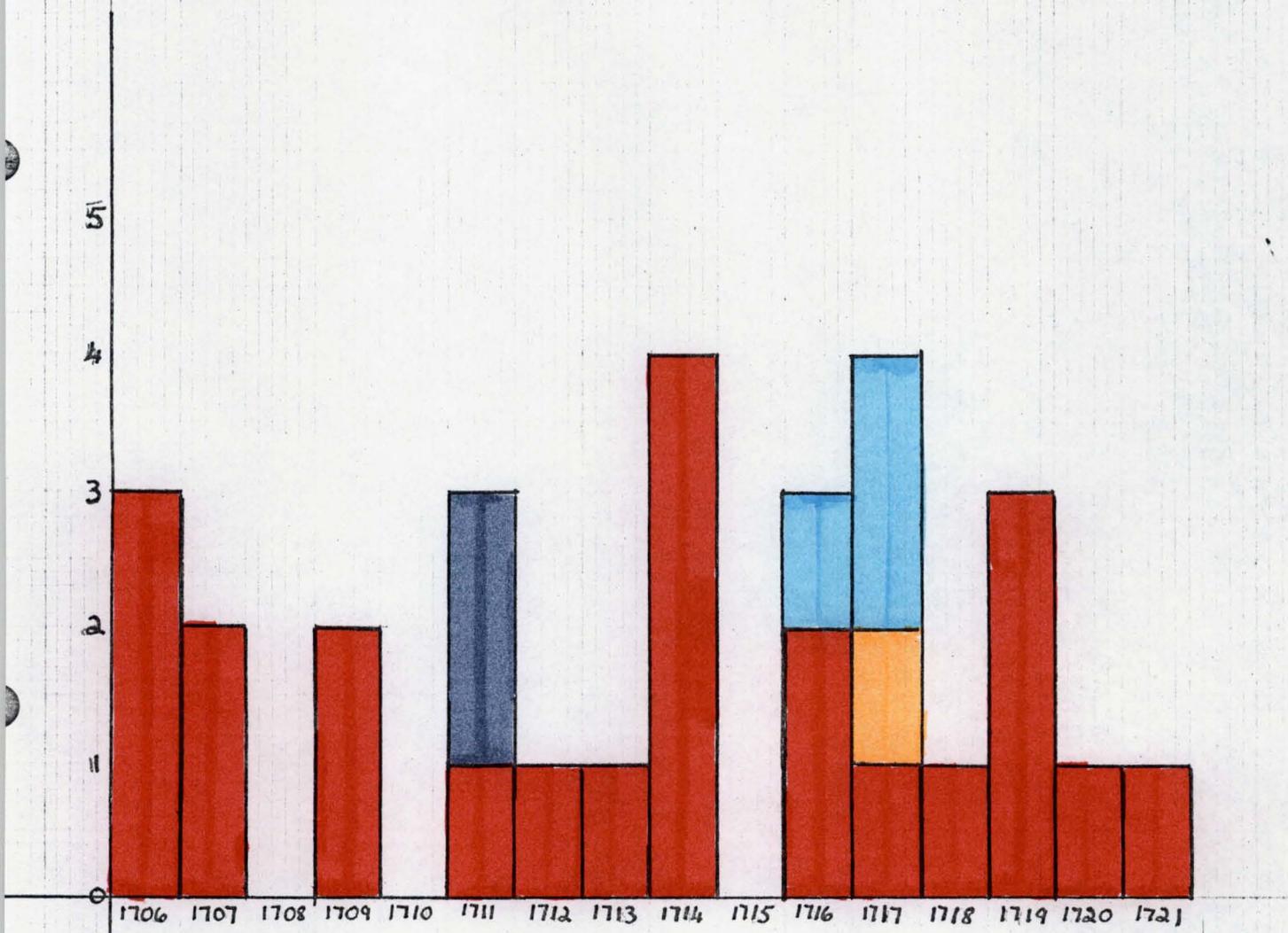
- DISORDERLY CONDUCT.



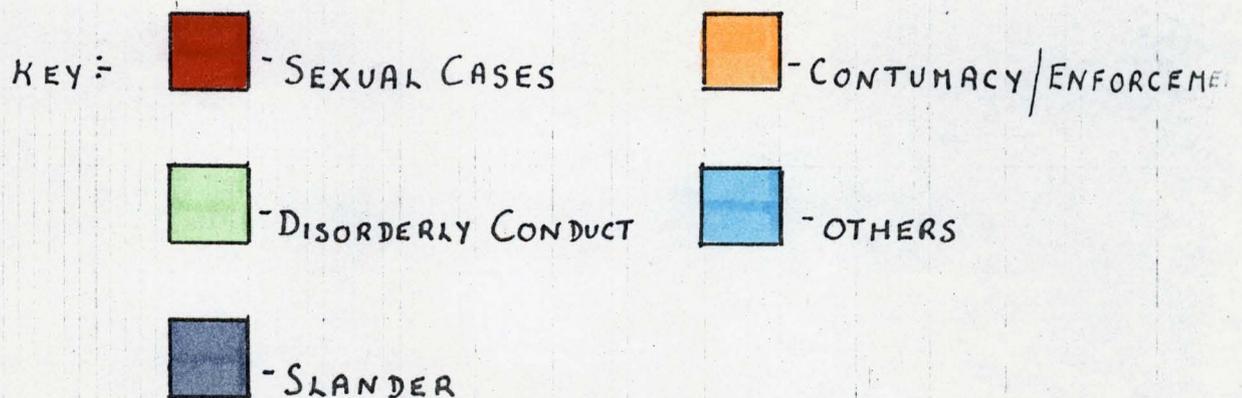
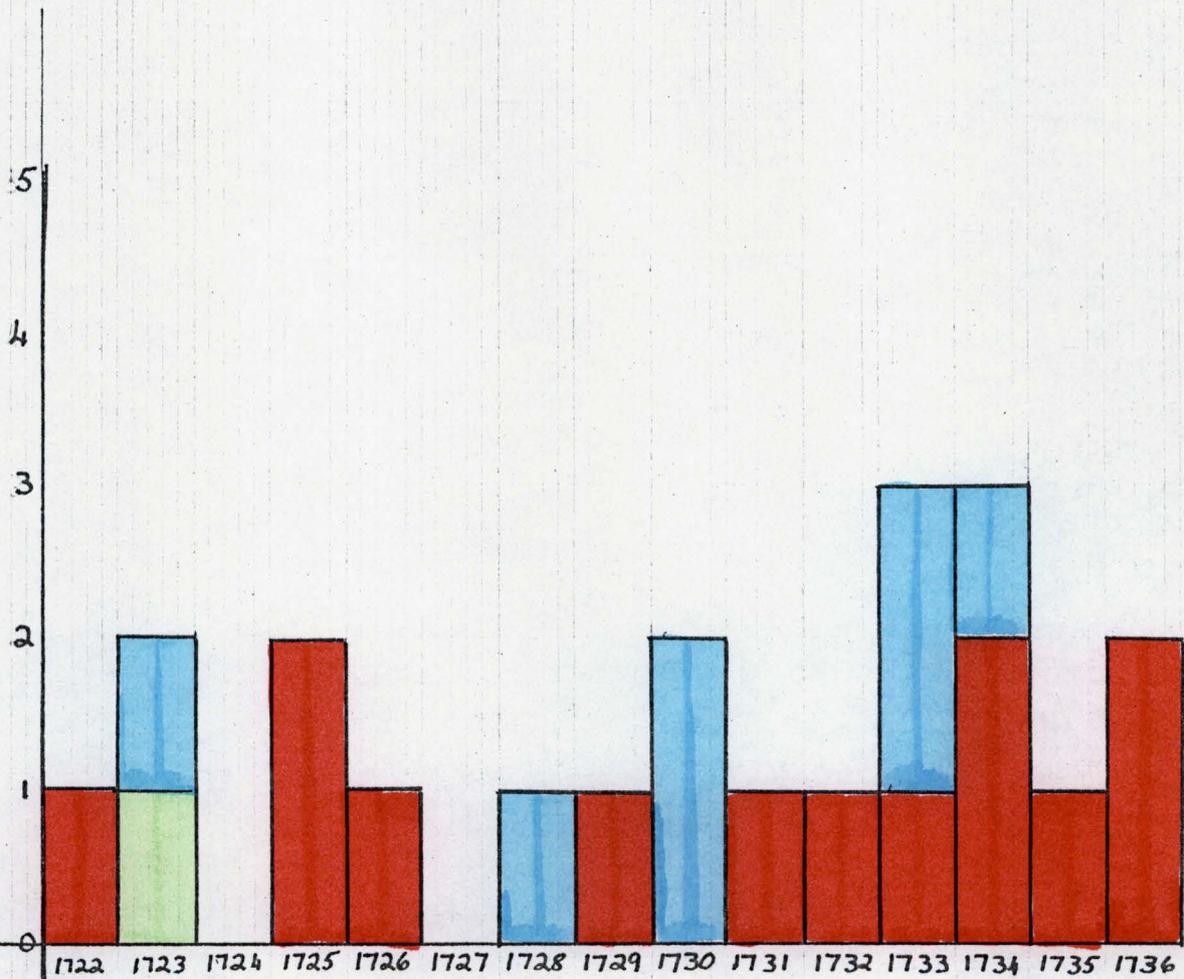
- OTHERS



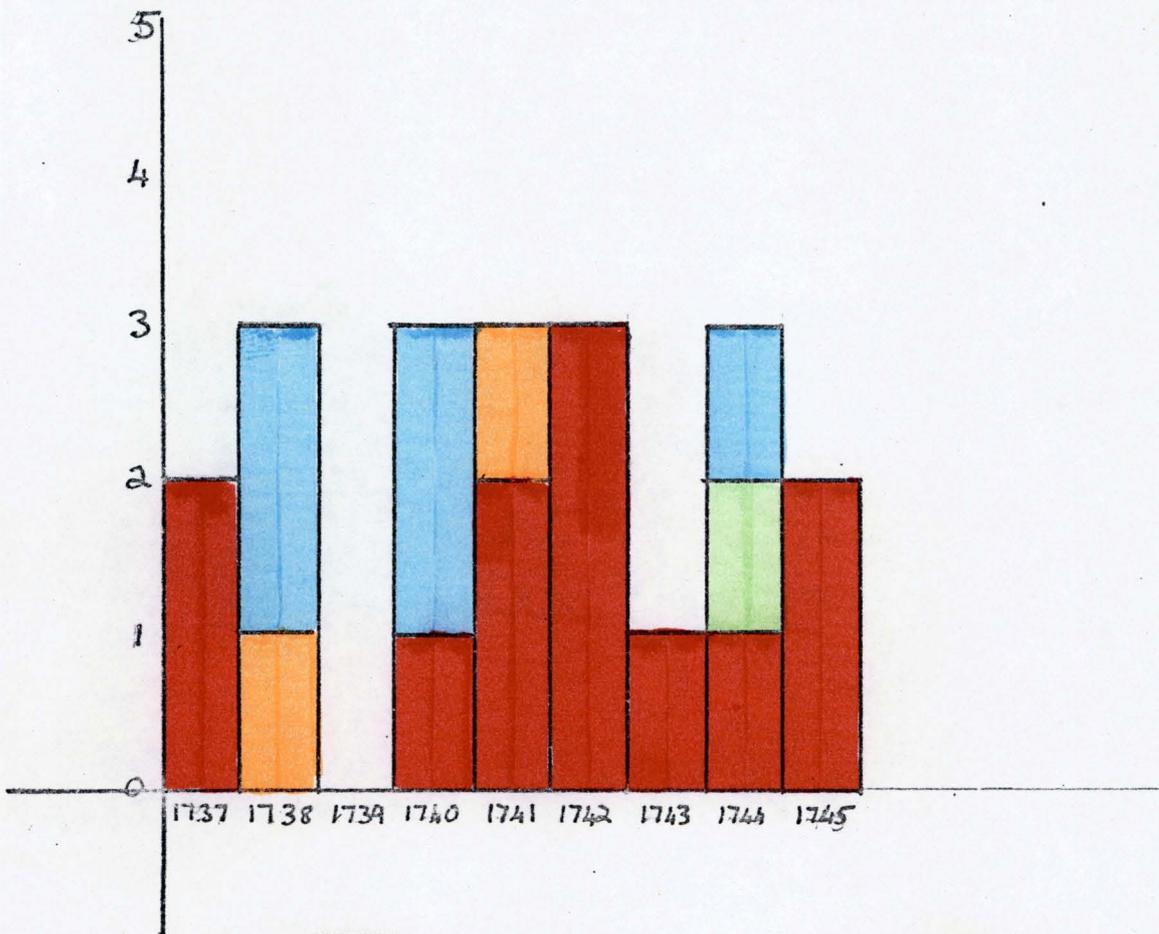
- SLANDER



SLAMANNON KIRK SESSION 1722-1736



SLAMANNON KIRK SESSION 1737-1745



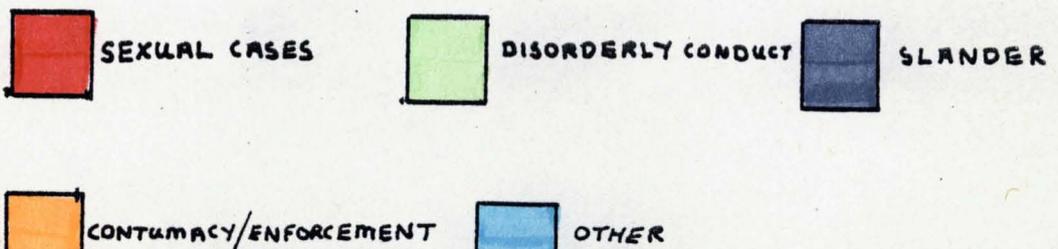
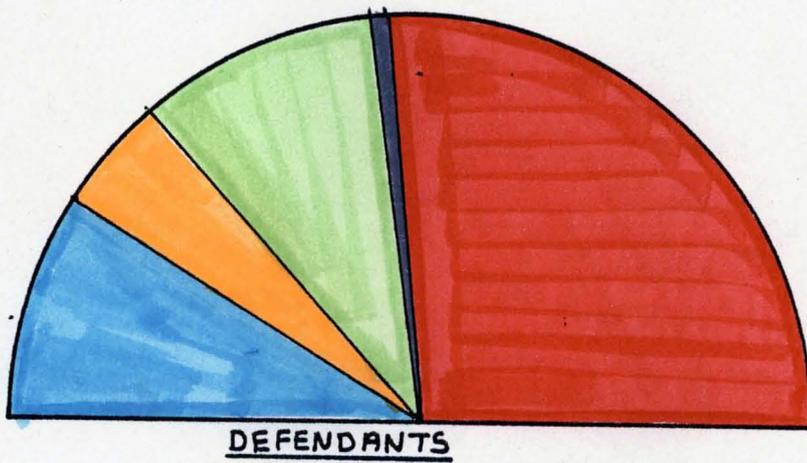
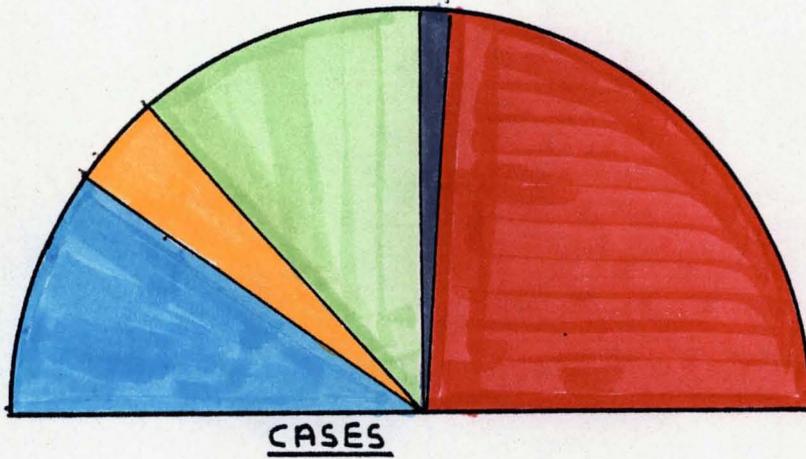
KEY:- - Sexual Cases

CONTUMACY/ENFORCEMENT

- DISORDERLY CONDUCT

OTHERS

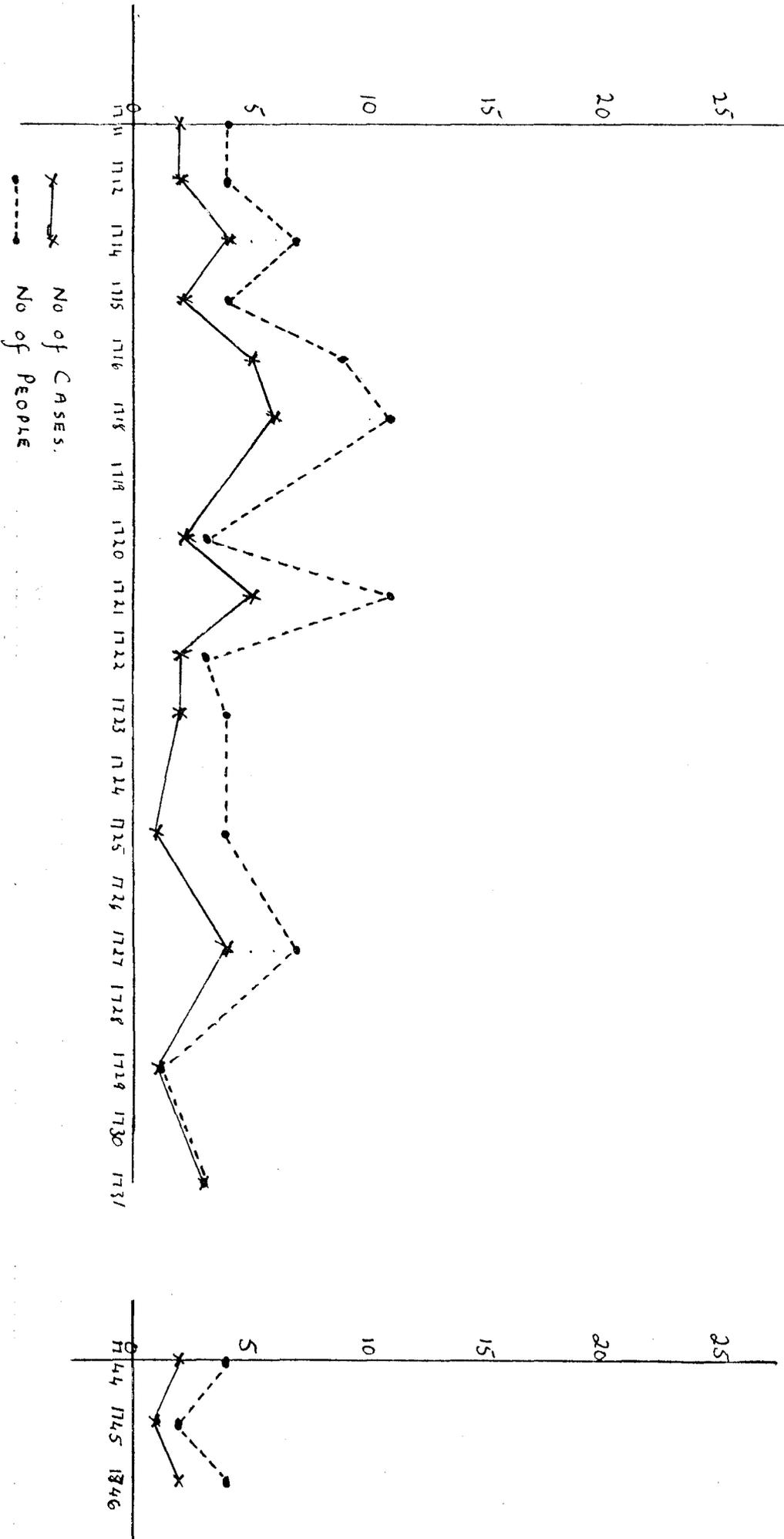
- SLANDER



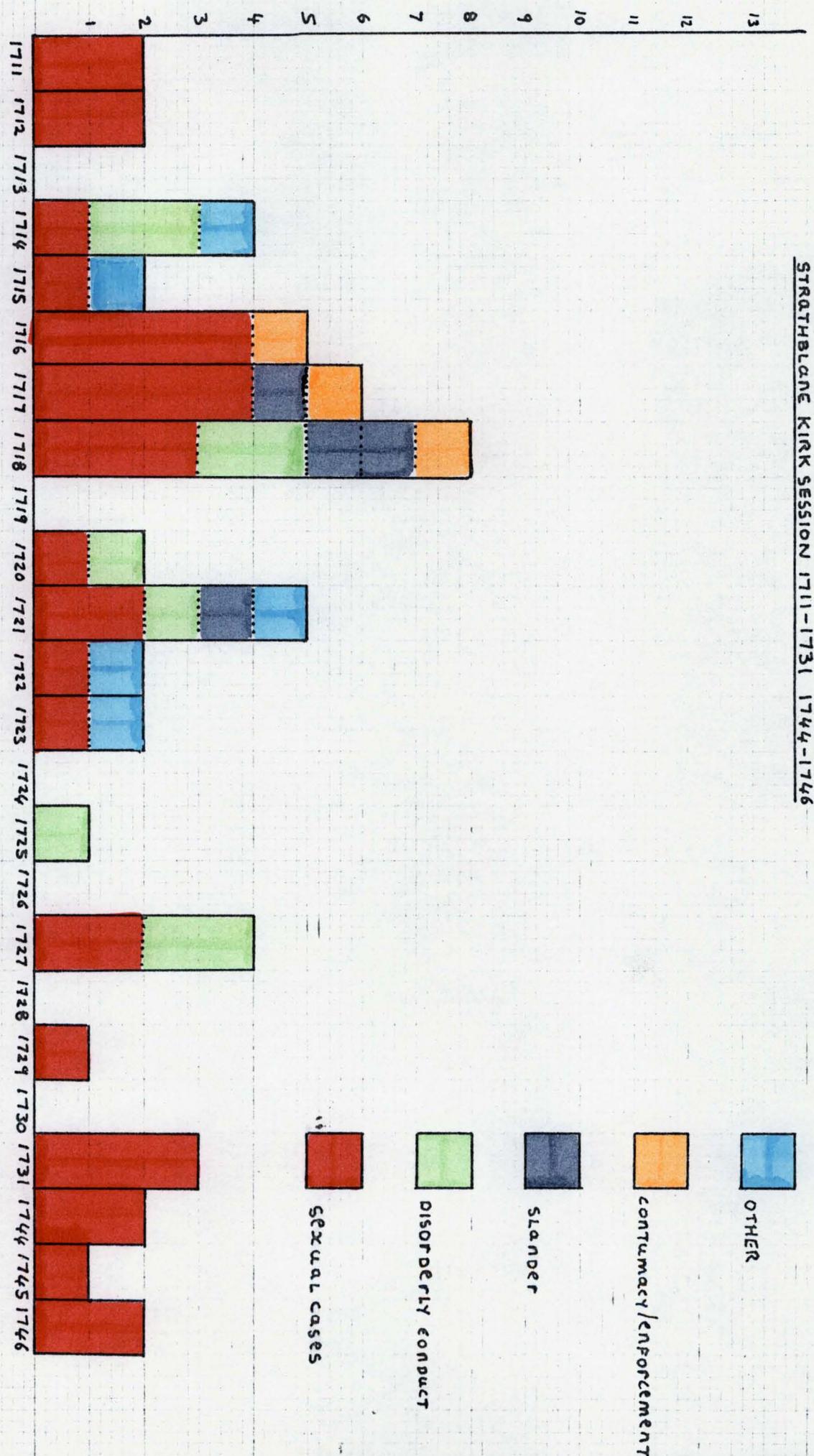
STRATHBLANE KIRK SESSION.

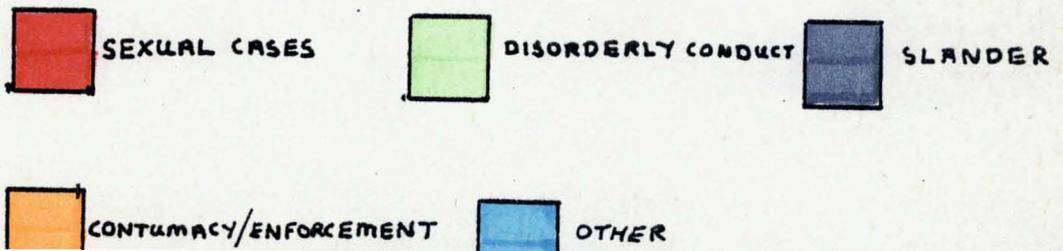
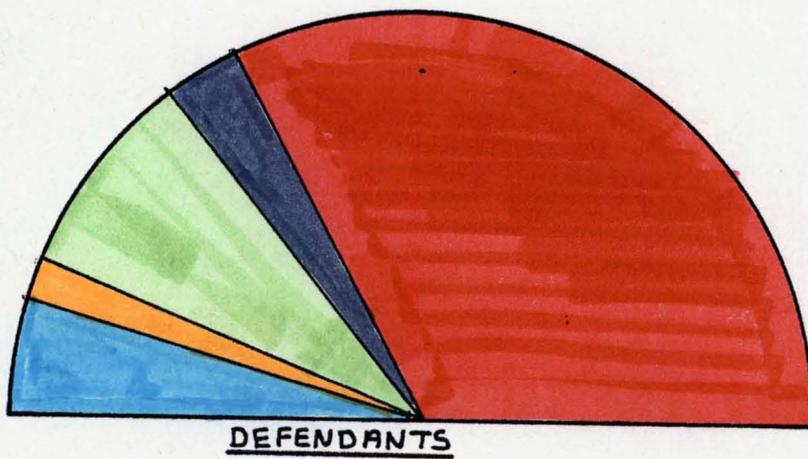
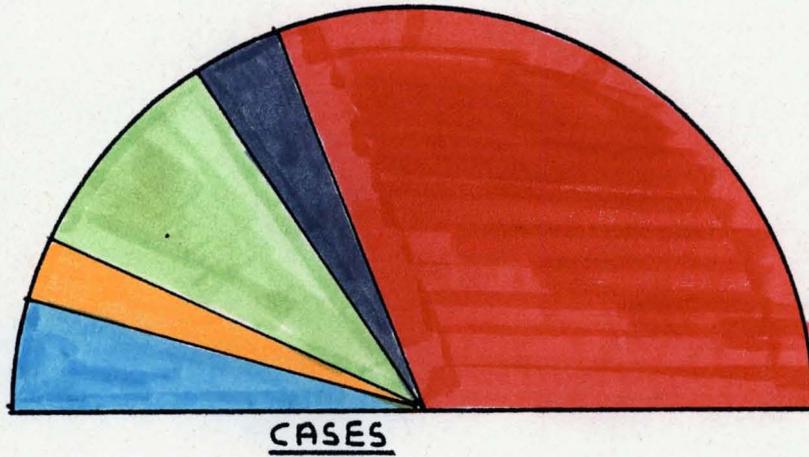
TYPE OF CRIME	NUMBER OF CASES	NUMBER OF PEOPLE		
		M	F	T
FORNICATION	24	24	24	48
F.A.N.	3	3	3	6
ADULTERY	2	2	2	4
SCANDALOUS CARRIAGE	4	3	3	6
SABBATH BREACH	2	1	2	3
DRUNKENOUS	5	8	3	11
CURSING AND SWEARING	1	2	0	2
WIFE BEATING	1	1	0	1
SLANDER	4	3	3	6
CONTUMACY	2	1	1	2
ENFORCEMENT	1	1	0	1
CHARMING	2	2	1	3
IRREGULAR MARRIAGE	2	2	2	4
OTHERS	1	1	0	1
TOTAL	54	54	44	98

STRATHBLANK KIRK SESSION 1711-1731 and 1744-66.



STRATHBLANE KIRK SESSION 1711-1731 1744-1746





NOTES

1. J. Kirk (ed): The Second Book of Discipline (Edinburgh, 1980) pp. 57 - 64.
2. ibid p. 164.
3. ibid p. 166.
4. ibid p. 163.
5. J.K. Cameron (ed): The First Book of Discipline (Edinburgh, 1973) p. 173 states this clearly:

"Thair soul be ecclesiasticall discipline
 uprightlie ministered as Godis word prescribed,
 whairby vice is repressed and vertew nourished."
6. See for example the figures given by Donaldson in:
Various: Introduction To Scottish Legal History
 (Stair Society, Edinburgh, 1958) p. 356.
7. The earliest surviving records are those of the St. Andrews session, which commence in 1559 and have been edited by D.Hay Fleming. See D.Hay Fleming (ed):
Register of Kirk Session of St. Andrews 1559 - 1600
 (Scottish History Society, Edinburgh, 1889).
8. On the subject of Kirk session business in general and of discipline in particular see G.D. Henderson:
The Scottish Ruling Elder (London, 1935 passim and especially pp. 100 - 145.)
9. Records of Kirk Session of Stirling SRO CH2/1026/1
10. For the early history of Stirling and other Presbyteries see J. Kirk (ed): Stirling Presbytery Records 1581 - 1587 (Scottish History Society, Edinburgh, 1981).
11. On the Golden Act and its significance see Kirk (ed):
Second Book of Discipline pp. 105, 128.
12. Acts of Parliaments of Scotland Vol III pp.25,26,38,54.
13. See Records of Kirk Session of Kilsyth 1690 - 1725 SRO CH2/216/1-2 and Records of Kirk Session of Muiravonside 1667 - 1814 SRO CH2/712/1.
14. See Henderson: Scottish Ruling Elder pp. 100 - 145 and the various volumes of session records edited and privately printed by H. Paton.
15. So for example, in Strathblane between 1711 and 1746, 33 out of 54 cases were sexual ones, while on the other hand, in Airth between 1660 and 1669 there were in all 190 cases, 73 being sexual in nature, the rest not. Putting the early records like Airth's together with the later records produces an overall figure - but as this example shows this conceals a sharp change in the overall composition of session business.

16. Records of Kirk Session of Killearn 1694 - 1717, 1727 - 1743 SRO CH2/468/1 - 2. Records of Kirk Session of Strathblane 1711 - 1731, 1744 - 1768 SRO CH2/510/1.
17. Fornication was the largest single class of offence in all the sessions except Airth, Alva and Baldernock.
18. Records of Kirk Session of Killearn SRO CH2/468/2, case of Janet Nclintock and Matthew Forsyth her late master. 29th. July, 8th. November 1733. Again in a case from 1668 the Session of Airth noted the defendant's pregnancy, adding "which was clear to any beholder." Records of Kirk Session of Airth SRO CH2/683/1 case of Ammas Nicol and John Robertsons 5th. July 1668.
19. Records of Kirk Session of St. Ninians SRO CH2/337/1 Case of Agnes Mayne and James Colquhoune. 1st. February, 28th. February 1656. The surprising revelation by the woman, surprising because the man was a member of the session, transformed it into an adultery case which was to continue for some years.
20. Records of Kirk Session Of Muiravonside SRO CH2/712/1 Case of Margaret Cornwell and John Mclerie in Carriden her master 25th. September 1698, 14th. January 1700. (This case continued until 24th. January 1703.) For a similar case see Records of Kirk Session of Kilsyth SRO CH2/216/1 Case of Margaret Rankine and John Lamb her master, 28th. June 1701, 7th. July 1701. Here the woman first said she did not know who the father was, then claimed it was a man she met on the highway and did not know. The Session, suspecting John Lamb to be the father, told the midwife not to attend her and they both then confessed and appeared in sackcloth, being absolved on 28th. March 1702.
21. A similar pattern is found in the records of English Church courts - see F.G. Emmison : Elizabethan Life; Morals And The Church Courts (Essex Record Office, Chelmsford, 1973) and the, as yet unpublished, work of Dr. David Marcombe on the records of Nottingham. What the English courts conspicuously lacked was the backup from secular courts enjoyed by their Scots counterparts.
22. As an example of such an oath see the one contained in Records of Kirk Session of St. Ninians SRO CH2/337/2. Case of William Cherrie and Janet Weir, 17th. December 1672 which reads:

"Whereas I, William Cherrie, have been delated to the Kirk Session of St. Ninians by one Janet Weir to have actually comitted adultery with her, I hereupon swear by the terrible and dreadful name of God, the searcher of the secrets of all hearts, that I did never know the said Janet Weir by having actuall carnal dealing with her. And if this day I swear falseley I doe here before God's people in this congregation renounce my interest in Christ and my right to everlasting happiness in the life to come."

This was obviously the standard form used by that particular session: the records state plainly "William Cherrie, given a copy of the session's oath." Further support for the idea that Kirk Sessions used a standard form of oath comes from Records of Presbytery of Linlithgow SRO CH2/242/4 - the rear binding of this volume has set out on it the oaths used by several of the sessions in that particular presbytery.

23. For an example of the latter see Records of Kirk Session of St. Ninians SRO CH2/337/1. Case of Janet Mclay and James Leckie 14th. October, 3rd. and 4th. November 1659 where the woman was forced to satisfy for adultery while the man purged himself. Then on 30th. July 1660 the session received a letter from the Minister of Gargunnock, stating that James Leckie had confessed perjury and adultery "being s^o extremelie struck by God's hand in sickness upon his body as the punishment for such heinous transgressions." He asked for pardon and mean whereby to ease his conscience: the Session's response was to send him, once recovered, to the Presbytery who imposed indefinite appearance in sackcloth on him. See Records of Presbytery of Stirling SRO CH2/722/6 1st. August, 25th. October 1660, 20th. March 1661
24. See for example Records of Session of Falkirk SRO CH2/400/2 Case of Helen Hutchesone and William Whyte in Lenzie, 5th. January, 9th. March 1641.
25. Records of Kirk Session of Campsie SRO CH2/51/1. Case of Isobell Boyd and Malcolm Wilson, 20th. November, 13th. December 1703, 3rd. January, 21st. February, 10th. April, 8th. September 1704.
26. Records of Kirk Session of Kilsyth SRO CH2/216/1. Case of Janet Grahame relict of John Stratherne and James Boyd in Craigstoun 14th. September 1693.
27. Records of Kirk Session of Airth SRO CH2/683/1. Case of Margaret Horne and John Campbell 7th. May 1661. A similar case in that session was that of Catherin Boyd and William Davidson "for being frequentlie seen by several witnesses kissing and to their best knowledge in the verie act of copulation." As this couple had married they could only be charged with fornication ante-nuptual, which they, ultimately confessed 12th. March 1665.
28. See for example Records of Kirk Session of Buchanan SRO CH2/606/4. Case of John and Jean Mcfarlane 5th. February 1720. He was pursued because he "has yet refused to do duty in alimending his proportionable part of the child." Records of Kirk Session of Falkirk SRO CH2/400/2. Cases of Janet Fleming and Thomas Brown, Margaret Wright and James Auld, Janet Hamiltone and John McAdam and Jean Hamilton and Robert Struthers, 21st. December 1641, 5th. July 1648, 3rd. July 1649, 9th. November 1652, respectively, are all examples of this kind of case, with the men forced to hand over money to their ex-lovers and the details spelt out in the session records.

29. Records of Kirk Session of Muiravonside SRO CH2/712/1. Case of William Binny and Sarah Nimow his servant, 13th. March 1698. Records of Kirk Session of Airth SRO CH2/683/1. Case of Margaret Gray and Alexander Miller, 8th. November 1661. In both cases the woman attempted to prove that sexual intercourse had come after a promise of marriage. Sarah Nimow failed in this, although the charge of fornication stuck, but Margaret Gray was successful, proving the man had "given her promeis of marriage and then had carnal dealing with her, in the Bishop his hous in Glasgow." He was ordered to marry her or pay her monetary compensation - otherwise his banns would be stopped. Records of Kirk Session of Slamannan SRO CH2/331/3. Case of Kathrin Ingram and Robert Camble, 8th. August 1725 is a later example with an interesting variation. Here the woman confessed voluntarily, not being sure if she were pregnant, but the man denied all: after consideration by the Prebytery, on 12th. December 1725 Kathrin Ingram was publicly rebuked "for scandalising of herself with Robert Camble." That is, no note was taken of the confessed fornication.
30. Records of Kirk Session of St. Ninians SRO CH2/337/2. Case of Alexander Smith and Marion Brown 17th. December 1672, 4th. March 1673. This was one of those cases where perusal of an oath brought a confession. The most remarkable and explicit testimony is undoubtedly found in ibid SRO CH2/337/3. Case of Agnes Rob and James Pirrie, 21st. March 1700 which contains detailed testimony from Rob's two maids as to how the lovers were caught and their state when apprehended by them. (This was in fact an adultery case, both being married.)
31. Records of Kirk Session of Falkirk SRO CH2/400/4. Case of John Duncan in Whitefoords and Margaret Houston, 11th. August 1706.
32. Records of Kirk Session of Falkirk SRO CH2/400/2. 4th. January 1647. The quoted passage comes after the minutes describing the case of William Baxter Coalhewer in Maddistoun and Agnes Whyte.
33. Records of Kirk Session of St. Ninians SRO CH2/337/2. Case of Thomas Glen and spouse, 5th. October 1669.
34. ibid. Case of Margaret Jaffray and Adam Robinsone, 19th. March 1672, gives a good example of this. As the banns had been read they were charged with fornication ante-nuptual and sentenced to one joint appearance the Sunday before the wedding. For evidence of the second see Records of Kirk Session of Airth SRO CH2/683/1 up to 12th. March 1665. This last record suggests that the great majority of fornicators subsequently married, often some time after the child's birth. The only way to check this would be to cross-correlate parish registers of marriage with session records and there was not sufficient time to do this.

35. For the criminal definition of adultery see Sir G. Mackenzie: The Laws And Customs of Scotland In Matters Criminal (Edinburgh, 1699) pp. 86 - 94. He defines it as a species of theft or robbery and so deserving of death ipso facto, as well as being listed as a capital offence in the Mosaic code (Dueteronomy 20 : 22).
36. ibid p. 87 defines notour adultery as having three features - (a) children are born, (b) the couple keep company or bed together "notoriously known", (c) the couple are excommunicate. However, he goes on to argue that the Justiciary Court had the power to impose the death penalty for any case of adultery.
37. For this see Records of Kirk Session of Falkirk SRO CH2/400/2. Case of John Miller and Marion Auld, 29th. December 1640. Often the public scandal was open - thus Records of Kirk Session of Buchanan SRO CH2/606/3. Case of Thomas Wilsone and Joan Kilpatrick, 27th. May 1711, 24th. June 1711, describes the couple as "under a flagrant mala fama of adultery." They were warned not to consort or else to face charges of adultery. Sometimes however there was no public scandal - in Records of Kirk Session of Baldernock CH2/479/1. Case of Marion Connell and John Thomsone 7th. January, 14th. January 1705 we have a case where the woman confessed the (unsuspected) adultery on her deathbed. The man also confessed and was referred to the Presbytery "as soon as he recovers from the wound given to him by Gilbert Wilsone husband of the umguill Marion Connell."
38. Records of Kirk Session of Buchanan SRO CH2/606/3 Case of Joan Kilpatrick and Thomas Wilsone, Gardner, 30th. September 1711, 13th. December 1711. (These were the same people as those cited in the previous footnote.) For a similar case see Records of Kirk Session of Airth SRO CH2/683/1. Case of Janet Johnstoun and James Grey, 23rd. September 1666, 5th. May 1667.
39. Records of Kirk Session of Falkirk SRO CH2/400/4. Case of Jean Buchanan in Falkirk, spouse to Robert Carmichael and George Sheriff Servant, 16th. June 1702, 3rd. January 1703, 23rd. April 1703.
40. For walking around naked see Records of Kirk Session of Muiravonside SRO CH2/712/1. Case of Murdoch Mackenzie, 29th. May 1709. For an example of the other sort see Records of Kirk Session of Airth SRO CH2/683/1. Case of Patrick Donald and Elizabeth Baad, 14th. September 1662 - charged with being alone in an empty house all Sunday.
41. Being found in bed was frequent and did not always imply guilt, thus Records of Kirk Session of Muiravonside SRO CH2/712/1. Case of Helen Glen and William Ker, Soldier, 29th. April 1677 was a case where an unmarried couple were caught in bed but sharing it with two other women - they were simply cautioned. By contrast see Records of Kirk Session of St. Ninians SRO CH2/337/2. Case of Elizabeth Napier and John Aiken, 26th. September 1671; Records of Kirk Session of Slamannan SRO CH2/331/1.

Case of James Crawford and Bessie Robertsons, servants, 16th. June 1706, 19th. July 1706 for two cases where guilt of fornication was blatant (in the second two witnesses, the master and mistress of the two servants, testified that they had found the couple naked in bed after hearing all the "sounds of uncleanness" including a rhythmically squeaking bed!) In neither of these cases was a conviction obtained for fornication.

42. Records of Kirk Session of St. Ninians SRO CH2/337/4. Case of Janet Browne versus William Douglas, 16th. December 1699.
43. Records of Kirk Session of Campsie SRO CH2/51/1. Case of Margaret Mclay versus James Elis, 12th. September 1709; ibid case of Janet Kincaid versus James Graham - 22nd. November, 18th. December 1702. For other examples see Records of Kirk Session of Falkirk SRO CH2/400/2 Case of Elizabeth Mitchell versus John Johnstone, 31st. May 1642; Records of Kirk Session of St. Ninians SRO CH2/337/2. Case of Janet Liddell versus John Liddell 16th. June 1678 - the minutes say "he came to her and struggled with her very violently offering to doe her wrong --- and that on the Lord's day.", ibid case of Isobell Archibald versus David Mitchell, 22nd. March 1668, the minutes mention that "he did break her apron strings and would have wronged her good name in offering to ly with her."
44. For two recorded cases of bestiality see Records of Kirk Session of Kilsyth SRO CH2/216/1. Case of James Strathearn, 26th. September 1699 - with a mare; Records of Kirk Session of Airth SRO CH2/683/1 Case of Janet Bowie versus William Symsons, 30th. August 1663 - she said she had seen him twice in broad daylight with his master's mare. For a clear example of incest as it usually occurred see Records of Kirk Session of Falkirk SRO CH2/400/4. Case of Elspeth Glass and John Davie both of Westquater, 11th. September 1715 - he had been husband to her mother's sister; In ibid case of John Davie and Elspeth Glass 22nd. September 1717, 25th. May 1718 the couple were referred to the Presbytery for contumacy and living as man and wife. That body sent them to the Justices of Peace who were recorded by the Session as saying:
- "if these persons were guilty of incest as alleged they were not competent judges (this they said extra-judicially, there being no court that day)."
45. Records of Kirk Session of Kilsyth SRO CH2/216/1. Case of William Thomson in Maeswatter and James Wallace 18th. February 1696 - the event took place at New Years fair at Kilsyth.
46. Records of Kirk Session of Slamannan SRO CH2/331/1. Case of Margaret Easton and William Binny, 18th. October 1706, 22nd. January, 24th. January, 6th. February, 7th. April 1707. A similar case is found in Records of Kirk Session of Falkirk SRO CH2/400/4. Case of William Young in Mungall and Elspeth Callandar in Bowes, 16th. March 1707 - she had concealed her pregnancy and had given

birth without calling for help with the child dying as a result.

47. For example of this type of case see Records of Kirk Session of Slamannan SRO CH2/331/3. Case of Margaret Brown and John Black, Servants in Blackridge, 30th. March 1740 - this case was sent to the baron court which fined the woman 65/- sterling; Records of Kirk Session of St. Ninians SRO CH2/337/2 Case of John Mitchell and Agnes Wingzet, 6th. January 1679.
48. In fact the Scottish Church courts enforced the full rigour of mosaic law where the sabbath was concerned - all forms of work, any kind of play, any travel over a distance of more than half a mile (unless it was to attend divine service) and any kind of non-religious activity, even playing pipes or beating ones servants could lead to citation.
49. Records of Kirk Session of Falkirk SRO CH2/400/4. Case of George and John Smalls et al 4th. June 1704; Records of Kirk Session of Baldernock, 3rd. March 1706; Records of Kirk Session of Falkirk SRO CH2/400/4, 27th. January 1706 has a record of the Session asking Baillie Bog of Falkirk Regality (one of their member) to take steps to stop people "walking abroad in companies on the Lord's Day."
50. For example see Records of Kirk Session of St. Ninians SRO CH2/337/2. Case of John Ramage in St. Johnstone cites him for travelling regularly to Glasgow on the Sabbath.
51. For the last see ibid - Case of John Marshall versus Margaret Jamison, 26th. December 1682. He charged her with slander "in saying that he had carnall dealing with his woman on the Sabbath day." and the minutes state that had she proved the truth of her assertion he would be guilty of Sabbath breach.
52. Records of Kirk Session of Airth SRO CH2/683/1. Case of John Murehead, 7th. July, 4th. August 1661.
53. ibid - Case of John Barrie and John Downie, 12th. February 1665.
54. One rare case where the charge of drunkenness although the event took place on the Sabbath is found in Records of Kirk Session of Baldernock SRO CH2/479/1. Case of John Tayer, 27th. July, 13th. September 1708, 1st. May, 22nd. May, 10th. July 1709. Here the offence was considered so heinous, taking place on a communion sunday, that at first the greater excommunication was imposed.
55. For example see Records of Kirk Session of St. Ninians SRO CH2/337/2. Case of Isobell Archibald, 22nd. March 1668 which states "she was beastlie drunk and that she vomited and could not stand bot fell oer ane dyk."

56. The normal practice was to send the Elders out around the ale-houses to ensure that none were drinking 'after the tenth bell' but in at least one parish the Elders has to be told not to go to the hostelries as this was bringing the Session into ill repute - see Records of Kirk Session of Airth SRO CH2/683/1, 22nd. May 1668.
57. Records of Kirk Session of St. Ninians SRO CH2/337/2 Case of 'John Robertstone his son', 12th. January 1669.
58. The most dramatic example of heresy as blasphemy is the case of James Colquhoun found in Records of Kirk Session of St. Ninians SRO CH2/337/1, 17th. March, 21st. April 1659 where two witnesses testified that they heard Colquhoun say:

"that there was not a God in Heaven to punish sinners and that God had no power to give to the Devil to punish men in hell, and when the people said to him will you deny the Scriptures then he said the Scriptures were but human speeches in books for gain, and in his discourse said often what is that God, have you any warrant for him?"

and also:

"when saw ye Christ or knew ye him and what know ye but that those ye call wicked may be as soon saved as those ye call godlie and when they questioned him why put your children to the school he then replied because it was the use of the countrey and when they questioned him what he said to the Scriptures which spoke of Christ he answered they were but mens' inventions."

59. Records of Kirk Session of Airth SRO CH2/683/1 Case of Jean Broddy, 5th. April 1662; in Records of Kirk Session of Kilsyth SRO CH2/216/1 Case of David Thomsone Maltman in Kilsyth, 14th. September 1693 we have a case of a man charged with saying "weavers soules were made of cloth." (He had also come into church drunk and been sick during the sermon.)
60. Records of Kirk Session of Airth SRO CH2/683/1 Case of John Penman, 9th. February 1668 - he was given a sessional rebuke "sharplic becaus it was not judged convenient to caus him appear before the congregation lest he should incense women more against him."
61. See for example Records of Kirk Session of Airth SRO CH2/683/1 Case of Essie Gilchrist versus John Paul, 9th. June 1661 - she complained he had beaten her and called her "proud loun" - His excuse was that he had been drunk and she would not leave him in peace to lye down; See also Records of Kirk Session of St. Ninians SRO CH2/337/2 Case of Andrew Lawrie, 4th. August, 11th. August 1668 for a case brought on a reference by neighbours. He said, when called, that she cursed and abused him, she that "she was compelled thereto by his setting his feet upon her bellie and using such speeches as was not decent for a husband to his wife."

62. For example, see Records of Kirk Session of Muiravonside SRO CH2/712/1. Case of Alexander Crawford versus Janet Murehead, 12th. September 1697; ibid - case of William Ewing and Janet Bartelman, 5th. June 1683.
63. So in the Records of Kirk Session of St. Ninians SRO CH2/337/2 - case of Stephen Smith in Cambusbarron versus Marion Liddell, 6th. June 1671, the record only states she had used "such odious oaths and imprecations as are not decent to be named."
64. So in Records of Kirk Session of Strathblane SRO CH2/510/3 - case of John McInlay, 1st. September, 14th. September 1718, the defendant (charged with slander) brought in a counter accusation that a party "had wished the curse of God to come upon him."
65. Records of Kirk Session of Falkirk SRO CH2/400/4 Case of Catherine Jervey in Coalheughbrae versus Margaret Johnstone spouse to Thomas Walker Coalhewer there 12th. August 1705.
66. Sir G. Mackenzie: Laws And Customs Of Scotland, p.15
67. Records of Kirk Session of Kilsyth SRO CH2/216/1. Case of William, Elizabeth, Janet and Christian Adam, 21st. January 1707.
68. Sir G. Mackenzie: Laws And Customs Of Scotland, pp.152 - 5
69. So in Records of Kirk Session of Slamannan SRO CH2/331/3 23rd. June 1713 we read of a 'fama clamosa' that Robert Thomson had bought poi^on to kill his wife because he was committing adultery with Helen Bord servant, yet on 20th. July 1718 no true evidence could be brought against him. Again in Records of Kirk Session of Buchanan SRO CH2/606/4, 26th. September 1714 we read of a "fama ciamosa that Janet MacQueen was seen lying with a man" found on investigation to be "but lies and idle talk."
70. ibid - case of Alexander Graham alias McGregor versus Janet and George Mcfarlane, 21st. November 1714, 13th. February 1715.
71. ibid - 13th. February 1715 has a testimony worth quoting in extenso:

"Isobell Mcfarlane in Claghan quhom Gregor in Roskannoch named as the reporter of the scandalous story on Alexander McGregor and Marion McNaughton being cited to this dyet compeared, and being interrogat if she said to Gregor that Alexander McGregor and Marion McNaughton were lying together made answer that she came into Robert Mcfarlane's house next day after his sheepphouse was burnt and found Marion McNaughton, the said Robert's wife, greeting after which the declarent enquired the cause of her sorrow quho replied 'no wonder I do weep for they talk in the countrey that I am lying with married men in the countrey' but that she did not name Alexander McGregor nor any other man and that this story she told to Gregor some days thereafter."

72. Records of Kirk Session of Campsie SRO CH2/51/1. Case of John Reid versus William Morrisone, 7th. July, 26th. July 1707.
73. From one parish we have ibid case of John Blair versus William Callander 8th. February, 10th. March, 18th. July 1696 - for saying "Glen Garrie dog you lay seven years in adultery before your marriage God's curse come on you."; January 1697 - for saying "she was a hott bitch and bidding her goe to a knowe side and let the whelps suck her."; ibid case of Margaret Armour versus Jean Kincaid 31st. January 1700 - by calling her a witch; ibid case of Robert Buchanan versus James Buchanan in Parkstoun 10th. July, 31st. July 1700 - by saying he "haunted highland men and kept them in his house and was as guilty as ever Andrew Adam who was hanged for a thief."
74. For example Records of Kirk Session of Falkirk SRO CH2/400/2 Case of Adam Lecky versus James Squyre 20th. March 1650 - for saying he had stolen a sheep; ibid case of James Squyre versus James Callander 12th. October 1652 - for calling him a common theif. In both cases the defendants tried to prove the truth of their assertions (same James Squyre).
75. For example Records of Kirk Session of St. Ninians SRO CH2/337/2 Case of Duncan Ewing versus Janet Jaffray 22nd. December 1668; ibid case of Jean Andersone versus Margaret Burn 29th. December 1668.
76. For one example see Records of Kirk Session of Airth SRO CH2/683/1 Case of Elspeth Reoch versus Christian Wilson, 2nd. December 1666.
77. Records of Regality of Falkirk SC 67/2/2 Case of Jean Cowane versus James Neapper 8th. April 1682.
78. Records of Kirk Session of Kilsyth SRO CH2/216/1 Case of William Grahame, portioner of Tarnover versus John Marshall in Auchincloch 13th. January 1706. For a similar case see ibid case of John Forrester versus John Brown, Smith in Chapel Green 8th. August 1708.
79. Records of Kirk Session of Falkirk SRO CH2/400/2 Case of Margaret Rankine and James Squyre versus Margaret Galbraith 12th. February, 26th. March, 29th. April 1650 - by calling them common thieves.
80. Thus in Records of Kirk Session of Slamannan SRO CH2/331/1 Case of Janet Shanks versus John Rankine and Agnes Simpson his spouse 6th. September 1700 we read that she produced a decreet from a franchise court ordering them to appear before the congregation "to restore the said Janet Shanks good name."
81. See Records of Kirk Session of Alva SRO CH2/10/1 Case of Anna Glass servant to Lady Alva versus John Moreis 20th. April 1684. He had said:

"That she had sent stolen packfulls of meal out of the Laird's granary over the hill to her Mother. That she was dishonest in her body and might have had a child as big as Alexander Moreis (a boy of 9 or 10) if all heights had haddn (so did he word it). But where all men gang noe grasse growes."

He claimed he could prove it, which, say the records, made it into an action of theft, under the jurisdiction of Alva baron court, while the matter of alleged fornication was reserved to the Session. On 7th. May 1684 it was noted he had failed to prove his case in the Baron court, where he was fined £20 and sent back to the session.

82. This must have happened much more often than is apparent from the records: in many cases the contact would have been informal and personal.
83. So effectively in fact, that I could not find one case where it did not ultimately work - where non-noble defendants were involved. This last point brings up the matter of the way referral was used: except during the 1640's and 1650's it was not, and could not be, used against anyone who held a court, i.e. against a member of the ruling class. When nobles or gentry were involved in a case the tactic adopted, outside the period 1637 - 60, was to be amazingly persistent and to hope the sheer nuisance value of the Session's attentions would bring about some kind of concession.
84. For example of how this was done see Records Of Kirk Session Of Alva SRO CH2/10/1 Case of John McCullie, 2nd. April, 16th. April 1682, referred to the Laird of Alva for banishment:
- "and the Laird of Alva had sent his officer through the toune and parish of Alva discharging all persons within the same to receive or entertain the said John McCullie anymore within the parish under pain of citation."
85. For reason of time it was not possible to carry out a detailed study of testification but even brief examination shows that the recording of testificates by sessions provides a major source for the study of population mobility in Scotland. When a testificate was handed in the session clerk would note where it came and any peculiar features, the same being done for testificates given out to people leaving the parish. Unfortunately few Sessions recorded the entire texts of testificates and many were slack over recording them at all. For one Session which had outstandingly good records of them, bound in with the minutes, see Records of Kirk Session of Muiravonside SRO CH2/712/1. The impression which I formed from brief perusal was that, on the evidence of testificates, Presbyterial boundaries reflected demographic realities better than other limits, such as shrieval ones. My purely subjective impression was that the majority of testificates given or received had reference to another parish within the Presbytery and that the majority of the remainder referred to a parish a very great distance away.

86. Records of Kirk Session of Muiravonside SRO CH2/712/1
Case of Elizabeth Bruce and Alexander Cousland 26th.
February, 23rd. July 1693 shows this very clearly. In
this adultery case the man fled the bounds but returned
and when asked why he came back answered:

"that he could have no settled residence wherever
he went because he had no testimonials."

Records of Kirk Session of Slamannan SRO CH2/331/2
Case of Mary Moffat in Dike Nook, 15th. January 1717
shows how this came about in another case. After
arriving in the parish just before Christmas she was
required to produce a testificate. On 26th. May 1717
she did so but the Session suspected forgery and on
12th. June 1717 the Laird of Herbertshire, J.P. was
called for and he put Moffat under arrest and returned
her to Fintry, whence she claimed to have come. Sessions
could, and did, refuse testificates to anyone convicted
of a serious crime. See ibid case of James Steven in
Boghills, 20th. April 1701 when he craved a testificate
but, as he had been on trial before the Regality of
Falkirk for theft and resett, they would not give him
one until they heard from the baillie of the Regality.
(He had in fact been banished out of the Regality). For
an identical case see Records of Kirk Session of Falkirk
SRO CH2/400/4 Case of Elspeth Hosie, 3rd. June 1705.

87. Records of Kirk Session of Slamannan SRO CH2/331/3
Case of John Tyler, 31st. May 1719. This power was
used by Sessions, and civil courts, to prevent the
spread of plague by refusing to accept testificates from
affected areas or to allow people to travel to them. See
Records of Kirk Session of Gargunnoch SRO CH2/1121/1
3rd. August 1645, 23rd. June 1647; Records of Kirk
Session of Falkirk SRO CH2/400/2 17th. February, 10th.
August 1648.
88. For records giving a clear picture of this process see
Records of Presbytery of Stirling SRO CH2/722/1 - 5
covering 1581 - 1616, 1627 - 40.
89. Elsewhere they do seem to have been more free with their
power as for example in Aberdeenshire where 26 people
were under the sentence of excommunication in the single
year of 1656. I am grateful to Prof. M G Parker for this fact.
90. For this truly amazing case see Records of Prebytery of
Stirling SRO CH2/722/6 1st. October, 8th. October 1656,
26th. January 1659, 20th. March 1661; ibid SRO CH2/722/7
21st. September 1664, 29th. April, 22nd. July, 22nd.
August, 16th. September, 18th. November 1668; Records
of Kirk Session of Airth SRO CH2/683/1 Case of John
Hendersone and Janet Dick 22nd. November 1668.
91. When reading the minutes of Presbyteries this impact is
not surprising as the defendant was subjected to hours
of preaching, haranguing and scripture reading, much of
it concerned with the physical torments of Hell. If
fear did not work, sheer tedium must have been a great
influence!

92. In all cases of irregular marriage details are given as to the date of the ceremony and name of the cleric conducting it: this could provide valuable information on the various episcopalian clerics who, with their noble patrons, made up the 'invisible Kirk' before 1712. In Stirlingshire and its environs the most active such cleric seems to have been Mr. Gilbert Muschet.
93. This seems to have been such a problem that the system of 'consignation' was devised. This was a 'deposit' put down by the intended partners: if either of them broke off the marriage they forfeited the 'consignation'. They also lost it if subsequently found guilty of fornication ante-nuptial and therefore they could only collect the money nine months after their wedding. For evidence of vigorous use of this see Records of Kirk Session of St. Ninians SRO CH2/337/3 passim.
94. For examples see Records of Kirk Session of Airth SRO CH2/683/1 15th. September 1661; Records of Kirk Session of Baldernock SRO CH2/479/1 Case of Agnes Lennox 14th. November, 14th. December 1699; Records of Kirk Session of St. Ninians SRO CH2/337/2 30th. January 1679; Records of Kirk Session of Falkirk SRO CH2/400/2 Case of Walter Buchanan and Janet Logan 21st. May 1650 - banished from parish for leading a profane life:
- "Ordanes the act to be extractit and given to the civil magistrat that it may be put in executione. As also that one pronance to be given out to Westquater that all beggaris be removit out of the baronie according to the act of assemblee."
95. Records of Kirk Session of Gargunnoch SRO CH2/1121/1 7th. June 1646; in Records of Kirk Session of Kilsyth SRO CH2/216/1 25th. August 1706 it is reported a penny brydal had been held "with many scandals comitted" and arising out of this on 30th. August 1706 Margaret Lyle and Janet Sinklair were charged with 'promiscuous dancing' of the 'springle'; Records of Kirk Session of Falkirk SRO CH2/400/4 3rd. December 1704 contains:
- "The same day the Session taking to tyr consideration the scandalous abuses yt are comitted at penny-weddings they referr to ye Presbytery for yr advice quwhat is fittest to be done to prevent same."
96. Records of Kirk Session of Gargunnoch SRO CH2/1121/1 7th. June 1646, 16th. January 1648; Records of Kirk Session of Falkirk SRO CH2/400/2 Case of Patrick Buchanan 6th. August 1649:
- "discharged upon playing upon pypes in any tyme coming under the pain of banishment."
97. For example see Records of Kirk Session of Airth SRO CH2/683/1 Case of John Symson and James Mitchell 9th. February 1668. For more on this see appendix no. 6 below.

98. Thus see Records of Kirk Session of Killearn SRO CH2/468/1 3rd. October 1697; J.G. Smith: Strathendrick And Its Inhabitants (Glasgow, 1896) pp. 62, 83. Again see below for further details.
99. See the case of Steven Maltman in Records of Kirk Session of Gargunock SRO CH2/1121/1 Case of Janet Lockhart 12th. May 1626; Records of Presbytery of Stirling SRO CH2/722/5 Case of Steven Maltman 17th. April 1628.
100. Unfortunately neither these nor public rebukes have been recorded so there is no way of telling, for example, how far they were extempore and how far a set, rote like pattern was used nor of determining their content - though we may make a shrewd guess at that.
101. For a clear statement of this see Records of Kirk Session of Alva SRO CH2/10/1 24th. August 1681.
102. Records of Kirk Session of Killearn SRO CH2/468/1 Case of Mary Black and John Miller 1st. May, 25th. August 1706.
103. For two examples see Records of Kirk Session of Buchanan SRO CH2/606/3 Case of Christian Mcfarlane 24th. November 1710, 14th. January 1711 - she paid 42/- "being poor"; ibid - case of Christian Campbell servant and Duncan Mullock in Sallochie her master 14th. January 1711 - he paid £4, she paid 2/6-.
104. Records of Kirk Session of Kilsyth SRO CH2/216/1 Case of Mary Fleming and John Steinsone, 8th. May, 20th. October, 14th. November 1693.
105. Records of Kirk Session of St. Ninians SRO CH2/337/4 17th. June 1697.
106. See for contrast the accounts in Records of Kirk Session of Killearn SRO CH2/468/2 and Records of Kirk Session of St. Ninians SRO CH2/337/3. (The latter is a complete edition of all mortcloth entries for the period 1666 - 1750 while the former has an accounts and poor book bound in with the minutes.)
107. So, see Records of Kirk Session of Gargunock SRO CH2/1121/1 Case of Janet Munnoch versus Isolbell Macelhose 23rd. May 1647.
108. For the frequent use of imprisonment in the sixteenth century see D. Hay Fleming (ed): St. Andrews Kirk Session Register passim. For scourging see Records of Kirk Session of Falkirk SRO CH2/400/2 Case of John Ormie and Margaret Packer 13th. March 1649.
109. ibid Case of James Auld 11th. January 1642; ibid Case of Bessie Livingstone 15th. October 1648; ibid 8th. May 1649.
110. See J. Kirk (ed): Stirling Presbytery Records passim.
111. I am indebted to Dr. Marcombe for drawing my attention to this comparison.

112. G.D. Henderson: Scottish Ruling Elder p. 160.
113. Records of Kirk Session of Gargunnoch SRO CH2/1121/1
Case of Thomas Turnbull 4th. April 1654.
114. Records of Kirk Session of Muiravonside SRO CH2/712/1
Case of William Makelbrae and Marion Brown 4th. May 1707.
115. Records of Kirk Session of Killearn SRO CH2/468/2
Case of John Mculloch and Jean Mason 2nd. July 1738 - rebuked for appearing before the congregation "with an unbecoming levity".
116. Records of Kirk Session of St. Ninians SRO CH2/337/2
Case of Isobell Madrell 21st. December 1669.
117. Records of Kirk Session of Falkirk SRO CH2/400/3
Case of Janet Buchanan and Robert Lorn, dragoun 19th. January 1701; see also Records of Kirk Session of Muiravonside SRO CH2/712/1 Case of Margaret Cornwell 24th. March 1706 where the session notes that although she had appeared six times, she did so as one forced thereto and showed no sense of her sin.
118. Or none at all - see Records of Kirk Session of Gargunnoch SRO CH2/1121/1 Case of Catherine Dun versus Lady Culmore her mistress 1st. March 1654 - the servant pursued her mistress for striking her on the Sabbath and cursing her but although Lady Culmore confessed guilt she refused to satisfy and was simply "marked as refractory."
119. Records of Kirk Session of St. Ninians SRO CH2/337/2
Case of Marion Burn and Robert Rollo of Powhous 3rd. June, 17th. June, 29th. July 1673, 29th. February 1680.
120. Records of Kirk Session of Killearn SRO CH2/468/2
Case of Mary Main and John Grahame of Killearn her master 17th. October 1742; see for another example out of many Records of Kirk Session of Slamannan SRO CH2/331/2 Case of Anna Steven and John Forrest of Parkhead her master 18th. November, 9th. December 1709, 1st. January 1710. Here it was agreed that Forrest should not appear on the stool but rather receive a rebuke sitting in his own seat and that, on payment of £20, he should only get two such rebukes.
121. Records of Kirk Session of Falkirk SRO CH2/400/2
23rd. November 1641 where the records read:

"Westquater was desyred to make the young gentlemen viz Bantasken, young Milnhall and young Castelcary satisfie the Kirk for their fornications"

on 11th. January 1642 they did.
122. Records of Kirk Session of Muiravonside SRO CH2/712/1
- of the other twenty per cent the largest part were those not given a cognomen.

123. Records of Kirk Session of Airth SRO CH2/683/1.
124. The problem being that, apart from sexual cases, church courts did not always record the marital status of female defendants. Even when they do further problems arise because the whole idea of 'married status' becomes vague, nebulous and difficult to apply in the circumstances of 17th. and 18th. century Scotland.
125. For further details see appendix no.1 below.
126. Thus the Session of St. Ninians appears to have tried to 'swamp' the ale-houses of Bannockburn during the 1660's, by means of saturation patrolling by Elders.
127. The records of Falkirk session show quite clearly how this worked at a local level - see Records of Kirk Session of Falkirk SRO CH2/400/2 passim and particularly 31st. October 1641, 7th. December 1641.
128. See L.M. Smith: 'Sackcloth for the sinner or punishment for the crime? Church and secular courts in Cromwellian Scotland' in J. Dwyer, R.A. Mason and A. Murdoch (eds): New Perspectives On The Politics And Culture Of Early Modern Scotland (Edinburgh, 1982) pp. 116 - 31.
129. See L.M. Smith: Scotland and Cromwell : A Study In Early Modern Government (University of Oxford D.Phil, 1979) pp. 171 - 90.
130. See Records of Kirk Session of Falkirk SRO CH2/400/2 passim after 1654; Records of Kirk Session of Gargunnoch SRO CH2/1121/2 passim after 1658 but particularly 10th. June 1658, 26th. July 1658.
131. Records of Kirk Session of Gargunnoch SRO CH2/1121/2 23rd. January 1659.
132. See L.M. Smith: Scotland and Cromwell pp. 190 - 92 for detailed figures showing this.
133. L.M. Smith: 'Sackcloth for the sinner or punishment for the crime?' pp. 130 - 31.
134. For an example of this kind of process from outside Stirlingshire see F. McRie (ed): The Life of Mr; Robert Blair, Minister of St. Andrews (Woodrow Society, Edinburgh, 1848) pp. 326 - 7.
135. For an account of this struggle see J. Buckroyd: Church And State In Scotland 1660 - 1681 (Edinburgh, 1980)
136. See tables and Records of Kirk Session of Airth SRO CH2/683/1; Records of Kirk Session of St. Ninians SRO CH2/337/2; Records of Presbytery of Stirling SRO CH2/722/7
137. C. Larner: Enemies Of God : The Witch-Hunt In Scotland (London, 1982) pp. 204 - 5, 76 - 7; A. Soman: 'The Parliament of Paris and the great witch hunt 1565-1640' in Sixteenth Century Journal vol IX (1978)

138. For just a few examples see Records of Kirk Session of St. Ninians SRO CH2/336/2. Case of Jean Cochran 13th. October, 27th. October, 10th. November 1668; ibid case of Isobell Cochran 7th. June, 14th. June 1670; ibid case of William Thomsone 30th. December 1673; ibid case of Joan Harvie and James Forrester in Auchinbowie 30th. December 1673 - this was a case of fornication, the child begotten "after one conventicle which the said James kept in his hous."
139. Records of Kirk Session of St. Ninians SRO CH2/337/2 15th. May 1689.
140. See Records of Kirk Session of Alva SRO CH2/10/1 6th. June 1690; I.M.M. McPhail (ed): Sir James Sinclair : The Statistical Account of Scotland 1791 - 99 vol IX (Edinburgh, 1978) pp. 440 - 41.
141. I am indebted to Mr.T. Clarke for unearthing this particular phrase.
142. On this see R.D. Brackenridge: 'The enforcement of Sunday observance in Post-Revolution Scotland 1689 - 1733' in Records of Scottish Church History Society vol XVII (Edinburgh, 1972)
143. Thus, this period sees the appearance of cases where people voluntarily came forward and confessed fornication to the session, even when no pregnancy had resulted.
144. For further elaboration of this point see below ch.7
145. Records of Kirk Session of Falkirk SRO CH2/400/4 Case of Janet Douglas Servant and Michael Livingstone of Bantaskin 6th. October 1712, 15th. March 1713.
146. For one set of records which shows this clearly see Records of Kirk Session of Muiravonside SRO CH2/712/1
147. Records of Kirk Session of St. Ninians SRO CH2/337/2; Records of Kirk Session of Falkirk SRO CH2/400/2-3.
148. Records of Kirk Session of Stirling SRO CH2/1026/4-5
149. Records of Justiciary Court - Dittay Books JC 16/22.
150. Records of Kirk Session of Killearn SRO CH2/468/1 4th. June, 23rd. July 1695; ibid SRO CH2/468/2 28th. April, 9th. July 1738; Records of Kirk Session of Strathblane SRO CH2/510/3 27th. May 1725.
151. Records of Kirk Session of Muiravonside SRO CH2/712/1 3rd. January 1697; see also Records of Kirk Session of Falkirk SRO CH2/400/2 13th. November 1652.
152. See for example Records of Kirk Session of Airth SRO CH2/683/1 Case of James Baad and John Turner 18th. November 1661 - the Lady Elphinstone, their landlord, was asked to "make them render obedience".

153. Records of Kirk Session of Buchanan SRO CH2/606/5
Case of Catherine Mcfarlane and John Wilson 8th. Mary
1726.
154. Thus see Records of Kirk Session of Campsie SRO CH2/
51/1 Case of William Lapslie, 1st. August, 19th.
August, 26th. September, 6th. October 1701 for use
of Sheriff; Records of Kirk Session of St. Ninians
SRO CH2/337/2 Case of John Davie and Janet Ewing
15th. June 1674 for use of the Commissary Court.
155. ibid case of Janet McGruder 25th. August 1671;
ibid case of Helen Graham and Robert Muirhead 9th. January
1672; ibid case of Robert Semple and Agnes Cochran
9th. January 1672; ibid cases of David Dick, David
Liddell and Christian Napier 1st. April 1677; ibid
case of Christen Campbell 1st. March, 17th. June 1677;
ibid case of John Stratherne in Carnock and Margaret
Hamilton 17th. June 1673; ibid case of Agnes Watt and
John Morrisone 17th. September 1672; ibid case of John
Chrystie and Mary Campbell 15th. June 1674 for
references to Touch baron court, Callander baron court,
Justice of peace court, Montrose baron court, Kilsyth
baron court, Carnock baron court, Stirling Sheriff court
and Stirling commissary court respectively. These are
only a few of many such cases.
156. On this point see the examples in G.I. Murray: Records
of Falkirk Parish (2 vols. Falkirk, 1888) vol II
pp. 36 - 43.
157. L.M. Smith: 'Sackcloth for the sinner or punishment for
the crime?' p. 130.

CHAPTER 4
THE LOCAL COURTS.

Alongside the church courts were the local and central secular courts. In contrast to the ecclesiastical judicatories, when dealing with the secular ones the researcher faces not a monolithic and uniform system but a highly complex and variegated one. This is particularly so at the local level where the sheer number of courts, the many different types and classes and the complexity of their interrelations combine to give the impression of a legal system of monumental complexity. It is tempting to argue that this must have led in practice to great inefficiency, confusion and, as a consequence, public disorder and violence. This is certainly the line taken by many modern historians and lawyers. Thus Dickinson sees the legal system of late medieval and early modern Scotland as a sad decline from the 'golden age' of the MacAlpin kings and its replacement by a modern legal system as an unqualified blessing while Lord Cooper speaks of a legal 'dark age'.¹ This view however is not supported by the evidence and rather reflects the perspective and viewpoint of modern lawyers, accustomed to a centralised system of state courts, and the ideological bias of most contemporary observers.² According to this the existence of private legal institutions is both indicative of and a cause of disorder, since social order is seen as the creation of the territorial state, enforced upon a riotous and unruly populace and aristocracy. Innovative 'strong'

monarchs are thus cast as heroes, conservative 'weak' ones as failures.³ Closer scrutiny of court and legal records reveals a self-governing legal system that was both coherent and orderly, surprisingly uniform in its practices yet both flexible and responsive to local pressure and demands. Seen from 'below', from the vantage point of the local community and in particular the local ruling class, a very different picture to that painted by many modern observers can be made out. The point is that the purposes of the old system and its successor were radically different.⁴

As argued elsewhere the legal system of seventeenth century Scotland was in a state of transition, containing both the origins of the modern structure of Scots law and survivals from a very different sort of system. This is most clear at the local level where the most radical changes have happened. The central courts of the period survived, developed and grew into the supreme legal bodies of contemporary Scotland while, with one important exception, the various local courts declined and eventually either vanished or were abolished. However, in seventeenth century Scotland it was these local courts which loomed larger in the daily life of Scots men and women. For most, the law meant the court of their superior, held often at the focal point of their community. Throughout Stirlingshire, as elsewhere, a great web of courts existed. As described elsewhere these courts had jurisdictions of various sorts over

defined areas of land and their inhabitants or 'indwellers'; they were also the institutional superstructure of distinct economic and social entities.⁵ Broadly speaking there was a court, in theory at least, for every estate and burgh with further, superior courts corresponding to the larger, more complex social and economic units which these basic entities made up. It was at this superior level that specialised courts, derived from a judicial division of labour, could be found. The actual number of courts varied considerably from one area to another : in Kilsyth parish there were only two 'territorial' courts, the baron courts of Monyabrough and Kilsyth while in St. Ninians there were at least fifteen comparable bodies.⁶ All the local courts were connected to each other, officially by institutionalised ties of law and unofficially by personal relationships of all sorts among the small class which exercised legal power. There were horizontal links between courts of the same sort, vertical ties between inferior and superior jurisdictions and a variety of connections between the purely local, Stirlingshire courts and the national courts in Edinburgh. To speak of a system is thus not an exaggeration.

The law which was enforced by the various local courts came from three main sources : tradition, the acts of their own head courts and laws made or determined by several national legislative bodies, particularly Parliament and the Convention of Royal Burghs. Under the first heading came a variety of things. At one time there had been many traditional law codes in force in

Scotland's several regions, such as the Lex Gallovidia and the Udall laws of Orkney and Shetland.⁷ The latter were only abolished by the Scots Privy Council in 1611. In the Lowlands such explicit local codes had lapsed earlier and there is no evidence to suggest that any such tradition was drawn upon in seventeenth century Stirlingshire. On the other hand, it is clear from their records that many local courts saw much of the law they enforced as being simply the traditional customs and usage of their area; the law, as they put it, of time immemorial. Thus the surviving records of the Boorlaw court of Yester and Gifford in East Lothian state, after listing the laws of the court, "The above 37 Acts have been, from time Immemorial, the Boorlaw of Yester."⁸ In Stirlingshire the earliest surviving records of the Falkirk and Callandar court open with a list of acts described as the 'trew and original law.'⁹ Fortunately for the historian the courts restated and re-enacted these local customs at regular intervals, firstly to keep them fresh in the memory of the people and secondly, because, under the principle of desuetude,* laws had to be continually re-enacted and enforced to retain their vigour and validity. Thus the baron court of Ballikinrain in Stirlingshire periodically re-affirmed "all the acts and laws of this court."¹⁰ Inevitably there was much similarity between the customary laws of the various local courts, deriving as they did from common sources and a concern with shared problems such as the vexed question of grazing rights and

* see above pp. 58-9.

the need to preserve living trees, or 'green wood' as it was called. However, there were also differences in content and detail from one court to another and the customary law of one court was valid only within its own jurisdiction and not in any other area.

The various courts could also legislate at the triennial 'head courts' which all suitors had to attend on pain of fine. Thus in 1691 the baron court of Ballikinrain, besides renewing its customary law, enacted several new laws, ordering all tenants to lay on lime on their lands and governing the cutting of peats.¹¹ Again, in 1640 the head court of Falkirk passed a series of new acts regulating trade and manufacture within the burgh.¹² Sometimes these acts were very specific or sprang from an immediate and pressing need, such as that passed in 1647 in Falkirk "that ane dyk be buildit around the burgh for the keeping out of strangeris."¹³ Others, like the one cited in Ballikinrain, were genuine innovations and extensions of the law code. Yet others simply amended old laws.

Lastly the local courts, particularly the sheriff, regality and major burgh courts, enforced the law determined by the central legislative bodies. This was particularly the case in criminal law where the penalties tended to conform to those laid down by the Parliament : records often state simply "unlaws (name) conforme to the relvant Act of Parliament."¹⁴ Again, the standard form used in recording an action of 'complaint' (i.e. a criminal or quasi-criminal suit) was to begin "Whereas by the lawes of this and all other well governed nations" and then cite

an act.¹⁵ However, having said all that, it is clear from some regality records that, for the greater franchise courts at least, laws laid down by the several central bodies were seen as advisory and treated in much the same way as legal precedent : they were not absolute and binding.¹⁶ Thus courts were not obliged to impose the penalty prescribed by Parliament - a lesser or completely different penalty could be enforced. * Appeals to statute by plaintiffs could be over-ruled by local courts. If wide divergence from centrally determined law was unusual, as it was, this reflected not just the moral authority of the Parliament, Convention of Royal Burghs and so on, but also convenience and the common origin of much local and central law.

What custom, legislation and central law together provided was a body of law concerned with the regulation of three things : economic life, 'good neighbourhood' and inter-personal relations. Under the first heading came the many laws governing such matters as rents, tolls, trade and markets, prices and wages, inheritance and debt. Laws of good neighbourhood covered matters which would nowadays be called public nuisance such as grazing rights, the cutting of trees and casting of peats, actions which were offensive or harmful to ones neighbours and in general any action which would harm the interests of the court holders and the community at large and which would tend to cause aggravations among the members of a community. Lastly

* For further discussion of this point see below pp. 254-255

there were laws covering more serious inter-personal disputes of all kinds with, as argued earlier, no clear distinction between civil and criminal disputes. This body of law was enforced over the community by, in the first instance, the local, community courts, beginning with the courts of lands, barony and birlaw.

Under Scots law any freeholder had the right to hold a court, to enforce the collection of rents and dues and to maintain order among the tenants.¹⁷ In fact many landholders only held courts as and when this became necessary while others did not exercise their right at all. In theory freehold courts were further subdivided into simple courts of lands, styled "courts of the lands of....." and courts baron where the jurisdiction was held 'in baroniam' meaning that the court had the distinctive power of 'furca et fossa'* or the right to execute public justice upon criminals apprehended in the act.¹⁸ This was similar to the Anglo-Norman jurisdiction of infangthief and outfangthief.¹⁹ In practice this power had lapsed by desuetude in the Lowlands by this period and the two types of court were for most practical purposes identical : the one major surviving difference, discussed below, concerned their relation to the higher courts of sheriff and regality.

In Stirlingshire between 1640 and 1747 there were at any one time around about 100 estates, lands or baronies entitled to a court.²⁰ How many actually used that power is impossible to tell, given the state of the records. Records for such courts are rare from any part of Scotland,

* meaning literally "gallows and pit"

often fragmentary, and Stirlingshire is no exception to this rule. However, records have survived from several widely spread periods from the baron courts of Callandar, Cambuskenneth, Ballikinrain, Mugdock and Buchanan as well as the court of lands of Balgair.²¹ There are also revealing references to baron courts in the records of other courts, especially Kirk sessions and regality courts, which both cast light upon their functions and give us a list of courts which certainly existed and worked at various times.²²

All of these records are relatively brief which makes comparison easier. The first point which emerges from such a comparison is the uniformity of the courts as regards their business and their style and procedure. This is despite the wide range of times from which the documents originate, and the only clear trend which can be made out (although this is proposed with great caution given the paucity of record) is the gradual disappearance of all business other than rent and debts after about 1720.²³ The work done by these 'grass roots' private courts can thus be divided into four broad categories.

There were actions initiated by the holder of the court in person, the commonest undoubtedly being action for the payment of rent. These were brought before courts by the holder, in his other capacity as landlord, at least once and often twice a year. This action always took the same form in every court, reading:

"decernes the heall tenantis, occupyres and possessors of the said lands to make payment of their heal rents, kaynes,* customes and casualties⁺ dew be them... under the pain of poynding."²⁴

* rents paid in kind especially in livestock.

+ feudal dues, e.g. heriots.

or words so close to that form as to be practically identical. At first sight the purpose of these actions may seem obscure; why should landlords need to take their tenants to court for their rent every single year? In fact the court action served the same purpose as a modern bill or final reminder, being a legally binding request for payment, enforceable in that court or a higher body, and copies of the formal action would often be sent out to the tenants. Alternatively the tenants would all be cited by name in the action and hence have to be present in court to hear it.²⁵ This collection of rents and dues was the most regular item of business in the surviving baron courts and by the mid-eighteenth century had become their main, or even sole, reason for existence.

The court holders also initiated actions to enforce the payment of other dues besides rent, especially the performance of 'thirlage' or 'multure' where tenants of an estate or barony were bound to grind their grain at a named mill. Unlike actions for rent these always sprang from acts of non-compliance by individual tenants : a typical case is that of Robert Wilson of Craigmiln and the court versus various tenants of the barony of Cambuskenneth in 1735 (in this case, although the baron brought the action the miller involved was named 'for his interest')²⁶ Moreover, baron courts and courts of lands were much exercised by the enforcement of economic regulations and agricultural legislation of various sorts : in Balgair in 1724 we find

an action brought by the proprietor against one Andrew Ure in Knowhead for keeping more sheep than was allowed by the court's laws, while in the same court in 1721 "The Laird compleins upon Jon Fisher in Overglins for not laying one chalder of lime yearly in terme of his task."²⁷ Last, but not least, proprietors were frequently brought to initiate action to correct some physical wrong done to them or their agents. By far the commonest of these were prosecutions for "cutting green wood".²⁸ The straits to which some proprietors were reduced in this regard may be gauged from an action in Ballikinrain which begins:

"The qlk day anent ane compleint given in Mekand Mentioune that there is certaine of the growand woods in this land cuttit and away taken and that the committaris of the said act cannot be knowine Cravans therefoir that the hail Tenants and Cottars may not only purge themselves thereof but also delait what persones they know or saw cutting or away taking any parts thereof."

and proceeds to a sworn examination of all the tenants of the estate.²⁹ Clearly, in such cases and in others, the landlords were faced by a general attitude of non-co-operation and hostility. The persons who often bore the brunt of this hostile attitude were the landlords' agents and court officers : in Balgair we have several cases of these officers being abused and, in one case, assaulted.³⁰ The technical term for this was deforcement : it was a serious offence but was often committed.

Besides all these actions brought by the court holder in his own interest there were also ones brought by either the proprietor or the tenants which fall under the heading of 'good neighbourhood'. This meant chiefly prosecutions for acts which were harmful to a neighbour or the community at large, such as driving sheep through corn, grazing animals on planted land or burning moors to excess.³¹ Also in this category came disputes over property rights of various kinds and what was called "molestation of property" meaning a boundary dispute.³² Most of this second type of business was done however not in the baron or land courts but in the birlaw court, run by the birlaymen. These were respected tenants, appointed by the baillie to hold office, though at an earlier date they had been elected by the tenants meeting at the head court.³³ Sadly no record of a birlaw court in Stirlingshire seems to have survived, for it seems that they were for the most part not courts of record, but there are many references to their work in the records of other courts. These show that their function was one of conciliation, arbitration and adjudication: they were called upon to settle boundary disputes, establish the rights and wrongs of disagreements between neighbours over some unsocial activity and, where possible, to attempt to reconcile them.³⁴ Thus, it seems likely that most disputes of this sort would not come before a baron court and often when they did they were promptly referred to the birlaymen. The exceptions were usually the more intractable ones.

The third type of business was action brought by one tenant against another over possession or payment, particularly actions for debt. In Ballikinrain, Callandar, Mugdock and Balgair this was the main function of the court after collection of rents and dues. A surviving writ found in the Montrose papers gives the formal style used in such actions, reading:

"Unto your lordship humblie means and shows
I Patrick Hardiman in Lochsyd That Whereas
John Cairns in Bardrell rests me twentie one
merks nine shillings two pennies Scots monie
the terms of payment being superceded I have
often and divers tymes since required the samen
but he still postpones and deffers so to do
Therefore I beseech your lordship I may have
diet against him to compell him to make payment
to me thereof."³⁵

Writs like this could be bought by the plaintiff from the court officer, the usual price being six shillings and eight pence scots. The writ would then be served upon the named defender by a court officer and at a diet of court he would then be 'decerned', or in plain English, ordered, to pay the amount billed, plus the cost of the writ. Collecting debt could thus be lucrative for the courts and the indwellers for their part seem to have used their landlords' courts as debt collection machines.

Finally, baron courts and courts of lands also tried cases brought by one tenant against another which alleged the commission of a quasi-criminal wrong. Slander

was often prosecuted in baron courts and sometimes punished there as well, as in the case of Robert Campbell at Craigmiln who was ordered by Cambuskenneth baron court to make a public confession in court, pay his accusers twelve pounds and the court thirty pounds for slandering Malcolm Stewart and Margaret Neill.³⁶ As stated earlier, however, baron courts frequently sent cases of slander to the relevant kirk session rather than trying them or, in some cases, sent the luckless defendant to receive an ecclesiastical censure after they had imposed a civil one.³⁷ Cambuskenneth and other baron courts also tried the quasi-criminal offence of spulzie, meaning the taking or using of some article without the owner's consent but with the intention of returning it.³⁸ If that intention did not exist the act became theft, a much more serious matter.³⁹ The normal penalty for spulzie was a fine paid to the court together with the return of the uplifted item or its monetary equivalent.

However, the commonest action of this sort tried by baron courts was assault; as the tables show, this was for baron courts the second most frequent item after debt to be brought before the courts. Assault came in two forms; simple assaults, known as 'ryots' or 'trublances' and 'bloodings & ryots' where an injury leading to loss of blood had been inflicted. A typical case of this type is in the records of Balgair for 1720, involving the beating and blooding of a servant by his master.⁴⁰ Here the fine imposed was fifty pounds, the normal penalty for any assault

Cambuskenneth Baron Court 1709 - 1739

Violence	8	(22.0%)
Cutting Green Wood	3	(8.0%)
Slander	7	(19.0%)
Good Neighbourhood	5	(14.0%)
Others	13	(37.0%)
	—	
<u>TOTAL</u>	36	
	—	

N.B. Although the court records continue after 1739, no business other than citations for rent is recorded after that date.

Balgair Court Of Lands 1706 - 1736

Violence	3
Cutting Green Wood	2
Good Neighbourhood	9
Others	12
Debt	33
	—
<u>TOTAL</u>	59
	—

leading to 'effusion of blood'; mere trublance only led to a fine of five pounds. Actions for assault were an important part of the work of baron courts in Stirlingshire but their number fell in the eighteenth century till by 1740 they had almost vanished from the record.

A form of legal action closely related to assault was the writ of lawburrows. This was a suit in which the pursuer would ask the defendant to find security (or borh in the original Norse form) not to molest him, his family or his goods. The writ began "I (pursuers name) do dread (defendants name) bodilie harme" and went on to demand a security of a specified amount. The defendant had to find a person, called a cautioner, who would submit a signed bond to the court, to the effect that if the defendant did harm the pursuer he, the cautioner, would pay him a specified sum. It was common for the parties to an assault case to ask for lawburrows from each other while the courts could, and did, demand that parties find lawburrows without any request coming from them. The suit could also of course be used as a preventitive measure, to stop a tense situation leading to blows.

The legal style used in all of these inter-personal disputes is both important and revealing. The records of such suits always start by naming the pursuer and then add "and the Fiscal for his interest". The penalty usually consisted of two parts, a sum paid in compensation to the pursuer and a fine paid to the court.⁴¹ Actions for slander, spulzie and assault were brought by or in the

name of the injured party but also involved the fiscal, or official prosecutor for the jurisdiction as co-prosecutor, since delinquent acts of that sort harmed the public interest by causing, or threatening, a breach of the public peace. Hence the dual penalty, part restitution to the victim, part fine to the public authority, the latter always justified as being "to the terrour of others in tyme coming."⁴² On the other hand, the fiscal did not initiate prosecution by himself; action had to be started by a private person, either as a 'complainer' or as an 'informer' and the position of the fiscal was as much that of a business -man providing a service as of a public official. The 'interest which he represented was the financial involvement of the court deriving from its levying of a mulct as much as any public interest : it is worth mentioning in this connection that the term fiscal derived from the Latin fiscus or treasury and referred to his role as the collector of public revenue through fines laid upon malefactors. Unfortunately the baron and land courts of Stirlingshire have left few details of this because of the paucity of their records but the picture can be drawn more fully through looking at the second level of local courts, the regality and sheriff courts.

As tenants and sub-tenants held suit to a baron court or court of lands, so freeholders and courtholders owed suit to a superior judicature, a Sheriff or regality court depending upon whose 'man' they were; as Dickinson puts it:

"As the baron owes suit to his lord's court, which is the king's court of the Sheriffdom in which his holding lies, so the tenant of the baron owes suit to his lord's court.... As the sheriff's court binds together the lands of the Sheriffdom, so the baron's court binds together the lands of the barony."⁴³

Thus in Stirlingshire many barons and small freeholders, all royal burgesses and crown tenants owed suit to the Sheriff court at Stirling. The rest however, including almost all the heretors in the western parishes and the south east of the shire did not : most owed suit to the two great regalities of Falkirk and Montrose. Some single estates, such as Campsie, had a court with regality status and so owed suit direct to King and Parliament : the larger regalities, Falkirk, Montrose and Lennox were more complex, consisting of several baronies and estates each.⁴⁴ Here there were baron courts or courts of land on each estate, the holders of which owed suit to the higher court of the regality which in turn owed suit to Parliament. Sometimes the same person held both courts : the Earl of Callandar had both a baron court at Almond and a regality court at Falkirk, while the Marquess of Montrose had baron courts at Mugdock, Buchanan, Buchlyvie and elsewhere and a regality court centred upon Mugdock.⁴⁵ On other occasions there was a division : the baronies of Bantaskin and Westquarter owed suit to Falkirk regality but were held by cadet branches of the Livingstones while similarly the courts of, for example Killearn and Fintry were held by branches of the name of Graham.

It may at first sight seem strange to lump together Sheriff and Regality courts, the one a royal court, the other private with the regality exercising a substantially greater jurisdiction. However, scrutiny of the records shows that these two courts were closer in nature and often in power than one might suppose. Many Sheriff courts, including that of Stirlingshire, were held heritably, making their royal status somewhat dubious. Again the type of work done by the two classes of court, and their procedure were very much the same. This in turn reflected a similar jurisdiction with the powers of Sheriffs and many regalities almost identical. Much of the confusion which exists over the exact nature of regality jurisdiction is because of inadequate realisation that there were in fact two distinct types of regality court. Some regalities had full regalian rights and were indeed miniature kingdoms complete with chancery, justiciar and all the other great offices of the feudal state. Montrose regality was clearly one such. Others, perhaps the majority, had no such powers and were simply private Sheriffdoms with a court which had the same powers and jurisdiction as a Sheriff court : Falkirk is an excellent example of this sort of regality. Moreover, even in the 'full' regalities the court which sat most often and did most of the work had the same role and status as that of the Sheriff : those courts which exercised regalian rights sat but rarely. Both types of court occupied the same niche in the legal system, the only real difference being that one was purely private while the other had a public element.

The Sheriff and the various regality courts have left extensive records, with three main sources surviving : the court books and processes of the Sheriff court, the court books of the regality of Falkirk and a whole spread of records from the regality of Montrose, including a splendid run of process papers.⁴⁶ These show that both Falkirk and Montrose had a main court carrying out the same functions and with the same powers as the Sheriff court at Stirling. Montrose also had a Justiciary court which tried the four pleas of the crown in its territory but Falkirk does not seem to have such a court.⁴⁷ All the classes of business found in baron courts and courts of land also appears in regality and Sheriff courts, giving rise to a first impression of overlap and confusion : in fact closer examination shows a complementary pattern rather than one of conflict.⁴⁸

There are citations for payment of rent in these court records but proportionally they are less important than for baron courts, concerning as they did only the direct tenants and sub-tenants of the holders or the crown or persons who had defaulted upon payment of rent. The regality courts, particularly Falkirk, were much exercised by the enforcement of economic regulation, which in Falkirk extended to control of the price of beer, fixed by an act of 1641 at one shilling and fourpence Scots per pint.⁴⁹ They were also concerned, like baron courts, to enforce the payment of feudal dues such as multure where the parties involved were direct tenants of the holder.⁵⁰ The regality court records also contain many prosecutions of the sort

found in baron courts for cutting green wood or harming the laird's property in some way. In the Sheriff court, however, such cases are non-existent - except for the period between 1652 and 1656, after heritable jurisdictions had been temporarily abolished and after about 1715.⁵¹ As far as the regality courts were concerned such cases only seem to have arisen when the holder was directly involved : presumably if one of the subordinate barons was injured he would deal with the matter in his own court.⁵²

Cases of the sort classified as 'good neighbour-hood' were again a common item of business for regality courts. Falkirk tried for example people accused of "keeping dogs that byt", of "keeping scabbed sheep" and of "molestation of property".⁵³ The cases tended again to be disputes either between direct tenants of the holder or else between persons from different subordinate baronies. The Montrose and Lennox records are not as good as those of Falkirk in this respect but it would seem that they had somewhat fewer cases than Falkirk. The Sheriff court has very few such cases in its records except for the 1650's and eighteenth century.

As the tables show, Sheriff and regality courts both processed vast amounts of debt and cases of debt or possession were in some respects the main business of these courts, comparing as they did a clear majority of the business transacted.⁵⁴ This predominance became even more marked after about 1690 and by 1740 such cases made up almost all the business of the Sheriff court and Montrose regality court.⁵⁵ (Falkirk regality had been escheated after the Earl's treason in 1715). Besides debt there

were other possessory actions, important ones being actions removing (a writ to force tenants to leave a property for non-payment of rent), actions of forthcoming (a writ to force the production of goods paid for but not delivered) and actions of poinding (writs for the seizure of property to pay debts). The origin of such cases varied. In Falkirk they tended to come from the burgh of Falkirk and those baronies held directly by the Earl of Callendar. In the case of Montrose there are comparatively few considering the size of the area so either debt was a rarer occurrence in that part of the shire or the matter was mainly handled by the baron courts. In the case of the Sheriff court, apart from the 1650's and part 1715, they involved parties from outside the bounds of the regalities and also outside the burgh of Stirling, often being cases where the persons hailed from two different areas. Even so, there may have been an element of competition between the several courts for this business but much more detailed research is needed before anything certain can be said.⁵⁶

Regality courts, unlike their inferiors also handled administrative functions, particularly brieves.⁵⁷ These came from the royal chancery in the case of Falkirk and the Sheriff court; but Montrose, as befitting a full regality, had its own chancery which its indwellers applied to and several of its brieves have survived in the process papers.⁵⁸

As with baron courts, however, the second biggest item was inter-personal disputes involving damage of some kind, particularly slander, spulzie and assault, but also, in these courts, theft, robbery, rape, arson and even murder.

As mentioned earlier, the records of these courts show more clearly how such cases were prosecuted and why, and what penalties were imposed. The style used is identical to that of the surviving baron court records and the penalties are similar, so the same procedure presumably applied.

The first step was for the injured party or their kin to draw up a detailed account of the alleged offence, known as a bill or libell of complaint (the corresponding document in a debt case was termed a bill of claim). This document was subscribed to by the accuser and the fiscal and followed a set form, reading:

"Complains I (name of accuser) and the procurator fiscal for his interest upon and against (name of accused) That whereas the crimes and acts under-written are highly punishable by law yet notwithstanding thereof true it is and of veritie that (follows a description of the offence) And whereas, by the laws of this^{and} all well governed nations such acts should be severly punished. Therefore (follows a detailed demand as to the penalty to be imposed)"⁵⁹

The bill had to give a detailed account, naming persons, times and places exactly otherwise it could be objected to. It is worth noting that the form given above was used both for what we would now call civil offences, actions of tort and for criminal actions such as theft, rape and blooding. This lack of distinction between civil and criminal was also reflected in the section of the bill which concerned punishment and often contained a dual demand; for both a fine to be imposed on the accused and an assythment to be

made to the accuser. Thus in a typical paper from the Mugdock papers, the bill reads:

"and sould not onlie be fined and unlaued for the forsyd blood, batterie and ryot in the sum of three hundred pounds scots monie to the terrour of otheris to commite the lyk in tyme coming, but also to be decerned to make payment to the said informer of the soume of ane hundred pounds monie forsyd for his assythment, loss of blood and damages....."⁶⁰

These demands for penalty and compensation were in the nature of claims subject to bargaining and reduction, like the claims for damages or alimony made in modern civil actions.⁶¹ The court would usually be guided as regards the fine by the law as determined by Parliament but it could chose to ignore it. In the case quoted the court imposed a fine of one hundred pounds and an assythment of thirty pounds. The dual nature of the penalties demanded and imposed is often not clear from the records of court books which only record the fine imposed : the assythment is often only mentioned in the process papers.⁶² However, it was within the power of a court to impose a fine as requested but ignore the claim for assythment and this may well have happened in many cases.

It would seem unlikely that this was so very often, at least in the seventeenth century, for two related reasons. As argued earlier, prosecutions were initiated by private individuals, acting as 'complainers' or 'informers' : the first meant that the accuser was the actual injured party, the second that they had simply informed the authorities of an offence. Even in this latter

case the older rule was that they must still have some connection to the actual injured party or have suffered loss in some way. So, in the case of Liddell and the fiscal versus Adam at Mugdock, the informer brought suit against Adam for an assault on his herdsman four years earlier which Adam attempted to have dismissed, arguing:

"Because crimes in their own nature and by our law being personal it is onlie competent to the partie injured to seek reparatioune and not for the late master. In respect whereof the bill is litigious and envious, as carried on without the knowledge or consent of the body or hird pretended to be beaten."⁶³

Significantly, although the objection was overruled, the basic arguement was not condemned. Instead the court decided that Liddell had sufficient interest to bring the case, since he was the hird's master at the time he was assaulted and because the assault had cost him much money in medical expenses.

Given that cases were brought at the initiative of individuals, their main motive, other than malice and spleen must have been a desire for restitution. Had the courts consistently not granted assythment this motive would have been removed. Moreover, to give the second reason, fines were a substantial source of income for many court holders (see table p. 257) and they would be unlikely to cut off such revenue.⁶⁴ On the other hand, if the class which ran the local courts, both shrieval and regality, came to have other, far more important sources of income, then this motive would be removed and this did in fact

Falkirk Regality: Income From Fines/Fees (Figures in Pounds Scots)

	Offences of Violence	All Other Offences	'Fees' for Debt Cases
1639	139.00	51.50	7/13/4
1640	20.00	170.00	9/13/4
1641	26.00	72.00	14.0
1642	567.75	371.00	14/13/4
1643	410.00	5.00	10/ 6/8
1644	296.50	35.00	10.0
1645	55.00	0	4.0
1646	405.00	175.00	8.0
1647	540.00	70.00	16/ 6/8
1648	535.00	80.50	12/ 6/8
1649	175.00	22.50	10/13/4
1650	415.00	70.00	10/13/4
1651	0	0	3/13/4
	<hr/>	<hr/>	<hr/>
TOTAL:	3583.25	1122.50	132.0
	<hr/>	<hr/>	<hr/>

N.B. While the figures for violent offences and 'others' are reasonably accurate, that for 'Fees' undoubtedly underrepresents the total income from that source.

happen during the eighteenth century. For this and other reasons discussed later, there was a falling off of criminal and quasi-criminal cases brought before local courts after 1700, till by 1745 they had almost vanished.

After the drawing up of the bill, the next step was for the court officer to serve it upon (i.e. deliver it to) the named accused - this was recorded and witnessed in a document called an 'executive'.⁶⁵ If the case was a capital one he would also present a list of names of possible jurors for the defenders approval. In the case of Gilbert Buchanan, tried by Montrose regality in 1738, a list of forty-four names was presented to the defendant along with the bill : all were sworn but only fifteen actually served at the trial.⁶⁶

When the case came before the Sheriff or baillie of regality there were in general five possible outcomes. The most straightforward was for the defendant to 'admitt the libell' and throw himself upon the mercy of the court. Otherwise he could try to have the libel rejected for inaccuracy or faulty drafting or because of lack of interest by the pursuer.⁶⁷ If this failed, or was not done, then one of two alternatives could be followed. The entire libell could be referred to an 'oath of verity', normally the defenders but sometimes the accusers as well. This meant that the party concerned would be formally sworn, the libell read to them and they would be asked whether it were true or not. As they were under oath, any mendacity would be perjury, a serious crime which would destory the perpetrator's good name.⁶⁸ Very often, this was enough for,

as in church courts, the defendant dared not lie under oath and refusal to take an oath of verity was held to prove guilt.⁶⁹

The alternative was for the matter to be put to probation, which took two forms, the deposition and the interrogative. These were not exclusive and could be combined; usually however they were not. The process could involve either a magistrate alone or a trial by jury, or assize as it was called. All capital crimes were tried by a jury while for lesser offences this could happen if one party requested it. The form used was invariably "The baillie/sheriff remits the matter to the knowledge of an assize." This style reflected the original nature of the jury, as a body of neighbours of the disputants who would be asked under oath what they knew to be the truth of the matter. Because of these origins, trials before these local courts were not adversary contests of the sort found in English criminal trials but partook of the nature of an inquest, with hints of the ancient practice of compurgation or oath helping.⁷⁰

If the method of deposition was used each witness would be sworn and then give an account of their knowledge of the alleged offence or, as lawyers' jargon had it: "depone as to the points of the libel". These accounts would be taken down in writing and signed and attested by the witnesses and the roll thus formed given to the magistrate or jury.⁷¹ In this case both sides could call witnesses to support their case and swear as to the truth of their assertions.

In the case of the interrogative, the witnesses would be sworn and then the libell would be put to them either in toto, so that they would be asked "is the libell

true and accurate?", or else as a series of questions. Here the bill would be broken down into points and each would be put to the witness in the form of a question requiring a simple 'yes' or 'no' answer.⁷² Thus one question might be: "did you see the accused strike the complainer in the manner alleged in the libell?" No cross-examination took place in either case.

Once the witnesses had been heard, by whatever method, then either the magistrate would deliver a verdict and sentence together or the jury would deliver their verdict in a sealed envelope to the dempster who would read it out before the court.⁷³ The magistrate would then give sentence. As stated above, the commonest penalty in criminal or quasi-criminal cases was a fine, plus compensation or a simple fine. Slander cases usually led to a punishment involving the public restoration of the accused's good name.⁷⁴ For the more serious offences a punishment was imposed which was designed to exclude the guilty party from society. Imprisonment was not a common penalty, and where it was used it was either as a supplement to another such as a fine or as a means of ensuring that a fine would be paid by preventing absconding.⁷⁵ Sometimes it was used as an alternative to a fine when the person concerned could not pay.⁷⁶ The main punishment was banishment forth of the bounds of the jurisdiction under pain of death.^{76A} In Falkirk, for example, John Potter in Culross, charged with stealing a purse, bound himself never to be found within the bounds again "and if he was found thereunto . to be scourgit to the deathe."⁷⁷ Some years later the same court ordered George Parrishe in Slamannan, convicted of theft, to stand at the Mercat cross with a

paper on his head and then to remove out of the bounds under pain of scourging and branding.⁷⁸ Many other examples could be given.⁷⁹ The most certain way of removing a criminal from society was to execute them but this penalty was very rarely imposed. Thus there are only two recorded executions in the Falkirk court books, one a case of infanticide, the other one of theft, while in the case of Montrose there was only one such case recorded after 1700.⁸⁰ The Sheriff court was equally abstemious in its use of the death penalty.⁸¹ In general, the penal policy of the local courts emphasised fines and restitution over retributive penalties.

If a party wished to appeal then there were two main routes open to them. They could declare the 'doom' (i.e. verdict) "false, stinkand and rotten" which led to the whole matter being sent to a higher court. This procedure was slow and laborious and almost never happened in criminal or quasi-criminal actions.⁸² This was because cases which came to court were normally 'open and shut' with no room for doubt as to the defendant's guilt. However, there was an alternative which was to appeal to Parliament or the Privy Council to overrule the verdict of a lower court. In Stirlingshire this happened in the case of four men tried before the Stirling sheriff court in 1648 who were found guilty of sheep stealing and sentenced to hang. Then the Viscount of Kilsyth, the lord of the condemned men, applied on their behalf to Parliament and procured a writ ordering postponement of the execution, followed closely by a judicial Act of Parliament which overturned the sentence imposed by the sheriff and commuted it to banishment.⁸³ Clearly though, this form of appeal required

either money or friends in high places or both.

Besides the baron and regality courts and the Sheriff courts there were several other courts in Stirlingshire, foremost amongst them those of the burghs. The various burghs of barony have not left any records but Stirling has left voluminous documentary records of all sorts.⁸⁴ As Stirling was a royal burgh its burgesses (i.e. merchants and craftsmen) were legally held to be a collective tenant-in-chief of the crown with the same legal rights as a baron, exercising jurisdiction over the indwellers of the burgh who occupied much the same position as tenants and sub-tenants in a rural barony. In fact, Stirling's legal prerogatives were greater than those of many other royal burghs as it had the same powers as a Sheriff court.⁸⁵ The procedure and business of Stirling burgh court were thus very similar to those of the Sheriff court and the main regality courts of Falkirk and Montrose. There were however differences of emphasis. In the first place, the predominance of debt in the court's work was overwhelming even in the mid-seventeenth century and by the eighteenth century it had come to compose all but a tiny fraction of the court's business.⁸⁶ Cases of serious interpersonal disputes such as ryot or slander were rarer than in other courts, as well as being a small proportion of the total. There were many cases of good neighbourhood and purely civil disputes but these were of a different sort to those tried by the other courts, reflecting simply the different nature of the environment. Thus there are no cases of cutting green wood or casting peats but many for allowing property to fall into disrepair or for making a loud noise and disturbing one's neighbours.⁸⁷ Given that

trade and manufacture were the main function of the burgh there was surprisingly little economic regulation - there was some but not as much as one might expect. (for details see table p. 276). Apart from disrupted contracts, the main items under this heading were prosecutions for forestalling and regrating of markets and use of false weights and measures.⁸⁸ It is worth mentioning that such cases also came before the Sheriff and regality courts, reflecting their supervision of non-burghal markets and fairs and the possible non-existence of some burgh of barony courts.⁸⁹ The reason for the seeming absence of economic matters was that most economic regulation was performed by another court within the burgh, the guildry court.⁹⁰ This consisted of the dean of guild and the heads of the incorporated trades and it was responsible for the control of manufacture and trade within the burgh, enforcing the edicts of the Convention of Royal Burghs, fixing pricing and wage levels and giving out licenses for manufacture and sale of goods.⁹¹ This court also settled many disputes amongst its members and kept an eye on their morals, trying tradesmen for offences such as slander or cursing, often acting in this area as a procurer for the burgh kirk session which was closely, even intimately, tied to the two other courts because of the overlap of membership.⁹² In general though, one can say that the burgh courts together handled much the same type of business as the comparable local courts and its procedure and methos of operation were also the same. The fact that the 'baron' was the council rather than a single individual does not seem to have caused any marked difference.

There was also at Stirling, as elsewhere in Scotland, a commissary court, which broadly speaking exercised the consistorial jurisdiction of pre-Reformation prelates, according to pre-Tridentine canon law. It was primarily concerned with testaments, wills and marriage settlements.⁹³ Although of great interest to the local social historian, these records offer nothing to the historian of crime except briefly between 1660 and about 1680 when serious cases of charming and suspect witchcraft as well as some slander cases were sent there by the kirk sessions and presbyteries. Why this was done is not clear but in any case the number of such cases is too low to be significant.⁹⁴

Stirlingshire also had Justice of Peace courts but regrettably these have left no record from before the mid-eighteenth century so for information as to their role we must rely upon the evidence of other shires and references in other court records.⁹⁵ The latter would seem to show that during most of the seventeenth century the Justices were mainly concerned to control vagrancy and begging with their other main function being to enforce the decisions of other courts, particularly kirk sessions. During the 1650's and after 1709 they acquired a new function : to act as an investigative judicature responsible for the presenting of criminals for trial before the High Court with the duty also of collecting information and witnesses for use against them. As this concerned mainly the central courts, this point and the question of the role of J.P.'s

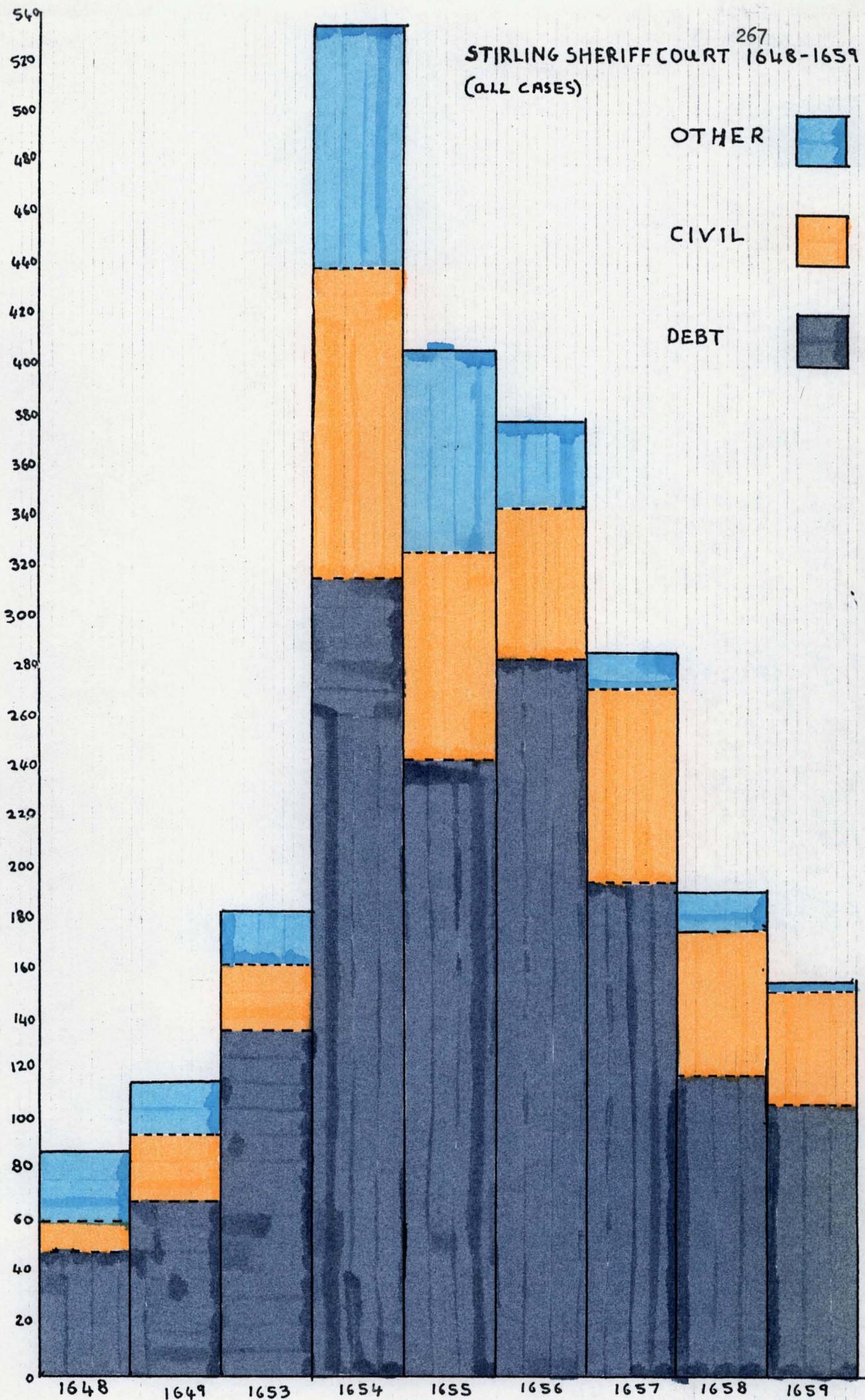
is discussed at greater length in a later chapter. Because of the lack of records we dare not make any bold statements about their role during the seventeenth century but, given their restricted powers and the evidence from elsewhere in Scotland, it would seem likely that, the 1650's apart, their role before the Union was specialised and limited.⁹⁶

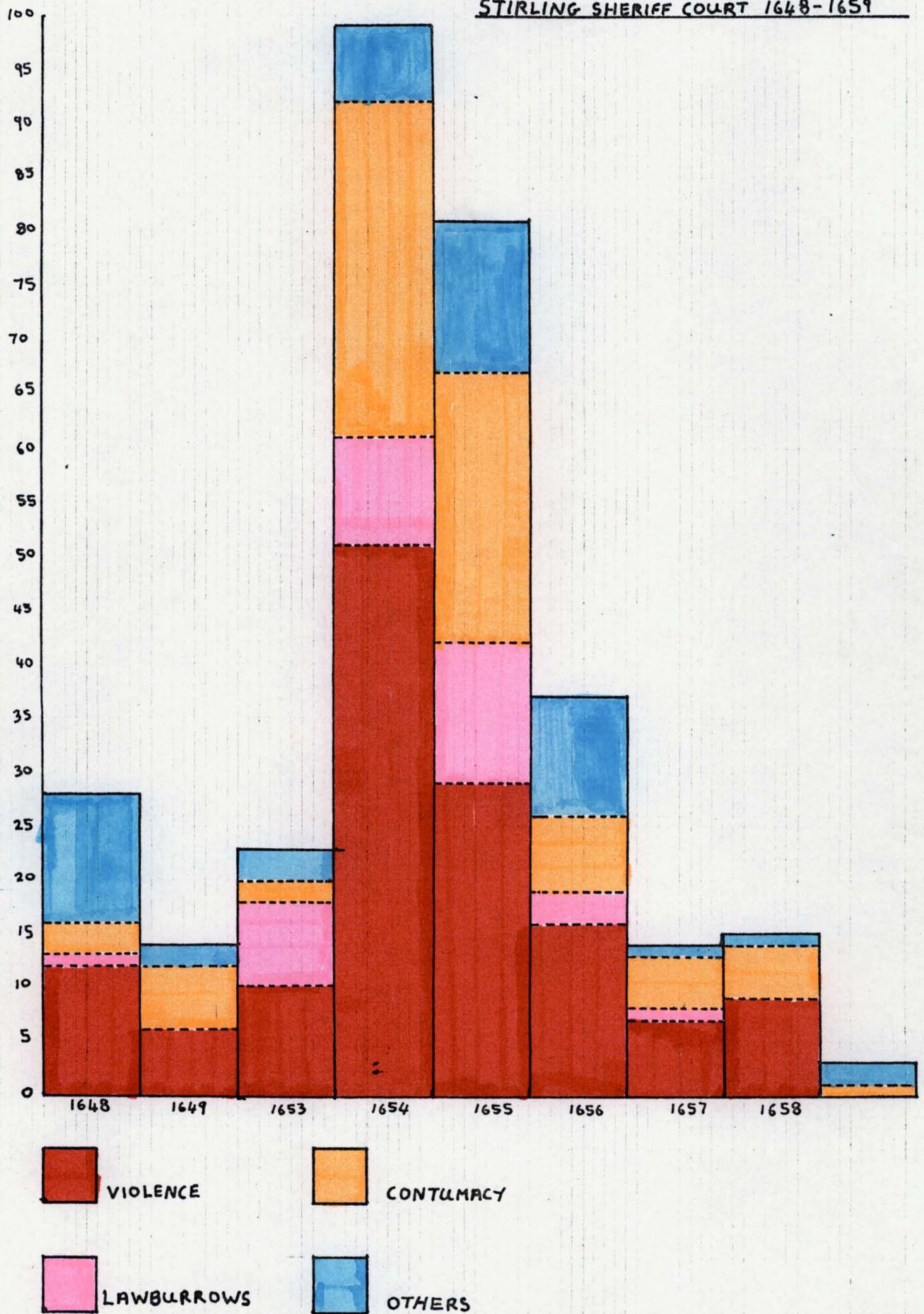
So when looking at the local courts in Stirlingshire, what questions can we meaningfully ask - what sort of information as to crime and the law can we derive from their records? In the first place can one make out a clear picture as to the pattern of crime and of crime rates and changes in these? The answer must be an unqualified negative. Far too many courts have left either no records at all or ones which are patchy and fragmentary. Many of the records which have survived were badly kept and are certainly incomplete and in some respects, perhaps important ones, inaccurate. Also we cannot be sure that those records which have survived were typical as regards the breakdown of their business, though we can be more certain about their methods and procedure. Most importantly it is clear that the majority of those who committed delinquent acts were not brought before courts.⁹⁷ The evidence suggests that many if not most prosecutions were the result of long standing feuds and enmities and were the end result of much aggravation and dispute : so for example, the case of Liddell versus Adam cited earlier was the consequence of at least seven years of argument and hostility.⁹⁸ Cases would also be brought where the offence was either blatant, done before witnesses or considered atrocious and grave (e.g. an infanticide). Most inter-personal disputes were settled outside the courts.⁹⁹

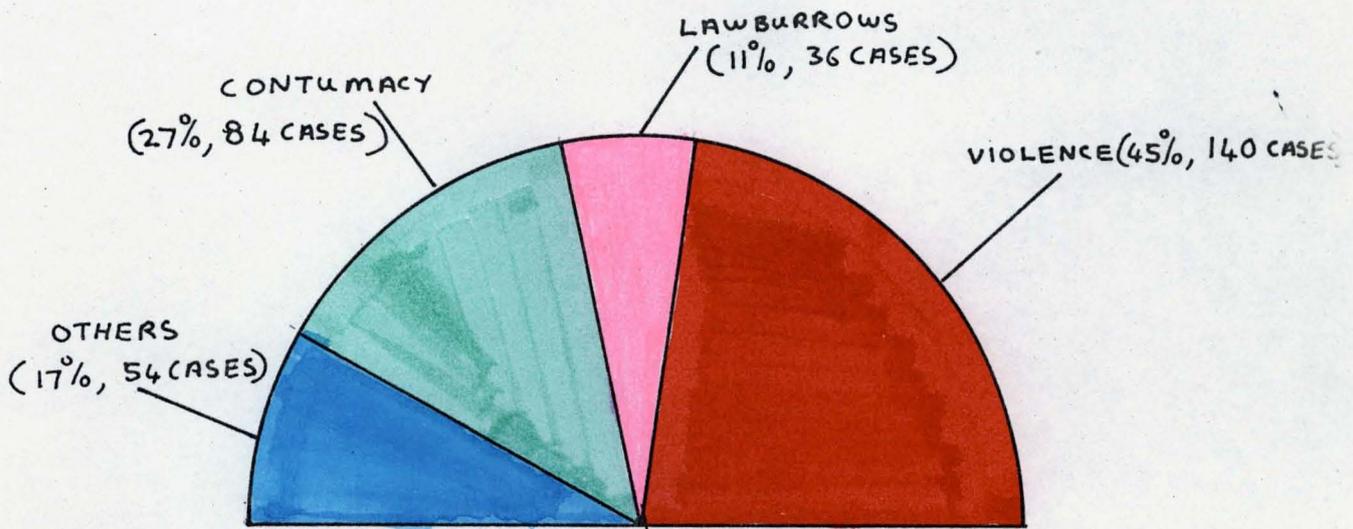
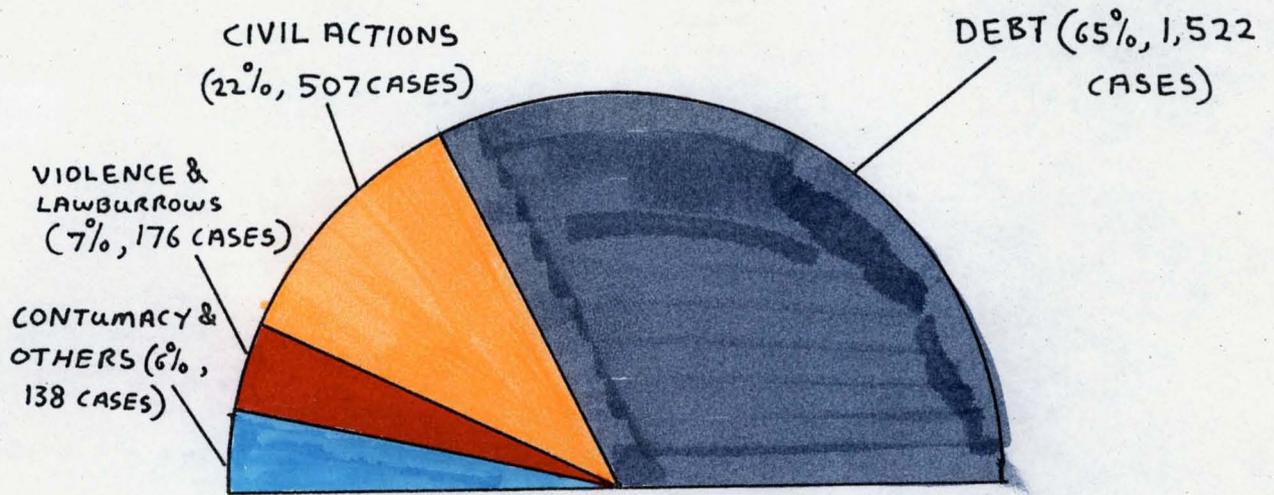
What we can talk about is the way the courts worked to maintain order in the community. The purpose of these local courts was not, even in theory, to prosecute every breach of law or delinquent act but rather to prosecute particularly grave and serious crimes, to settle disputes which had become too acute to be handled by informal sanctions such as social disapproval and gossip and, by doing this, to punish malefactors and give compensation to the injured, so maintaining social peace.¹⁰⁰ The workings of these local courts also helped to maintain the power and position of the local ruling class by maintaining the local estate as the basic community and by establishing them as the direct arbiters and maintainers of social order. The courts could also be used to uphold their economic and class interests through the control of the local economy.¹⁰¹

What kind of cases then were brought before the courts? It is clear from even a cursory glance at the records of the various courts that the vast majority of the criminal and quasi-criminal cases were ones of personal violence. Property offences such as theft were remarkable for their relative rarity. Where process papers are available study of the cases of 'ryot' shows that most involved a public affray or brawl, often the culmination of a long dispute, and often involving clear evidence of premeditation. Thus in one case from Montrose the bill describes how the accused had crept up behind the complainer, armed with a shovel and had beaten him - "to the perill of his lyfe."¹⁰² This point of premeditation was important : the style used by the courts in their formal documents shows that it was premeditated acts which they were most concerned to punish.¹⁰³

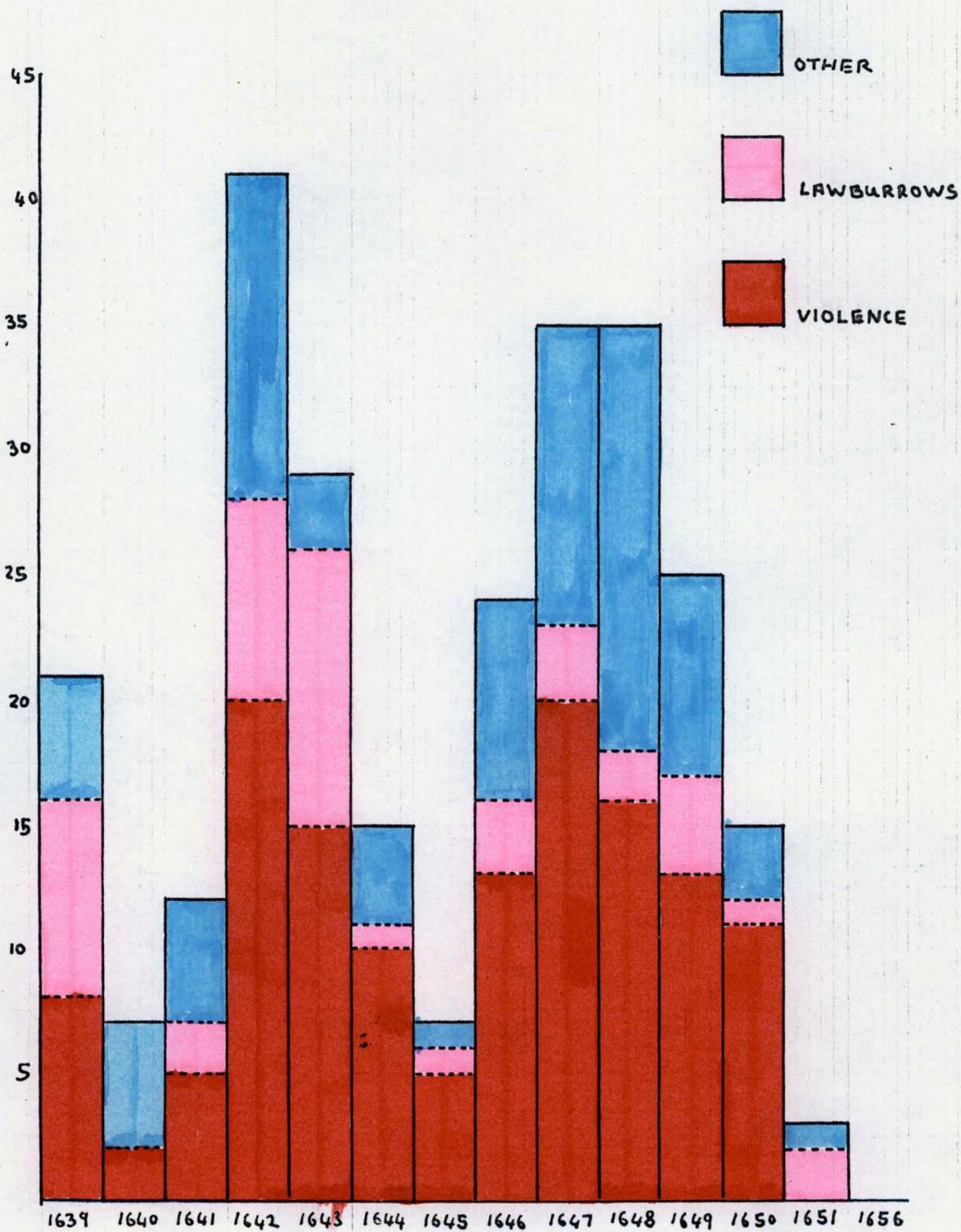
267
STIRLING SHERIFF COURT 1648-1659
(ALL CASES)



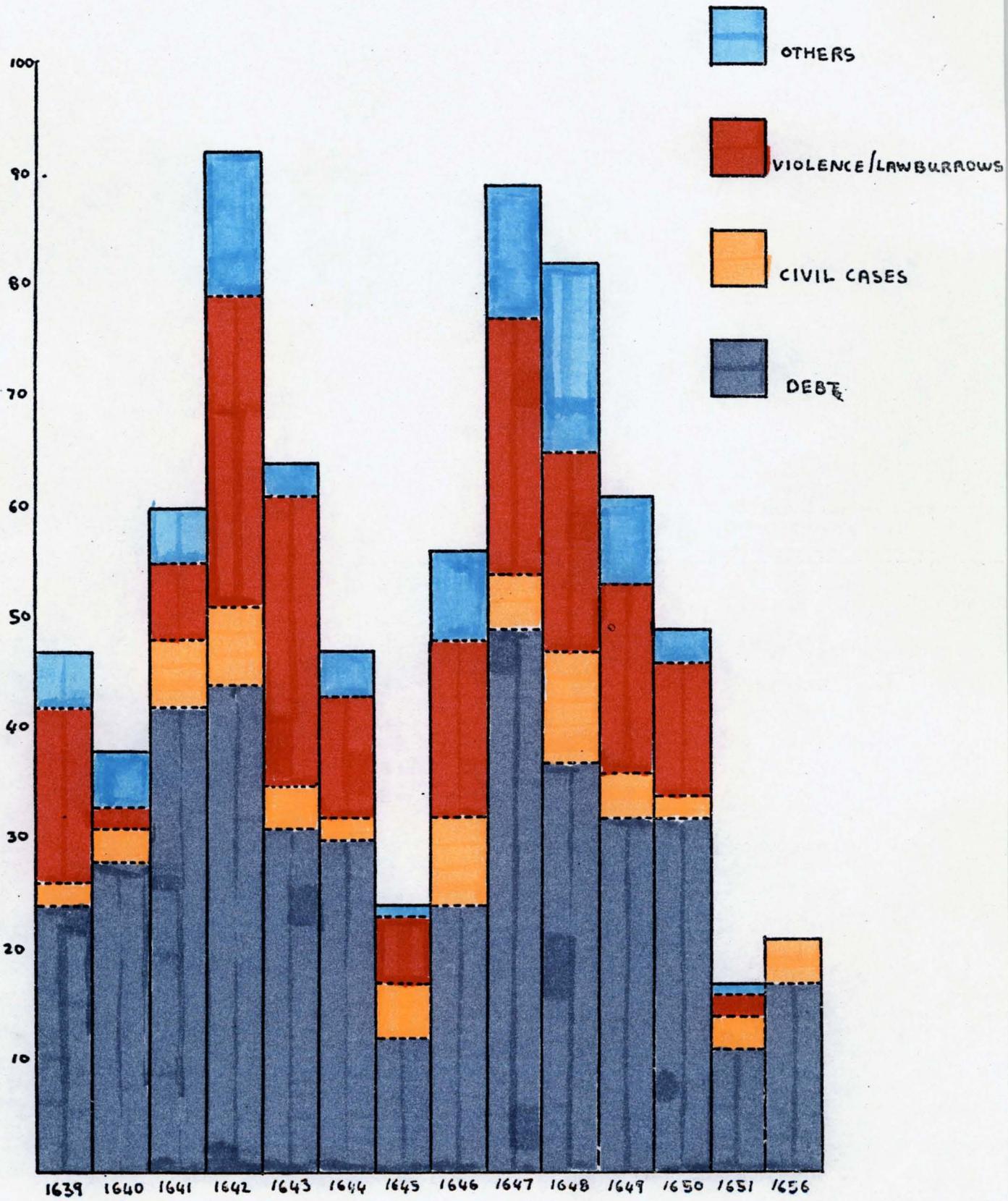
STIRLING SHERIFF COURT 1648-1659

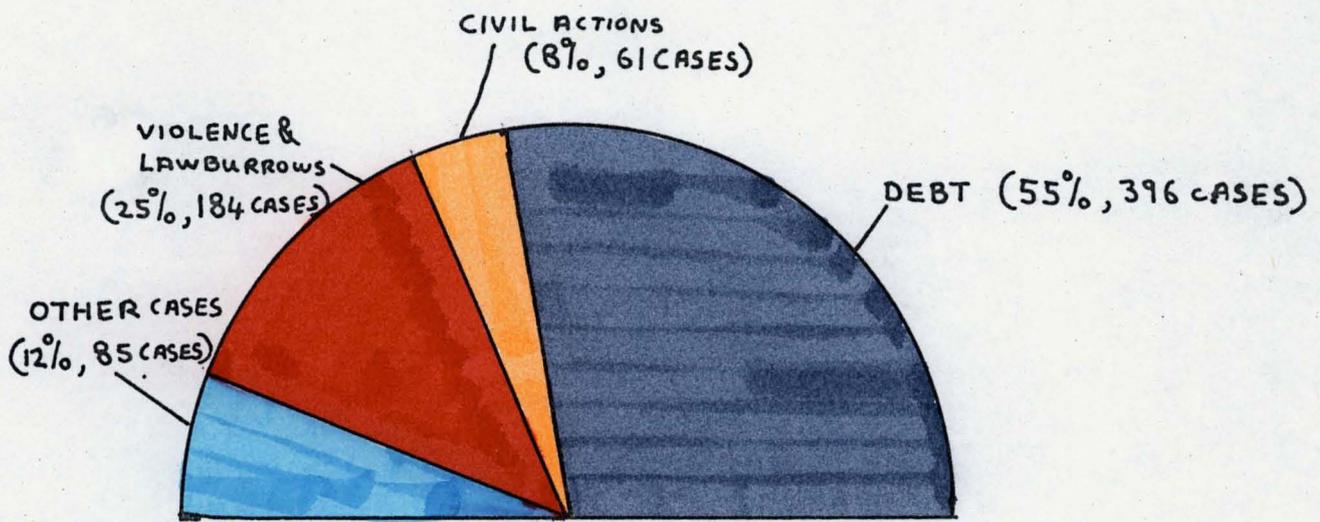
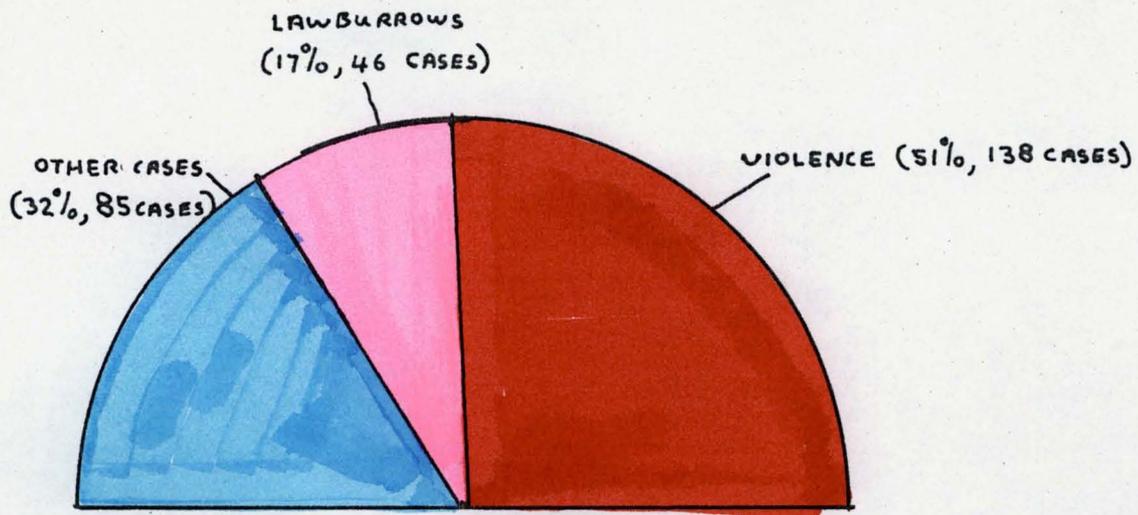


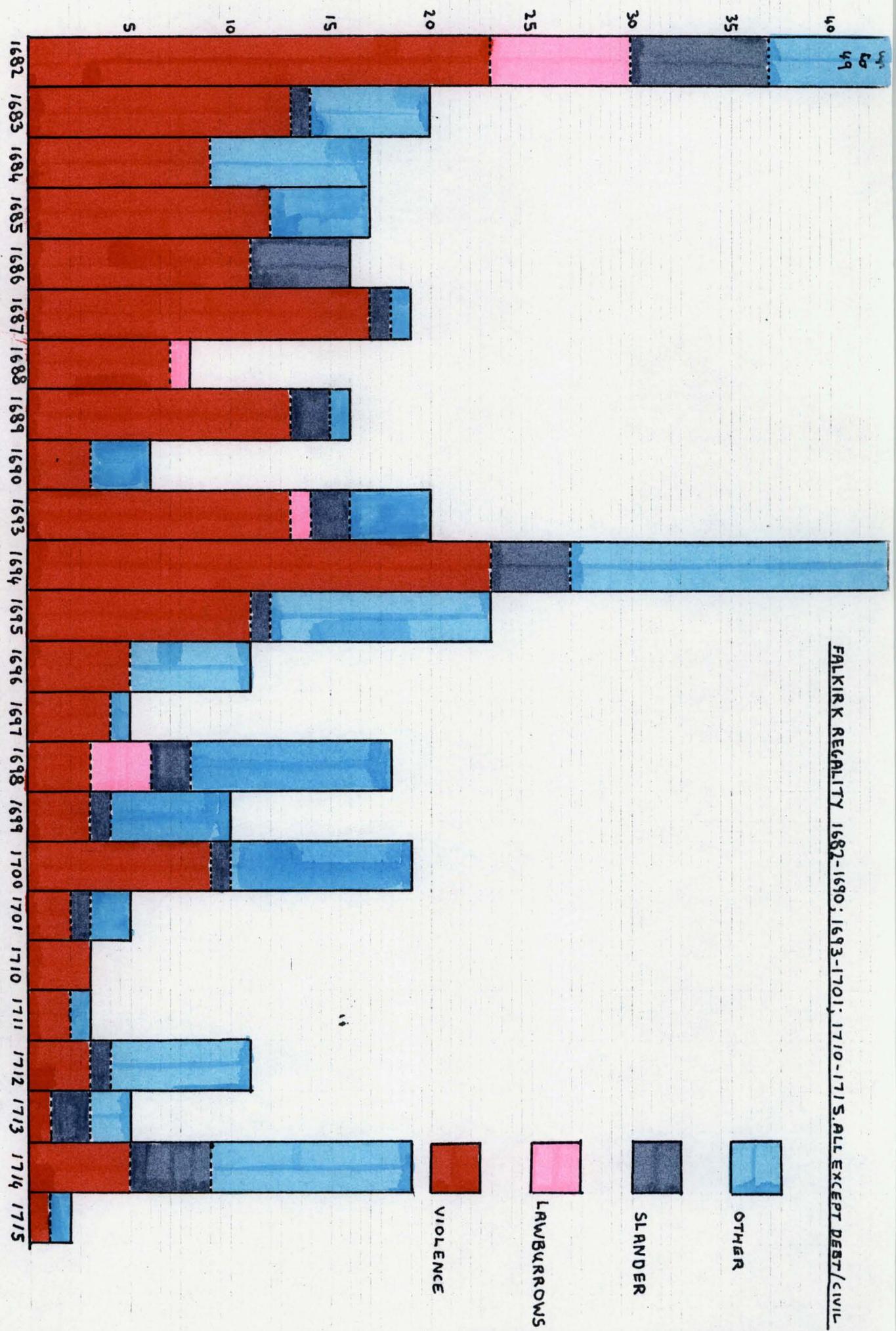
FALKIRK REGALITY 1639-1651 & 1656: ALL EXCEPT DEBT & CIVIL



FALKIRK REGALTY 1639-1651 & 1656 :- ALL CASES.

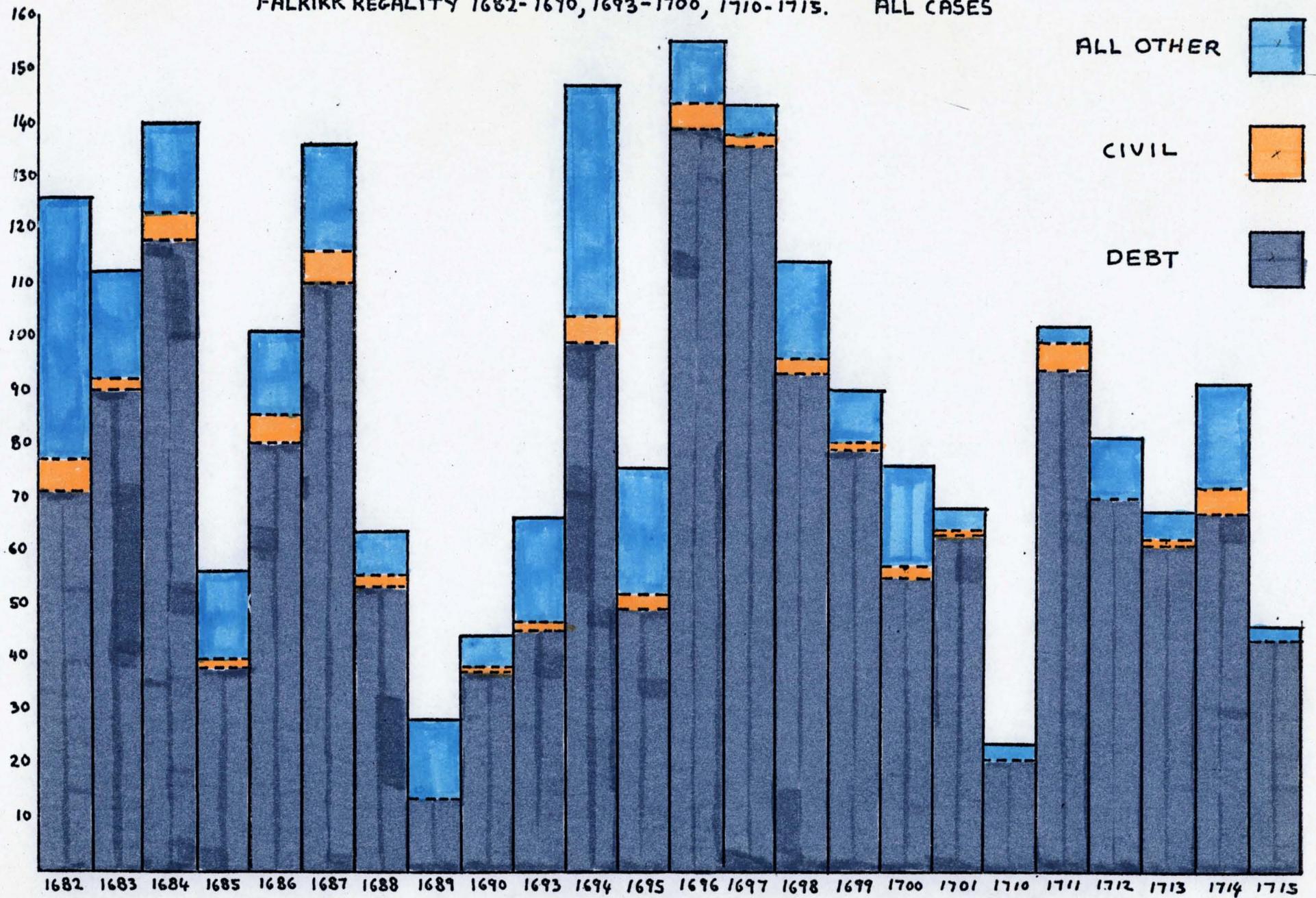




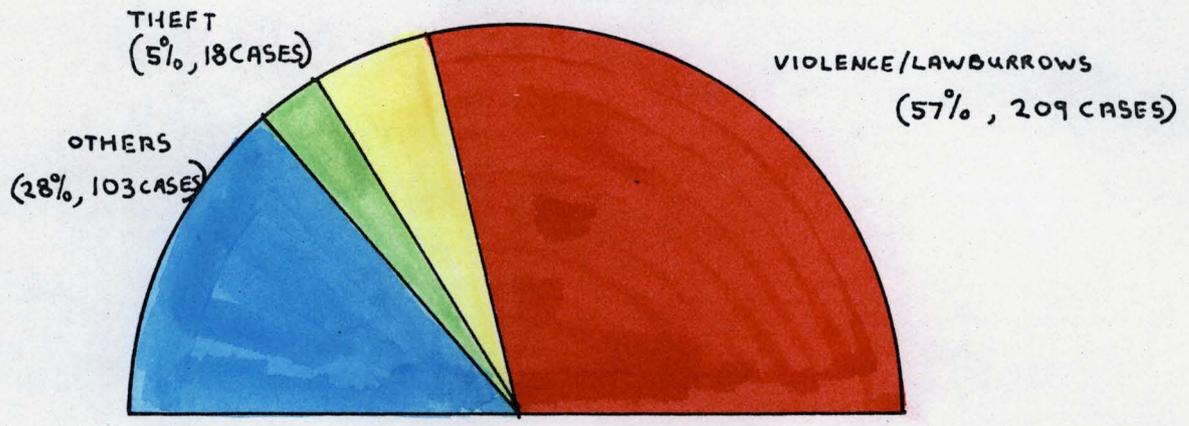


FALKIRK REGALITY 1682-1690, 1693-1700, 1710-1715. ALL CASES

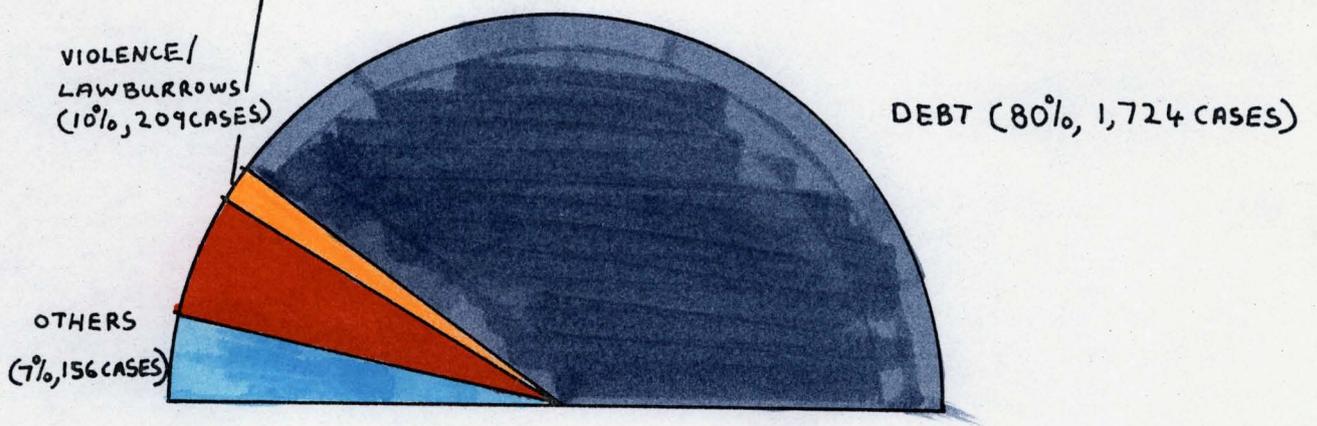
274



SLANDER (10%, 35 CASES)

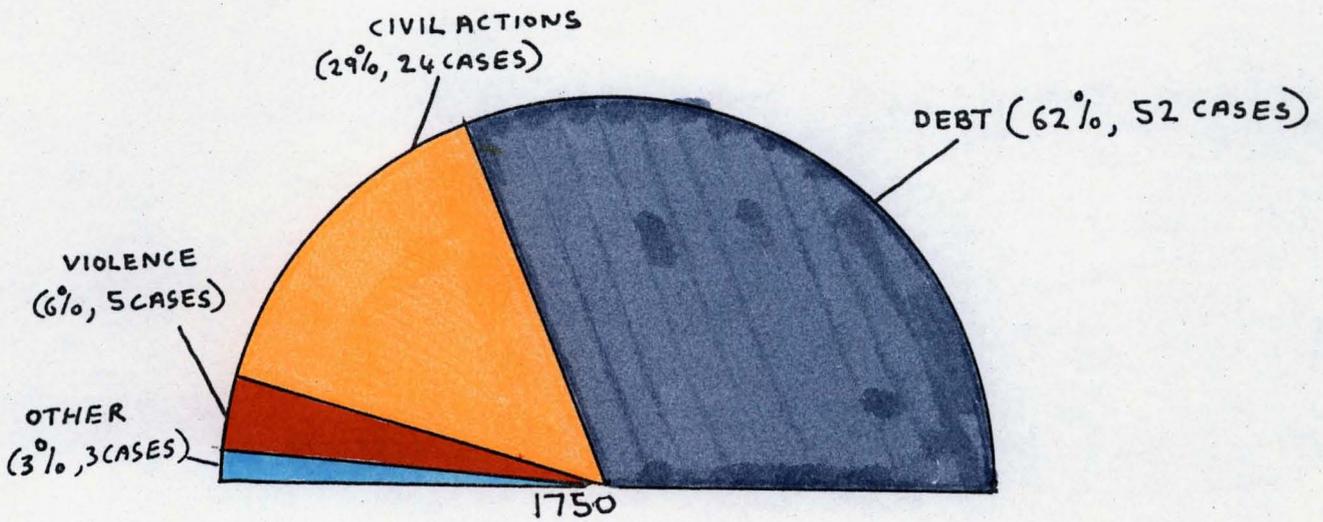
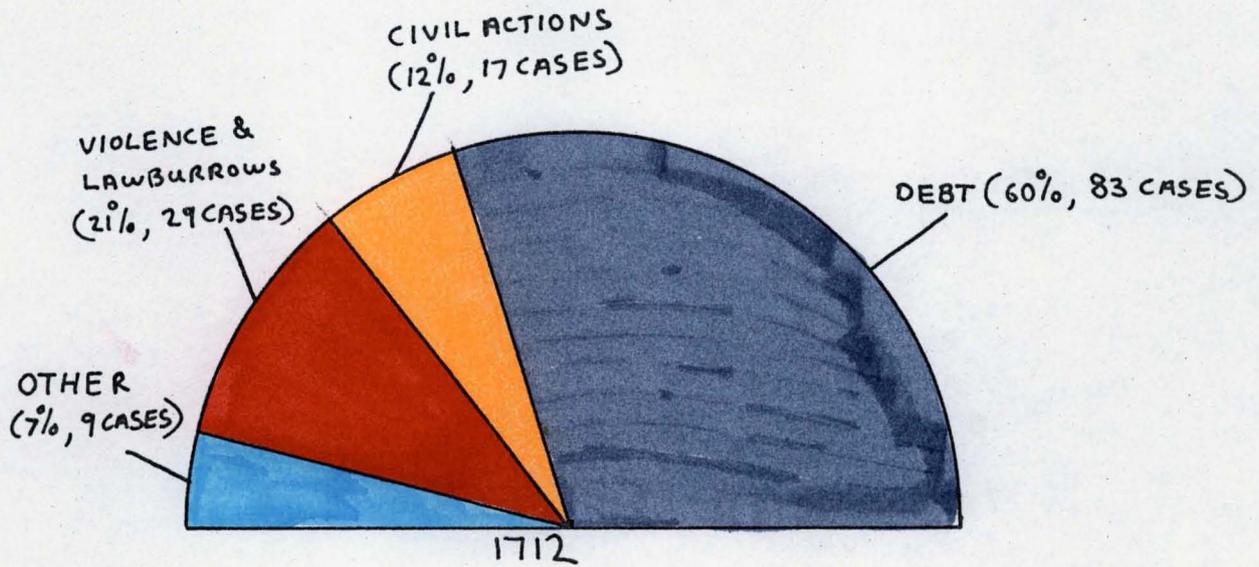
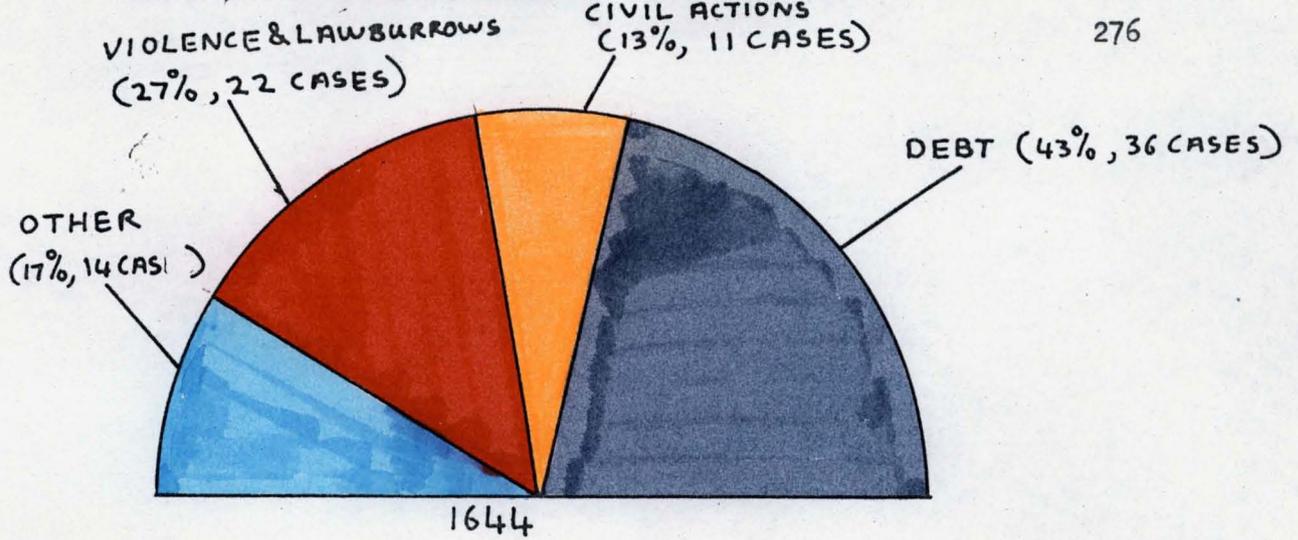


CIVIL CASES (31%, 62 CASES)



STIRLING BURGH COURT 1644; 1712; 1750

276



This was why offences committed 'under cloud of night' attracted heavier penalties and also partly accounted for the marked disparity between simple trublance and blooding as regards sentences. Blooding almost always involved the use of an implement specially acquired or used with intent, thus implying premeditation. (Of course, in the absence of anti-sepsis, any injury which involved loss of blood was more serious than most which did not.)

As mentioned, cases of theft were rare and involved either a thief caught red-handed or one whose depredations had become too notorious and heavy to escape notice.¹⁰⁴ Petty theft was usually not prosecuted, firstly because of the tremendous difficulty of detection and proof and secondly because it did not threaten social peace in the way that violent crime did.¹⁰⁵ Theft which did so threaten the social order, such as theft of live-stock, was treated much more severely and prosecuted whenever possible. Besides the courts, there were other means by which persons might protect themselves against theft, the most famous being black-mail. This was a form of insurance policy whereby a cattle owner would pay a set sum to the black-mailer who would then, if the cattle were stolen, either recover them or reimburse the owner with their value.¹⁰⁶ Many contracts of blackmail have survived and can be found in, for instance, the Old Statistical Account.¹⁰⁷ The most famous levier of blackmail, who operated throughout western Stirlingshire, was, of course, Rob Roy McGregor.¹⁰⁸

The various local courts were all interlinked in many ways. There were personal connections springing from

ties of blood, friendship and marriage among the class which ran the courts. There were further links derived from certain people having more than one judicial role : thus after 1687, when the Earl of Linlithgow was made sheriff principal, the two sheriff deputed were the Laird of Westquater, one of the baillies of Falkirk regality and Patrick Graham of Boquhappel, a creature of the Marquess of Montrose.¹⁰⁹ There were also more formal links, particularly between regalities and their subordinate baronies and courts of land. In Falkirk for many years, at every head court the chief baillie would formally ask if there were any outstanding cases before the various baronies which the regality court should take over.¹¹⁰ Courts also enforced each others' decisions and co-operated in ensuring that parties would appear or comply with rulings. Thus on 22 March 1648 the sheriff forced a party to enact a caution :

"That he shall compear within the town of Falkirk and the tollbooth thereof the 28 day of March instant to answer at the instance of the procurator fiscal of the regality of the said toune."¹¹¹

There was also the formal link expressed in the right of repledgiation* which defined, in theory at least, the scope of the various courts' jurisdictions. The one major surviving difference between a court of lands and a barony was that a barony could repledge any of its indwellers charged with an offence within the scope of its jurisdiction while a court of lands lacked this power. This distinction

* see above p. 68

is clear in two cases from the 1640's. In one, brought by William Gillespie of Culcreuch and the fiscal against Andrew Paul in Bochill of Firtry for blooding, the verdict was set aside after an appeal from the baillie of the Viscount of Kilsyth and the case was referred to Kilsyth baron court.¹¹² By contrast, a similar claim made by Walter Leckie of Deshors was not allowed - "he not having the privilage of ane barony."¹¹³

Yet, even if the theoretical demarcation between the various local courts were clearly drawn it proved hard to enforce them upon prospective litigants. In Falkirk in 1641 one James Tennant of Easter Dykhead was unlauded ten pounds :

"for contravening of ane act sett down be My Lord that none of his Lord's vastellis or tenants should persew any other vastell or tenant before any other judicatorie but onlie before My Lord and his baillies."¹¹⁴

In the records of the same court for 1705 we read :

" The which day the baillies taking to their consideration that many of the inhabitants within the regality of Falkirk doe persew severals of those lyble to the said regality court before the admiral, sheriff and commisary courts whereby the persones so persued are put to an great deal of expenses and troubles, for remead thereof. The bailies ratifie and approve all former acts of court made against the persueing of the inhabitants within the regality before any other judge than the baillies of the said regality and further statutes and ordains that

every within the said regality who shall contraveen the said acts formerly maid shall be fyned in the soume of five pounds scots toties quoties by and attow the penalties contained in the former acts and shall be imprisoned until payment."¹¹⁵

From this and evidence in the sheriff court it would appear that litigants going outside their proper court was a frequent occurrence.¹¹⁶ As said above, more research is needed, but it seems that this applied mainly to civil and possessory actions : in criminal cases the need for a local jury and the danger of not getting compensation meant that recourse to another court would be unwise. This sort of competition is often seen as a drawback of the old order but it can be seen as one of its great advantages. Even if it was irksome and costly for defendants, for litigants it meant that they had some element of choice between various courts - this may even have kept those bodies alert and improved the service they provided!

What then can we say about this system of local courts? Essentially it was a system intended to regulate the economic and social life of the kind of community described in chapter one. It consisted of courts based upon the economic, social and political units of the shire, which attempted to maintain economic order through regulation of the local economy and social cohesion and order through the settlement of disputes and punishment of anti-social behaviour, when this became necessary and was requested by one of the parties involved. It usually acted in cases where unofficial, extra-judicial procedures and sanctions had

failed. It was thus primarily a responsive legal system, which normally acted on requests from the subject class or at the direct order of the ruling class, rather than being an active legal system, designed to enforce a pattern of order laid down from above, i.e. outside the local community.¹¹⁷ In the absence of a police force, it was not an investigative system of courts, concerned actively to enforce law but rather one which provided a service.¹¹⁸ Undoubtedly, in much of its workings it reflected the interests of the dominant class, consisting of landowners and merchants but as a form of class rule it was different in type from that which followed.¹¹⁹

Some changes can be made out, in the workings of the courts if not in the pattern of crime. Between 1640 and 1717 two specific changes can be clearly seen, as the tables show. The first is the great growth in the importance of debt and possessory actions generally, to the point where they became the main business of the sheriff and burgh courts. This was well advanced by 1717, though it accelerated after that date. Parallelling this is a decline in the number of other actions generally but particularly as regards personal violence and criminal or quasi-criminal actions of all sorts. Again this process accelerates after the early eighteenth century but had set in before then. There is clearly a general decline in the importance of these local courts as agencies for the enforcement of law, a decline which however was unequal as regards different courts.¹²⁰ The sheriff and burgh courts continued, in a more limited way than before;

alternatively one might say they were the same as before,¹²¹ only more so. In the case of the franchise courts, however, the decline was absolute. This was of course much encouraged by the involvement of many courtholders in the 1715 uprising but the decline also effected the courts of the Whig Duke of Montrose.¹²² This set of changes were together only part of a more general change in the nature of the scots legal system, away from the kind of system described and towards a modern type.

What was the source of these changes, particularly as for the local courts? Two broad answers can be briefly given. There were changes in the nature and structure of the local community and its ruling class caused ultimately by economic developments. These tended to undermine the social basis of the local courts and the upper class's interests in maintaining them in their old form.¹²³

Secondly, there were changes in the nature of the central courts and their relations with the various local bodies. Given that the question of what the local courts did has been put, the contrary question of what they did not do becomes relevant. The answer is that, in general, they did not prosecute the most serious of offences or ones which involved prominent or feared individuals. That was the role of the central courts, which during the period 1640 to 1717 underwent fundamental change, both as regards their own nature and functioning and also in their relationship with the local courts.¹²⁴ It was these changes which more than anything else transformed the Scottish legal system from a mixed, pre-modern system, to a modern one. The changes involved the aggrandisement of the central at the expense of the local, the transformation of criminal law

and a basic change in the way in which criminal cases came to trial. The first attempt at this reform was made under the Cromwellian regime of the 1650's yet, it seemed to have failed with the re-establishment of the old order in 1660. However, within sixty years the old order had fallen. How this happened and the changes in the central courts and their relations with the other courts which brought about this judicial revolution between 1660 and 1715 are matters for another chapter.

NOTES

1. W. Croft Dickinson: 'The administration of justice in medieval Scotland' in Aberdeen University Review Vol XXIV (1952) pp. 338 - 351; Lord Cooper of Culross: The Dark Age Of Scottish Legal History 1350 - 1650 (Glasgow, 1952).
2. This bias, which underlies most writing on Scottish history is being undermined. See for example the essays in J.M. Brown (ed): Scottish Society In The Fifteenth Century (London, 1977)
3. For a critical view of this stereotype see J.M. Brown: 'Taming the magnates?' in G. Menzies (ed): The Scottish Nation (BBC, 1972) pp. 46 - 59.
4. Both the old legal order and its successor were intended to create and preserve order but the meaning given to that term was very different in each case. In the first it meant the prevention or settling of disputes within the local community and the punishment of delinquent acts which threatened the stability of its rulers. In the second case the term means the adherence to a code of laws and rules, created by the state and applying to local communities both in their internal and external relations, of hypothetical isolated individuals held to compose society. This is seen as necessary for the survival of the territorial nation state which is identified with society. In the first case order is generated and maintained at local level by informal sanctions and the legal system exists to assist and supplement that process: in the second it is created by direct action by the state, without which, it is held, there would be chaos. For a brief survey of the concept of a self-regulating social order and its maintenance by predominantly informal sanctions see H. Barclay: Peoples Without Government : The Anthropology of Anarchy (London, 1983) pp. 16 - 31. For discussion of the division between the two concepts see K. Wrightson: 'Two concepts of order in seventeenth century England' in J. Brewer and J. Styles (eds): An Ungovernable People : The English And Their Law In Seventeenth And Eighteenth Centuries (London, 1980).
5. See Appendix No.3 The Scottish Barony and Regality As Economic and Social Entities. Also W. Croft Dickinson (ed): Court Book Of Barony Of Carnwath (Edinburgh, 1957) pp. LIX - LXIX.
6. Thus, the records of St. Ninians kirk session contain references to the following courts : Polmaise, Bannockburn, Greenyards, Touch, Touchadam, Plean, Sauchie, Scheoch, Craigforth, Auchenbowie, Throsk, Powhous, Livilands, Redhall, Cocspouw. For Kilsyth see Sir J. Sinclair : The Statistical Account Of Scotland 1791 - 99 Vol IX; Stirlingshire, Dunbartonshire and Clackmannanshire (ed): I.M.M. McPhail (Edinburgh, 1978) p. 407.

7. Acts of Parliaments of Scotland, Vol I p. 403.
8. Marquis of Tweeddale (ed) : 'The boorlaw book of Yester and Gifford' in Transactions Of East Lothian Antiquaries And Field Naturalists Society Vol VII (1958) p. 16.
9. Records of Regality of Falkirk SRO 67/2/1 4th. December 1638 gives the laws in the form of thirty acts.
10. Ballikinrain Court Book NLS MS 9303 27th. November 1674, 24th. October 1691. (This manuscript is in the National Library of Scotland).
11. ibid
12. Records of Regality Of Falkirk SRO SC 67/2/1 14th. February 1640.
13. ibid 18th. May 1647
14. Records of Regality Of Falkirk SRO SC 67/2/2 26th. April 1637. Case of Janet Dick in Wester Maddistone and Fiscal versus John Ranken Carrier in Roschilhill is just one example of a case where this style is used.
15. Records of Regality Of Montrose : Justiciary Court Book SRO GD 220/6/467 21st. August 1735. Case of James Taylor in Easter Cringelt and Fiscal versus David and Margaret Din there is a late example of a case using this style in its records.
16. See Sir G. Mackenzie : The Laws And Customs Of Scotland In Matters Criminal (Edinburgh, 1699) p.3
17. Dickinson, Court Book Of Carnwath pp. XI - XV
18. ibid pp. XVIII, XXVII.
19. See F. Pollock & F.W. Maitland : The History Of English Law Before The Time Of Edward I (New Edition, Cambridge, 1968) Vol I pp. 576 - 80.
20. This figure is based upon two sources : the records of other courts, particularly kirk sessions and the regality and Sheriff courts, in so far as they cite or mention such bodies and secondly, the valuation rolls for the shire which give estates names and recognise them as being in some sense single units, even when the lands were divided. See : Stirlingshire Valuation Roll 1709 SRO GD 47/254.
21. Records Of Barony Of Falkirk & Callandar 1722 - 1726 SRO SC 67/2/6; Records Of Barony Of Cambuskenneth 1709 - 1743 SRO B 66/24/1; Ballikinrain Court Book 1666 - 1729 NLS MS 9303; Records of Regality Of Montrose 1684 - 1748 SRO GD 220/6/416, SRO GD 220/6/

418 contain extracts from baron courts of Mugdock and Buchanan; J. Dunlop (ed): Court Minutes Of Balgair 1706 - 1736 (Edinburgh, 1957)

22. So, for example, the list of courts given in footnote 6 supra is derived from the session records of St. Ninians. However, caution is necessary : because a court is mentioned in the records of a session and a refractory person sent there does not mean that the court met regularly. The Ballikinrain court book suggests that, in that barony at least, meetings were held on an irregular ad hoc basis. This may well have been true elsewhere also : no doubt much depended upon the energy of the baron. One problem is that courts of lands and baron courts might often meet without making any record, or any permanent record such as a court book. Process papers are, by their nature, highly perishable items.
23. See: Records Of Barony Of Cambuskenneth SRO B 66/24/1; Dunlop; Court Minutes Of Balgair, passim.
24. ibid p. 6 10th. June 1708
25. The most striking example of this is to be found in the records of a regality - that of Lennox. See: Records Of Regality Of Lennox SRO GD 47/347 which lists all the cited tenants at every one of nine recorded courts. For example from a baron court see: Records Of Barony Of Cambuskenneth SRO B 66/24/1 13th. January 1713.
26. ibid 4th. February 1735. Case of Robert Wilson of Craigmiln and fiscal versus William Kidstone, Robert Dasone, William Ewing, William Hendersone and John Mclay. All except Kidstone (who was acquitted) were ordered to use the mill in future and fined 26/-.
27. Dunlop: Court Minutes Of Balgair p. 22 17th. November 1724. Case of Balgair versus Andrew Ure in Knowhead; p. 18 14th. November 1721 Cast of Balgair versus John Fisher in Overglis.
28. Thus Ballikinrain Court Book NLS MS 9303 contains an act against this at every recorded meeting while in Records Of Regality Of Falkirk SRO SC 67/2/1 - 5 at every single head court the baron baillies of the various baronies were asked if they knew of any who had 'harmed my lords wood'.
29. Ballikinrain Court Book NLS MS 9303 16th. January 1710.
30. Dunlop: Court Minutes Of Balgair p. 6 10th. June 1708 Case of Balgair versus tenants of Hill of Balgair; pp. 8 - 9 17th. August 1709 Case of Duncan Wood Officer versus John and George Galbraith in Hill of Balgair - here the officer accused the named tenants and their wives of having:

" violently and cruelly beat and abused the said

Duncan Wood in his masters own presence by throwing great stones at him to the great danger of his life, the batterys and bruises remaining upon his body quhilk they gave him by throwing of those stones."

31. ibid p.15 1st. December 1718 gives a good example of a prosecution for burning moors - the same item also records another frequently prosecuted offence, that of steeping lint in running water; Records of Barony Of Cambuskenneth SRO B 66/24/1 17th. October 1716. Case of Masters of Cowanes Hospital versus Archibald Mcfarlane is an example of a prosecution for driving livestock through corn.
32. ibid 16th. April 1711. Case of Janet Kidstones versus Malcolm Stewart is a classic example - the molestation consisted of destroying a boundary hedge, trampling a path through the pursuer's corn and planting trees on her land. Interestingly the defender denied that the baron court was competent to judge the case, a claim brushed aside by the magistrates. In the same records on 25th. February 1617 Case of James Christie versus Janet Kidstones is an example of what seems to have been a very common form of molestation - the illegal removal or shifting of boundary stones.
33. Marquis of Tweedsdale: 'Boorlaw book of Yester & Gifford' p. 9.
34. ibid pp. 10 - 17 gives a series of acts which makes clear what kinds of matters came before birlaw courts. For example of a major land dispute being sent to the birlawmen for settlement see: Records of Regality Of Falkirk SRO SC 67/2/3 8th. August 1693 (the case had come to the regality from a baron court in Slamannan and was sent back to the birlawmen of that area).
35. Records Of Regality Of Montrose : Processes SRO GD 220/6/418 (1691 - 1709).
36. Records of Barony Of Cambuskenneth SRO B 66/24/1 16th. April 1711. Case of Malcolm Stewart and Margaret Neill and the fiscal versus Robert Campbell at Craigmiln - the slander was that Margaret Neill and her son had stolen corn, a claim which he attempted unsuccessfully to prove true.
37. Records Of Kirk Session Of Alva SRO CH 2/10/1 8th. May 1681. Case of John Ure is an example of this.
38. Records Of Barony Of Cambuskenneth SRO B 66/24/1 26th. June 1729. Case of Ker and fiscal versus Janet Kidstones is a good example - the item in question was a chicken and the penalty a £5 fine plus a payment of 20/- for the bird.

39. Mackenzie : Laws And Customs pp. 96 - 106 defines theft as "to be a fraudulent taking away or using what belongs to another man, without the owners consent" (p. 97) and then cites the interesting law of Burden Sack, according to which "no man can be accused for theft for as much meat as he can carry on his back" so long as he was driven thereto by absolute necessity. (p. 98).
40. Dunlop, Court Minutes Of Balgair p. 17 18th. March 1720. Case of Archibald McLaughlane and fiscal versus John Thomsone.
41. ibid pp. 8 - 9 17th. August 1709. Case of Duncan Wood versus John and George Galbraith states:
- "And therefor the compleiner craves that the said George and John may be exemplarly punished in their person and goods to the terror of others to commit and doe the like in time coming. And likeways craves ane assythment from the said George and John ffor the damage he hes sustained in his body."
42. In other words, as the item cited above states, the punishment was meant to be **condign** and exemplary rather than reformative or retributive. Hence the stress upon public punishment. This aim meant also that it was not needfull or even desirable to aim at punishing every single malefactor.
43. Dickinson, 'Administration of justice' pp. 340 - 41 and 342 where he applies the same model to the King's court.
44. This is clear from the head court records of the regalities, which name the subordinate baronies. The regalities consisted of lands held directly of the lord, for whom it was a court of first instance, baronies held by others but owing suit to the head court of the regality and baronies where the baron was also the lord of regality. It is not clear if in this last case the regality court was one of first or second instance and indeed this may have depended upon whether or not the lord chose to hold both a baron and a regality court. The evidence of the head court rolls suggests that they did for which see Records Of Regality Of Lennox SRO GD 47/346; Records Of Regality Of Montrose; Head Court Rolls 1684 - 1738 SRO GD 220/6/416; Records of Regality Of Falkirk SRO SC 67/2/1 - 5 - this last is particularly informative.
45. This last court was one of three into which the regality of Montrose was divided, the other two being at Auchterarder and Old Montrose. The court at Mugdock appears to have had jurisdiction over the lands in Stirlingshire and Dunbartonshire, that at Auchterarder over those lying in Perthshire and that at Old Montrose over the estates in Angus and Mearns. See: Records Of Regality Of Montrose; Court Book 1710 - 36 SRO GD 220/6/463 for evidence of this.

46. These records were, for various reasons, not all available at the start of research for this thesis. See Bibliography below for details of the records. For the processes see: Records Of Regality Of Montrose; Processes SRO GD 220/6/418 - 53. There is a continuous run from 1691 to 1748.
47. There seem to have been two differing sorts of regality : one, in Dickinson's phrase, "a barony with fuller powers" exercising the same jurisdiction as a sheriff and a second sort which had regalian rights, exercised through several courts. Montrose regality has left two series of court books, one entitled "court books", the other "judiciary court books". Unfortunately they are not particularly informative but they do make clear that two distinct courts did exist, presided over by different officials - the baillie and the justiciar principal. The records make plain that there was also a chamberlain (John Hamilton of Bardowie who was also baillie of the barony of Buchanan) but if he also held a court then no record of it has survived. By contrast, in Falkirk there was only one court which has left record, in the shape of a series of court books, where it is styled "Court of the regality of Falkirk" and these contain no suggestion of any other court being held. See : Records Of Regality Of Montrose : Court Books SRO GD 220/6/417, 463, 465; Records Of Regality Of Montrose : Judiciary Court Books SRO GD 220/6/462, 467; Records Of Regality Of Falkirk SRO SC 67/2/1 - 5. For examples outside Stirlingshire see : Records Of Regality Of Dunfermline SRO RH 11/27/6 - 26; Records Of Regality Of Glasgow SRO RH 11/32/3 - 14; Records Of Regality Of St. Andrews SRO SC 20/1/1 - 8.
48. In fact the courts tried to avoid competing with each other, though they were not always successful. The 'overlap' sprang from two things. Firstly, what I have chosen to call 'cumulative jurisdiction' which means that in the hierarchy of courts, each court at any given level had the power and right to try, at first instance, all those classes of business which were within the competence of the courts below it as well as those which fell within its own jurisdiction. Thus a sheriff or regality court could try all the matters competent to a baron or birlaw court while the central courts could address themselves to all the categories of case tried by birlaw, baron, burgh sheriff and (some) regality courts. Of course the fact that sheriff and regality courts could try the same type of offences at first instance as baron courts did not mean that they had the theoretical power to try such cases when they originated within the territory of a baron court. However, to give the second reason for the apparent overlap, all of the courts in the Scots legal system were courts of first instance for those who held suit to them - there were none which

were purely courts of appeal.

49. Records Of Regality Of Falkirk SRO SC 67/2/1 30th. April 1641. The court also prosecuted any who traded within the bounds without a licence - see ibid 14th. June 1642, 28th. September 1642.
50. See for example ibid Cases of Earl of Callandar versus John Grey in Blacksands 14th. June 1642; John Burne at mill of Larbet versus Hew Hall there 2nd. November 1647; Records Of Regality Of Falkirk SRO SC 67/2/2 16th. October 1683. Case of John Livingstone of Kirklands versus James Menteith Flesher in Falkirk; 10th. February 1685 Case of Andrew Mitchell at Walkmylnetoune versus Alexander Walker in Maynehead.
51. No detailed count has been performed on the records after 1715, although they have been examined. Between 1653 and 1656 there were 14 such cases, an average of three per year, as opposed to less than one per year outside that period.
52. Thus in Falkirk all the cases of cutting green wood involved the Earl directly. Records Of Regality Of Falkirk SRO SC 67/2/1 25th. May 1643. Case of Earl of Callandar versus Thomas Bowie at Kettelstone shows how strictly this law could be enforced - he was prosecuted and fined £5 for breaking a branch off a tree.
53. Records Of Regality Of Falkirk SRO SC 67/2/1 2nd. July 1641. Case of Marion Duncan versus George Mcheid is a typical molestation case involving, as usual, a boundary dispute - he had moved one of the marchstones between Easter and Wester Bantaskin so as to annex part of her land to his. A committee of neighbours were told to determine the boundary from memory and fix it, by replacing the stone. Records of Regality Of Falkirk SRO SC 67/2/3 1st. August 1693. Case of Robert Gibsone charged with "having scabbed sheep"; ibid 5th. February 1695, 12th. March 1695. Case of fiscal versus John Stirling Flesher in Falkirk for an act against keeping dogs which bit and one of several subsequent prosecutions on that charge.
54. This in the records of Falkirk debt cases made up not less than 60% of the courts business between 1638 and 1650 and by 1715 had come to compose no less than 80% of the total. In the case of the sheriff court debt cases made up between 60% and 70% of the total. See tables for details.
55. No count was made of the debt cases in the sheriff court for this period but the predominance of debt is striking and unmistakeable. In the process papers of Montrose regality there is virtually nothing other than debt cases in the bundles dated after 1740. See : Records Of Sheriff Court Of Stirling SRO SC 67/1/10, 11; Records Of Regality Of Montrose; Processes SRO GD 220/

6/444 - 52.

56. What is needed in particular is detailed comparison of the names of parties in actions for debt and civil disputes in the records of both sheriff and regality/ baron courts. Wherever possible process papers, which are much more informative than court books, should also be consulted. If in a substantial number of cases the same suit has been brought before two separate jurisdictions or a suit has been brought before one court by a person bound to another then we may assume that inter-court competition did exist. This would however be a major undertaking.
57. Brieves were letters, directed to a local magistrate ordering him to summon an assize to either declare someone heir to a deceased person (brieve of service); declare a named party insane (brieve of idiotry); or name a particular person guardian to a minor (brieve of tutory).
58. Thus Records Of Regality Of Montrose; Processes SRO GD 220/6/452 contains a brieve of service which reads:

"Good men of inquest - unto your wisdoms humbly means and shews your servitrix Elizabeth, Jean and Margaret Anguses, lawfull daughters of the deceased William Angus portioner of Wester Lecholer that the said Angus being now dead and we having procured a brieve forth of the Chancery Of The Regality Of Montrose duely execute....."

Brieves in this form can be found in all the bundles of process papers.

59. Records Of Regality Of Montrose : Processes SRO GD 220/6/418 contains several examples, one of the best reading:

"Complaines I Margaret Andersone relict of the deceased Thomas Reid portioner in Carbiestoun and the procurator fiscal for his interest upon and against Thomas Reid now portioner there my stepsone That whair the crymes underwryteen are highly punishable by law yet notwithstanding thereof trew it is and of veritie that the said defender upon the nynth day of June instant or one or other of the dayes of this instant month as I was flitting and removing my goods and gear furth of the hous I lived in last to that I dwell in now The saids defender, without any offence or provocation given, not onlie ejected and turned my plenishing out of doors and turned out my meal out of a barrell on a dubb before the door But also beat, bruised and battered me and tread and trampled and spurned me doune underfoot and streak and beat upon me with his feet. In a most cruel and merciless manner, and if he had not been impeaded, would have bereaved me of my lyfe. And

hitherto threatens and menaces me and my children
 And Therefor ought and should not onlie be decerned
 to pay unto the procurator fiscal the soume of Twa
 hundred pounds Scots to the terror of others to
 commit the lyke in tyme coming but also find caution
 of lawburrowes that I and myne shall be harmless
 and skaithless in tyme coming according to justice,
 and to pay for the meal and for the hurts sustenit."

In this case both Andersone and Reid submitted bills of complaint describing the same event but from their different viewpoints. This practice of mutual accusation was common and could have two results. Either one of the bills would be accepted and the other rejected (which happened in this case with Reid's bill failing) or both would go ahead in a mutual prosecution. In that case the court books would record a prosecution by the fiscal of a "mutual ryot" of two or more people. In this particular case both Andersone and Reid attached to the bill alist of witnesses whom they wished to be called, the two lists being almost identical. All the named witnesses were in fact called on 29th. June 1703.

60. Records Of Regality Of Montrose : Processes SRO GD 220/6/48 29th. February 1709. Case of John Liddell and Fiscal versus Andrew Adam.

61. Thus in ibid the fine imposed was £100, as opposed to £300, and the assythment granted was £30 as against a claim of £100. In the same bundle and the above cited case of Andersone and fiscal versus Reid on 29th. June 1703 the defender was forced to pay £100, while the fine demanded had been £200, and after that we read:

"Thereafter the Baylie upon the defenders promise not to be guiltie of the lyk in tyme coming but to walk uprightlie without offence Remitts the forsyd fyne to Fifte Pound Scots."

62. In Records Of Regality Of Montrose : Miscellaneous SRO GD 220/6/416 21st. August 1735 and Records Of Regality Of Montrose : Justiciary Court Book SRO GD 220/6/467 both records contain the case of James Taylor in Easter Cringate and fiscal versus David and Maragaret Din there for arson and **making** threats but the court book makes no mention at all of the assythment demanded for the arson. The records of cases in court books are in general brief summaries of the material contained in process papers and are mainly concerned to record the result and verdict rather than the origin and subject of the case and even the penalty.

63. Records Of Regality Of Montrose : Processes SRO GD 220/6/418 21st. February 1709 Case of John Liddell and fiscal versus Andrew Adam.

64. Thus in the case of Falkirk, between 1639 and 1651 alone the total income from fines amounted to £4,705 Scots.

65. Records Of Regality Of Montrose : Processes SRO GD 220/6/48 1st. April 1701 has a good example of such a document which reads:
- "Upon the first day of Apryll 1701 John Balneaves officer past at command and lawfully summoned Andrew Hutton in Heddykes and delivered ane copie at this dwelling house to compear befoir the Baillie of the Regalitie of Montrose or his deput at Ochtairdour the sekond day of Apryll instant in the hour of cause to asnwer at the instance of Mr. Greory Graham of Pitbarns upon the paynts of his libell pershewed be him against him, and also to give his oath of veritie Soe far as can not be proven be contrat or witnes and this I did befoir these witnesses..... this my executive subsit with my hand....."
66. Records Of Regality Of Montrose : Miscellaneous SRO GD 220/6/416 and Records Of Regality Of Montrose : Justiciary Court Book SRO GD 220/6/467 9th. October 1738 both contain this case and record the choice of jury. For another example of the procedure see Records Of Regality Of Montrose : Justiciary Court Book SRO GD 220/6/462 13th. March 1718. Case of Patrick McNicholl alias Campbell, charged with the murder of John Grahame gaoler of Mugdock on 6th. December 1717.
67. It was at this stage of the proceedings that legal representatives, or procurators as they were called, came into their own. Inevitably they were much more employed in disputes over property, goods and contract than in criminal cases - at least at the local level. At the national level they were well established as part of the process of law in criminal as well as civil cases and their prescence was partly responsible for the extreme prolixity of High Court and Court of Session records.
68. Thus in one case tried at Mugdock, the defendant's procurator stated specifically "yet the defendants fame and repute is at stake" Records Of Regality Of Montrose : Miscellaneous SRO GD 220/6/416. Case of James Taylor versus David and Margaret Din.
69. On the other hand, as with church courts, if the oath was taken and the defender 'deponed negative' then the case was dropped and could not be raised again.
70. The main role of procurators in such trials was to challenge the right of witnesses to depone and , if needful, to make speeches of mitigation. There were no debates between the lawyers as to the meaning or content of the evidence nor was there any process of cross examination. On the other hand there could be tremendously long debates over points of order and procedure and fine points of law.

71. Records Of Regality Of Montrose : Processes SRO GD 220/6/431. Case of John Din and Fiscal versus James Tailor elder, William Tailor and James Tailor younger (for ryot) ha a good example of a 'deposition'.
72. The case of James Tailor and fiscal versus Margaret and David Din in Records Of Regality Of Montrose : Miscellaneous SRO GD 220/6/416 has copies of both depositions and interrogatives which makes the distinction very clear.
73. This was followed for example in ibid Case of fiscal versus Gilbert Buchanan et al.
74. This meant either publicly craving the pursuers pardon before the court or being referred to the kirk session after payment of a fine with the session then enforcing a public appearance and confession. For examples of the first see Records Of Regality Of Montrose : Processes SRO GD 220/6/431. Case of William Taylor in Fintry and fiscal versus Andrew Din; Records Of Regality Of Falkirk SRO SC 67/2/2 10th. July 1682 Case of Thomas Watt et al and fiscal versus James Johnstone flesher in Falkirk - he was put in irons for some days then put in the stocks with a paper on his head for three days after which he was to appear before the congregation. For just three of many examples in the records of the second sort of penalty see ibid 10th. July 1683. Case of James Watt flesher in Falkirk and fiscal versus Elspeth Hunter there and Records Of Regality Of Falkirk SRO SC 67/2/3 19th. November 1689. Case of Alexander Bennie, Bessie Foord and fiscal versus Margaret Maline; Records Of Sheriff Court Of Stirling : Court Books SRO SC 67/1/4 18th. April 1654. Case of Archibald Denny-stoune Minister at Campsie versus Patrick Gell Macfarlane.
75. Thus in Records Of Regality Of Montrose : Processes SRO GD 220/6/418 in the case of Andersone and fiscal Reid the magistrate, having fined Reid ordered him "to be imprisoned till the law be doon."
76. Thus in Records Of Regality Of Falkirk SRO SC 67/2/2 6th. July 1687. Case of John Russell and fiscal versus Walter Stewart (for blooding) the record states that as he had been imprisoned for a long time and had nothing wherewith to pay he should go down on his knees in court and crave the pursuers pardon "and to remain in prison at this courtis pleasure."
- 76A. The punishment of banishment was very widely used in Europe at this time, purportedly as an alternative to death. The exact nature and severity of this sentence is very hard to establish and much must have depended upon the individual circumstances of a particular case. Common sense would suggest that banishment from a stable community without any pass or testimonial was tantamount to a death sentence. However, the records

contain evidence for cases where banished people continued to live, outside their old community.* The problem for the historian is that such cases leave record while the others, probably the majority, where the person simply died as a result of the sentence will leave no such trace. For discussion of penal policy in another part of Europe which looks at the question of banishment see M. Weisser 'Crime and punishment in early modern Spain' in V.A.C. Gatrell, B. Lenman and G. Parker (eds) : Crime And The Law; The Social History Of Crime In Western Europe Since 1500. pp. 76 - 96 and particularly pp. 93 - 6.

77. Records Of Regality Of Falkirk SRO SC 67/2/1 6th. March 1649. Case of Charles Heuch in Stenhouse versus John Potter in Culross.
78. Records Of Regality Of Falkirk SRO SC 67/2/2 21st. January 1685. Case of George Parrishe in Slamannan - he had been caught red-handed picking a pocket at nighttime.
79. Among a few of many are Records Of Sheriff Court Of Stirling; Court Books SRO SC 67/1/4 2nd. February 1655 Case of Christian Forbes; Records Of Sheriff Court Of Stirling; Court Books SRO SC 67/1/5 26th. December 1655 Case of John Grahame in Coalhill of Bannockburn, Sara Reid and Grisell Reid - for resett - states:
- "They, having been imprisoned of their own consent and accord actit and ableisit themselves.... to remove out of the bounds of Stirlingshire and Clackmannanshire never to return under pain of death."
- On the same date Case of Grizell Chrystie, charged with stealing the clothes received by the others was sentenced to be handed over to the magistrates of the burgh, to be scourged through the town and never to return under pain of death; Records Of Regality Of Falkirk SRO SC 67/2/1 14th. July 1646. Case of John Watt in Falkirk versus Jeane Smith - banished on pain of scourging and branding.
80. Records Of Regality Of Montrose SRO GD 220/6/464 13th - 14th March 1718. Case of Patrick McNicoll alias Campbell; Records Of Regality Of Falkirk SRO SC 67/2/3 14th. June 1698. Case of Margaret Mitchell in Carron - infanticide; Records Of Regality Of Falkirk SRO SC 67/2/4 14th. April 1699. Case of Alexander Rodger in Gilstoun - theft of sheep. In this last case the corpse was given to a doctor "for the further knowledge of his calling."
81. Thus between 1648 and 1660 there was only one capital sentence, which was revoked, while there do not appear to have been any between 1687 and 1695.

* For example the case of Lapslie alias Brisban discussed below pp. 460, 467.

82. No case of this procedure being used could be found in the records examined, though it may have been resorted to in some of the property disputes. On this subject see Dickinson 'Administration of justice' p.345.
83. Records Of Sheriff Court Of Stirling : Court Books SRO SC 67/1/3 29th. January 1648, 8th. March 1648, 18th. March 1648, 21st. May 1648. Case of Thomas Schirray and fiscal in Lechye versus John and William Adam in Phinnochauch, John Duncan there, Thomas Liddell there and John Lockhart elder and younger in Fintry - the first four were convicted.
84. These are Court and Council records for the period 1519 - 1580 (SRO B 66/15/1 - 7), Burgh Court records from 1598 to date (SRO B 66/1 - 40 covers the period 1598 - 1750) as well as other records - for fuller details see Bibliography.
85. W.D. Simpson : Stirlingshire (Cambridge, 1928) p.114.
86. So, in 1644 the burgh court tried 36 cases of debt or possessory action and 22 cases of inter-personal dispute : in 1750 there were 52 cases of debt to only five of ryot or trublane. See Records Of Burgh Court Of Stirling SRO B 66/16/9, 41. However, there were also some cases of more serious offences, such as theft, brought before the court - Records Of Burgh Court Of Stirling SRO B 66/16/13 5th. November 1662. Case of Patrick Mcinlytor is an interesting case of theft, including the statement:
- "And the said Patrick being also present with John Wardie his proctr, desired to know of the persewarie and nis procurator whither he insisted criminallie or simplie for restitution wha declared that hut loco et tempore he onlie insisted simplie restitution."
87. Thus the burgh court tried 14 such cases in 1644 of which 8 involved allowing ones house to fall into disrepair, 2 keeping dogs and another 2 disturbing ones neighbours. Records Of Burgh Court Of Stirling B 66/16/9.
88. Mackenzie, Laws And Customs pp. 116 - 118 defines forse-stallars as being either those who "privately or by entering into societies" buy up all the supply of a good to cause a shortage or those who buy goods before they have come to market and further describes regraters as those who buy goods for resale at a dearer rate. From the frequency with which courts passed acts against them they must have been regular practices.
89. Records Of Regality Of Falkirk SRO SC 62/2/2 25th. July 1683. Case of fiscal versus Catherine Drummond and Christian White, hucksters is a good example of a prosecution for using false weights and measures.

90. Records Of Guildry Court Of Stirling PD 6/1/2 1169 - 1733 (This record is in the Central Region Archive in Stirling).
91. D.B. Morris: Extracts From Records Of The Merchant Guild Of Stirling (Stirling, 1916) p.58 gives an example of an act against the unlicensed sale of butter from 12th. December 1642; p.59 has an extract from a prosecution for selling goods unlawfully dated 19th. May 1645, while p. 57 has an example of a case of sabbath breach being prosecuted by the Guildry from 4th. September 1641. The evidence of the manuscript records is that these were all typical items of business.
92. In fact all the presidents of the various trades, and the Dean of Guild, were ex officio members of the Council and would expect to become magistrates. They were also all session elders.
93. F.J. Grant (ed) : The Commisariat Of Stirling (Edinburgh, 1953) prints all the wills and testaments brought before this court.
94. In fact, there seem to have been no more than six cases of charming referred to the commisar plus an uncertain number of slander cases. All of these originate from Kirk sessions and are recorded in their records or the Presbytery's.
95. See : C.A. Malcolm (ed) : Minutes Of The Justices Of Peace For Lanarkshire 1707 - 1723 (Edinburgh, 1931) p. LXXXII gives the earliest surviving records from Stirlingshire as 1686 but I have been unable to trace any such document. Most of the other shires have no records before the nineteenth century.
96. ibid pp. IX - XL discusses this question.
97. This is of course the case in all legal systems - the modern police system can still only apprehend and prosecute a minority of law-breakers. However the proportion prosecuted is larger than in pre-industrial society. Moreover, part of the ideology of modern society is the belief that every infringement of criminal law ought to be prosecuted and in the best of all possible worlds would be. The system is therefore structured in theory to attempt to achieve this goal and the fact that it does not do so in practice is seen as a sign of failure. The evidence from research in England suggests that in the Early modern period total prosecution was not even a theoretical goal. See D.J. Guth; 'Enforcing late medieval law' in J.H. Baker (ed) : Legal Records And The Historian (London, 1978) pp J.A. Sharpe 'Enforcing the law in the seventeenth century English village' in V.A.C. Gatrell, B. Lenman and G. Parker (eds) : Crime And The Law; The Social History Of Crime In Europe Since 1500 (London, 1980) pp 97 - 119.

98. In Records Of Regality Of Montrose : Processes SRO GD 220/6/418 there are the following documents - a bill dated 21st. February 1709 brought by Liddell and the fiscal against Adam on behalf of Adam's hird; a further bill dated 29th. February 1709 brought by Liddell and the fiscal against Adam alleging that Adam had committed a ryot on Liddell outside the courthouse(!) after the conclusion of the previous case; a suit brought by Adam against Liddell dated 23rd. February 1709 charging "oppressoun" - i.e. attacks on his property; a bill dated 4th. September 1707 detailing a mutual ryot and blooding between Adam and Liddell; another bill dated 8th. March 1705 in which Liddell and fiscal charge Adam with having a dog which worried sheep and lastly a document from 1702 concerning an action of 'Molestation'.
99. The major exceptions to this rule, argued here and supra note 97, were atrocious crimes, such as murder, and crimes where the offender was caught red-handed. In these cases it was held that the victim was under an obligation to prosecute and it was out of this that the idea of a public prosecutor grew - although it took a long time to take root. Thus in the case of theft, if a victim caught a thief red-handed and then failed to execute justice or to prosecute he was guilty of the crime of "theft-boot". Mackenzie, Laws And Customs pp 106 - 7 states:

"Theft-boot is committed by securing a Thief against the punishment due by law"....."Theft-boot is also committed by any other person who takes a ransom from a thief, when he finds him with the fang"

and cites an Act of Parliament from James V which declared that:

"he who transacts with a thief, for theft committed against himself, shall be guilty of theft-boot"

and should bear the same penalty as the thief. Mackenzie then remarks that in January 1665 Angus Mackintosh being pursued by the Sheriff Depute of Inverness on these grounds (he had componed with a thief who had stolen meal from him):

"the Lords of Session did Advocat this Pursuit to themselves, because they thought crime of Theft-Boot in desuetude, and therefore they resolved to hear it themselves, that they might clearly determine what Theft-Boot was, and how far it was to be extended"

Notwithstanding this, in Records Of Regality Of Falkirk SRO SC 67/2/2 24th. August 1682 we find the case of fiscal versus Thomas Borne who was charged that after one John Mclauchlane had stolen corn from him he had "received good deeds to conceal the samen" and also the case of fiscal versus Robert Ker who was charged with failing to prosecute Robert Mclauchlane, son to the said John, for the theft of some beads, the items concerned having been returned by the thief. So it

seems that prosecutions for theft-boot did occur, at least in this particular court. However, these are the only such cases discovered so it seems most likely that they were the product of exceptional circumstances and that in general the crime was indeed in desuetude with composing a wide-spread and common custom, for theft and minor crime at least.

100. It is worth stressing that such a system required a high level of support and participation from the individual members of the community - the sanction of banishment for instance was only successful insofar as people were prepared to support it and broke down once acts of banishment were widely ignored. For a theoretical analysis of this point see Barclay, People Without Government passim and particularly pp. 114 - 117, 13 - 31.
101. Thus the acts of both burgh and regality courts consistently supported the interests of a mercantile elite in the burghs and the landowners in the country. For the latter in particular see I. Whyte Agriculture And Society In Seventeenth Century Scotland (Edinburgh, 1979) pp 41 - 51.
102. Records Of Regality Of Montrose : Processes SRO GD 220/6/418 6th. - 9th. January 1709. Case of Thomas Pollock in Bachlair and fiscal versus John Mitchell. He was fined £100 plus £25 assythment.
103. A frequently used style was "casting off all fear of God and man, did with intent and malice....."
104. See for example Records Of Regality Of Falkirk SRO SC 67/2/3 8th. April 1690. Case of Mary Lisk in Falkirk, Janet Mackie her daughter, Janet Robertstone - banished under pain of scourging and branding for "keeping bad houses, harbouring thieves and whoores and being thieves themselves." and Records Of Regality Of Falkirk SRO SC 67/2/2 20th. September 1682, where the thief John MclauChlane and his family (see Supra note 99) enacted themselves to leave the bounds under pain of £100.
105. ibid 6th. November 1682. Case of Agnes Mackie in Falkirk shows this. She confessed stealing " twa pleats and ane chamber-pot" but as she was "sensible of her misdemeanour" she was allowed to enact herself not to do the like again under pain of banishment and no further penalty was imposed.
106. See McPhail (ed) : Old Statistical Account pp 401 - 6.
107. ibid p. 651.
108. Rob Roy is mentioned in several documents from the courts. These make him appear to have been a kind of free-lance law enforcement agency, employed by the gentry of the Lennox to apprehend persons whom they wished to lay their hands on. Most interestingly the Duke of Montrose, supposedly the bitter foe of the McGregor seems to have been one of his clients. In

Records of Regality of Montrose : Processes SRO GD 220/6/418 there is a letter from John Hamilton of Bardowie, baillie of the barony of Buchanan and Chamberlain of the regality, to Montrose which states:

"My lord, I wrote munday last that I had apprehended one Robert Mcfarlane about the burning (of) Donald Buchanan's hastack and that he having informed agst one John McCoul as his author That I was going to receive him prisoner from Robert Roy whom I imployed to apprehend him, for he was not within your lordship's lands."

The letter is dated 29th. February 1707 and is one of three, the others being dated 24th. February 1707 and 17th. March 1707. There is also an extract of a meeting of the baron court of Buchanan, dated 20th. February 1707 and a record of a meeting of the regality court at Mugdock on 25th. February 1707, all connected with this case.

109. Records of Sheriff Court Of Stirling : Court Books SRO SC 67/1/11 8th. April 1687
110. For a good example see Records of Regality of Falkirk SRO SC 67/2/1 26th. January 1647.
111. Records Of Sheriff Court Of Stirling : Court Books SRO SC 67/1/3 22nd. March 1648 - case of Janet Lyll and fiscal of Falkirk versus George Logan in Airth; Records Of Regality Of Falkirk SRO SC 67/2/1 2nd. February 1647, 9th. February 1647 and 28th. March 1648 give the background to the case and its conclusion.
112. Records Of Sheriff Court Of Stirling : Court Books SRO SC 67/1/3 14th. June 1648, 21st. June 1648. Case of William Gillespie and fiscal versus Andrew Paul.
113. ibid 25th. May 1649, 30th. May 1649. Case of John Miller versus George Forrest in Deshors.
114. Records Of Regality Of Falkirk SRO SC 67/2/1 18th. May 1641. Case of fiscal versus James Tennent elder of Easter Dykhead.
115. Records Of Regality Of Falkirk SRO SC 67/2/5 19th. June 1705.
116. As stated earlier, it is not possible within the scope of this thesis to discover how frequent this was, particularly in debt and property disputes. Sometimes courts would co-operate to try a case jointly. - See Records Of Sheriff Court Of Stirling SRO SC 67/1/3 5th. May 1654. Case of William May versus James Hendersone in Carntoune (a slander case) for an example of this. The case was tried by the sheriff and two baillies sitting jointly "the wrong being done within the territory of the said burgh" and the penalty, of 20 marks, was divided equally between the two courts.

117. The church courts are a major exception to this rule, being very much an active, investigative judiciary but even these prosecutions were often carried out only in flagrant cases. See above ch. 3
118. Increasingly in the seventeenth century the system came to be defined by the theorists as an active system rather than a 'service' one which supported social order. Even by the 1680's however, this was not an accurate reflection of reality and the works of writers such as Mackenzie should be recognised as ideological statements, intended to argue a case for the way things ought to be as much as descriptions of how they were.
119. That is to say, the rule was conducted through a different kind of institution and increasingly involved a different sort of relationship between the social classes.
120. For example of this process happening outside Stirlingshire see and compare J. Cameron (ed): Justiciary Records Of Argyll 1664 - 1705 (Edinburgh, 1949) and I. Imrie (ed): Justiciary Records Of Argyll 1664 - 1742 Vol II (Edinburgh, 1969)
121. That is, while they did far less as regards cases of inter-personal violence they came to concentrate on what had always been their main business - debt and possessory actions.
122. This is clear from an examination of the processes - Records Of Regality Of Montrose : Processes SRO GD 220/6/418 - 453, which show a general decline in activity.
123. Whyte: Agriculture And Society pp. 173 - 193.
124. In essence the central courts change from being a supportive jurisdiction to the local courts, into an active, dominant one. See below.

PART III

THE RISE OF THE CENTRE AND THE DEMISE OF THE OLD ORDER.

INTRODUCTION

In the old Scots legal system the King and his courts played a central, pivotal role. Alongside the local courts, exercising jurisdiction over local communities, were the courts of the king effecting his own jurisdiction within the community of the realm. These courts, Parliament, Privy Council, the courts of Justiciary and Session and several specialised courts, were the institutional expression of the key role of the monarchy in the political entity called the kingdom of Scots. For much of Scotland's history these courts were the main part of such state apparatus as existed and when modern scholars speak of the growth of government and central authority in sixteenth and seventeenth century Scotland what they actually refer to is the growth in the number, power and importance of the king's courts.¹ Indeed it was these bodies which originally provided the unity of the kingdom with an institutional form: as Dickinson puts it the king's court bound the community of the realm together in the same way that baron, sheriff and regality courts bound their communities into one whole.² As the local courts cannot be understood when separated from the economic, social and political entities of which they formed the superstructure, so the courts of the king of Scots derived their form and function from the nature of the community of the kingdom.³

However, when trying to establish the nature of the role played by the king and his courts, it is necessary to distinguish between theory and reality, rhetoric and actuality, ideology and objective fact. According to the theories produced by proponents and apologists of monarchy during the middle ages the king was the fount of justice, the source of

all true legal right and all legal bodies derived their authority in the last analysis from him. As Dickinson again, pithily, puts it:

"any jurisdiction was a delegated one."⁴

In the course of the seventeenth century this theory was much elaborated and even changed, by the introduction into Scots legal thought of concepts and forms derived from Roman law, which exalted the sovereign power of the prince and denied any legitimacy to other power centres. Thus, in their published works, authors such as Stair and Mackenzie constantly sought to interpret the law and legal system in a fashion which would concentrate all effective power in the royal courts in Edinburgh.⁵ The reality was somewhat different, both in medieval times and later.

In its very earliest form the kingdom of Scots was what the name itself suggested and no more: a political entity consisting not so much of a territory as of a people, or folk in the Saxon form, all owing allegiance to one ultimate ruler.⁶ Looked at from another angle, the kingdom was a confederation of separate units, united primarily by loyalty and personal ties to the figure of the king. This was reflected in the style used by the earliest kings, that of 'ard-ri' or high king.⁷ Apart from his role as a focus of unity the king had three main functions: a sacral one, which need not detain us here, that of leading the folk in war and, most relevant for this study, that of arbiter and provider of justice.⁸ This meant the settling of disputes between communities, to prevent internal divisions of the folk, settlement also of disputes amongst the important and powerful and protecting the weak by providing an ultimate authority to which all might appeal.⁹ Under the MacAlpin

kings the kingdom was cast into a feudal mould, with, for example, normaers becoming earls.¹⁰ However, as the style used by earls such as Duncan of Fife shows, the pre-feudal reality persisted and the creation of a united kingdom was not finally achieved until the sixteenth century.¹¹ To use Maine's terminology, the Scots monarchy was for much of its history a 'primitive' institution, having sovereignty over a people rather than a territory and the shift from this to a territorial sovereignty, which Maine sees as a fundamental change, was slow and only finally completed in the reign of James VI.¹² Even then much of the old survived and the idea of the state or monarchy as an essential judicial body, whose main function was the settling of disputes, still remained.¹³ Moreover, the state and its institutions were still seen very much in personal terms: the royal courts were still largely the king's personal courts, in structure, organisation and procedure much like any private court, the main difference being the scope of their jurisdiction.

Then, in the seventeenth century, the nature of the state in Scotland changed yet again with the move to the modern model of an impersonal sovereign state ruling over individuals. The rapidity of this fundamental change contrasts markedly with the slowness of movement in the institutions of medieval and renaissance Scotland.¹⁴ It is paralleled by other, equally dramatic, changes in Scotland's economy and society which give the late seventeenth and early eighteenth century the appearance of a watershed in Scots history.¹⁵ So far as the structure of the state and law was concerned, this process was much assisted by the removal of the king to London, which made it easier for the idea of an impersonal state to emerge and which also brought about a fundamental change in the

political structure of the realm.¹⁶

With the introduction of feudalism into Scotland under David I and his successors the central royal function of providing justice became institutionalised, taking concrete form in the Curia Regis or court of the king, together with several officials who actually performed the royal function in several areas of law. Gradually, as time passed, the original undifferentiated court grew by a process of division into several separate, specialised courts, a process completed by the reign of James VI. Even then, there was much overlapping both of personnel and of jurisdiction between the various royal courts and it therefore makes sense to think of them as a single, united body, exercising the several parts of a single jurisdiction.¹⁷

From an early date the full meetings of the king's court, its head courts, became established as the Parliament of Scotland, its central function being to determine what the law was.¹⁸ However, some of the members of this court were consulted more regularly and frequently by the sovereign, on a wide range of matters, and this body became the Privy Council, in effect the administrative branch of the government.¹⁹ In legal matters it had a wide and unlimited jurisdiction and could take cognisance of any kind of offence or dispute. The Parliament and Privy Council both had standing, permanent judicial committees whichⁱⁿ/the sixteenth century evolved into the Court of Session and the College of Justice.²⁰ The Court of Session appeared formally in 1526 although its records were not kept separately from those of the Privy Council until 1540, with a completely separate record being kept after 1554.²¹ The various officials of the medieval monarchy each came to preside over a court of their own,

concerned with legal matters falling within their own area of authority. Thus the Admiral, Constable and Chamberlain each had a separate court by the mid-sixteenth century as did the greatest such officer, the Justiciar.²² Originally there were two Justiciars - for the lands north and south of the Forth. In 1514 however, Colin Earl of Argyll was made Lord Justice General with authority throughout the entire kingdom. He and his descendants held this post until 1628 when the then Earl of Argyll abdicated from his hereditary position, reserving to himself and his heirs the heritable Justiciarship of Argyll and the Isles.²³ Following this the court was presided over by the Lord Justice General appointed by the king or by his deputy the Lord Justice Clerk who, by virtue of his membership of the College of Justice, linked the Justiciary court to the Court of Session and Privy Council.

Along with this growth in the number of courts and refinement of their duties went the steady increase in the number and importance of a class of full-time, professional lawyers.²⁴ In contrast to the position at the local level, where even in the late seventeenth and eighteenth centuries such figures were rare and not a central part of the system, at the national level of royal courts they came to play an increasingly important role and came to staff and run most of these bodies. The first major landmark in this process was the creation in 1532 of the College of Justice, consisting of fifteen full-time, paid judges, or Senators as they were called, who were used to man the Court of Session and, increasingly, the other courts as well.²⁵

So, by the seventeenth century there was a full range of royal courts, the main ones being Parliament, the Privy Council, the Court of Session and the High Court of

Justiciary. However, one must stress and repeat the point made earlier that this congerie of courts was not yet essentially different as regards structure, mode of procedure and organisation from the local courts described in the previous chapter. They were still in essence the king's personal courts.²⁶ Thus Parliament corresponded to the head courts of the various local jurisdictions while the Court of Session did much the same type of work as the Sheriff courts and main regality courts. The High Court of Justiciary, as its name suggests, was only one of several such courts, with local Justiciary courts in existence in areas such as Argyll, Orkney until 1611 and elsewhere in the bounds of full regalities. What distinguished the royal courts was the geographical scope of their activity, extending over the entire realm rather than one community and secondly, the maximal scope of their jurisdiction both civil and criminal.²⁷ The courts of Session and Justiciary may not have had, as is often asserted, an absolute monopoly of certain types of business but they were among the few courts which could claim absolute competence within their field and the only ones to have such competence over more than a restricted local area.²⁸

Briefly, then before looking at their work in more detail, what were the functions of the royal courts in the seventeenth century, deriving as they did from the monarch's role as the ultimate arbiter and enforcer of law? In particular, what was their role in the creation and enforcement of the law in those areas defined as criminal law? In one sense at least their role was all-embracing. As mentioned earlier one of the features of the old Scots legal system was cumulative jurisdiction. That of the royal courts

was maximal: there was no limitation upon the type of case they could try either in respect of severity and importance or of triviality and insignificance. Thus, as far as criminal jurisdiction is concerned, the records contain both the most serious offences such as trials for treason, murder and witch-craft but also the most minor ones such as a case of good neighbourhood from Stirlingshire, involving the cutting down of pear trees, which exercised the Privy Council in the course of 1649.²⁹ In English terms it is as though the court of Kings Bench were to regularly try not only grave offences but also the kind of case normally tried before Quarter Sessions or Courts Leet. In general though, the royal courts had five main functions. Firstly to try persons who had offended directly against the person of the king or his agents. Treason in its many forms clearly falls into this category but it also included such matters as counterfeiting of coins and shedding blood within the king's presence.³⁰ In the second place the courts were to handle disputes, civil and criminal, of such intrinsic importance that their settlement one way or another would directly affect the interests and livelihood of a large number of people over a wide area. This meant in particular disputes between groups or communities or between the rich and important.³¹ The central function of the royal courts was to deal with delinquent acts which in one way or another threatened or harmed the cohesion of entire communities and were regarded therefore as peculiarly grave. These were the 'atrocious' crimes such as murder, arson and witchcraft described in Chapter 2 above.³² Often the actual prosecution and punishment of such acts could be best carried out at a local level. This could be done either by recognising local courts as having jurisdiction or by the granting to local magistrates

of special commissions to try named offenders. Closely linked to this was the royal courts' fourth main function - to try cases which for one reason or another the local courts could not or would not deal with. Lastly, they had a legislative function, to declare what the law was, either by innovation or by clarifying or amending existing law and custom.

Another point worth making at this juncture concerns the relationship between central and local courts. It would be misleading to think of it as hierarchical, with the royal courts having a superior jurisdiction.³³ Rather, they had a wider ranging jurisdiction in geographical terms than the local courts and the relationship should be thought of as complementary and co-operative, between two differential sections of the entire legal system, with the royal courts possessing an ultimate but not an absolute authority.³⁴

As argued earlier, the period between 1640 and 1715 saw a radical change in the nature of the legal system, this change having three main aspects: the growth in the power of the Court of Session and High Court of Justiciary; the attempted reform and ultimate demise of the Scots Parliament and Privy Council and not least changes in the procedures of the royal courts which led to a fundamental transformation both of the nature and composition of their business and of their relations with the local courts. These changes resulted both from internal pressures due to the transformation of Scotland's economy and polity and from pressures from without, particularly the relations between Scotland and England. It is worth saying that the two were so entwined that it is hard to separate them.³⁵ Some changes, notably the abdication of

the last hereditary Lord Justice General in 1628, occurred before 1640 but the major developments happened after that date. The removal of the monarchy and court to London after 1603 seemed at first to have had little effect but in fact it had consequences which were radical and far reaching. This is hardly surprising given what has already been said about the role of the monarch in Scotland's polity: as one modern authority puts it:

"The keystone of the arch of Scottish society was the king, and one might say that this keystone had been seriously loosened by the absentee monarchy brought about by the union of the crowns of 1603."³⁶

In fact that union left a vacuum at the centre of Scots politics which other institutions and groups moved to fill. This incipient political instability, when joined with the political ineptitude of Charles I and the growing economic problems of the early seventeenth century, created a pre-revolutionary situation and in the fateful year of 1637 it needed only the impetus of a single event to start a profound political upheaval, one which led to radical changes in the structure of law and politics in Scotland. Indeed the years between 1637 and 1661 saw firstly attempts to radical reform of the legal system from within followed by an even more fundamental assault from without, which could not fail to have a lasting impact on the development of the Scottish legal system.

1. See for example G Donaldson: Scotland: The Shaping Of A Nation (Newton Abbot, 1974) pp 91-112.
2. W C Dickinson: 'The administration of Justice in medieval Scotland' in Aberdeen University Review vol xxxiv (1952) pp 338-51.
3. Thus the fact that the kingdom derived its unity in the first instance from the person of the King meant that they were in a strict sense his courts, rather than part of an impersonal state.
4. Dickinson, 'Administration of Justice' p341. See also W C Dickinson (ed): Court Book Of The Barony Of Carnwath (Scottish History Society, Edinburgh, 1937) pp xxxix - xl.
5. This is most obvious in the work of Mackenzie whose 'Laws And Customs' consistently interpreted jurisdictional rights in a fashion favourable to the Crown.
6. On this see A A M Duncan: Scotland: The Making Of The Kingdom (Edinburgh, 1975) pp 43-7, 112-14, 172-3, 610-14.
7. ibid. pp43-4.
8. ibid. pp610-4.
9. ibid.
10. J D Mackie: A History Of Scotland (London, 1978) pp 48-9.
11. Dickinson: Court Book Of Carnwath pp xvi -xvii; S Cowan: Three Celtic Earldoms: Atholl, Strathearn, Menteith (Edinburgh, 1909) p60 quotes a charter which starts "I, Gilbert son of Ferthet, by the kindness of God Earl of Strathearn".
12. G Donaldson: Scotland: James V - James VII (Edinburgh 1971) pp276-91.
13. On this see Mackie, History of Scotland pp109-14 where the point is made that the reforms introduced by the later Stuart monarchs were just that - refurbishments of an established structure.
14. Thus, in 1600 many of the old communities, lordships and institutions of early medieval Scotland could still be made out even if some (like the Lordship of the Isles) had perished. Yet, by 1708 almost all had either gone or been drastically changed.
15. R Mitchison: A History Of Scotland (London, 1982) pp292-301

16. On the latter see D Stevenson: The Scottish Revolution 1637-44: The Triumph Of The Covenanters (Newton Abbot, 1973) pp16-20. The creation of an absentee monarchy by the union made the distinction between King and government much clearer and more obvious and made a move towards an impersonal state all the more necessary.
17. Mackie, History Of Scotland pp49-51
18. ibid. pp83-4.
19. Mitchison, History Of Scotland pp 168-9.
20. R K Hannay: The College Of Justice (Edinburgh, 1933) pp63-78.
21. A R G McMillan: The Evolution Of The Scottish Judiciary (Edinburgh, 1941) p71.
22. Sir G Mackenzie: The Laws And Customs Of Scotland In Matters Criminal (Edinburgh, 1699) pp 183-99, 212-14.
23. J Cameron (ed): The Justiciary Records Of Argyll And The Isles 1664-1705 (Stair Society, Edinburgh, 1949) pp x - xiii.
24. Hannay, College of Justice pp 135-64.
25. ibid. pp160-64.
26. That is they enforced a jurisdiction peculiar to the person of the King rather than a neutral, positive law.
27. That is they could try any class of offence from the most venial to the heinous.
28. While some regality courts did exercise a maximal jurisdiction, this was confined to a, relatively, small territory compared to that covered by the royal Justiciary court. The only exception was the Argyll court but this was sui generis - the court was not a private, 'free' regality and its records describe it as the Kings justice court. By a legal fiction Archibald Campbell and his heirs had resigned their position as Lord Justice General except in Argyll and the Isles. There was thus no question of erecting a new court. It was simply that in Argyll and the Isles the pre-1628 situation still applied.
29. Register Of Privy Council Of Scotland 2nd series vol viii pp2-3, 19. Case of Sir Charles Erskine versus John Ewen of Cockspow.
30. Mackenzie, Laws And Customs pp20-34, 184-6.
31. ibid. pp188-91.

32. ibid. pp12-13 makes the distinction between lesser and 'atrocious' crimes.
33. That is there was no clear division of labour between different levels of the system with lower courts trying minor offences and the higher courts trying the more serious ones and hearing appeals. Instead there were overlapping and parallel jurisdictions with no single route of appeal: it was possible for a party to appeal from a local court to the highest level (Privy Council) directly.
34. Ultimate in the sense that there was no authority recognised as superior to Privy Council, Parliament and the courts of Session and Justiciary; not absolute because their authority did not extend into every corner of the realm and there were autonomous courts within the system.
35. See for example on this Mitchison, History Of Scotland pp291-361; Mackie, History Of Scotland pp 253-65.
36. Stevenson, Scottish Revolution p16.

CHAPTER 5The First Assault On The System : Revolution And Occupation 1637-60

From September 1651 until the restoration of the Monarchy in 1660 Scotland was a defeated country, occupied by an English army and ruled by an English, military government. This state of affairs was the conclusion to fourteen years of war, revolution and upheaval which had begun with the signing of the National Covenant at Greyfriars Kirk on 28th. February 1637, the first, symbolic act in a general revolt against Charles I by almost every person of importance in Scotland. The destabilisation of the Scottish political system by the removal of the monarch to London, exacerbated by the personal incompetence of the King and the wrongheaded policies pursued by his government had created a situation where dramatic action seemed to many Scots both necessary and desirable. Between 1637 and 1642 the victorious Covenanters carried out a veritable revolution in Church and State.¹ In the case of the Kirk, episcopacy was abolished and a 'pure', presbyterian form of church government set up which removed the Kirk and its courts from any vestige of central government control. Power within the Kirk passed instead into the hands of local landlords, at least until the Whigamores' raid of 1647 and the coming into power of the 'Kirk party'.²

The structure of the state was also radically altered, with far reaching reforms of the Parliament and the imposition of such sweeping controls upon the crown's ability to appoint officers of state that Charles I was moved to declare he had no more power than a Doge in Venice.³ The revolution was essentially

one led by a disaffected aristocratic elite, supported by a mass of the 'middling sort of people', in this case substantial tenants, 'bonnet lairds' and burgesses and aimed against a political order which no longer served their interests. In geographical terms it was supported by the South and West of the country rather than the North.⁴ So far as its ideology and goals were concerned the Scottish revolution was an instance of a distinctive phenomenon of early modern Europe - the conservative revolution.⁵ Its intention was ultimately to preserve and strengthen the old order and to direct and control the process of change so as to check its impact rather than to provoke it. The aim of the Covenanters was to seize control of the state and so transform the political order as to ensure that never again could a monarch pursue those anglicising policies associated with Charles I which had so threatened the position of Scotland's traditional elite. At the same time they sought to give the Scots polity that focus and order which it had lost after 1603. The revolution was in one sense a response to growing instability at the centre of the political system.⁶ The paradox of this conservative revolution was that it led to radical change, nowhere more so than in the composition and function of the central body of the legal system, the High Court of Parliament.

The supreme or ultimate judicatory in Scotland before 1707 was the Parliament. Like its English namesake the Scots Parliament was in origin a judicial body, the head court of the King, a fact recognised by all seventeenth century Scots.⁷ However, although their origins were similar, the English and Scottish Parliaments developed over the years into two very

different bodies. In England Parliament, divided from an early date into two separate chambers, developed into a specialised legislative and deliberative body with its judicial role - exercised by the House of Lords - confined to an appellate jurisdiction.⁸ By contrast, the Scottish Parliament remained a mixed body, combining in one chamber both legislative and judicial functions and continuing to function as a court both of appeal and first instance. The fact that Parliament was a law court was recognised in several ways: its sessions were always opened with a formal ceremony of 'fencing', just as in any other court while its members were formally styled as 'suitors' and listed in a roll of suits, again following standard practice.⁹ Parliament's status as the supreme court was shown in the ban on other courts sitting while Parliament was in session - a ban which applied in theory even to the Court of Session.¹⁰

With the removal of the monarch and his court to London after 1603 several developments became possible so far as the Parliament was concerned. One possible consequence was that the Parliament would grow in power and importance, moving into the political vacuum left by the removal of the monarchy and replacing it as the focus of the political life of the country. Paradoxically, given its ultimate fate, this was the course events seemed to be following for much of the seventeenth century as the Parliament greatly expanded its activity and powers, reasserting many of its old rights and claiming new ones.¹¹ This was certainly the case after 1637 when the Covenanters, faced with a ruler both obdurate and untrustworthy, were driven to reform Parliament in its composition, procedure and practice while at the same time greatly increasing its power, activity and the scope and quantity of its business. This was apparent in

several areas, for instance the economic, where many Acts were passed but was perhaps most clear where the Parliament's judicial role was concerned.

Before 1640, the Scots Parliament contained in its single chamber five distinct elements: the nobility, the clergy, the representatives of the royal burghs and commissioners of the shires, who together made up the third of the three estates of the realm, and the officers of state who sat ex officio. By one of the many Acts passed in June of that year the clergy and officers were excluded, so radically changing the composition of Parliament.¹² Other acts drastically altered its procedure. The most distinctive feature of the Scots Parliament was the permanent standing committee known as the Lords of the Articles. This body carried out most of the actual work of Parliament and the full body only met at the start of a session to elect it and at the conclusion to pass and approve the bills which the Lords of Articles had drawn up and passed. Thus, through control of the Lords of the Articles the monarch was able to control Parliament. The Articles carried out all of the judicial functions of Parliament, hearing and trying cases and petitions, delivering verdicts and granting commissions and warrants.* By yet another act, passed in June of 1640 the Lords of the Articles were abolished as a permanent standing committee: instead all business was to be discussed by Parliament as a whole.¹³

One of the consequences of this was a massive increase in the amount of judicial business. The records of Parliament from

* For more detailed analysis of this business see below pp.361-8.

1640 to 1650 are full of legal actions, in marked contrast to the printed records from earlier periods. These actions were both civil and criminal, most of the latter being cases of treason or other political crimes. The civil litigation produced a veritable flood of private Acts and orders directed to particular individuals together with many petitions and supplications. To deal with all this business Parliament adopted the expedient of creating ad hoc committees 'for-proceses' to try these cases and come to a verdict.¹⁴ The actual sentence was left for the entire Parliament to decree, on receipt of a report from the relevant committee. The sharp increase in judicial business is easily accounted for: before 1640 the Lords of the Articles, having almost exactly the same membership as the Privy Council, tended to pass such matters on to that body but with the abolition of the Articles they rather remained in the Parliament's hands. Moreover mistrust of the Privy Council as the agency of royal power led the Covenanters to rely instead upon committees of Parliament for the execution of urgent business and the Council effectively ceased to function. As a result its wide ranging jurisdiction passed to Parliament.¹⁵

The political upheavals of these years had no discernable effect upon other central courts which continued their work almost as though nothing had happened. Yet the revolution was of great importance for the legal system. The forceful reassertion of Parliament's judicial role left a lasting mark and was not forgotten after 1660 while the radical changes in the government of Scotland effected by the Covenanters made change in other areas seem possible. Ironically a movement designed to strengthen and renovate the old order had instead weakened it.¹⁶

Most important of all the revolution, because of the policies followed by the Covenanters and the inextricable linking of the affairs of Scotland and England, led to the occupation and defeat referred to at the start of the chapter and an attempt to reform the old legal system from without, root and branch.

In order to protect the gains made by 1641, the majority of the Covenanters became involved in the English Civil War through the Solemn League and Covenant of 1643, -at first on the side of Parliament but later, via complex political dealings, on the side of the defeated Charles I. The latter process took place in two stages, with the moderate party joining the King in the Engagement of 1647 and most of the militant faction supporting Charles II in 1650/51. Both parties were comprehensively defeated on the battlefield, the Engagers at Preston and the rest at Dunbar and Worcester. The Earl of Callandar, who had played a leading part in the Engagement, barely escaped from the debacle of Preston and he and the rest of Stirlingshire were soon caught up in the struggle which followed the battle of Dunbar: the records of both the burgh of Stirling and the regality of Falkirk are full of details of the billeting of troops.¹⁷ Callandar House was stormed by the English in June 1651 and later, on 6th. and 14th. August, Stirling burgh and castle fell to Monck. Then, on 3rd. September, Cromwell defeated the last Scots army in the field at Worcester and within four months all effective resistance in Scotland had been put down.¹⁸

So, by December 1651 all factions of the traditional Scottish ruling class had seen their political hopes and aspirations utterly dashed while their effective political power was, for the time being, broken. In the aftermath of Dunbar and

Worcester the Scottish state and all its institutions simply broke down: in the field of law the courts of law had mostly ceased functioning by 1651.¹⁹ The English were thus moving into a political vacuum with no real opposition to face and the traditional order bankrupt. In the first instance ad hoc military bodies were set up to administer affairs of state, including criminal justice. However, the English military regime was not content merely to occupy and administer the country: indeed, given the bankruptcy of the established political elite and the bitter opposition of most of its members to the republican government of England, such a policy was not possible for the English, much less desirable. Instead the years of occupation saw a serious attempt to carry through radical and irreversible change in the economic, social and political order. In fact the English sought to impose upon Scotland something similar to the 'Puritan revolution' already achieved in England: this was inevitably more radical and far reaching than the native-born revolution of the Covenanters, requiring, as it did, the fundamental transformation of Scottish society.²⁰ It may be seen as a forced 'modernisation', imposed by an external and colonial elite, something the English would do frequently in their subsequent history in various parts of the globe.²¹

The policy of the military regime after September 1651 had three main elements: to establish a union between Scotland and England, to crush the power of the aristocracy and to completely restructure the machinery of state power and administration, including the legal system. These three policies were all closely connected: one could not succeed if the other two failed and many specific acts and measures of the English administration aimed at attaining all three goals.²²

Immediately after September 1651 the English army took several 'ad hoc' steps to fill the vacuum left by the defeat of the Scottish ruling class and the collapse of the institutions

of its rule. A committee of officers was set up at Leith to try outstanding cases from the now defunct central courts, especially the Court of Session, and had despatched most of them by December of that year. Elsewhere, courts martial were set up to regulate relations between the occupying army and the natives.²³ While this was happening the Parliament and Council of State in London were deciding their policy towards Scotland. At first, they seem to have leaned towards outright annexation but eventually they decided upon a policy of uniting the two nations. Given the turbulent relations between England and Scotland since 1637 and because Scotland's political system was fundamentally different from England's, this necessarily involved restructuring Scottish institutions to bring them into line with their English counterparts. The policy was eventually put forward, on 28th. October 1651, in 'A Declaration of the Parliament of the Commonwealth of England, concerning the settlement of Scotland'.²⁴ This stated the aim of a union of the two countries and, by its second clause, proclaimed a wide degree of religious toleration. By the third clause, all who supported the Engagement or Charles II were declared to have forfeited their estates and revenues, but the blame for the events of 1648 and 1650/51 was laid firmly on the aristocracy and gentry rather than the Scots nation as a whole. In line with this, the last clause of the 'Declaration' stated that any tenants and vassals who put themselves under the protection of the English Parliament would not only be pardoned but would also be given a proportion of the confiscated estates, under freehold tenure.²⁵ Clearly, the English policy makers decided that, given the intense hostility of both the Presbyterian clergy and the landowning aristocracy, the policy to be followed was one of attacking both of these groups on the one hand while trying to

gain support from the rest of Scots society on the other. While drawing up the 'Declaration' Parliament also decided to send eight Commissioners up to Scotland to put the policy into effect and order affairs north of the Border. The Commissioners were appointed on 23rd. October and on 4th. December detailed instructions were compiled, divided into nineteen heads.²⁶ These were passed by the Parliament along with the 'Declaration' and on 15th. January 1652 the Commission met at Dalkeith.

The first act of the Commission was to order the election of deputies to negotiate a Union. A commission was sent to the various burghs, instructing them to elect one representative each while the shires were to have two each. All the deputies were ordered to appear before the Commission at Dalkeith once elected, those for Stirling and Stirlingshire being required to appear on February 12th.²⁷ At these meetings the deputies were presented with a set of propositions under three heads, the first being a tender of Union, which they were required to agree to and comment upon.²⁸ Stirling sent Thomas Bruce of Walkin one time provost of the burgh: he found the propositions little to his liking but felt obliged to accept them as he said in his letter to his colleagues on 14th. February:

"Gif I had nott respek to the towin, and fering the evill suld fallin them, I wald never exceptitt of the comissioun, nor agrie to this peper, and suld haif cost me quhat is deirest to me."²⁹

His colleagues agreed with him and on 28th. February the burgh 'freely and willingly' (sic) accepted the tender.³⁰ Later, on the 2nd. March, the two deputies for the shire, Sir George and Sir Mungo Stirling gave their assent as well.³¹

Closely following the order to elect deputies on 31st. January 1652 the Commission issued a declaration in line with

article seven of its 'instructions' which abolished all jurisdictions which did not derive their authority from the English Parliament.³² As the central courts had not met since 1650 (the last meeting of the Court of Session had been on 28th. February 1650) this was directed at the local courts, the burgh, Sheriff and franchise courts in particular. So, apart from the 'ad hoc' committee at Leith, all courts ceased to function: given the central role of these bodies in local government and economy this step was both a shattering blow to the power of the Scottish aristocracy and a major step towards the reconstruction of government. That it caused some considerable degree of disruption at grass roots level is apparent from the 'desires' presented by the deputies engaged in negotiating the Tender of Union, which were submitted on 2nd. March. Stirlingshire's 'desires' had as their third head:

"Revive Judicatories, put in offices, and employing men who fear God and hate covetousnes, allow Barrons Courts as before."

while Stirling requested:

"That thair be ane supreame judicatorie presentlie Established within this Natioun of qualefeit persones For administrating of Justice conforme to the law of the land."³³

Some time shortly thereafter the Commission issued a Charter to all those burghs which had assented to the Tender.

Stirling's charter was issued on the 14th. April and one week later the burgh council was restored 'conforme to use and want'.³⁴ At the same time commissions were given to Sheriffs, incorporating an oath of loyalty.³⁵ Two were appointed in each shire, one Scots, the other an English army officer: in Stirlingshire the two were Colonel Thomas Read, commander of the

garrison at Stirling, and one Mr. John Rollock.³⁶ The latter was already experienced as he had been Sheriff-depute to the Earl of Callandar from 1644 to 1651 and, since under the new arrangements the Scots Sheriff normally presided over the court, in Stirlingshire at least there was no break in continuity at this level in 1652.³⁷ There was however, so far as we know, a clear break at the grass roots level of the baron and regality courts. While burghs and sheriff courts were continued, no move was made at this stage to re-establish franchise jurisdiction - so continuing the assault on the traditional elite. In Stirlingshire the records of the regality of Falkirk end in 1651 and do not resume until 1656, with a rather different format and content.³⁸ Of course the absence of record does not mean that franchise courts ceased functioning between 1651 and 1654, far from it; but the evidence of other court records is suggestive. This is particularly so for the Sheriff court's records. Before 1651, the major items of business in franchise courts had been actions for debt, various other sorts of possessory action and a wide range of civil suits and a large number of cases of 'ryot' i.e. public affray. Before 1652 the Stirling Sheriff court never tried more than 70 cases of debt in a year yet it tried 316 in 1654 alone. Civil suits showed a corresponding increase, from 26 in 1649 to 121 in 1654.³⁹ In many of these cases the action involved pursuers from such places as Falkirk, Airth, Mugdock and Drymen which were covered by baron and regality courts before 1651. Would these people have gone to the trouble of going to Stirling if an effective local court had been available? In the later 1650's, with baron courts re-established by the authorities, the number of debt and civil cases tried by the Sheriff court declined, although it still had not reached the levels of the 1640's by 1659.⁴⁰

The most persuasive argument for the lapse of franchise courts, in Stirlingshire at least, is provided by the record in the books of the Sheriff court of 'actions of meals and duties'. This was a formal suit, brought by a proprietor in his own court, requiring named tenants to pay him the rent which they were due for the previous quarter. It served the same function as a bill or invoice and provided both the proprietor and the tenant with a record of the rent due, so protecting both their interests. Before 1652 such suits were rarely found in the Sheriff court's business yet after 1652 they occur in dozens. Again, would proprietors have done this if they had a court of their own to turn to, however humble and dubious its status?

One consequence of the abolition of franchise courts was that several shires, including Stirlingshire, submitted 'desires' on the 6th. and 8th. April requesting that:

"yor honors will be pleased to authorise the
Inferior Judicatours to sitt, cognosce and
determine in such causes as they have formerly
bin in use to doe"

and most importantly, that:

"you would be pleased to take into yor Consideracon
all such persons who have had conferd upon them
any Jurisdicon or office, heritable or ad vitam,
that they may yett be authorised by yor Honors
(after imbracing of the Tender) to enjoy and
exercise their said offices and places as formerly
.....Seeing they have all good right thereto by
the law of this Nation as to their lands, wich
rights are so valid as they have not att any time
bin revokeable by the kingly power."⁴¹

These petitions did not only present the fears of an embattled and financially desperate ruling class (the 'desires' also carefully mentioned "those offices afford to some of them a considerable part of their livelihood").⁴² They also derived from a concept of law and jurisdiction utterly alien to that of the English Commissioners and reflected a fear that this system of law was in imminent danger. It seems clear from the Commissioners' actions and their instructions that one of their aims was the alignment of Scots law with English.⁴³ In pursuit of this, and perhaps in response to the complaints from the localities, on 28th. April 1652 they appointed seven Commissioners for the Administration of Justice, three Scots and four English, to take the place of the Courts of Session and Justiciary.⁴⁴ The three Scots were at first paid only half the salary of the English and were not allowed to sit on criminal cases, that being reserved for the English judges under a separate commission. The seven were formally installed on 18th. May 1652 and almost immediately the four English judges went out on ayre to hear criminal cases, with sittings at Edinburgh, Glasgow, Aberdeen and, on 23rd. September, at Stirling.⁴⁵

Little evidence or record has been left by these circuits but the one held at Stirling did leave a court book, albeit brief and in poor condition. From this one can say a surprisingly large amount about the workings of the new criminal court, particularly when this record is compared with those which have survived from later in the decade. The court tried 53 cases in all, involving 77 individuals.⁴⁶ As the court is only recorded as having sat for one day it must have worked at very high speed, in a fashion typical of an English assize court. It was undoubtedly helped in this by only 15 of the cases proceeding to a full trial by assize. Of the remainder, in 21 the parties confessed to the

Justiciary Circuit Court, Stirling, 23rd September, 1652.

Offence	No of Cases	No of persons	Confessed	Denied-found not guilty	Denied-Diet Deserted	Result not Recorded	Case Cont'd	Referred to Civil Court	Tried by an Assize	Declared fugitive	Absolutor Pr
Adultery	23	40	19						3	1	
Theft	6	7		3	1				2		
Foresta lling	5	9		2					3		
Cutting Green Wood	4	4		1					3		
Killing Red Fish	4	5		1		1			2		
Bestiality	2	2	2								
Slaughter	1	1									1
Deforcement	1	1				1					
arson	1	1			1						
Wounding	1	1							1		
Housebreach	1	2							1		
Witchcraft	1	1					1				
Usury	1	1		1							
Wrongous intromission	1	1				1					
Oppression	1	1						1			
	53	77	21	8	2	3	1	1	15	1	1

charge, in 10 the charge was denied but no trial seems to have taken place and in the remaining 7 there was either no recorded result or the case was continued, (see table no.1 for details). The largest single category by far was adultery, with 23 cases and 40 named defendants. In 19 cases the couple simply confessed and were fined £40 Scots, in line with the relevant Act of the Scottish Parliament.⁴⁷ In 2 of the cases the record states that the parties had "satisfied the Kirk" i.e. they had done public penance at the instance of the church courts.⁴⁸ It is likely that this was also true in the other cases, hence the large number of confessions. Three adultery cases were referred to trial by an assize, all of which brought in verdicts of 'not guilty', while in one case the male party refused to turn up and was declared fugitive.⁴⁹ He was still on the fugitive roll in 1655. Besides adultery there were 2 cases of bestiality. In both of these cases the accused, described as 'prisoners' confessed to the charge.⁵⁰ There is no record as to the sentence imposed but it is only reasonable to assume that they were executed. Interestingly, there were no cases of buggery, a crime which featured prominently at the other sittings of the circuit.⁵¹

The second largest class of offences was theft, with 6 cases and 7 persons. Three of the thefts were of sheep, one of a horse, one of corn and one of 'ane tub'. None of the thieves were convicted as 2 cases were tried by an assize and resulted in 'not guilty' verdicts while in one other the accused denied guilt and the case was dropped for lack of evidence. In the remaining 3 the court book records the parties as being found 'not guilty' following a denial of indictment but without a formal trial: however 2 of the 3 cases occur again in the fugitive roll

of 1655 and the delinquents roll of the same year.⁵² It is clear that the same offence is involved for Thomas Johnstone in Bancloch charged in 1652 with theft of corn was cited in the fugitive roll of 1655 for theft of five sacks of corn in 1651, while James and Thomas Brown in Wester Gonochan who denied theft of sheep in 1652 were cited in 1655 for 'notour theft of sheep.'⁵³ It may be that the record of 1652 is incorrect but it seems more likely that these were cases closed in 1652 for lack of evidence or witnesses, but ~~then~~ revived during the great sweep of 1655-58 described later. There were several other categories of offence tried in 1652, notably 'forestalling' (5 cases), cutting green wood and slaying red fish, i.e. immature salmon, (of which there were 4 cases each).⁵⁴ There were then 9 'solitary' cases, including one of witchcraft with a male witch, recorded as being continued till the next court, although no mention of it can be found from later records, and an extremely interesting case of slaughter. The accused, one John Aikin in Auchincloch, produced an absolvitur from the regality of Campsie, dating from 1650, which was accepted by the judges who must have therefore accepted regality decisions made before 1651 as valid and binding.⁵⁵

Two general points can be made on the circuit of 1652. In the first place, only those cases where the parties confessed produced a conviction and sentence: all the cases tried by an assize produced verdicts of not guilty while denials by the accused led either to the case being abandoned or an absolvitor. Secondly, many of the cases were old, outstanding ones with periods of five and fourteen years mentioned. Moreover in many cases 'complainers' and/or witnesses failed to appear - hence the difficulty in pushing cases to a positive conclusion. One piece of information which is lacking and would be of great use is evidence as to the process by which indictments were made.

Were they made by private individuals to the courts or were they rather submitted by the sheriff and burgh courts? Unfortunately there seems to be no way of discovering an answer. From the information which is available one can make two general observations: firstly, that the aim of the 1652 circuit seems to have been to go through all the outstanding criminal cases and to bring them to a conclusion, prior perhaps to the intended final re-organisation. It was intended to be a 'mopping-up' operation. Certainly subsequent circuits in 1655, 1658 and 1659 tried nowhere near as many cases. In the second place it seems that the judges had considerable difficulties in enforcing the law. Unless a confession was forthcoming conviction could not be obtained, either because witnesses would not appear or because the assize would not convict. As mentioned later this was in marked contrast to the pattern between 1655 and 1659. This difficulty most likely resulted from three factors: the confusion caused by the conquest and its aftermath, the absence of a local court system to provide indictments and enforce appearance and an attitude of 'non co-operation' on the part of the locals.⁵⁶ If so then the fate of the 1652 circuits was but one more sign of the difficulties which the English regime faced in imposing its will on Scotland, difficulties which came to a head in the next two years.

During 1653 the English government was faced with increasing unrest in Scotland, which grew into the Royalist revolt known to historians as 'Glencairn's Rising'.⁵⁷ This grew until by the first months of 1654 it had come to absorb the attention of the English and their commander, the hapless and increasingly desperate Robert Lilburne. In its early stages it was seen as a problem of 'law and order', particularly

on the fringes of the Highlands, and led to the forceful 'Declaration Against Vagabonds' of 4th. July 1653.⁵⁸ However it soon became clear to Lilburne that what had occurred was the unforeseen consequence of the policy followed by the English Parliament and its Commission. The policy of sequestration and strict enforcement of the law of debt had reduced many of the aristocracy to a pitch of desperation where they felt they had nothing to lose by revolt. At the same time the regime had failed to gain enough support from the rest of Scottish society and as a consequence it lacked that body of collaborators which any occupying power needs to maintain its position.⁵⁹ This last problem was made worse by the absence of any institutional machinery outside of the burghs through which any collaboration could be effected. By their decree abolishing baron and regality courts the Commission had destroyed the local power structure of seventeenth century Scotland and there was now no institution through which they could work.

The response of the English, urged by Lilburne and adopted by his successor Monck, has been described in detail in a recently published work by F.D.Dow and an unpublished work by L.M.Smith. In essence this amended policy (for the main lines laid down in 1651 were still adhered to) had four main points: the granting of relief to debtors, the issue of a pardon or amnesty to all but the most prominent of the traditional Scots rulers, the employment of more Scots in the government of Scotland from the traditional elite and the creation of a machinery of local government in line with Scottish circumstances. This last ultimately involved shelving or abandoning any attempt to bring the Scottish legal system fully into line with that of England.⁶⁰ The first was achieved by a measure entitled 'An Ordinance for Relief of Debtors in Scotland in some Cases of

'Extremeity' which was passed on 26th. May 1654.⁶¹ Earlier, on the 12th. April 1654, the Council of State had passed an Ordinance formally uniting England and Scotland along with an 'Ordinance of Pardon and Grace' and another erecting courts baron in Scotland.⁶² At about the same time Monck wrote to Lambert urging the creation of a system of Justices of Peace in Scotland, in order to involve the traditional holders of authority in the maintenance of order.⁶³ Although his suggestion was not put into effect until 19th. December 1655 it was still, as Dow points out, a major concession to the nobility and gentry, involving them once more in the process of control.⁶⁴ So the measures taken in 1654 and their subsequent implementation were a considerable softening of the policy originally laid down in the 'Declaration'. However, that policy was not abandoned and its essential elements still stood: the Union went through on the terms of the Tender of 1652; the Ordinance of Union specifically abolished feudal tenure and heritable jurisdictions.⁶⁵ Regalities, stewartries and heritable Sheriffs did not return with baron courts. Moreover the baron courts created in 1654 were feeble beings compared to their pre-1651 predecessors: they were simply courts set on the English model with no jurisdiction over matters of more than forty shillings sterling. Finally, the Ordinance of Pardon and Grace contained a long list of excepted persons who did not come within its terms (among them the Earl of Callandar) and imposed stiff fines on many more.⁶⁶ Even so there was a distinct softening of approach which became more apparent as time went on. Thus many of the fines imposed by the Ordinance of Pardon and Grace were remitted while others were mitigated considerably: in fact of the 73 fines originally imposed only 8 were confirmed at the initial level.⁶⁷ In February 1655 the Council of State began to consider how to re-organise Scottish

civil government in the aftermath of the uprising and on 4th. May Cromwell appointed a Scottish Council with 9 members, 2 of them Scots, to act as the government of Scotland. The Council were given their instructions on 24th. June and took up residence in Edinburgh in September.⁶⁸ Soon the administration of justice was once more taken in hand.

In fact, although no circuits were held between 1652 and 1655 the Commission for the Administration of Justice continued to sit in Edinburgh and tried a fair number of criminal cases. Of these 7 came from Stirlingshire and Clackmannanshire, consisting of 2 cases, of theft and 'ryot', from Clackmannan; a case of murder from Stirling along with an instance of 'convocation'; 2 of incest, one coupled with a charge of murder, the other with a slaughter charge and lastly a case of 'bribery and Corruption.'⁶⁹ This last case was of great importance for the administration of law in Stirlingshire as it involved Mr. John Rollock, the Scots Sheriff of the shire. He had been appointed in April 1652 yet less than fourteen months later he was arraigned before a criminal court and forcibly stripped of office.⁷⁰ The records suggest that Rollock was not strictly guilty of the charge: he was however guilty of partiality towards friends and kinsfolk, a normal enough practice among Scots magistrates but not for the 'kinless loons' of English stock who now manned the High Court bench. Moreover, and more significantly, he had failed to co-operate fully with his English colleague, Thomas Read and the English authorities in general. In 1652 he had failed to perform his duties correctly particularly where the calling of parties and witnesses for the circuit was concerned, and this had resulted in his being reprimanded and fined by the English judges.⁷¹ This may have been due to incompetence rather than a positively rebellious

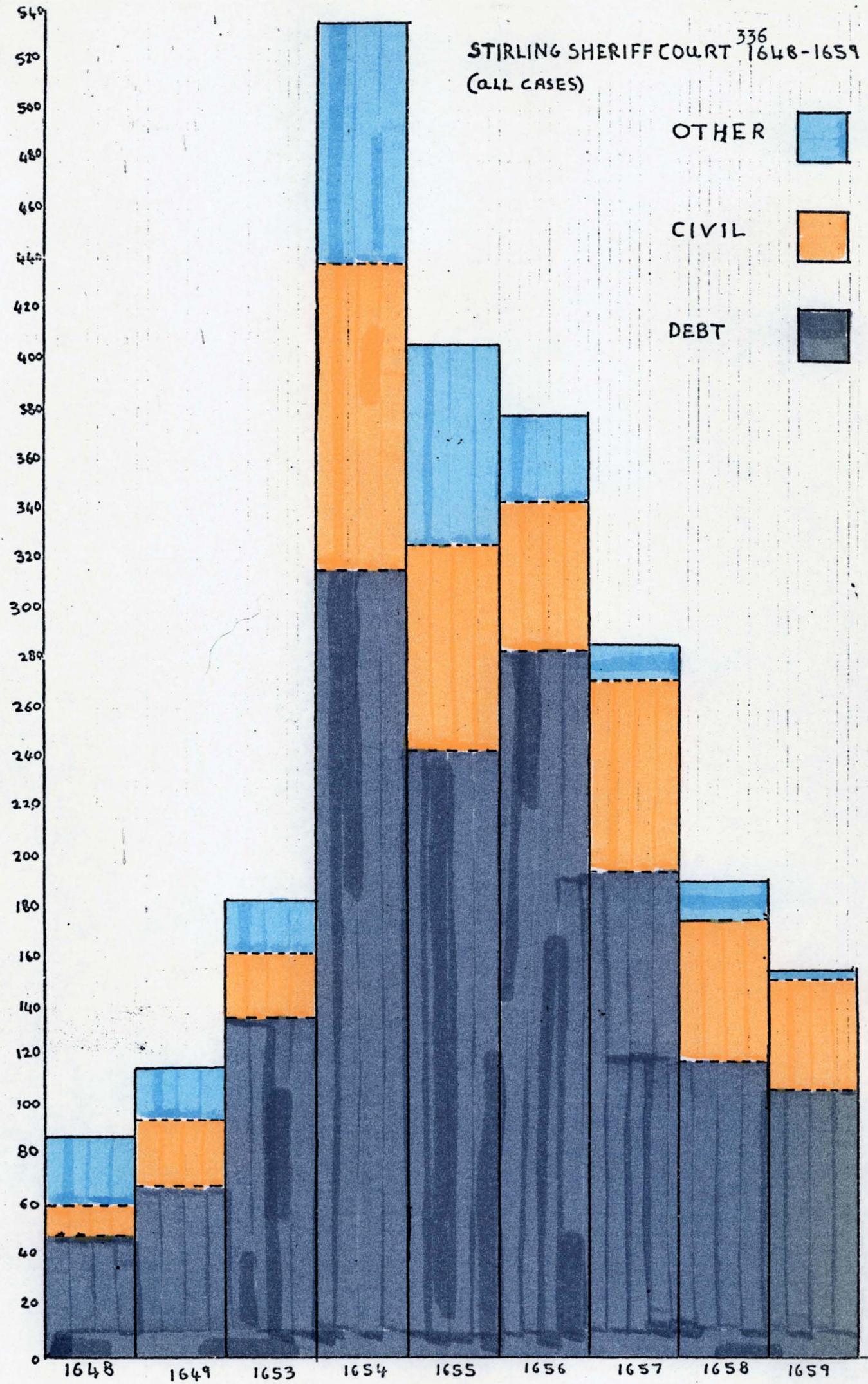
attitude but either way the authorities were determined to be rid of him. For the latter part of 1653 the court was presided over by a depute but its activity was very much reduced.

Then, on 21st. February 1654 Sir William Bruce of Stenhouse, a local laird and prominent supporter of the regime was made Sheriff principal while at the same time the English 'co-Sheriff' withdrew from that post.⁷² This particular appointment was confirmed in 1656 when the Council carried through a similar reform throughout Scotland.⁷³ The various reforms of the 1650's had a considerable impact upon the Sheriff court and its business, as may be seen from table no.2. The massive recorded increases in actions for debt and 'ryot' were most probably due to the initial abolition and later reduction in competence of the baron courts which increased the relative importance of the Sheriff court, coupled with a build-up of outstanding cases due to the disorders of 1650-54. It seems clear from the pattern displayed in table no.2 that in the Sheriff as in the central courts the pattern of the 1650's was of a massive 'clean-up' of outstanding cases, followed by a decline of activity to a more normal level. The breakdown of non-possessory actions in table no.3 makes another important point very clear: although the total volume of such business did increase during the mid 1650's, the composition of this body of cases remained unchanged.⁷⁴ There was simply an increase in total volume.

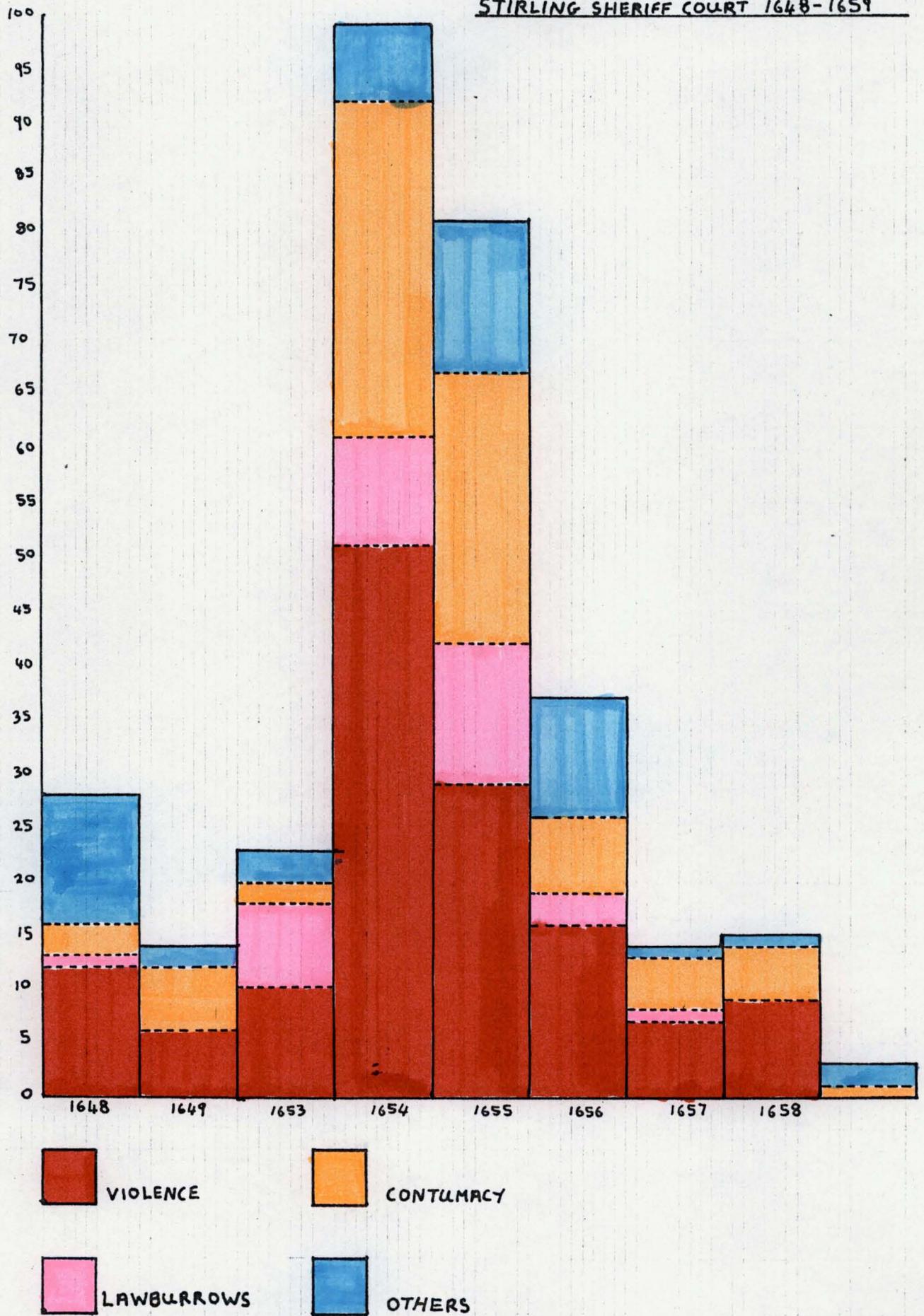
One of the first steps taken by the Council was the reconstruction of the central court and this, along with the decline in opposition to the regime led to a marked increase in judicial activity in 1655 and subsequent years. This has survived in three separate records: the circuit court books for 1655 to 1659 and the Dittay and Fine and Fugitive Rolls for 1655.⁷⁵ The Justice of Peace Courts, which were formally

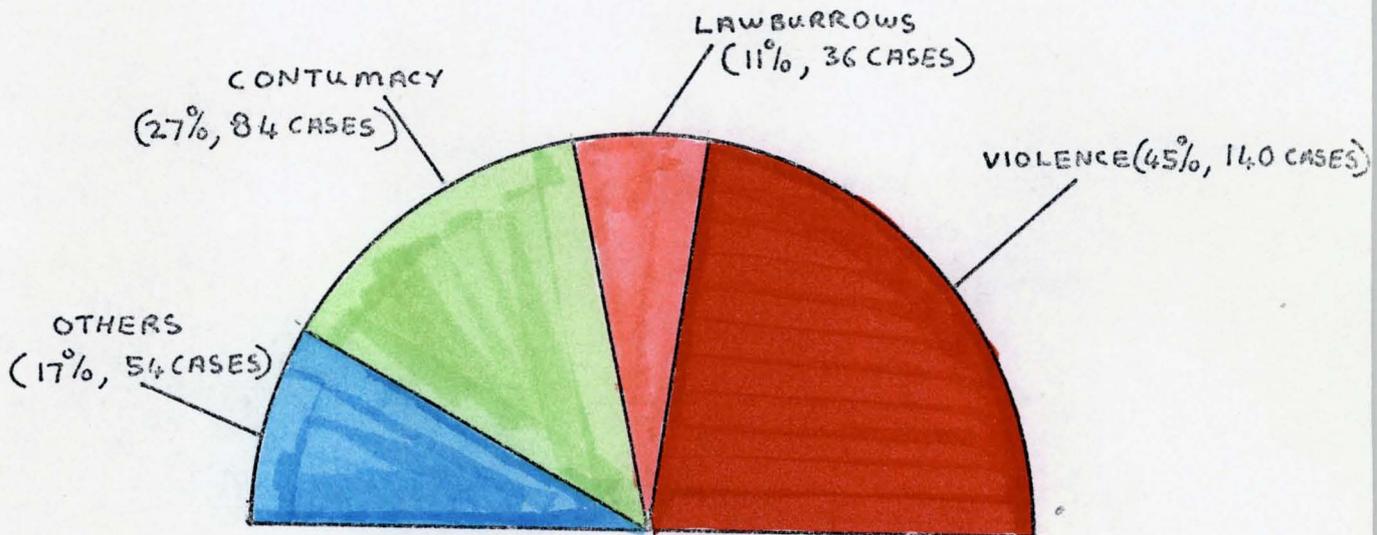
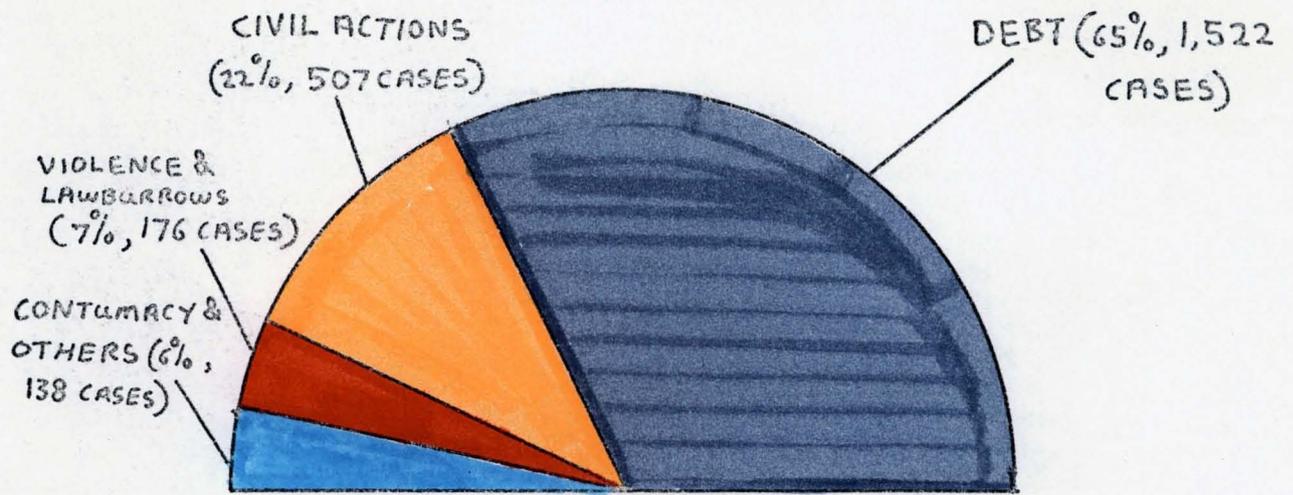
STIRLING SHERIFF COURT ³³⁶ 1648-1659
(ALL CASES)

OTHER 
CIVIL 
DEBT 



STIRLING SHERIFF COURT 1648-1659





erected on 19th. December 1655 were also very active but unfortunately few Quarter Session Court books have survived.⁷⁶ Those which have come down, from Aberdeen, Roxburgh and elsewhere, shows that their main business seems to have been the enforcement of moral laws, involving the prosecution of such offences as fornication, together with the imposition of civil penalties on such cases as were tried by the church courts.^{77*} However, besides the actual court books which have survived, there are also many papers in the small papers of the Justiciary court which cast light on their work. These show that the Justice of Peace Courts were used as an enforcing or policing branch of the legal system, being used to collect information against suspected offenders and to ensure the appearance of indicted persons and witnesses before the Commission for the Administration of Justice. The local Quarter Session would call persons before them from each parish and ask them to name any persons whom they knew to be guilty of a crime: if they did name anybody, that person would either be placed in custody or asked to give surety for appearance while the depositions against them would be sent in to the Commission in Edinburgh. Ordinary members of the public could also appear and voluntarily hand in depositions against named parties. The justices were not employed to compile the dittay (i.e. indictment) roll for 1655: this was done by the Sheriff, burgh magistrates and army officers.⁷⁸ The Justices of Peace were in fact an intermediate jurisdiction, operating between the people and the central courts: they both relayed instructions from above and transmitted pressures from below.⁷⁹

* For a fuller analysis of this point see Chapter 3 above.

So, surviving among the papers of the central court are the dittay rolls for 1655/6 together with rolls of fugitives and delinquents. In a separate volume are records of the circuit courts for 1655, 1658 and 1659. The records are undoubtedly incomplete, yet Stirlingshire has one of the best survival rates with almost complete rolls. The most important gap in the records comes from the loss of many of the papers which supplemented the very terse minutes. Because of this we know little, if anything, about the way many of the cases were concluded or about the finer details of the cases. However, we have got enough to give us a clear idea of the court's business and the records are fuller than those from 1652. Taken singly none of the three is even near complete but when collated together a clear picture emerges.

The dittay roll for 1655, dated 9th. October, contains only 10 cases and 10 names while the circuit court records, bearing the same date simply have a list of 5 cases.⁸⁰ Of the 10 cases in the dittay (2 adultery, one fornication, one case of usury, 5 of theft and one resett of stolen goods) only 2 are found in the circuit court records: one of these, plus another case are recorded again in the fugitive roll. One case, of usury brought against Dugal Keir is clearly a revival of a case abandoned in 1652. In 5 of the 10 a pursuer is named, suggesting that these were cases referred by private individuals.⁸¹ In the 5 cases found in the circuit court records 3, including the 2 also found in the dittay rolls are marked as "actit to appear at next court."⁸² However none of these appears in the next court held at Stirling so the cases may have been left 'on the table' or else tried at a court held elsewhere in the circuit at Perth, Glasgow or Ayr. In the 2 other cases one, involving a party named Andrew Shaw who was "guiltie of five separate fornications", resulted in imprisonment while the other, a case

Justiciary Court Roll of Delinquents - Stirling 1655 (11th. October 1655)

Type of Offence	Number of Cases (+ others in Fugitive Roll	Number of Persons named	Number of Cases also found in Fugitive Roll
theft	29 (+ 2)	38	7
adultery	17 (+ 2)	28	12
slaughter	5	7	2
infanticide	2	3	2
murder	1	1	-
incest	2 (+ 2)	4	2
rape	1	1	1
counterfeiting	1	1	-
deforcement	1	3	1
TOTAL	59	86	27
TOTAL WITH FUGITIVE ROLL	68	100	-

Justiciary Court - Stirling Fugitive Roll (11th. October 1655)

Type of Offence	Number of Cases	Number of Persons Named	No. of Cases also found in Roll of Delqts.
Adultery	14	25	12
theft	9	12	7
incest	4	7	2
slaughter	2	3	2
infanticide	2	4	2
deforcement	1	3	1
mutilation	1	1	-
breaking gaol	1	2	-
rape	1	1	1
other	1	1	-
TOTAL	36	60	27

of infanticide, had no verdict recorded but is found in the fugitive roll, along with 2 of the other 3.⁸³ So only one final verdict was recorded out of 13 separate cases while only 2 out of 10 dittays resulted in a trial. This was almost certainly due to pursuers and witnesses failing to appear and may reflect continuing difficulties for the regime. The 3 cases brought to trial but not found in the dittays were all referred by other jurisdictions, one by the burgh court of Stirling and the other 2 by Kirk Sessions.⁸⁴ Two days after the court, on 11th. October rolls of fugitives and delinquents were drawn up. The fugitive roll is preserved in the same volume as the dittay roll while the roll of delinquents is bound up with the circuit court books. They are thus separate documents, with rather different contents, as tables no. 4 and 5 demonstrate, yet at the same time there is a considerable overlap with many cases cited in both. When collated together with the dittay roll and court book they grant a glimpse into the workings of the law after Glencairn's uprising. The collection of these rolls of fugitives and delinquents may well have been the main purpose of the 1655 circuit for such rolls, often extensive, survive from almost every shire even when no trials are recorded.⁸⁵

As table no.4 shows, the fugitive roll yields a pattern similar to the court book of 1652 with adultery the largest category, followed by theft. This predominance of adultery was even more marked in some other shires such as Moray and Sutherland.⁸⁶ The relatively high number of incest cases may seem strange but 3 of the 4 cases involved one family in Buchanan parish which clearly had sexual relations of Byzantine complexity.⁸⁷ By contrast the roll of delinquents was dominated by theft with adultery a poor second. Only 9 of the cases in the fugitive roll are not also recorded in the roll of delinquents yet the latter

has 32 cases not in the former. Put together the two documents yield a grand total of 69 cases, with theft clearly the most important with 31 cases followed by adultery with 19. The nature of the distinction between the two rolls is not clear but their purpose seems straightforward. No such rolls were drawn up again and of the 68 cases only one, involving a family of thieves in Kilsyth, ever came to a trial: so it seems that the purpose of the exercise was simply to draw up a list of all the outstanding crimes in each shire for subsequent use if needed.⁸⁸

The 'fugitives' seem to have been people who had already appeared before other jurisdictions - thus all the adulterers in the roll are stated to have satisfied a kirk session while the case of rape had been tried before 1652 by the barony of Muiravonside.⁸⁹ The 9 'fugitive' cases not found in the roll of delinquents may well be the product of a clerical oversight. Evidence from other fugitive rolls show why persons became so categorised; by refusal or inability to pay fines.⁹⁰ Undoubtedly the fugitive roll is incomplete, for example the majority of its adultery cases hailed from Campsie parish, clearly a disproportionate amount. The roll of delinquents on the other hand is clearly an attempt to list outstanding cases, whether these had come to trial or not. The high number of thefts not found in the fugitive roll shows the need for a local court with criminal jurisdiction, particularly near to the Highlands: the majority of these theft cases came from such 'borderline' areas.⁹¹ Another point which shows the nature of the exercise is the age of many of the cases: as in 1652 many were from 7, 10 or even 12 years earlier.⁹² The 1655 circuit may thus be seen, like its predecessor in 1652 as an attempt to draw a line under the record of the past, to establish what cases were

outstanding and start afresh. Some evidence of this 'fresh start' comes from the later circuit court records for 1658.

By 30th. March 1658, when the court next sat, the Cromwellian regime had consolidated itself and had started to come to terms with some of the traditional rulers of Scotland. All this shows in the court records which indicate a marked contrast to those of 1652 and 1655. In all 28 cases, involving 46 separate persons, came for trial and verdicts were recorded in 27. All but 2 went before an assize and the whole machinery seems to have worked very smoothly. There were 13 cases of adultery, of which 12 led to a confession and fine of £40 while one resulted in an acquittal.⁹³ Ten cases of theft were brought against 15 persons in all. The assize showed a fine discrimination in their sentencing for in the 3 cases which involved more than one defendant different verdicts and sentences were delivered on each. Of the 15, 6 were found not guilty and absolved, 3 were 'hangitt', 2 flogged, 2 "banishet forth of the three Kingdoms underpayne of death" while in one case no verdict was recorded and in the last the whole case was referred to the central court where the party was found guilty and hanged.⁹⁴ The remaining 5 cases were one each of murder, slaughter, resett, oppression and perjury, resulting in 2 hangings, a fine and 2 acquittals respectively.⁹⁵ Besides these the court had to perform justice upon one William Georgie, sentenced to death the previous year at Edinburgh for parricide. He was "taken and hangit at the place of his cryme" in Falkirk, presumably "pour encourager les autres".⁹⁶ Clearly from this evidence the court was working much more effectively and had been accepted by the local persons, elite and otherwise. The dittay roll is very brief and only contains 2 names, both of whom came up for trial. One of the 2 had the amazing marginal note:

"This man being imprisoned for a cryme quch
 is found not in the Rolls is only marked
 there to have broken the Tollbooth of
 Stirling."⁹⁷

By the time the court sat the judges had clearly found out why this unfortunate man was incarcerated as he was charged with theft: even so they still had problems as this was the one case with no recorded verdict. The evidence of both 1655 and 1658 is that the dittay was not the main route whereby malefactors were brought to trial, in contrast to the position before and after the 1650's. How cases were brought before the central court is not clear but the most likely route would be via 'delations' from other jurisdictions particularly the Justices of Peace - the system adopted after the Union of 1707. Clearly by 1658 major concessions had been made by the English: baron courts had been revived, albeit in weaker form; the important and wealthy members of the community had become involved in the process of law enforcing and local government through the new J.P. courts while in the case of the central criminal court a majority of the bench was now Scottish.⁹⁸ Moreover, in Dow's phrase "the ideal of assimilating the legal systems of Scotland and England had been quietly abandoned."⁹⁹ All these concessions served to consolidate rather than weaken the position of the English by defusing opposition yet they also marked a retreat from the radical policy of the 'Declaration' of 1651.

In 1659 the Commission for the Administration of Justice came out on ayre for the last time and sat at Stirling on 22nd. and 23rd. March. The dittay roll submitted contained 9 cases of adultery of which 5 came to trial, all resulting in flogging - a more severe penalty than previously imposed.¹⁰⁰ There were also 2 cases of murder and one of theft. However this sitting of

the court was dominated by a massive witch-hunt with 12 persons charged. This was in one respect yet another sign of concession on the part of the English: immediately after 1651 the administration had taken a generally dismissive attitude to accusation of witchcraft.¹⁰¹ In allowing the trials to take place in 1659 the English administration was responding to local pressure from Alloa and Stirling.¹⁰² In Alloa accusations brought in the Kirk session against one Margaret Duchill in 1658 had led to her appearance before the Justices of Peace and the Presbytery of Stirling sitting jointly. This led to the production of a long confession in which she named several other women who were all then imprisoned by the justices. They in turn all made confessions and extensive depositions were drawn up by the Justices and send to Edinburgh.¹⁰³ A similar process took place in Stirling with accusations of 'charming' brought against various women in the Stirling Kirk Session leading to charges of witchcraft.¹⁰⁴ Margaret Duchill died in 1658, most probably from the aftermath of torture but those named by her were all brought to trial. It is clear from the surviving small papers for these cases that the trials were a response to pressure from the locality, particularly from the Justices of Peace for Clackmannanshire who, on being ordered by the Commission to release one of the witches did so but then promptly imprisoned her again.¹⁰⁵ Of the eleven women and one man brought to trial, 3 denied the charge and were acquitted, including the solitary male defendant, while 2 confessed, one being burnt and the other "banished forth of the three Kingdoms". The remaining 7 all denied the charge but were convicted, 4 being banished, 2 burnt and 1 (only convicted by a plurality of the assize) whipped.^{106*}

This grim and savage proceeding was the last time the court sat on ayre and soon afterwards with the restoration of the

Rump the Cromwellian judiciary came to an end.¹⁰⁷ For the next year the army enforced criminal law in Scotland but no records of its activities have survived and in 1661 all the reforms and changes of the previous ten years were swept away and the status quo ante restored entire.¹⁰⁸ So the rule of the English army proved to be an interlude only, yet one of considerable significance. In assessing its importance for the development of criminal law in Scotland three questions must be posed and answered. In the first place what did the Cromwellian regime achieve in this field? In some respects its achievements were considerable: a properly organised central criminal court was set up along with a workable system of J.P.'s while the heritable jurisdictions were abolished. By 1658 this system was by all signs working smoothly and well. Yet it had taken almost six years and several important policy changes to reach that point. Previously in 1655 and even more in 1652 the newly imposed system ran into serious problems so far as its effectiveness was concerned and its workings had played a major part in provoking Glencairn's uprising. The English prided themselves on having introduced impartial justice, rigorously enforced yet it was this rigorous attitude which pushed many Scots into outright opposition. Also, although many contemporary accounts of the 1650's mentioned them as a time of great peace when the law was well-kept, this was only true after the change of tack in 1654/5 and the setting up of the J.P.courts: before then the evidence shows a criminal legal system which was struggling to cope - evidence supported by the constant complaints and petitions of the Scots in the localities. In fact the English were, as mentioned earlier, trying to 'modernise' Scotland or, to be more precise, assimilate it to England. In

this attempt they ran up against the bug-bears of all radical reformers; inertia and the immense difficulty of changing a political or legal order when the economic substructure remains untouched. The legal institutions of 17th. century Scotland sprang out of and reflected the society portrayed in chapter 1. Attempts at change which did not affect that social order were doomed to failure as the new institutions were found to be out of step with practical experience and requirements. The poor communications and low mobility for example made a local criminal legal system essential to maintain order: any attempt to impose something like the Court of King's Bench on Scotland would lead only to the breakdown of order at the grass roots level.

This brings one to the second question; did the regime fail? Clearly it did insofar as it did not survive; the monarchy and the old order were restored in 1661. Yet its demise was due to events outside its control in England. The regime failed to fully achieve the goals set out in the Declaration of 1652 and the trend of events after 1655 was rather away from the policies of that document. Had the republican regime survived Cromwell's death then further concessions would probably have been made to the traditional Scots rulers. Yet despite this substantial change had been effected. So the third question must be did the Cromwellian occupation have any long term consequence? This is a difficult question to answer but on the whole, one must say that it did.

The memory of the ten years lived on, an example to some and a dread warning to others while the break of continuity, in the institutions of government at the top and in the local courts at the grass roots, must have had some effect.¹⁰⁹ Moreover the divisions within the Scottish ruling class which

had come to the fore in 1637-51 were, if anything, more acute in 1661 than ten years earlier. The attempt to restore the old order in toto in 1661 meant that these divisions, particularly over the control of the Kirk, would revive and gain in bitterness. The experience of toleration strengthened both militants and moderates within the Kirk. The old order had been in a state of crisis before 1637 and the conservative revolution of the Covenanters had failed; their children were no more successful after 1661. On the other hand some, particularly those who had collaborated or co-operated with the English, would come to see Cromwellian style reforms as a possible solution to Scotland's social and political impasse.

NOTES

1. D. Stevenson: The Scottish Revolution 1637-1644: The Triumph Of The Covenanters. (Newton Abbot, 1973) pp 15 - 55.
2. D. Stevenson: Revolution And Counter-Revolution In Scotland 1644 - 1651 (London, 1977) pp 115 - 9 gives an account of the uprising. The control of the Kirk by local magnates can be seen clearly in Records Of Kirk Session of Falkirk SRO CH2/400/2 which show that in Falkirk up to 1647 the Earl of Callandar completely dominated the local session: it was as much his instrument as the regality court was. He nominated elders, his baillie (William Livingstone of Westquater) was the ruling elder, and he determined the selection of representatives to presbytery and synod. In 1647, after the Earl's taking of the Engagement and his flight to Holland following Preston, the radicals gained control of the session and, having purged it of malignants, publicly censured all who had taken part in the Engagement, including Westquater.
3. Stevenson: Scottish Revolution, pp 192 - 6, 233 - 6, 315 - 26; Stevenson: Revolution And Counter-Revolution, p 237.
4. G. Donaldson: 'Scotland's conservative North in the sixteenth and seventeenth centuries' in Transactions Of The Royal Historical Society 5th. series vol XVI (1966) pp 65 - 79.
5. Stevenson: Revolution And Counter-Revolution, pp 232 - 40
6. Stevenson: Scottish Revolution, pp 315 - 26.
7. R.S. Rait: The Parliaments Of Scotland (Glasgow, 1924). pp 454 - 5; Sir G. Mackenzie: The Laws And Customs Of Scotland In Matters Criminal (Edinburgh, 1699) pp 183 - 4.
8. W.B. Gray: 'The judicial proceedings of the Parliaments of Scotland 1660 - 1688' in Juridical Review vol XXXVI (1924) pp 135 - 51 - see p 136.
9. Rait: Parliaments Of Scotland p 394. Acts Of The Parliaments Of Scotland vol VI p 96 is one example where after reading the suit roll the president "Caused fence this high court of Parliament".
10. Rait: Parliaments Of Scotland, p 452.
11. ibid, pp 473 - 4.
12. Stevenson: Scottish Revolution pp 193 - 5.
13. Acts of Parliaments Of Scotland vol v p 270; Stevenson: Scottish Revolution pp 166 - 9; C.S. Terry: The Scottish Parliament : Its Constitution And Procedure 1603 - 1707 (Glasgow, 1905) pp 103 - 20.
14. ibid, pp 121 - 4; Acts Of The Parliaments Of Scotland vol VI p 98 gives one Act erecting such a committee.

15. Stevenson: Scottish Revolution pp 257 - 8
16. This was particularly so after the events of the later 1640's had pushed the revolution onto an even more radical course, bringing lairds and burgesses to the fore and weakening the aristocracy. See Stevenson: Revolution And Counter-Revolution pp 134 - 40.
17. Records Of Regality Of Falkirk SRO SC67/2/1 for 1648-1651; R. Renwick (ed): Extract From The Records Of The Royal Burgh Of Stirling 1519 - 1666 (Glasgow, 1887) pp 196 - 200.
18. W.S. Douglas: Cromwell's Scotch Campaigns 1650-51 (London, 1898) pp 263 - 73.
19. At the national level, the Court of Session did not meet after 1650, while the High Court ceased functioning in 1651. At the local level the Stirling burgh and Sheriff courts continued to work but, as their records show, found their task very difficult, while the franchise courts in this part of Scotland appear to have stopped work in 1651. The records of Falkirk regality and its associated baronies run out at this point while the Graham baronies in the west of the shire may well have stopped work even earlier. However judgement on this matter is hampered by the lack of evidence: very little franchise court material has survived from the 1650's and that almost all dates after 1655.
20. On this general subject see F.D. Dow: Cromwellian Scotland 1651 - 1600 (Edinburgh, 1979); L.M.Smith: Scotland and Cromwell: A Study In Early Modern Government (Oxford Thesis, D.Phil., 1979); H.Trevor-Roper: 'Scotland and the Puritan revolution' in Religion, The Reformation and Social Change (London, 1967) pp 392 - 444.
21. In fact the style of government described by Dow and, particularly Smith was the one which the English were to follow in most of their imperial ventures around the globe: that of retaining the central, ultimate positions of power in the hands of a small group of expatriates while leaving much of the local administration (and power at grass roots level) to collaborating members of the local elite, who continued to rule through traditional forms and institutions. The best known example was India after the Mutiny but the same philosophy was followed in Africa and elsewhere in Asia. Where it was not (e.g. in Ireland) this was because there was no local power structure which the occupying power could work through. Smith argues that the problems faced by the Cromwellian government in Scotland typify those which faced Early Modern government anywhere, because of the state of communications, cost of maintaining armed forces and absence of a paid bureaucracy. This is true: it also reflects the fact that most Early Modern European states were imperial or multi-national entities rather than coherent nation-states of the nineteenth and twentieth century variety.
22. Dow: Cromwellian Scotland pp 32 - 5.
23. ibid, p 25.

24. C.S. Terry (ed): The Cromwellian Union (Scottish History Society, Edinburgh, 1902) pp xxi - xxiii.
25. ibid, p xxiii.
26. C.H. Firth (ed): Scotland And The Protectorate (Scottish Historical Society, Edinburgh, 1899) pp 393 - 8.
27. Terry: Cromwellian Union pp 11 - 14.
28. ibid pp 14 - 15.
29. Renwick: Extracts pp 200 - 1.
30. Terry: Cromwellian Union p 62.
31. ibid, p 80.
32. Dow: Cromwellian Scotland p 36.
33. Terry: Cromwellian Union pp 78 - 80, 81 - 3.
34. R. Renwick (ed): Charters And Documents Relating To The Royal Burgh Of Stirling 1124 - 1705 (Glasgow, 1884) pp 168 - 70 prints the authorisation; Renwick: Extracts p 202 records the restoration of the council.
35. Terry: Cromwellian Union pp 65 - 7.
36. ibid p 164
37. Smith: Scotland and Cromwell pp 197 - 8.
38. Records Of Regality Of Falkirk SRO SC67/2/1; Smith: Cromwell and Scotland pp 205 - 7 mentions that the later records show continuity because the post 1656 court was presided over by William Livingstone of Westquater, who had been chief Baillie of the regality court. However, although the personnel were the same the court was not: the pre 1651 court had jurisdiction over lands in Falkirk, Muiravonside, Slamannan and Larbert parishes while the court records from 1656 only contain cases from the burgh of Falkirk and the parts of the parish of Falkirk which lay within the barony of Callandar. Again, the records of 1656 are all of debt cases, in contrast to the earlier records of which are full of cases of 'ryot', 'spulzie', and even theft. Finally, the court is styled differently - it is called 'court of the barony of Falkirk' not regality. All this is not conclusive but it does suggest a break in continuity after 1652.
39. See table 2 above pp336.
40. ibid; for the restoration of baron courts in 1654 see above p333.
41. Terry: Cromwellian Union pp 156 - 7.
42. ibid, p 157.
43. Dow: Cromwellian Scotland p 33.

44. ibid, pp 55 - 7; A.R.G. McMillan 'The judicial system of the Commonwealth in Scotland' in Juridical Review vol XLIX (1937) pp 232 - 55.
45. Dow: Cromwellian Scotland p 56.
46. Records Of Justiciary Court : Stirling SRO JC27/4 23rd. November 1652.
47. ibid; cases of Matthew Porter in Bantskin and Margaret Miller; Archibald Miller and Marianne Pedie; John Clark and Bessie Harg; James Turnbull and Jeanne McLean; Bessie Wood and Malcolm Pattersone in Kilsyth; Walter Roberysone in Craigulyeane and Margaret Risk his servant; John Dunbar and Janet Craig his servant; John Riddoch in Drymen and Jeanne Kemp; James Miller in Newlay and Helen Russell; William Barone in Dollar and Janet Drysdail; William Tannoch in Bardowie and Margaret Zuil; John Galloway in Menstrie and Janet Mitchell; William Binny in Balgrochane and Helen Riddoch; James Donaldsone and Jeanne Meggeth; John Watter in Touchadam and Margaret Din; David Myllar in Stirling; John Burn, tailor in Stirling; Robert Houstone in Stirling; John Mclerie maltman in Stirling.
48. ibid; cases of Andrew Bull in Rossiehill; John Watter in Touchadam and Margaret Din.
49. ibid; cases of John Schearer in Mugdock and Elizabeth Masone; John Cushing; James Lindsay in Alloa and Janet Moreis; Andrew Bull in Roshiehill (declared fugitive).
50. ibid; cases of John Tailyour; Robert Seaton.
51. Dow: Cromwellian Scotland p 57.
52. Records Of Justiciary Court : Stirling SRO JC27/4 23rd. November 1652. Cases of John Ure in Balmanoch (of a sheep); John Fraser in Banknock (of a horse) - both found not guilty by an assize; William Din in Finacharch (of a tub) - diet deserted; Thomas Johnstone in Bancloch (of corn); James and Thomas Brown in Wester Gonochane (of a sheep); Andrew McGilchrist in Wester Gonachane (of sheep) - all denied and absolved.
53. Records of Justiciary Court : Dittay, Fine and Fugitive Rolls SRO JC 17/1 1655.
54. Records of Justiciary Court : Stirling SRO JC27/4 23rd. November 1652. Cases of James Heriot in Cartyne; James Paulie; William McAndoo in Denovan; Patrick McMarish in Airth - all cutting green wood; William Ker and Hew Roxburgh; Robert Bruce, William McLennan and Walter Buchanan; Patrick Bryce in Drummond; William Sinclair in Denovan; Williame Meassore and David Cadder - all forestalling; John Scotland in Dollar; John Fleming at Jaw Milne; Robert Crockett in Gertrees; Patrick Macadame in Garstone and Adam Reoch - all killing red fish.
55. ibid; cases of John Aiken in Auchincloch (slaughter of Patrick Drew there; Alexander Donaldsone (wrongous

- intromission); William Paulie (deforcement); Janet Burne in Buig (arson); Walter Morisine in Powlack (wrongful poinding of a cow); James Patrick in Carnbog (wounding John Bancrone in Kilsyth); James and Duncan Backop (housebreaking); John McInlock in Napierstoun (witchcraft); Dugal Keir in Ladreoch (usury).
56. Lack of co-operation seems to have been important where the sheriff was concerned since he is recorded as having failed to perform his duty of calling witnesses and reprimanded as a result. See p 334 for further details.
 57. Dow: Cromwellian Scotland pp 74 - 142
 58. C.H. Firth (ed): Scotland And The Commonwealth (Scottish History Society, Edinburgh, 1895) pp 155 - 6.
 59. Smith: Scotland and Cromwell passim.
 60. Dow: Cromwellian Scotland p 221.
 61. C.H. Firth and R.S. Rait (eds): Acts And Ordinances Of The Interregnum (3 vols; London, 1911) vol 2 pp 898 - 9.
 62. ibid; pp 871 - 5, 878 - 83, 883 - 4 prints the Declaration of Union, Ordinance Of Pardon And Grace and the Ordinance Erecting Courts Baron respectively.
 63. Firth: Scotland And The Protectorate p 98.
 64. Dow: Cromwellian Scotland pp 179 - 80
 65. Firth and Rait: Acts And Ordinances vol 2 pp 874.
 66. ibid; pp 876 - 7, 881 - 2.
 67. Dow: Cromwellian Scotland p 158. Moreover many of the exerted persons were allowed to return to Scotland upon their giving surety. One such was the Earl of Callandar; Firth: Scotland And The Protectorate p 319 prints a letter from Monck to Cromwell dated January 1655, where Monck says he has taken £2,000 bond from two (unnamed) Scots nobles for ensuring Callandar's "future peaceable demeanour" as well as the Earl's word "as a gentleman" and that on this he has allowed him to return home.
 68. Dow: Cromwellian Scotland pp 165 - 6.
 69. I am very grateful to Miss Lesley Smith for providing me with this information. Cases of Elizabeth and Margaret Constant (theft); Robert Younger (ryot); George Liddell (murder); Thomas Hodgene (incest and murder); John Johnson of Goldenshaw (incest and slaughter); inhabitants of Stirling (convocation).
 70. Case of Mr. John Rollock. This was the only case from the entire Cromwellian period where the verdict was reversed after the Restoration; the verdict was declared null and void on 11th. September 1661. See W.G. Scott-Morcrieff: Records Of The Justiciary Court, Edinburgh, (Scottish

- History Society, Edinburgh, 1905) pp 19 - 20.
71. Smith: Scotland And Cromwell p 152.
 72. Records Of Stirling Sheriff Court SRO SC67/1/4 21st. February 1654.
 73. Firth: Scotland And The Protectorate pp 316 - 7.
 74. See table no 3 p 337. For further analysis see chapter 4 below.
 75. Records Of Justiciary Court : Circuits SRO JC10/2;
Records Of Justiciary Court : Dittay, Fine and Fugitive
Rolls SRO JC17/1.
 76. Firth: Scotland And The Protectorate pp 403 - 5 prints the instructions given to the justices.
 77. Smith: Scotland And Cromwell pp 190 - 1 gives a breakdown of the records of the Aberdeen and Roxburgh J.P. Courts.
 78. Records Of Justiciary Court : Processes SRO JC26/23 (1655)
 79. Smith: Scotland And Cromwell pp 177 - 80 makes the point that the J.P.'s had taken over the duties formerly performed by the Army. P 156 points out that the Army continued to try cases as late as 1655.
 80. Records Of Justiciary Court : Dittay, Fine And Fugitive
Rolls SRO JC17/1 9th. October 1655, cases of Robert Rankin in Middlebog; David Ranken - both adultery; Robert Rankin in Middlebog; Andrew Myllar in Drymen; Janice Brown in Wester Gonochane; John Browne in Easter Gonochane; David Wigtoone in Strathblane - all theft; John Morisone in Stirling (fornication). Records Of Justiciary Courts : Circuits SRO JC10/2 has cases of Robert Rankin in Middlebog; David Calder and Janet Burn - both adultery; Thomas Rankin in Kilsyth (resett); Andrew Shaw in Baldrochane (fornication); Agnes Stevinsone (infanticide).
 81. Records Of Justiciary Court : Dittay, Fine and Fugitive
Rolls SRO JC17/1 has Thomas Flemine in Edinburgh as pursuer in both cases involving Robert Rankin; Thomas Buchanan as pursuer of Andrew Myllar; Andrew Cowan of John Browne; John Lennox of David Wigtoone. The record for the cases of Janice Brown and Thomas Rankin states "no pursuer".
 82. Records Of Justiciary Court : Circuits SRO JC10/2 cases of David Calder and Janet Burn; Robert Rankin - both adultery; Thomas Rankin.
 83. ibid; cases of Agnes Stevinsone; David Calder and Janet Burn; Robert Rankin.
 84. ibid
 85. The Dittay Rolls for Moray, Sutherland and Aberdeenshire are particularly impressive with 56, 56 and 84 names listed respectively.

86. Thus Sutherland Fugitive Rolls records 60 adulterers, Moray 25, Caithness 71.
87. Thus Duncan Morr Macfarlane in Craigreston is listed for adultery with Agnes Macfarlane, widow, and incest with her mother's brother's daughter. Andrew McRobert Macfarlane is listed for adultery with Janet Macfarlane, sister to Duncan Morr Macfarlane, and incest with Elspeth Macfarlane, daughter "to the said Duncan"; Andrew McLain in Moreiswood is listed for incest with his "brother's son's daughter" who again is related to Duncan Morr Macfarlane.
88. This was the case of William, Andrew and George Adam, all tried at Stirling on 30th. March 1658 on several counts of sheep-stealing. Records Of Justiciary Court: Circuits SRO JC10/2 30th. March 1658.
89. Case of John Wylie in Muiravonside cited for both the rape of Margaret Rankin and his breach of an act of banishment imposed by the barony. Records Of Justiciary Court : Dittay, Fine And Fugitive Rolls SRO JC17/1.
90. This was very clear from the Sutherland and Moray Rolls which specifically state that certain persons have been declared fugitive for refusing to pay fines - all but a handful of the fugitive adulterers fall into this category.
91. It was for this reason that the gentry of several shires lying just below the Highlands, including Stirlingshire, were given the power to arm their tenants to apprehend malefactors in 1653. See Firth: Scotland And The Commonwealth pp 174 - 9.
92. Thus, for example, the adultery case involving Robert Rankin was thirteen years old, that of Andrew Ball in Rosshiehill twelve years old, while that of William Binny and Helen Smith was sixteen years old.
93. Records Of Justiciary Court : Circuits SRO JC10/2 30th. March 1658. Cases of David Wordie and Margaret Mitchell; John Aledander and Margaret Cherie; John McLane and Margaret Stevine; John Robesone and Janet Chrystie; John Beg and Margaret Craig; James Callandar and Janet Ochie; John Robesone and Janet Craig; George Gobsone and Margaret Macfarlane; Robert Archibald and Helen Sibbett; William Drummon and Janet Nicholsonsone; David Gray and Janet Ramsay - all confessed and fines; James Colquohoune and Janet Nairn - denied the charge and diet deserted.
94. ibid; cases of John Lennox in Bauglar (hanged); William Andrew and George Adam all in Provanstoun (George Adam found not guilty, Andrew Adam hanged, William Adam banished forth of the Three Kingdoms); Robert Lyll, son to Thomas Lyll, and Robert Lyll, son to James Lyll (the first hanged, the second banished forth of the Three Kingdoms); James Brasch and John Leckie (both absolved); David Gray and Elizabeth Denie (both flogged and goods confiscat); Andrew Liddell (absolved); John Alexander (absolved); James McNair (absolved); John Thomsone in Ferrietoun (sent to Edinburgh); John Leckie in Strathblane (no recorded verdict).

95. ibid; cases of Harie Blackwood (oppression); John Henry of Craig (perjury); John Lennox (slaughter); Andrew Dick in Kirk of Muir (reset); James Liddell (murder).
96. ibid
97. Records Of Justiciary Court : Dittay, Fine and Fugitive Rolls SRO JCl7/1 case of John Leckie. The other cited person was James Liddell, for murder.
98. Firth: Scotland And The Protectorate pp 385 - 91
99. Dow: Cromwellian Scotland p 221.
100. Records Of Justiciary Courts : Circuits SRO JC10/2; Records Of Justiciary Court : Dittay, Fine And Fugitive Rolls SRO JCl7/1.
101. So much so that between 1652 and 1656 only two people were tried for witchcraft, both of them men. Yet between 1656 and 1659 110 individuals were brought before the courts charged with witchcraft. See Smith: Scotland And Cromwell pp 142 - 4.
102. This is clear from the surviving papers in the Small Papers series of Justiciary Court records which show that the demands for the trial began in 1658 and came from the J.P.'s of Clakmannanshire and the magistrates of Stirling. See Records Of Justiciary Court : Processes SRO JC26/26 (1659). Smith: Scotland And Cromwell argues that this was typical of the witch trials through the Kirk Sessions, with the introduction of J.P. courts providing a mechanism through which this pressure could lead to indictments and trials. Larner takes a slightly different tack, arguing that the pressure for persecution of witches originated instead from the local members of the ruling class via the courts which they controlled rather than through the Kirk session. This misses the point - in seventeenth century Scotland J.P.'s were almost always kirk session elders as well and the sessions worked hand in glove with the other local courts. Certainly all the cases tried in Stirling had begun at kirk session level before being brought to the attention of the Justices - or rather, before some of the elders put on their J.P. hats. See C.Larner: Enemies Of God : The Witch Hunt In Scotland (London, 1981). pp 84 - 6.
103. Records Of Justiciary Court : Processes SRO JC26/26 (1659).
104. ibid; For a detailed account of the events at Stirling and Alloa see Appendix no 5.
105. Smith: Scotland And Cromwell p 145.
106. Records Of Justiciary Court : Circuits SRO JC10/2 Cases of Bessie Stevinsone (burned); Isobell Bennett (whipped); Magdalen Blair (absolved); Barbara Erskine (burned); Elspeth Crockett (banished forth of the Three Kingdoms); James Kirk (absolved); Catherine Black (banished forth of the Three Kingdoms); Elizabeth Black (banished forth of the Three Kingdoms); Isobell Keir (burned); Margaret Gourlay (banished forth of the Three Kingdoms); Margaret Harvie (absolved).

107. Dow: Cromwellian Scotland p 261.
108. Acts Of Parliaments Of Scotland vol VII pp 189, 193 give the acts which restored the pre 1652 legal systems.
109. For the traditional argument, that the 1650's were merely a brief and unpleasant interlude in a story of steady progress, which contributed nothing see Lord Cooper: 'Cromwell's judges and their influence on Scot's law' in Selected Papers (Edinburgh, 1957) pp 111 - 5 where he says *inter alia* "But so far as direct and tangible consequences to the law of Scotland are concerned the years between 1650 and 1661 were years which the locusts ate".

CHAPTER 6.The Central Courts 1660 - 1690 : Growth & Development

With the restoration of the monarchy in 1660, all the reforms and changes of the previous twenty-three years were swept away and the status quo ante restored. Yet despite this, as argued above, evidence of the impact of those years of upheaval remained, in the shape of changes which were subtle but nonetheless significant. In the case of Parliament, the Triennial Act was repealed, it reverted to its former composition and the Lords of the Articles were restored. However it did not revert entirely to its pre-1640 form: the Articles did not dominate the Parliament as they had before that time and so it remained an active and vigorous body.¹ So far as its judicial business went, in the words of one commentator its functions "were exercised between the restoration and the revolution more freely than at any other period subsequent to the establishment of the Court of Session in 1532."²

The judicial business of Parliament fell into five broad categories. Rather confusingly, all its decisions were termed Acts and this makes the distinction between judicial and legislative business hard to draw, if indeed such a distinction is meaningful in this case. However, the different styles used in the various decisions of the Parliament, when interpreted carefully, enable us to recognise the various aspects of its work and analyse them.³

In the first place Parliament, as the ultimate legal authority, could declare what the law was. This could mean giving a definitive interpretation of the law in a particularly difficult case or dispute. Alternatively it could mean defining and recognising a named person or body's rights at law. Much of this sort of work was left to the Court of Session but Parliament retained the right and power to do this itself. This was done

through the mechanism of the 'Act of favours' or private bill.⁴ These measures, which occupy so much space in the printed records of Parliament are often treated as legislation but were in fact "legislative in form but judicial in content".⁵ On examination these 'Acts in favours', which always name a specific person, turn out to be declarations of private right or formal judgement in significant legal disputes - particularly where a claim for redress was concerned.⁶ The procedure was for the interested party to present a petition to Parliament, by way of the Lords of the Articles, asking it to 'find right' and the result was a declaration or verdict, cast in the form of an Act. This could state what the rights and powers of the petitioner were and hence what the law was, or it could give a verdict in a case, again clarifying the law.⁷ Very often it would contain a specified grant of money or aid of some kind to the petitioner. In theory Parliament had simply uncovered a pre-existent right at law, hence the use of the word 'finding'. Parliament was much exercised by such business in the years 1661 and 1662 when its records are full of private Acts, most of them arising out of the events of the previous twenty years. After 1663 there was a marked decline in this type of activity but it did continue, albeit at a lower level : thus in 1681 the printed records contain an "Act in favours of James Earl of Airlie against Mr. John Dempster of Pitliver anent a Prescription."⁸

Parliament could also restore or define law by means of the 'Act of Ratification'. This was a formal document, approved by Parliament and written into its records, which rehearsed and confirmed an already existent right, privilege or power.⁹ Thus the records of Parliament are full of ratifications which restate and confirm the rights and jurisdictions of holders of baronies and regalities.¹⁰ There are also narrower ratifications which simply

restate and uphold the decisions of other courts, placing them beyond challenge or appeal by giving them the imprimatur of the ultimate legal authority. So, in one case cited by Gray, Parliament ratified and upheld verdicts reached in the Commissory Court and the Court of Justiciary and prohibited any further action before any other judicatory.¹¹ This procedure of ratification may seem at first sight to be yet another instance of the centrifugal tendencies of the old order : in fact, as argued later, it was used by the central government to radically strengthen its power.

Parliament also acted as the ultimate court of appeal through the procedure of 'falsing the doom'. Under this, if any party to a case rejected the doom (i.e. verdict) they had to stand up in face of court as soon as the verdict was announced and say 'I declare and find the doom false, stinkand and rotten.'¹² The next step was to draw up a bill giving reasons why the doom should be rejected; this had then to be presented, within forty-five days, to the court to which the holder of the original jurisdiction held suit. Dooms could be falsed on several grounds such as partiality on the part of the magistrate, deviation from proper procedure during the trial, technical error in the original indictment, because the prosecution was merely malicious and litigious or because, quite simply, the verdict was wrong.¹³ In theory this procedure could be followed in both civil and criminal actions but by 1660 was effectively confined to the former.

When presented with an appeal of this sort Parliament could uphold the original verdict by issuing an Act of ratification or it could declare the doom false and without value or force. This was still done in civil cases after 1660 but the declaration was often cast in the form of an Act in favour which makes it hard to determine how often this occurred.¹⁴ It does however seem to have been very rare. More important after 1660 was the second type of

appeal to Parliament, the action for remeed of law.¹⁵ This derived from the feudal principle that a man who failed to get justice in the court of his immediate superior could apply to the King for redress. It thus had to derive from what was termed 'iniquitie of judges' meaning that the magistrates were partial or corrupt. In the 1670's this old procedure was used by Lord Almond and the Earl of Callandar to appeal to Parliament against a decision of the Court of Session, so leading to a furious dispute which has been amply dealt with elsewhere.¹⁶ Its ultimate result was the establishment of the right of judicial appeal from the Court of Session to the House of Lords in London. In this period its main significance was that it showed the extent to which Parliament was attempting to assert its power over the other courts.

The third class of judicial business handled by Parliament between 1660 and 1690 was made up ^{of} appeals for it to intervene in cases in progress before other courts. As the highest court of the King, Parliament could in theory intervene directly in the progress of any case in a court held directly of the King, though it was not clear if it could do so in the case of regalities. This intervention could be brought about in various ways. The commonest was for a party to a case or a person with an interest in it to present what was called a 'supplication' to Parliament asking them to intervene. Supplications seem in turn to have been of two types: most often they were brought by people who had been imprisoned on a criminal charge but not brought to trial and requested that the petitioner be either set at liberty free of charge or else brought to a speedy trial.¹⁷ Sometimes they were brought by parties who had been found guilty in a criminal case but had not had a sentence imposed - in these cases the supplication requested that Parliament either waive the penalty or impose one itself, presumably in the hope that this would be lighter than that

of the original court.¹⁸ Parliament was at liberty to reject the applications but seems to have always upheld them, acting by giving orders to lesser courts which either ordered parties to be set free or brought in a lesser penalty than that prescribed by law.

The other ways Parliament could intervene were the Acts of Remit and Precognition. The first of these was a decision ordering a case which had been brought and tried before one of the central courts, such as the Court of Session, Privy Council or even Parliament itself, to be referred back to a local court where it would be retried.¹⁹ The Act of Precognition, which was a rare but very important legal procedure, ordered a case in process before another court to be stopped and the whole matter referred for trial before Parliament or the Privy Council. As this procedure was more often associated with the Privy Council it is discussed in more detail later.²⁰ As with private Acts and appeals, all of these forms of intervention could only be done in response to a petition from a party or interested person, directed in the first instance to the Lords of the Articles. By analogy, Parliament had much the same role as a tennis referee, being called upon to settle serious disputes within the legal system, give an ultimate and final judgment in controversial cases and act to prevent serious miscarriage of equity.

However, the Scots Parliament could also act as a court of first instance and in Mackenzie's phrase was "competent to cognosce any case."²¹ The procedure was for the aggrieved party, or pursuer, to present a bill setting out their case to the Lords of the Articles. If the crown was the aggrieved party this would be done by the Lord Advocate while in private prosecutions a hired lawyer, or procurator, would do the job. If the Articles found the bill acceptable, or relevant as the lawyers jargon had it, they

would then issue a warrant setting out the points of the bill and ordering the trial to take place. The warrant gave the pursuers specific powers, particularly that of citing witnesses and the named defenders to appear before Parliament.²² The actual work of the case was thus done by the pursuers but despite this they had to pay for the warrant: the records of Parliament and Privy Council constantly refer to "Warrants of Parliament dewly purchased."²³

Once the defendants and witnesses had been cited, the case would be heard by the Lords of the Articles, called after 1661 the Lords of Articles and Processes. Upon hearing the evidence they would draw up a verdict in the form of an act which would then be presented to the full session of Parliament for its approval. When passed it was styled as an "Act and decreit in favours of (pursuer's name) against (defender's name)." In theory the full Parliament could reject or amend the proposed Act presented by the Articles but in fact this almost never happened.²⁴ In such cases Parliament had an almost unique power, shared only with the court of Justiciary, to try cases, hear evidence and proceed to a verdict in the absence of the defendants.²⁵

In the years after the Restoration Parliament was kept busy trying private suits and the records of the Parliament of 1661 contain no fewer than 50 'Acts and decreits'. The overwhelming majority were the result of civil actions but there were a number of criminal cases. Many of these were cases of treason brought against leading covenanters, most notably Argyll and Warriston, but there were other criminal actions brought as well.²⁶ This is contrary to the usual assertion of legal writers that, apart from treason, the Parliament had ceased to exercise a jurisdiction of first instance in criminal matters. Thus, on 7th. June 1661, the Duke of Hamilton gained an 'Act and decreit' against James Campbell of Arkinglass for "violent, wrongous and masterful depredation

and robbie" while later in the records of the same Parliament is an "Act and decret in favours of Murdo Maclean of Lochbuie against John MaCalaster Roy alias Campbell and otheris" for murder.²⁷ After 1661 the number of Acts and decreits recorded falls off, with only eight in 1662, but they continue to occur in the records up to and after 1690.²⁸ The cases tried almost always involved important people and could often be fairly described as 'political' cases. This is one reason for the enormous amount of work in 1661, the other being that Parliament was clearing up the great backlog of cases left over from the Cromwellian period.²⁹ However, the fact that cases continued to be brought before Parliament after 1661 indicates that the great surge of business in that year was not the result of its adopting exceptional powers and functions in an emergency: rather, one of the Parliament's normal roles, that of trying certin cases at first instance, became unusually important in the circumstances of 1661.

The final judicial function of Parliament was the issuing of commissions of Justiciary. Twenty-nine of these were issued in the Parliament of 1661, 16 being for the trial of witches with others for trials for bestiality, theft and robbery.³⁰ However this does seem to have been exceptional and unusual and the issuing of such commissions was normally done by the other 'political' central court, the Privy Council. In fact the jurisdictions of Parliament and Privy Council overlapped to such an extent that they can be thought of as virtually one. However it was the Privy Council where, apart from exceptional years like 1661, most of the actual work was done.

The Scottish Privy Council was a body with an unusually wide range of functions and a correspondingly broad competence.³¹ It was a very important legislative body passing acts on a variety of subjects, from the superscription of coins to the importation of

oysters.³² Perhaps significantly, it was the Privy Council which in 1671 passed the initial measure restructuring the High Court of Justiciary.³³ It was responsible for much of the detailed administrative work of central government, particularly after 1671, when Lauderdale became president. Inevitably it played a central role in the national politics of the period and its records are essential for any study of Scottish political history. Last, but not least, it was a court, exercising like Parliament an ultimate and supreme jurisdiction and its records are full of legal matters, cases and appeals. It combined the functions of cabinet, high court and legislative simultaneously.

As said earlier, the Privy Council and Parliament exercised the same jurisdiction with the difference that the Council by 1660 did so on a much more regular and routine basis.³⁴ Speaking in general terms its function within the legal system was threefold. It tried cases which involved very important people or which had some kind of political import, when these were not being handled by the Parliament. It provided a remedy at law which people could turn to when faced with blatant injustice or sheer incompetence on the part of other courts, particularly local ones. It was thus very much a governing or regulating body. Finally, it worked to exercise political control over the workings of the various parts of the legal system and linked its various branches together. In particular it provided a link between the local courts, whose holders often sat in the Privy Council, and the centre of the Scots polity. Put another way, it was the institution through which Scotland's national ruling class, such as it was, attempted to direct the workings of the system in the localities while simultaneously preserving their own local power bases.

The Privy Council tried many cases at first instance, such cases being recognisable by their being called 'complaints'.³⁵ Such

cases were started by the complainer, always a private person or persons, presenting a document detailing their case to the Council which would then issue a warrant giving a particular time and enabling the complainers to cite defendants and witnesses. If they turned up on the appointed day or compeared, as the official term had it, then the Council would hear evidence and submissions from both sides as well as testimony from the witnesses. It could then either impose a verdict and sentence itself or declare the verdict alone and refer the matter of sentence to another court. Very often however, one or both sides of the dispute did not appear: then the case fell and had to be re-started ab initio since a new citation to appear had to be served on the defendant who could also claim costs from the defaulting pursuer.³⁶ If, as was more common, it was the defending party who did not make an appearance then the Council would declare them to be outlaws and order letters of horning to be served. This last was a long and formal legal document which declared certain named persons to be outside the law, fugitive from justice and ordered all their moveable property to be escheated. It was read out in a public place and was announced by three blasts on a horn - hence the term horning.³⁷ This could be backed up by the issuing of letters of intercomuning which were a form of secular excommunication, forbidding all persons from having any contact with the outlaw whatsoever on pain of the like penalty.³⁸ It is important to stress that the issue of a letter of horning, by the Privy Council or any other court, did not constitute a verdict: the named party could apply for a letter of revocation reversing the horning but they would still be liable for trial on the original charge, as indeed they would if apprehended while under horning.³⁹ How effective this procedure was is difficult to tell. Certainly there is much evidence, from Privy Council records and elsewhere, that those parts of letters of horning which excluded the outlaw

from civil society were widely ignored.⁴⁰ However, by this date that may not have been their main function. It seems probable that the seizure of the defendants goods and gear was the main purpose of the exercise, the horning giving the pursuer and local magistrates formal authority to do this - if they could manage it.

On average the Privy Council tried 26 complaints per year after 1660. The records show they were a varied assortment of cases ranging from clearly criminal actions to purely civil disputes. However no distinction was made between one sort of pursuit and another and it is often difficult to place a particular case in either category. Despite the overall variety certain types of case recur regularly and formed the staple legal diet of the council.

Most frequent were complaints of what was called 'wrongous occupation' which meant the forcible and unlawful seizure of disputed property, particularly land and other fixed goods.⁴¹ This was often joined with an accusation of convocation, the illegal gathering together of a large number of armed men, which was a serious crime under Scots law.⁴² The usual result of these cases was that the complainers were given a writ, directed to the sheriff, ordering him to restore the goods to their rightful owners. Almost as frequent were cases of assault, with the records often containing gruesome descriptions of the injuries inflicted. Thus, in 1681, Major John Lyon and the Lord Advocate complained against John McLachlan in Edinburgh for assaulting Janet Kennedy, Lyon's wife, on the highway and beating her so severely that her limbs were all broken and put out of joint and dislocated, the record containing pitiful descriptions of her condition.⁴³ One particular form of assault which the Privy Council often tried was hamesucken. For an assault to qualify as hamesucken the offender had to enter the complainer's house with intent to assault them and commit the offence in the residence.⁴⁴ Cases of this sort are relatively

frequent in the Council's records, often being linked with accusations of the illegal bearing of hackbuts (i.e. firearms).

Other regular, but less frequent complaints, were of wrongful imprisonment, desertion and maltreatment of one's wife, the last two sorts being brought by the offended woman. There were also many oddities such as a case which exercised the Council considerably in 1662, described in the record as one of "rape and seduction" though the details leave considerable doubt as to how accurate this description was.⁴⁵

In those cases where a verdict and sentence were imposed they were not always recorded but fines seem to have been the commonest with the imposition of an assythment also frequent: the case mentioned earlier, of Lyon versus Mclachlane, saw the defendant ordered to pay one thousand pounds Scots of assythment.⁴⁶ The cases almost always involved people of some importance and often had clear political overtones; the Privy Council was very much the 'top peoples' court. Many also involved disputes between groups or communities rather than individuals per se, such as the violent dispute between the Aberdeen burgh council and guild of taylor's which takes up much room in the records for 1662.⁴⁷

However the trials at first instance for which the Privy Council is best known were the overtly political ones, arising out of the savage struggles of the period. Not surprisingly the records are full of actions brought by the Lord Advocate against holders of conventicles, attenders of the same and people involved in the two great uprisings of 1666 and 1679.⁴⁸ The recorded proceedings were often sanguinary in the extreme, with accounts of prisoners being put to torture to extract confessions, the use of the 'boot' and thumbscrews being especially popular.⁴⁹ During the disturbed times of the 1670's and 1680's the Council sent out its members from Edinburgh, armed with commissions giving them sweeping powers, to

'pacify' the country. This meant not only the ruthless crushing of political and religious dissent but also much trying of vagabonds, thieves, robbers and other criminals.⁵⁰ The sending out of these bodies, such as the Committee for the West in the 1670's and the Commission for the pacification of the Highlands, was not simply a repressive response to political unrest and rebellion; it was also part of a general policy of increasing the power of the state and the centre which runs through all the central records of the period.

Besides acting as a court of first instance the Privy Council also acted as a controlling body, intervening in the work of other courts. As with the Parliament, this was almost always done as a result of a supplication or appeal. Many of the supplications recorded in the Council papers are requests for monetary relief or assistance of some kind but there are also many arising out of judicial affairs. By far the most common of these were appeals, often most pitiful, from prisoners held on a criminal charge, asking that they be set at liberty since no one was prepared to press any charge, despite their having been incarcerated for a considerable time, often years.⁵¹ Time and again there were cases of people held in gaol without being brought to trial, who, according to their supplications, had suffered loss of money, employment and health because of prolonged imprisonment in foul conditions. In these circumstances anything was preferable to a continued stay in gaol. The practice of leaving persons suspected of crime in gaol for long periods without pressing charges seems to have been common in all types of crime but particularly in cases of witchcraft. Thus, in 1661 three of the women who had been tried by the Cromwellian Justice court at Stirling in 1659 gave in a supplication stating that they were still imprisoned and asking for a retrial.⁵² The Council agreed, but this would seem to have had

little effect for the same three women gave in yet another supplication to the same effect some months later.⁵³ Interestingly, it was not just prisoners themselves who sent in such supplications: the records, particularly in the 1660's, contain cases where magistrates did so as well on account of the cost of keeping prisoners. Thus in two cases, again from 1661, the Earl of Haddington asked that people held prisoners in one of his private jurisdictions be either tried or transferred to Edinburgh as the cost of keeping them in gaol was "verie great and burdensome".⁵⁴

There were also other types of judicial supplication as well. In 1662 a merchant of Stirling reported to the Council that his estranged wife had "flitted without ane warning" and taken every stick of furniture he possessed, leaving him nothing but bare walls (to use the very words of his appeal).⁵⁵ His supplication asked that an act be passed ordering her to return the goods concerned, particularly his bed! In the same year a man who had been charged with incest but acquitted, asked the Council to order the local magistrates to allow him to live at home and not enforce an illegal decree of banishment against him.⁵⁶ Sometimes the supplication was for a legal warrant, usually one giving the power to arrest and imprison a named person suspected of a crime.⁵⁷ This should not be confused with the issuing of commissions, described later; the warrant was a document giving much more limited powers and in particular it did not give power to hold a trial.

The Privy Council also received, on a regular basis, supplications concerning miscarriages of justice or simple instances of confusion which required sorting out. So, for example, in 1678 there is a supplication from one John Innes, prisoner in the tolbooth of Edinburgh at the instance of the Laird of Innes for assaulting one James Mitchell, one of the laird's tenants. John Innes pointed out that, not only had he been tried and fined by

the regality court of Urquhart but also James Mitchell had formally, and in writing, discharged and renounced any claim or pursuit against him and had not given permission for the Laird of Innes to pursue the case. The Council, on hearing and seeing the evidence, set the petitioner free.⁵⁸ In another example, a supplication was made by James Sinclair of Asserie and - Steil which described how they had been summoned to the High Court of Justiciary to answer criminal letters raised by William Sinclair of Dumbeath but while going to Edinburgh:

"they mutually submitted their differences to Lord Duffus and Lord Tarbert, whereby being put in tuto they returned home."

However the document setting out this agreement did not arrive in Edinburgh until the day after the date set for the trial and as a consequence, they had been fined as absents and the Justices could not reverse their 'act of amerciamento' without permission from the Privy Council.⁵⁹ This was duly given.

The most dramatic way in which the Privy Council could intervene was through the precognition. As mentioned earlier, Acts of Precognition were sometimes granted by Parliament and it was possible for one case to appear in the records of both Parliament and Council, reflecting their shared jurisdiction.⁶⁰ In the case of the Privy Council the relevant document was styled 'Letter of Precognition'. In essence, a precognition was an inquiry into the facts, circumstances and details of an event which had become the subject of a criminal prosecution, carried out by the Privy Council, or its agents, before the case came to trial - hence precognition. While the inquiry was being conducted all further action in the case was halted. This procedure was initiated by one of the parties to the dispute, almost invariably the accused, or more rarely by the Council itself, at the behest of the crown. Where one of the

parties requested it, a document detailing the case had to be submitted, giving reasons for issuing the Letter of Precognition which would stop criminal proceedings and order the parties to appear before the Council for the actual precognition itself. This was like a trial but was less formal and its main purpose was to establish the circumstances surrounding the case. Once this had been done, there were several courses of action open to the Council. It could order the case to be abandoned or alternatively could order the court of law concerned to bring in a particular verdict and sentence.⁶¹ A common choice was to suspend all further proceedings indefinitely but order the accused parties to find caution to 'underly the law' i.e. appear in court if and when the charge was re-activated.⁶² Sometimes the council would ask the parties to reach some kind of agreement. According to Mackenzie there were only two instances where precognition could be resorted to, that is where "considerable persons are interested in the crimes comitted", so that prosecution might lead to violence on a large scale and public disorder, and cases where peculiar circumstances demanded a mitigation of sentence.⁶³ In practice almost any case which posed peculiar problems of law or where the strict enforcement of the law could lead to injustice could be brought to precognition. One good example is the case of William Porteous in Glenkirk versus William Geddes there, for the slaughter of Patrick Porteous, servant to the said William. Here the complexity of the case had led to both parties being imprisoned as the possible killer!⁶⁴ All that was certain was that the unfortunate Patrick had been killed during an affray between himself and his master on the one hand and Geddes on the other, by a gunshot wound caused by a pistol which belonged to his master. The problem of course was to establish who had fired the fatal shot, with Geddes maintaining that William Porteous

had fired at him and hit his servant by mistake while Porteous insisted that Geddes had acquired the pistol during the affray and delivered the mortal wound. The confusion during the affray had evidently been great and the Council was able to establish that both parties had had, and fired, the pistol but in the absence of modern forensic science they were unable to establish which shot had struck the dead man. The result was, the case was suspended with Porteous being fined for the illegal carrying of firearms while Geddes was left in prison, as he was still liable for a charge of ryot. However, a year later he was released on petition.⁶⁵

The lawyers bitterly resented this procedure and Mackenzie argued that it was simply a mechanism whereby malefactors could escape condign punishment.⁶⁶ However, as Irvine Smith has noted, it was in fact a useful, sometimes literally vitally necessary, procedure.⁶⁷ The methods and processes of the criminal courts, particularly the High Court of Justiciary, did not often allow detailed examination of the circumstances of a case and strict adherence to them would have often led to serious miscarriages of justice. Again, in cases involving public figures such as noblemen or entire communities such as clans, the interest of the public at large was clearly involved because of the possible consequences of proceeding according to the letter of the law. The Privy Council's powers were thus an important safety mechanism.

Finally, the Privy Council could intervene by ordering other courts to impose a particular sentence in a specified case. So for example in 1664 the Council ordered five persons convicted by the Justiciary Court of petty theft to be branded, or scourged and then banished from the realm.⁶⁸ Often the imposed penalty involved a mitigation of the full rigour of the law and frequently during this period the Council imposed a sentence of banishment

forth of the realm, transportation to the colonies or enforced military service rather than the statutory penalty of death.⁶⁹

According to McNeil the interventionist activities of the Privy Council became more prominent during the course of the seventeenth century.⁷⁰ This reflected firstly the growing importance of the Privy Council as the effective government of Scotland after 1603 and secondly the growing trend towards regulation of the local judiciary and of the old Justice Court, by the newly aggrandised state. The other main fashion in which the Privy Council interacted with these bodies was by means of the commissions of Justiciary.

The issuing of commissions of Justiciary was, along with the actual trying of cases, the central judicial function of the Privy Council during this period. Through them it controlled, or tried to control, the trial of heinous crimes by most local courts. In essence the commissions granted by the Privy Council were of two sorts; general and specific. The first were documents giving named people, usually members of the Council, wide ranging powers to hold courts, apprehend criminals and try and sentence them, in a specified area of the country, without naming any particular individuals.⁷¹ In essence the council was sending out its members on ayre to exercise the royal rights of Justiciary in particularly troubled parts of the country, by clearing up all the outstanding offences in the area and apprehending malefactors who would otherwise escape, either because of their having powerful protectors or because of their ability to intimidate their neighbours. These general commissions were thus direct interventions by the centre in the affairs of the locality, often linked with attempts to establish political control over an area and at one stage, during the 1670's almost all the members of the Council were out on such commissions.⁷²

More numerous, and in some ways more significant, were the specific commissions. These were writs giving named persons in a locality the power to hold a justice court to try and sentence certain specifically named individuals for particular specified crimes. The commissions had a set, constant format and had, in theory, a standard procedure for both their execution and their production. In theory, a formal commission of Justiciary was granted on receipt of a petition from the magistrates in a locality. A good example of such a petition is recorded in the case of Mary Reid alias Roy in Auchilty from 1689. Here the petition came from the local Kirk session and requested power to hold a trial for infanticide.⁷³ The petition, to be valid, had to request that powers be given to named magistrates, along with others nominate at the Council's pleasure, to try and sentence a named individual, sometimes already in custody, who was 'suspect guilty of the crime of.....' Usually, but not invariably, the petition would also contain evidence tending to prove the suspect's guilt, sometimes a confession made to the petitioning magistrates, sometimes simple assertion of 'common fame and bruit' i.e. notoriety.⁷⁴ The point is that the petition had to state names, crimes and evidence or cause clearly and precisely. If the Council responded positively to the petition a commission would be drawn up which gave a list of magistrates the power to hold and fence a justice court, appoint court officials, call witnesses and parties, hear and try the case and, having heard it, declare and impose sentence. It was always made clear in the preamble that this was a temporary and limited grant of powers, to try and sentence only those people who were specifically named in the petition for the specific crimes alleged and mentioned.⁷⁵ The actual powers were always spelt out in detail because if, through oversight, a particular power was not included in the remit, the commissioned magistrates could not exercise that

power without themselves being guilty of a serious offence, such as wrongful imprisonment or 'oppression'.⁷⁶ If local magistrates, having been given a commission to try certain people for particular offences, wished to try other people for different offences a new commission had to be obtained. Thus in 1649 the Presbytery of Linlithgow having been given a commission to try a woman for witchcraft, and the unfortunate person concerned having named other witches, the Presbytery asked that a general, standing commission be given to them for a specified time but making no mention of names or other particulars. In response:

"The Council refuseth the desyre of this bill as unreasonabill and contraire to the ordinarie course kept in the lyk caises, bot when anie particularis salbe offered concerning anie parties guiltiness, the committee will then tak suche course as salbe agreeable to Justice."⁷⁷

Again, in 1669 a commission was issued for the trial of William Glabraith in Glencavert for bestiality and during his trial he accused one Janet Din in Blacksyd of Boquhan of incest. The consequence was her being brought to trial, but only after a new, separate commission had been obtained.⁷⁸

It must be said that actual events frequently did not conform to the theory: often it seems the suspected parties had been all but tried before the commission was applied for. This happened most often in cases of witchcraft and in 1662, at the height of the post-Restoration witch craze, the Privy Council felt obliged to pass an act stating clearly that no trial or examination could take place before the receipt of the commission and that, in particular, it was a criminal offence to use torture to extract a confession and then apply for a commission.⁷⁹ Scots law was quite clear that the judicial use of torture was a

prerogative of the Privy Council and could only be used when it had given permission.⁸⁰

Unfortunately it is almost impossible at present to say how the trials held under these commissions of Justiciary were actually conducted. Very often no record has survived and those that have are buried in the voluminous and unsorted process papers of the local courts. Some points however can be made. Where possible, one of the Justices Deputes who presided over the Justiciary court would be named in the commission and would sit at the trial, presumably to ensure proper procedure was followed.⁸¹ Also, wherever possible a member of the council who held one of the local jurisdictions in the area whence the petition had come would be named by the commission. Thus, in the case of Stirlingshire, petitions might be brought by local gentry but the Earl of Callendar was always named in the commission, in his capacity as sheriff principal.⁸² Personal links among local magistrates, between the lesser ones and those who had seats on the Council were thus of great importance and worked to tie the local courts and the Privy Council together. As the applicat^s for commissions were invariably court-holders themselves the question arises of what sort of court was held under the terms of these documents. Did they lead to special, ad hoc courts being held, as the style used would suggest, or did they simply grant temporary Justiciary powers to the existing local courts in an area, such as baron, sheriff and lesser regality courts? Probably both could happen but the second seems more likely, a supposition born out by what evidence there is available.⁸³

Between 1660 and 1672 commissions of Justiciary were issued frequently and regularly. On average, about 12 to 16 would be given out, for a variety of crimes.⁸⁴ The years 1661 and 1662 saw the issuing of 21 and 75 commissions respectively but these figures were distorted by the witch craze, with witchcraft cases

accounting for 17 and 56 of these totals, and by the backlog of cases from the Interregnum. Besides witchcraft, commissions were given for a whole range of serious crimes but particularly for murder, theft, infanticide, [§]betiality and incest.⁸⁵ Other crimes, such as rape, did figure but these were rare compared to the five listed above.⁸⁶ After 1672 the number of commissions given out fell sharply, to an average of less than 10 per annum; this reflected both the establishment of the High Court of Justiciary in that year and the impact of the turbulent politics of the time. In particular the sending out of members of the Council on ayre meant that cases which might otherwise have been tried on a commission were instead tried directly by the Council. Thus in 1678 the Committee for the West gave orders to:

"the sheriff-~~of~~put of Stirling or baylies of
Falkirk or any one of them to sett at liberty
James Alexander of Pitskelly, prisoner in Falkirk"

as he had given bond to appear before the Committee at Ayr to stand trial for theft and ryot.⁸⁷

What then was the significance of the commissions of Justiciary granted by the Council? At first sight they would appear to have been given out freely but further thought corrects this impression : apart from the witchcraft cases the number of such commissions was relatively low, considering the size and population of the geographical area from which the petitions came.⁸⁸ The practice of issuing such commissions has been seen by many commentators as a fundamental weakness of the system, to be deplored and disparaged.⁸⁹ This view completely misunderstands the situation : in fact the institution of commissions of Justiciary was a sign of strength on the part of the monarchy and, at this stage, the main means whereby control was maintained over the activities of the local courts. Several points should be made in this connection. In

the first place, given the state of communications and the practice of having a jury drawn from the place where a crime had been committed such local trials were often the only acceptable means whereby malefactors could be tried and executed. The books of adjournal of the Justiciary court are full of references to cases being continued or even deserted because of the difficulty in getting all the parties to be in Edinburgh at the same time, particularly when long distance travel was involved.⁹⁰ Often, the practical alternative to trial by a commission was summary justice, carried out by local people outside the formal legal structure. This sort of thing must have happened fairly often but the system of commissions meant that such practices were checked and regulated. This was particularly important in the case of witchcraft where the system worked to restrain ardent local magistrates and to limit the scope of crazes and panics.⁹¹ So in 1662, as well as passing the Act mentioned above, the Privy Council inserted into all its commissions for trying witches clauses which stated that torture should not be used and that accused persons should only be sentenced to death on the basis of their own 'free confession' rather than the evidence of other accused persons or statements extracted by torture or deprivation of sleep.⁹² The Council's insistence that new commissions should be applied for whenever a new name was thrown up in a local craze again tended to check the growth and spread of such panics.

In fact the way the system worked in general was to restrict the power of the local magistrates, who were bound strictly by the terms of the commission given to them. Modern historians should ask why local courts and their holders bothered to ask for such commissions. The fact of their doing so is a sign of the power and status of the monarchy and its courts rather than of their weakness.⁹³ Of course the obvious question is why did the

royal courts, particularly the court of Justiciary, not go out on ayre and try such cases themselves? Here misleading comparisons can be made with the situation in England, where the assize ayres established by Henry II and later consolidated by Edward I enjoyed a virtual monopoly of serious criminal business in the provinces. In Scotland the physical geography and climate of the country made such a system difficult to emulate but, more importantly such a comparison ignores the marked differences between England and Scotland. Even in the later seventeenth century they were still two polities of radically differing types.⁹⁴ Scotland was a far less homogeneous and united political entity, made up of many small and still quite distinct economic and political units. The Highlands and Island were in some respect a different country from the Lowlands, divided as the two were by barriers of language, culture, lifestyle and, increasingly, political allegiance.⁹⁵ There were deep divisions within Highland and Lowlands : thus in Stirlingshire the evidence suggests that the North-West and South-East of the shire were two separate entities, economically, socially and politically.⁹⁶ Economic life was still based on small, localised units and a truly 'national economy' was only starting to emerge after 1600 and had still not clearly been established by 1690.⁹⁷ Most significantly, the national state of seventeenth century Scotland which bound together the various local communities was still largely personal, founded upon the inter-personal relations of a relatively small number of men, who derived their ultimate power from their control of, and dominance over, a particular local community rather than from access to and control of the institutions of the state. In the last analysis, the power of the Argyll dynasty rested upon their dominance over the society of the West Highlands, that of the Gordons upon their control of much of the North-East while the importance of the Livingstones and Grahams at the national level

derived primarily from their strength in places like the Lennox, Falkirk and Linlithgow.⁹⁸ In this scheme of things the local courts had a central position, being one of the key mechanisms by which the ruling class maintained their local power, in every sphere of life. In such a social order it was not possible to have an institution like the assize circuits of England nor, from the point of view of the ruling class, was it desirable. It was for precisely that reason that the attempts to set up regular Justice ayres in 1587, 1588, 1594 and 1629 all failed.⁹⁹ The problems experienced by the Cromwellian government also derived from this, or rather from the initial failure of the regime to understand the nature of the system they were working with.

Given all this, the system of Privy Council commissions, and its other interventionist activities, make sense. They were the means whereby the ruling elite could attempt to regulate and co-ordinate the workings of the system in the locality while leaving the essential independence of the local courts untouched.¹⁰⁰ However, as argued, the more activist policy of the Council and its attempts to enforce the conditions of commissions and warrants do show a shift towards a more interventionist policy on the part of the central government, which was undoubtedly growing in power and importance throughout the century. In the last analysis this was a response to the events and changes of the times, which led increasingly to a changing perception of their interests on the part of Scotland's ruling class.¹⁰¹ Moreover the old order depended for its functioning upon a reasonable degree of consensus amongst the magnates who controlled the major local jurisdictions and sat in Parliament and Privy Council. After 1660, or even the early 1640's, no such consensus existed, the consequence being the savage struggles for power described by writers such as Buckroyd; struggles to a large extent for control of the newly emerging state and which

paradoxically enhanced its power and growth as each side sought to use the machinery to dominate and crush the opposition.¹⁰²

It is against this background that one should try to assess developments in the role and jurisdiction of Privy Council and Parliament between 1660 and 1690. These two bodies were the institutional expression of the national community and the central role of the monarchy in that community. So far as the legal system was concerned they were the bodies which settled disputes amongst the court-holders and co-ordinated and regulated the workings of the system. The period undoubtedly saw a growth in their power and importance and an assertion of the central government and its role, partially successful. Parliament was much more active after 1660 than before and it made several attempts to reassert, or even establish, its authority over other courts. For its part, the Privy Council, as argued earlier, was engaged in activities which were designed to enhance the power of the monarchy in all spheres, not only the political. There were also other moves, made through both bodies, which tended to enhance the power of the centre. Most notable was the assertion with great force that the monarch was the sole source of jurisdictional right, which took several forms. In 1681 Parliament passed an "Act asserting His Majesty's Prerogative in Point of Jurisdiction" which stated the doctrine clearly and bluntly.¹⁰³ Another feature of this move was the insistence that all who acquired a jurisdiction of barony or regality should obtain an Act of Ratification from Parliament confirming the same and so establishing the point of theory that these were jurisdictions held by franchise, not as of right.¹⁰⁴ In the Privy Council records the style used in commissions of Justiciary changed in a way which reflected this preoccupation. In the period after the restoration the style used was "The Lords of His Majesty's secret Council do grant etc." but after 1663 a preamble was adopted, beginning "We,

Charles, by the Grace of God, King etc." which made it clear that the Council was granting a dispensation to use a peculiar royal jurisdiction and power.¹⁰⁵

Of course one may ask how far this rhetoric and theory was reflected in practice : one suspects, at first not very much. On the other hand attempts were made to put it into effect, most notably following the Test Act of 1681 when several heritable jurisdictions, including the regality of Falkirk and the sherriffdom of Stirlingshire, were declared to have reverted to the crown, their holders having failed to take the oath.¹⁰⁶ In fact the jurisdictions were simply granted out to supporters of the government so that in Stirlingshire the Earl of Mar became hereditary sheriff while the Earl of Linlithgow took over the regality of Falkirk from his kinsman the Earl of Callandar. However the point of principle had been made.

The other main development in the years after 1660, and the central one so far as the criminal law was concerned was the reform and partial restructuring of the central courts of law other than Parliament and Privy Council, particularly the Justiciary court. There were several royal courts based in Edinburgh, each exercising a slice of that royal jurisdiction which Parliament and Council wielded in totality. During the development of the feudal monarchy each of the great officers had come to preside over one court. The Constable's court, which is still officially in existence, had jurisdiction over all crimes of violence committed within one mile of the royal person and was also responsible for the enforcement of the Law Martial.¹⁰⁷ The Admiralty Court, which had a specialised but important jurisdiction, ruled over territorial and navigable waters, trying all crimes committed in these areas as well as concerning itself with a wide range of business ranging from piracy through smuggling to disputed contracts.¹⁰⁸ The maritime law which

the Admiralty court enforced was not a home grown product but rather the code of the Baltic port of Visby, reflecting the international nature of maritime and mercantile law and also Scotland's close trading links with the Baltic. Another of the central courts which had been very important at an earlier date, was the Chamberlain court, an outgrowth of the 'court of the four burghs' and hence closely linked to the Convention of Royal burghs. This court was responsible for interpreting and enforcing the customary law of the burghs and the laws made by the Convention. It had exercised a jurisdiction of appeal over burghal courts and gone out on ayre through the royal burghs - all this reflecting the extent to which the royal burghs formed a truly national community.¹⁰⁹

There were other, even more specialised courts, such as the court of teinds and the Lyon court but by far the most important central court so far as criminal law was concerned was the court of the Justiciar, the Justiciary or Justice court. The early development of this court has been described earlier, with particular attention to the reforms of 1628. In 1660 the Cromwellian Justice court was abolished and the position which had existed from 1628 to 1650 was restored. Indeed, even the personnel were brought back with Justice Deputes Colville and Robertson returning to the bench to resume their judicial duties and try most of the cases. However, events did not stand still and the Restoration years saw several technical, but significant, changes in procedure as well as one major structural overhaul.

The Justiciary court has left four classes of record which are of particular interest to the historian.¹¹⁰ The sittings of the court in Edinburgh are recorded in the Minute Books and Books of Adjournal. In theory the former contain a verbatim account of the court's proceedings while the latter have the same material more

formally presented. In fact the two records are to all intents and purposes identical. Both are mainly concerned to record the verdicts and decisions of the court and the legal arguments which took up so much time in court and so much space in the record. There are also several records of circuit courts or ayres, similar in form to those which have survived from the 1650's. Lastly, there are the voluminous but fascinating process papers, which have recently become much more accessible and useable.¹¹¹

The court which left these records was primarily concerned with the trial and punishment of serious crime. Yet its records contain examples of what we would now consider minor offences as well, reflecting its cumulative jurisdiction.¹¹² Basically it was the King's Justice court, providing for those lieges who could obtain access^{to} redress for serious criminal wrongs and working, albeit against great odds, to maintain order by doing this and imposing exemplary punishment on those whose actions threatened to disrupt the social fabric.

During the seventeenth century, cases were brought before the Justiciary court by three distinct methods : by direct prosecution on the part of the Lord Advocate, through the public indictment or dittay and by means of criminal letters.¹¹³ It was the last which was by far the most common, accounting for more than half of all the cases brought between 1660 and 1672. In all three cases the actual prosecution in court was carried out by the Lord Advocate or his substitute and it had been established since 1587 that no prosecution brought by individuals could proceed without his consent.¹¹⁴ His right to prosecute in the absence of complaint by injured parties, in cases where the royal interest was not directly affected, was not so clear : as shown later, this was one of the areas where important change took place before 1690. The procedure followed in

raising criminal letters was broadly the same as that described earlier for the local courts. In fact examination of the Justiciary court's records reveals a court which in much of its procedure was very like the local courts described earlier.

Prosecution by criminal letters went through four distinct stages before arriving in court. The first was the drawing up of the letter which, like the criminal bills of the local courts, contained a long and detailed account of the alleged crime, together with demands for specified penalties and assythment. The letter had to give details of time, place and other circumstances and was commonly divided up into specific and separate headings or paragraphs, known as 'points', each giving details of a particular aspect of the offence.¹¹⁵ Most notably, in almost every case the letter had to describe some kind of actual harm, or 'skaith' as it was called, done to the complainer. Last but not least the letter would name 44 potential jurors : as in the local cases cited earlier it would seem that the accuser could select the final 15 names from the list.¹¹⁶ The second stage of the process was for the letter to be served on the accused person while at the same time a copy was sent to the Lord Advocate in Edinburgh, and, for payment of a fee, passed under the signet. This second step was often not taken, despite the fact that it was an offence not to do so: the Books of Adjournal contain many references to parties who had raised criminal letters being fined for failing to report them to Edinburgh.¹¹⁷ After this a warrant was sent out from Edinburgh ordering the parties, the assize and the named witnesses to appear before the Justice court on a named date. This deadline was very seldom met because of the problems involved in getting such a large number of people to appear in court on the same day, particularly when some had to travel a long distance. As a result cases in the Justiciary court were very often continued from one sitting of the

court to another, often for months at a time.¹¹⁸ The final stage which overlapped with the third and continued after the start of the actual trial, was the investigation of the cases by the Justice-deputes or by subordinate magistrates. This was not always done and as a consequence cases could be brought to trial for it to emerge that no evidence could be presented to support the charge.¹¹⁹

Investigation played a more important role in the second route whereby cases were brought before the court - the public indictment or dittay. It is commonly supposed that the dittay was a form of public prosecution, as opposed to the private prosecution of criminal letters but in fact the status of this type of indictment was ambiguous.* Dittays could be raised in three distinct ways, each of which tended to produce a different pattern of indictments. The first was through the long-standing mechanism of the Porteous Roll, whereby the sheriff of a county was ordered to collect information as to malcontents and malefactors. A writ was sent to the sheriff and to the other magistrates of a shire asking:

"Are there any within the shire of (name of county) guilty or suspect guilty (follows a long list of crimes, ranging from treason to such offences as cutting trees or steeping lint)"¹²⁰

Upon receipt of this document, the sheriff would appoint people to be collectors of dittay : they in turn would send out writs of dittay, formal standardised documents which ordered named persons to "give up dittay against all delinquents", to important people in each local community, particularly the Minister, session Elders and the miller.¹²¹ They would then appear before the collector of dittay and either 'depone negative' i.e. say that they knew of no delinquents in their community, or else name particular persons as

* At least that is until the reforms of 1709. See below pp468-9

guilty of certain crimes. If the latter, they would then be asked by the collectors to give detailed evidence on points such as the precise circumstances of the crime, the time and place of its commission and any aggravating aspects.¹²² The collectors could also investigate the matter further, by calling witnesses or obtaining extracts from Kirk session or other court records. They could also proceed on the basis not of information acquired from a cited person but of "common bruit and fame" i.e. notoriety and rumour.¹²³ When all the information had been collected it would be put together in formal style to make up the dittay or indictment which was almost identical in structure to a criminal letter except that no person was named as the particular pursuer. The dittays were all written down on one long roll, the Porteous Roll, which was then sent to Edinburgh.

Dittays could also be drawn up on the basis of what was called private information. This referred to information given in voluntarily to the collector by a private individual who had not been cited by writ of dittay.¹²⁴ Thus in 1709 the session records of Kilsyth contain a case where a complaint of slander was brought against an individual for saying that the pursuer had gone to Stirling to submit private information (of infanticide) against his fellow parishioner.¹²⁵ In both this and the previous procedure the dittays, although collected by the central governments agents, were still essentially private documents deriving from personal injuries and the feelings and desires of individuals and the local community. If a person cited wished to do so they could simply depone negative in the face of their own knowledge and if a community, for whatever reason, did not wish to see a particular delinquent prosecuted it was a simple matter for a conspiracy of silence to be enforced.¹²⁶ On the other hand this mechanism enabled people to accuse persons who would otherwise have gone unprosecuted, because of the failure

of the immediately injured party to raise criminal letters, The collection of dittays provided a mechanism whereby local conflicts, often ones which had been outstanding for some time, were brought into the central Justiciary court. It provided a means for prosecutions to be brought and complaints made in instances where no direct, personal interest was involved.

The third source of dittays was direct indictment by local courts, particularly Kirk sessions. When a person had been examined by a court and had 'judicially confessed' to an offence or when examination of witnesses and evidence had produced a strong case against an individual, the court concerned could draw up a dittay and submit it to the Justiciary Court in Edinburgh.¹²⁷ As mentioned, church courts were by far the most active in this regard, reflecting both their power at a local level and their investigative, even inquisitional role. The Justice of Peace courts were also often involved but very often the individuals concerned chose to wear their session Elders' hats. This procedure was in fact the most important institutional link between the church courts and the central criminal courts, with the local sessions easily the most important and active investigative branch of the judiciary. One of the consequences of this, discussed later, was the high proportion of sexual and moral crimes in the Justiciary court's work.¹²⁸ In the absence of a police force, or a system of J.P.'s like that of England, this was the closest approach possible to a public investigation and prosecution service. Of course, the members and holders of local courts could submit dittays to be entered in the Porteous Roll which would clearly carry weight as they could be backed up by confession and other evidence. However in such a case they acted, in theory, in a private capacity and not as officials bound by duty to investigate and report crime. Independent dittays were indeed by and large not as important or numerous as those

collected by the Justice-Clerks. The dittay system in this period of Scots history still relied ultimately upon personal and private initiative rather than the workings of a public investigative force. It makes sense to think of it as a complaints procedure, designed to handle and direct complaints from 'below', rather than as a truly public system of prosecution.

Of the third source of prosecutions after criminal letters and dittays little need be said. The Lord Advocate could clearly prosecute directly where the interests of his master, the King, were involved. This meant not only treason in its many forms, including the peculiarly Scottish crime of 'leasing making'^{*} but also such matters as counterfeiting of coins, the 'venting' (i.e. use) of counterfeit currency and deforcement of the Crown's servants.¹²⁹ The interesting point is that the 'interest' of the monarchy and its state did not clearly include the upholding of general peace and the prosecution of all malefactors. It was not clear even at this date, that the state had an automatic right to prosecute in cases where the injured party refused to do so or where a private prosecution was dropped for one reason or another.¹³⁰ At an earlier date, before the Act of 1587 the position had been clear: the responsibility for prosecution lay with the injured party or their kin and if they refused to proceed no case could be raised. During the seventeenth century the contrary principle, that the Lord Advocate could continue a prosecution after the private pursuer had withdrawn or initiate a prosecution when an injured party failed to do so, was gradually established, a critical decision being the case of Patrick Bald in 1649.¹³¹ However, as Irvine Smith points out, the crown did not appear to be wholly certain of its right and even in this period sometimes played safe by applying for a privy council warrant in a case where the prosecution had lapsed.¹³² Moreover, theory was one thing, actual practice another. If the parties to a

* 'Leasing making' meant the creation of dissension between a King or lord and his subjects.

case before the Justiciary court came to an agreement to settle the dispute, it was almost impossible to proceed, even in cases such as slaughter or other serious crimes of violence. For example, in 1662 an action was brought by Agnes Livingstone, relict of James Ure of Shragartoun and her tenants against John Menteith of Strowieleeg and John Wright his miller for robbery, theft and 'oppression'. However, three months later the parties came to an agreement, the pursuers failed to appear in court to 'insist' (i.e. press their case) and as a result the whole case was dropped.¹³³ Again, in the absence of a police force the only means whereby the Lord Advocate could learn about criminal offences in sufficient detail to prosecute was by means of the raising of criminal letters and the collection of dittays - both requiring at this period co-operation from the public at large. So in practice the initiation and continuance of prosecutions still depended upon the decisions of private individuals.¹³⁴ Even in the case of a suit brought on the basis of a dittay the co-operation of the local community and courts was essential. On the other hand one should not underestimate the importance of the theoretical extension of state power in this area. All that was lacking by the 1660's and 1670's was machinery to give it force.

All this raises the vexed question of title to prosecute : apart from the Lord Advocate who did have the right to bring criminal prosecutions before the Justiciary court at this period? The criminal letters preserved from the post-1660 period show that, as in the local courts, criminal letters could be raised at the instance of either persons directly involved, styled as pursuers or complainers or others with a more exiguous connection to the offence, termed informers.¹³⁵ The basic principle was that the person who brought the prosecution must have suffered some kind of personal loss or 'skaith' either directly or indirectly. Persons

who could bring action as pursuers included not only the actual victim but also their relatives, their master and their landlord or feudal superior.¹³⁶ Suits could be brought by an informer where delinquent action had somehow harmed all the members of a community. This included such offences as disruption of church worship and also moral crimes such as incest.

Offences could thus be prosecuted either by the injured through criminal letters or by the Lord Advocate on the basis of information either gained directly or via dittay. What then happened once the accused had been 'entered in pannell' i.e. brought into court and charged? Almost invariably the first stage was an argument between the lawyers for both sides as to whether the indictment was valid and should be accepted by the court. These debates, which take up an unconscionable amount of space in the Books of Adjournal, were often amazingly long winded, with replies, duplies, triplies and even quadruples all given at great length. Eventually the Judge would give his decision on the question of relevance by means of the 'interloquitur' a statement of the legal principles involved.¹³⁷ If this upheld the validity and relevance of the prosecution the next step was to ask the accused if they admitted the verity and accuracy of the bill of indictment. If they did, then sentence could be proceeded with fairly swiftly, If not, then the trial would proceed in much the same way as it would have before a local court. The defendant could refer the matter to the pursuer's oath of verity or the slightly different procedure of an oath of calumny. This was used in cases where the pursuers were not directly acquainted with the facts and therefore could give no clear answer to an oath of verity. Essentially the pursuer was asked under oath if his action sprang from real injury as opposed to malice.¹³⁸ Providing this hurdle was passed, the Justice would then 'refer the case to the knowledge of ane assize'. To a large extent

this phase was still taken literally - the jurors were expected to have personal acquaintance with the facts of the case and its background. This was the reason for the preference for local juries, even when this meant 15 men journeying a considerable distance. Often, because of the difficulty involved, a majority of the assize would be drawn from Edinburgh but as many people as possible from the 'locus delicti' would be included. The Scots jury, even at this level, was still more like an inquest than a modern jury.¹³⁹ However, the jurors were not left entirely to their own devices as information was put before them in various forms. In the first place they would have a copy of the indictment with its lengthy account of the circumstances of the case. There was also evidence given by witnesses, almost invariably using the 'deposition' method.* This was often done in court but could be done elsewhere with the results being drawn up in a roll and sent on to Edinburgh. As in the local courts cross examination of witnesses was unknown, but, following the case of Janet Corsar in 1649, the principle that the defense might submit sworn evidence was allowed.¹⁴⁰ Much of the substance of defence cases however was contained in the initial assault upon the relevancy of the indictment with matters such as alibi, factual accuracy and veracity all grist to the defense advocate's mill. Finally the jury would deliver its verdict and either "find the libell proven" or "cleanse the defendant as to the libell and assolzies (absolves) them". Its main job was thus to establish the status, true or otherwise, of a particular indictment by means of its own knowledge and examination of evidence put before it. As a consequence the strict concept of double jeopardy was unknown : if one particular indictment failed it was open to the pursuers to simply draw up and present a new,

* For the distinction between this and the 'interogative' see above pp259-60.

different one.¹⁴¹ This happened in witchcraft cases: thus in the great craze of 1661-62 one Margaret Hutchison appeared in court in August 1661 on a dittay containing nine points of which she was cleared by the assize. The prosecution, far from being dismayed, empannelled her a month later on a new dittay and she was duly convicted and sentenced to death.¹⁴²

One thing juries could and did do was to acquit parties in the teeth of truly damning evidence. Thus in one case a certain Margaret Ramsay in Edinburgh was charged with having concealed her pregnancy, failing to call for help at the birth and with casting the dead child into the Norloch where it was found some days later. All this constituted a prima facie case of infanticide, even with a still-born baby and she confessed all the points of the libell to her Kirk session yet despite this the jury 'cleansed' her.¹⁴³ By contrast, in the case of Barbara Smith servant in Grothill the defendant, who was convicted of killing her child by pushing peats into its mouth with a stick till it died, was swiftly declared guilty and hanged.¹⁴⁴ On the other hand in the case of Ramsay already mentioned the jury, having "cleansed her of the libell" referred her to the Justice depute for an 'arbitrary' punishment. She was sentenced to be flogged and then banished from Edinburgh.¹⁴⁵

In fact arbitrary is the term modern lawyers might well use to describe the penal policy of the court which was, by present day standards, inconsistent, even capricious. In fact this policy was motivated by the deeply held belief that the punishment should fit the crime and that each case should be taken on its merits before deciding what the appropriate sentence might be. Cases of murder other than infanticide, incest, bestiality and treason always attracted the death penalty. Hanging was the normal form of execution but decapitation was used and of course burning, preceded by strangulation, was the usual penalty for witches,

sodomites and bestiality. In the case of property crimes the penalties were more varied. Death was the normal penalty where the theft was aggravated by violence or in cases of serious, large scale theft, which meant almost invariably theft of livestock. Thus John Watson in Lamington was found guilty of stealing forty sheep and was hanged, despite his having returned all the stolen animals.¹⁴⁶ Again, in the case of Marion Shorless versus John Dicksone and George Cleping both were hanged for a violent theft, made worse by its being done in the victim's home which made it hamesucken.¹⁴⁷ On the other hand in a case where two Pentlands sheep thieves had been taken with the fang the court dismissed the case against one because of his youth (less than twelve) and ordered the other to be branded on the cheek and then banished from the Lothians.¹⁴⁸ Often the Justices would ask the Privy Council for guidance as to the sentence. They did this particularly in cases of theft, where the period after 1660 saw a debate as to the proper level of sentence, and 'notour adultery'. For both of these the maximum penalty was death but the Council often instructed the Justiciary court to commute this.¹⁴⁹ As the examples above suggest; for thieves the key questions were the scale of their depredations and whether they were notorious criminals or first time offenders. During this period the penalty for 'notour adultery' was always reduced either by the Council, or, more rarely, by the Justices themselves. The normal reduction was to a sentence of public flogging and banishment - sometimes forth of the kingdom but often simply out of a specified region or shire. On the whole though, the Justiciary court imposed harsh penalties with a clear majority of those convicted being sentenced to death.¹⁵⁰

All this assumes though that the case would actually be concluded - a most unwise assumption to make. The Books of Adjournal

contain records of cases commencing which have no further mention; in others the pursuers simply failed to appear and the diet was deserted or abandoned. In yet more the parties withdrew the case from the court during its process by mutual agreement. More detailed examination of the process papers for this period might reveal cases which were started, with criminal letters issued, but where the case never came before the court. Moreover, the cases where people were fined for failing to report criminal letters and then ordered to 'insist' their case suggests that many criminal letters were issued which did not even lead to a citation to Edinburgh. Sadly, it is impossible to put a number to such cases and they must remain a 'dark figure' as obscure as the number of non-detected crimes.¹⁵¹

What all of this reflects is the great importance of the private settlement or 'composition' as it was often called. No doubt many cases did fall because of the difficulty of prosecuting them at such a distance from the locus delicti and others may have ceased to progress because of sheer accident or when it became clear that the evidence was inadequate. However, the evidence of the central court records does suggest very strongly that most terminated suits were stopped by private agreement. The problem is that this is not always recorded in the Books of Adjournal. Sometimes the entry will specifically state that the pursuer had reached an agreement while on other occasions the record will mention, and the process contain, a remission.¹⁵² This was a document, cast in the form of a letter directed from the monarch, which forbade any future prosecution of the case either by the original private pursuer or by the Lord Advocate. It thus had the same effect as a pardon and can be seen as an exercise of royal prerogative. However a letter of remission was not precisely the same as a pardon for two reasons : it did not clear the recipient

of his original guilt but remitted (i.e. waived) the punishment and it was not a 'free gift' as pardons in theory were. For one thing remissions could be purchased. More importantly they were given out only when the guilty party had bound himself over to pay compensation to the victim.¹⁵³ The letter of remission was thus a purchase of freedom from punishment in return for recompense. The point of applying to the state authorities was firstly to make the agreement binding and secondly to ensure that the lapsed prosecution would not be taken up by the crown. Very frequently the Books of Adjournal only show that a case had stopped and the evidence of private agreement is either buried in the process papers or simply not available.

It would seem likely that many of the private prosecutions brought before the Justiciary court were attempts to force a settlement to a dispute and obtain compensation; they were thus rather like civil suits but with the extra ingredient of criminal penalties which might push a reluctant party into an agreement.¹⁵⁴ In fact, many cases that we would now consider criminal were prosecuted before the Court of Session, particularly instances of theft, and the Justices also sometimes declared actions brought before them to be civil and sent them to the Session.¹⁵⁵ The main purpose of many prosecutions would therefore be the acquiring of assythment rather than retribution and some cases are very revealing in this regard. One particularly revealing one is George Scott versus Alexander Gordon. Here Scott had pursued Gordon before the Aberdeen Sheriff court for ryoit and effusion of blood and had been awarded twenty pounds of assythment and a fine of fifty pounds, payable to the Sheriff. On the very same day that this verdict was announced a criminal letter was drawn up, alleging hamesucken which was served on Gordon and thus brought his case before the Justiciary court. They, on the basis of the evidence of the indictment and the

roll from the local court dismissed the charge of hamesucken but then reassessed the penalty, awarding one hundred pounds of assythment and reducing the Sheriff's fine to only twenty pounds.¹⁵⁶ This looks very much like a case where the pursuer, disappointed in the result obtained before the local court, successfully brought suit before the Justiciary court for a better settlement.

Clearly, such results and private agreements were only going to happen in private prosecutions rather than those resulting from dittay or direct prosecution by the Lord Advocate. This brings one back to the question of the types of offence prosecuted by the court's plaintiffs and their actual provenance - did the different sorts of prosecution produce different crimes? The answer is clearly yes. The cases prosecuted directly by the Lord Advocate were all 'state political' crimes, ones which directly touched the interest of the crown. Prosecutions by criminal letter tended to be for offences such as theft, robbery or personal violence together with an assortment of prosecutions for a range of minor breaches of law, many of them coming under the heading of good neighbourhood.¹⁵⁷ The cases brought under public indictment by dittay were different again. Those collected by the Justice Clerks favoured moral offences such as adultery, bestiality and usury while the ones submitted directly by the local courts, particularly of course Kirk sessions, were mostly accusations of witchcraft, incest and infanticide. Other crimes, particularly theft, were brought forward from all sources.

The most striking feature of the Justiciary court's business was its variety, a reflection of its all embracing jurisdiction. It is very difficult to classify or categorise this mass of material and any system of taxonomy will inevitably have severe drawbacks, being a reflection of the concerns and concepts of the modern historian rather than of seventeenth century Scots. On consideration several distinct ways of classifying the court's

work come to mind. The traditional method is to categorise cases by placing them in certain conventional legal pigeon-holes. This approach produces six broad classes of business; serious crimes of violence such as murder, slaughter and rape and also hamesucken, deforcement, mutilation and the peculiar case of infanticide; crimes against property, including both theft and robbery but also such offences as falsehood and stellionat^{*}; a whole range of moral crimes, from adultery through bestiality and incest to usury; the 'crimen exceptum' of witchcraft; political crimes such as treason, rebellion and uttering and lastly the assorted 'other' offences which defied categorisation. Using this analysis one can say that the largest single category of offences was that of personal violence, with slaughter the commonest.¹⁵⁸

Prosecutions for murder were rare, no doubt because of the extreme difficulty of apprehending and successfully prosecuting the perpetrator of a concealed killing - even when circumstantial evidence was allowed, often providing the sole grounds for conviction.¹⁵⁹ By contrast infanticide cases were much more common, and, apart from witchcraft, this was the crime most likely to bring a woman before the court.¹⁶⁰ This may be because the practice was widespread but it probably reflects the relative ease of detection and proof. Rape, mutilation and demembration were rarities but deforcement and hamesucken were a part of the court's staple diet, the latter often linked to accusations of invasion and oppression i.e. the forcible seizure of goods and lands.¹⁶¹

Property crimes formed the second largest class, with robbery and theft easily the most common. The only other property crime of any significance was falsehood, meaning most often the forgery of legal documents for unlawful gain.¹⁶² It is hard to draw

^{*}Stellionat means to wrongfully gain goods by deceit or trickery. See fn68, p486.

a clear distinction between this class of offences and crimes of violence because of the status of robbery which by definition was a criminal offence involving violence of some sort.¹⁶³ Often it was only the nature of the locus delicti which determined whether a prosecution would be for robbery or for hamesucken. The court was also much exercised by a whole range of sexual and moral offences of which the most frequent was adultery. To come before the justiciary court an adultery case had to meet a whole range of conditions which made it into 'notour adultery'.¹⁶⁴ Moreover, many adultery cases tried by the Justiciary court also involved accusations of infanticide, of the murder of children conceived in adultery.¹⁶⁵ The central court records do not contain many of the kind of 'simple adultery' cases found in the records of the circuit courts from the 1650's and the 1670's. The only exception to this was the period 1671-3 when the workings of the 1671 circuit produced a great upsurge in adultery cases brought before the court in Edinburgh.

By contrast there was no hesitation where the 'abominable' crimes of bestiality and incest were concerned. Here prosecution would appear to have been automatic - if the perpetrators could be caught.¹⁶⁶ Another fairly common offence was usury, this was a statutory crime, the term being interpreted to mean the charging of excessive interest rather than levying interest per se.¹⁶⁷

Of the peculiar crime of witchcraft much is said elsewhere. During the period after 1660 there is a great rush of cases during the craze of 1660 - 62, and after that only a few appear.¹⁶⁸ On reading the evidence and indictments one can only agree with Smith's remark that they show no limit can be placed upon human credulity and prejudice.¹⁶⁹

Many of the cases tried by the Justiciary court were clearly political in nature being prosecutions for treason,

rebellion and insurrection and also for counterfeiting and circulating forged coins, which was seen as a special form of lese majeste. Not surprisingly, there are many such political cases in the record for this period, from the uttering of seditious speeches to taking part in the uprisings of 1666 and 1679.¹⁷⁰ Finally, there is a body of miscellaneous cases, some of them simply idiosyncratic, others minor offences such as regrating and cutting of green wood.¹⁷¹ These cases simply show the absence of any hierarchical division of labour in the old legal order, a situation redolent of chaos to the modern lawyer's mind.¹⁷²

Yet, as suggested above, this traditional mode of classification and analysis, although both useful and fruitful in its own way, has serious flaws. In the first place the categories employed are very hard to define precisely and in any case tend to reflect the assumptions made by modern legal theorists. Is the distinction between crimes of violence against the person and crimes against property a truly valid one - in seventeenth century Scotland?¹⁷³ The problem of where to draw dividing lines is acute - should robbery and oppression be counted as crimes against the person or property? Is usury a moral crime or a property offence? For that matter adultery can be seen as a form of theft and often was.¹⁷⁴ In fact such an analysis reflects the imperatives of the modern legal system where all crimes are conceived of as public wrongs and breaches of positive law and are therefore classified according to the kind of challenge they present to that law or to public order. Applying this analysis to the circumstances of seventeenth century Scotland, where such concepts were not yet dominant, can thus be informative but also dangerously anachronistic.¹⁷⁵

In particular it leads to the conclusion that the Justiciary court was somehow crippled or hobbled, part of a disorganised and even chaotic system, lacking the powers it needed to fulfil its

duty and purpose and hence ineffective. It can also lead to the conclusion that Scots society was extremely violent and brutal with often savage crimes of personal violence the dominant form of law-breaking or at least the form which most concerned contemporaries. Neither of these is necessarily true and both can be shown to derive from misunderstanding. Are there then any other patterns of analysis which can be used to supplement the first one and to check it? Two at least suggest themselves.¹⁷⁶

The first approach is to try and categorise the business on the basis of the types and motives for prosecution. The question of motive is an important one for the study of any legal system but is particularly significant when looking at a system where private prosecution has a central position.¹⁷⁷ To revert to the points made earlier, private prosecutions accounted for most cases of slaughter, murder, theft, robbery, oppression, rape and hamesucken as well as mutilation and falsehood. The motives for bringing such prosecutions would seem to have been threefold, although they were closely entwined. Clearly, as argued above, many had physical restitution as their prime motive whether by 'composition' or the exaction of assythment. This was particularly important in cases of theft and it is significant that almost every single case of theft brought before this court involved the uplifting of livestock or horses : often one purpose of the suit would be restoration of the stolen animals.¹⁷⁸ Since such suits could be brought before the civil courts, such as the Session, study of the criminal courts in isolation can give the impression that theft was very rarely prosecuted, either because it was not common or because it was so common that it could not be checked. This may

well have been the case but in order to study many crime patterns it will be necessary to look at the civil courts as well.¹⁷⁹ The idea of restitution was clearly an important motive in other prosecutions, notably slaughter and rape.

Obviously however, many private prosecutions were motivated by the desire for retribution and revenge. Often no doubt this was gained extra-judicially but the courts provided a mechanism through which this desire, considered perfectly reasonable and acceptable, could be achieved, particularly by people who otherwise lacked the sheer physical 'clout'. However one should not distinguish too clearly between restitution and retribution. Death can be seen as the ultimate form of compensation, made in cases where physical restitution was impossible or where the crime was particularly atrocious.¹⁸⁰ Again we should not forget the still continuing importance of the bloodfeud and its ideology at this time : systems of bloodfeud studied by anthropologists all show the phenomenon of regulated revenge. Acts of retribution should not be unlimited but rather reflect the severity of the original injury.¹⁸¹

The third motive behind private prosecutions, particularly those for oppression and invasion, was the establishment of legal right. In this they were again more like a civil rather than a modern criminal action. This motive tended to go along with the desire for compensation or revenge rather than being a primary motive.¹⁸²

In the second class of offences, those prosecuted directly by the state, the type of offence and motive for prosecution are both quite clear. These are the political crimes of the first mode of analysis and the motive is clearly to prosecute and put down overt challenges to royal authority and sovereignty, whether by armed opposition or by circumventing the royal monopoly of issuing

currency.

Public prosecutions by dittay present yet another body of motives. The crimes brought by this route were ones where the victim was helpless or unable to prosecute for some reason, the most extreme example of that being infanticide, together with public crimes which affected an entire community and not least acts which undermined the moral basis of society such as adultery, bestiality or witchcraft. This last point may seem strange but it is worth stressing in this connection that witches were very seldom sentenced to death or even convicted on counts of performing maleficium : the key point in the indictment was always the renunciation of baptism and entering a demonic pact.¹⁸³ It was this which attracted the death penalty. The motive for naming a person in a dittay, whether this was done by a jurisdiction or an individual, was the desire to maintain order.¹⁸⁴ Of course personal malice must have often counted also but as the possible inconvenience to the accuser was great (a dittay which was taken up could mean loss of time and a long journey if one was cited as a witness or juror) this cannot have been the primary motive in many cases.

The second form of analysis of the Justiciary court's business is to classify offences by the sentences which they could provoke. This was in fact the traditional way of dividing up offences in early modern Scotland : as pointed out in an earlier chapter, for Balfour the distinctive feature of criminal offences was the nature of the penalty they attracted - one of blood, life or limb.¹⁸⁵ Clearly a distinction must be made between the potential penalties and the actual ones imposed, with the latter surely more significant. Broadly, there were four types of sentence given : recompense, corporal punishment, banishment and death. For the reasons given earlier it is hard to define the relative

frequency of these various forms of sentence. In general however, when recompense was impossible or not desired and where public order was seen to be radically challenged death was the normal penalty.¹⁸⁶ Banishment and corporal punishment, which took a variety of forms although flogging was the usual one, were given for minor crimes where there was a public as well as a private interest to consider.¹⁸⁷ What is striking is the absence of the modern penalty of reformative incarceration : the case from 1662 of a youth sent to a house of correction for a year is practically unique before 1700.¹⁸⁸ This partly reflects the contemporary concept of criminality. The modern idea of the criminal as a distinct and somehow different sort of human being, morally and mentally or even physically degenerate is absent from these records, even though it is clear many of the accused were 'notour criminals'.

In fact, the seventeenth century idea of criminality and the nature of criminals was quite distinct from that held today. The accepted modern view sees the commission of crime as an extraordinary and deviant act, the product of some peculiar circumstance such as poverty, moral degeneracy or inadequate socialisation. In consequence modern penal theory sees criminals as abnormal and delinquent and aims at reshaping them to make them conform to social norms.¹⁸⁹ By contrast, most seventeenth century Scots seem to have taken the view that criminality was an inevitable aspect of man's fallen nature with most criminals not fundamentally different from their fellows. The purpose of punishment was thus to inhibit criminality by inspiring fear in both the punished and the beholder.¹⁹⁰ The one exception was the class of 'atrocious' crime : here the punishment was designed to purge and purify the social body.

What can be said of the geographical provenance of the cases brought before the Justiciary court between 1660 and 1690?

It is very difficult to give a clear answer, even after time consuming resort to the gazeteer and much study of place names. However, it would seem that the majority of cases came from the Lothians and the littoral of the Forth, including Fife and East Stirlingshire, with almost no cases from the North-West Highlands and Islands and the far South-West. (Much of the Highlands and Islands of course came under the jurisdiction of the Justiciary court of Argyll and the Isles, held by the Campbells). There were a fair number of cases from Angus, Perthshire and the North-East but not as many as from the central Lowlands. All this is very tentative and many factors need to be taken into account, not least the relative density of population.¹⁹¹ Several factors lay behind this seemingly patchy provenance : the physical difficulty of actually getting to Edinburgh from the more distant corners of the realm and the absence of regular circuits; the existence of large 'full' regalities and the use of commissions by the Privy Council. Moreover, as with the composition of its work, it reflects the nature of the seventeenth century justiciary court and its place in the legal system.

The features of the legal system which defined the role of the justiciary court are easy to identify. Most important perhaps was the absence of a national system of investigative magistrates or anything even corresponding to the English grand jury system.¹⁹² Also, the absence of regular local circuits, for the reasons set out earlier, meant that the court could not even begin to exercise a comprehensive or monopolistic jurisdiction : only certain cases would get through it in Edinburgh.¹⁹³ As a result it had a procedure very like that of the local courts, relying for much of its drive upon private initiative. Another very important point was the court's lack of clear ultimate authority - that quite clearly lay with the Privy Council and Parliament. Moreover it faced

competition from several full regalities, many of them jealous of their rights. Also, until 1672, it did not have a truly professional and full time judiciary, again like the local courts.

It follows that the Justiciary court was not a true supreme court, like the present day High Court of Justiciary. It was clearly the most important criminal court but it occupied a subordinate place in the legal system and had neither a clear monopoly nor an effective public court system to back it up. However it does not follow that it was therefore a supreme criminal court manque, fighting in Smith's phrase 'a losing battle against crime'.¹⁹⁴ It was rather part of the traditional system, still more akin to the local courts than different from them. As stated above, it was the King's justice court, the place where lieges could get justice - if they wished. In functionalist terms, it was providing a service to the public, giving them an institution through which restitution could be applied for, revenge sought, public order upheld and difficult cases settled.¹⁹⁵ It was also of course one of the main instruments for upholding and defending the royal power and position. In all of this it was supervised and checked by the Privy Council and it makes sense both in constitutional and legal terms to see it as the criminal judicial arm of the Council, matched on the civil side by the Session.¹⁹⁶ The relations between the Justiciary court and other judicatories were mainly informal before 1690, with little institutional contact other than the collection of dittays through local magistrates. What contact there was took place mainly via the Privy Council and its various committees. There were sometimes more direct contacts through repledging to local courts or joint trials of criminals by local regality magistrates and Justices; these however were rare.¹⁹⁷

What makes analysis of the Justiciary court's position

and role difficult is the fact that after 1587 persistent attempts were made by the crown to change it from the type of body described above to the kind of court it became in the eighteenth century.¹⁹⁸ The court was thus in some ways betwixt and between two states, in a state of transition and several important developments took place during this period.

The first of these took place in 1663 when the Justice Clerk, previously no more than an official of the court, was made a permanent Justice Depute ex officio.¹⁹⁹ This brought at least one full time lawyer on to the bench. As stated above, the practice of Justices tended also to strengthen the role and power of the Lord Advocate, even if much of this increase was in principle rather than practice. The great change however was the sweeping reform of 1671/2. On the 11th. January 1671 the Privy Council registered an edict which reformed the Justiciary court and formally erected the High Court of Justiciary. A further Act on the second of March settled points of detail and arranged its first meeting.²⁰⁰ By the terms of the Act the office of Justice Depute was abolished and the renamed court was henceforth to be staffed by Senators of the College of Justice, bearing the title of Lord Commissioners of Justiciary. The whole was to be presided over by the Justice Clerk, now created the Lord Justice Clerk. In other words the court became a full time body, run and staffed by the ever more important class of professional lawyers.²⁰¹ Most importantly the act set up a system of regular ayres and this was clearly its main purpose : the preamble begins:

"that the ancient and neccessar policie and custome of justice airs and circuit courts, which upon occasion of the late troubles have been intermitted should be againe revised and continued."²⁰²

This had been tried before, in 1587 and 1607, as well as during the

interlude of Cromwellian rule, but none of these attempts had come to anything. Some circuits do seem to have been held, but on an extremely irregular and erratic basis with almost nothing in the way of record.²⁰³ It does not make sense to talk of a system of circuits apart from the 1650's. Interestingly the court erected in 1672 looked rather like the Commission for the Administration of Justice set up twenty years earlier under Cromwell : as the circuit records show, the practice was also similar.

This time again a serious attempt was made to start up the ayres and in March and April of 1671 various judges were sent out into the shires to clear the way for the new court.²⁰⁴ In the case of Stirling two Justices came round the West Circuit and sat at Stirling in April, hearing no fewer than 39 cases from Stirlingshire alone in the space of four days.²⁰⁵ The surviving court book shows that this sitting, like the one of 1652 under Cromwell, was intended to clear the decks and bring to a conclusion all the outstanding cases.

The records contain 39 separate indictments from Stirlingshire, naming 45 individuals, one of them indicted upon two counts, another on three.²⁰⁶ The work of the sitting was dominated by two crimes, theft and adultery with 13 cases each. As in the 1652 circuit many of the adultery cases were old and longstanding ones with the parties having already satisfied a Kirk session. In some cases the offence was clearly more than twenty years old as the accused produced evidence of decreets and sentences passed by the English judges during the interregnum - this happened for example in the case of John Guidlatt of Abbotshaugh in Falkirk charged with two counts of adultery.²⁰⁷ Of the 13 cases of adultery only 4 went to a trial by assize and 1 other was continued to a future sitting.²⁰⁸ Of the remaining 8, in 6 the parties confessed their guilt and in 2 the diet was deserted.²⁰⁹ With the cases of

theft matters were rather different for only 1 went to a trial while in 2 the diet was deserted and in no fewer than 10 instances the case was continued.²¹⁰ The other 13 indictments were a very mixed bag, including arson (3 cases), mutilation, lese-majesty, blooding and beating, incest and usury (1 case each).²¹¹ Again most of these were longstanding cases and in 3 instances a baron court decret was produced which terminated the case.²¹²

On examining the breakdown of cases and sentences (see table overleaf) and the other records of the Justiciary court the pattern and structure of the circuit becomes apparent. As in 1652, the court started off by calling all those cases in a locality which had arisen within the memory of those submitting dittay and which could be seen as falling into the Justiciary court's jurisdiction. When the cases came before the court at Stirling several courses of action were followed. Some of them were simply deserted, most probably for lack of evidence. In other cases decreets from local courts were produced which were also accepted and recorded.* Sometimes decreets from the Cromwellian court were produced and these were also accepted, under the terms of the 1661-Act, albeit grudgingly.²¹³ So far as the remainder were concerned, some were tried by an assize, which at Stirling produced 4 verdicts of guilty and 4 of not proven. Other cases saw the parties freely confess. These people, together with those convicted were ordered to go to the court at Edinburgh to receive sentence.²¹⁴ Many failed to appear on the set date and were officially declared fugitive though what effect this had is not clear.²¹⁵ In other cases a remission was purchased, in one instance upon payment of a mulct of 700 marks to the treasury.²¹⁶ The remaining cases were continued.

* For discussion of the significance of this see below chapter 7 pp466-7.

JUSTICIARY CIRCUIT COURT - STIRLING 1671.

TYPE OF CASE	RESULT OF CASE				
	CONFESSED	DESERTED	CONTINUED	REF. TO ASSIZE	DECT. PROD.
Adultery	6	2	1	4	-
Theft	-	2	9	1	1
Arson	-	2	-	1	-
Blooding	-	-	-	-	2
Lesemajesty	-	-	-	1	-
Incest *	-	-	1	-	-
Cursing Parent	-	-	1	-	-
Usury	-	1	-	-	-
Murder	-	1	-	-	-
Robbery	-	1	-	-	-
Mutilation	-	-	-	1	-
Blasphemy	1	-	-	-	-
Riot in Kirk	-	1	-	-	-
Other	-	1	-	-	-
TOTAL:	7	11	12	8	3

* This case saw the defendant being sent back to gaol pending trial.

Looking at the table, and the central records the structure of the circuit emerges as follows. Having cleared up and concluded those cases where a trial had already been held, or where the evidence was inadequate, the court then tried those cases where it was possible to do so and sent the persons found guilty, along with the ones who had confessed, for sentence in Edinburgh. The remainder, probably consisting of cases where there was a case to answer but not sufficient evidence to hold a trial at that time, were continued. Most of those sent for sentencing, either from confession or trial, were adultery cases and the effect of this was to make a 'clean sweep' of the serious adultery cases, bringing them to a conclusion. Those cases which were continued to the next sitting of the court were almost all very serious capital crimes. Unfortunately, if another circuit court was held in 1671 or 1672 it has left no record and the evidence of the central records tends to suggest that it was not in fact held.²¹⁷ Had it been, its work would have consisted to a far greater extent of serious crime, particularly theft. Thus there would have been a pattern of a first court which tried all the minor cases, cleared up those where a trial had already been held and tried some serious cases and a second which concentrated almost entirely on the serious ones, particularly theft. This was indeed the pattern followed later in 1708 - 10 and was somewhat like the development of the Cromwellian circuits of the 1650's. The 'interlocking' of the records of the Edinburgh and circuit records of the court gives some guidance as to the aims of the reform. It was intended to expand greatly the effective jurisdiction of the court by giving it the ability to handle and control the trial of cases in the locality. As argued above, the court before 1671 sat in Edinburgh, providing a service to those with the money and determination to get to Edinburgh to use it but not being concerned with a great mass of offences which were

either settled out of court or tried locally by commissions and regalties. The establishment of a system of circuits would have meant that many of these would now be tried in the locality by the Justiciary court with the sentencing carried out by the full court at Edinburgh in many cases. This would allow time and opportunity for the purchasing of remissions and would also mean that any punishment or sentence would in theory be national in its scope rather than local. Altogether, this would have been a major shift in the entire legal system's centre of gravity, a radical shift away from the locality to the centre.

Did the reforms however have this effect? On balance it would seem that they did not. As said, if further routine circuits were held in the 1670's they have left no record and it seems most likely that none were held. Nationally the newly created High Court of Justiciary was soon caught up in the political turmoil of the later 1670's.²¹⁸

Records of further ayres have survived from the period 1679-84 but these were entirely political, concerned with trying people who had taken part in, or supported, the rebellion.²¹⁹ A further circuit was held in 1679 to handle a witch-craze in Paisley but it seems that apart from these two instances, no more circuits were held before 1700 and that the reforms had therefore been derailed by the political upheavals of the times.²¹⁵ It is difficult to come to any firm conclusion but it would seem the immediate impact of the reforms of 1672 was slight and blunted, so far as the pattern of the court's work was concerned. Regular ayres were not set up and the prosecution system continued unchanged. This does not mean however that the restructuring operation of 1672 should be written off as being of no real significance. It had changed the court in an important way, making it into a far more professional body. Moreover the reforms made possible further, more radical

changes even if these did not follow at once. One basic change at least had been made, others came later. The reforms had created what was potentially a new kind of court and it thus required only a few more changes for a fundamental revolution.

Between 1660 and 1688 the old Scots legal order enjoyed its 'indian summer': this was the last period when all the distinctive features and institutions of that order were still in existence and functioning in the traditional manner. During this period the central courts continued to play their traditional role, of assisting the attempt by individuals and communities to maintain order.²¹⁶ Yet at the same time, just as these years saw increasing divisions and tensions within the polity and society at large, so they saw the steady undermining of the old role of the central courts, with expansion and assertion of their powers and potentially very significant changes in their structure. The three decades after 1660 saw Scotland as a national community faced with a range of choices as to its development and future which became increasingly sharp as the years went by and the underlying crisis which had led to the revolution of 1637 remained unresolved and indeed intensified. Obviously the legal system was caught up in this great process with questions as to its development becoming ever more acute and pressing. All of this came to a head in the twenty years after 1688, leading up to the resolution of the crisis in the years 1707-1710, out of which emerged a political and legal system radically transformed.

1. C.S. Terry: The Scottish Parliament : Its Constitution And Procedure 1603-1707 (Glasgow, 1905) pp 103 - 20.
2. W.B. Gray: 'The judicial proceedings of the parliaments of Scotland 1660-1688' in Juridical Review vol XXXVI (1924) p 136.
3. Thus during this period at least 15 distinct forms of legislative action can be made out, each with its own distinctive title. These were as follows: Act and Decreet - gave a verdict in a civil or criminal action brought before Parliament; Act and Remitt - took a case away from Parliament or another central court and handed to another jurisdiction; Act of Precognition - stopped proceedings in a case before a lesser court and referred the matter to Parliament or Privy Council; Act Rescinding - overturned a previous judicial decision; Act and Warrant - gave limited powers to named persons to carry out a specified task; Act and Commission - a more wide ranging version of the previous giving wider powers; Act Discharging - forbade named individuals from doing particular things; Act Against - a more general form of the above, addressed to people in general and a wide category of action e.g. 'excessive drinking'; Act Anent - the most general kind of Act, usually aimed at some kind of improvement; Act For - the narrower version, ordering or empowering particular and local improvements and changes; Act in Favours - a measure brought in at the behest of a private individual declaring the law and clarifying private right, often giving privilege; Act of Ratification - confirmed and restated already existent rights at law; Act of Protection - this gave a man immunity from his creditors for a limited time, usually so that he could come to Edinburgh to take part in a trial; Act and Licenses - gave a license or patent to a person or company; Act of Exoneration - self explanatory. Each of these forms of Act was probably linked with a writ directed to the locality or to agents of the crown which gave it force.
4. One interesting point is that these Acts in Favours were private legislation introduced by people who were very often outside Parliament. The petition submitted to Parliament via the Articles was often clearly a draft Act, requiring only minor recasting and Parliamentary approval to become an Act, with the force of law.
5. Gray: 'Judicial proceedings' p 142.
6. Acts Of Parliaments Of Scotland vol VII pp 14-15 gives "Act in favours of Margaret Campbell relict of Captane Abraham Schockley" 8th. January 1661 which is a good example of such a private Act. See also ibid p 37 "Act in favours of Thomas Ker of Mersingtoun" 20th. February 1661. These are only two of many. It is worth pointing out that the majority of Acts in favours from 1661 were in response to petitions claiming relief or redress for losses incurred during the revolution or interregnum.
7. For several examples see Gray: 'Judicial proceedings' pp 145-7 particularly the case of Elizabeth Dutchie in Drumleithie versus Harry Dennistoun merchant in Edinburgh.
8. Acts Of Parliaments Of Scotland vol VIII p 347.

9. Thus Acts Of Parliaments Of Scotland vol VII p 113 3rd. April 1661 has an Act and Ratification in favour of the Earl of Callander confirming his position as hereditary Sheriff-Principal of Stirlingshire.
10. For examples of such ratifications see Acts Of Parliaments Of Scotland vol VIII pp 114-5 11th. September 1672 - in favour of the Marquess of Montrose in his holding of the barony of Mugdock and other lands; ibid pp 305-7 6th. September 1681 - in favour of Elphinstone of Airth in his holding of the barony of Airth; ibid pp 372-6 17th. September 1681 - in favour of the Earl of Queensberry in his holding of the Earldom lordship and regality of Drumlanrig; ibid p43 22nd. August 1670 - in favour of Collin Campbell of Monzie in his holding of the barony of Monzie. Many of these Acts merged existing baronies into 'ane new whole and free barony'.
11. Gray: 'Judicial proceedings' pp 147-8; Acts Of Parliaments Of Scotland vol VIII p511 1685.
12. For this process see R.S. Rait: The Parliaments Of Scotland (Glasgow, 1924) pp 456-7, 130-2; Lord Cooper (ed): Regiam Majestatem And Quoniam Attachiamenta (Stair Society, Edinburgh, 1947) pp 322-3.
13. Rait: Parliaments Of Scotland pp 130-2.
14. ibid p 457.
15. ibid pp 470-5.
16. For example in Gray: 'Judicial proceedings' pp 148-51.
17. For one such case, from a slightly earlier period see Acts Of Parliaments Of Scotland vol VI pp 135-6 case of Harry Cunnyngame, 2nd. July 1644.
18. ibid pp 13, 22, 29, 46, 47-8, gives a good example of this in the already mentioned case of the four sheep thieves from Stirlingshire who had petition brought on their behalf by the Viscount of Kilsyth. He claimed the thefts had been minor but in fact no fewer than 29 sheep had been uplifted, from one Thomas Schirray in Leckie. The crucial point seems to have been that they returned the stolen animals under the terms of the 1641 Act.
19. For example of remits see Acts Of Parliaments Of Scotland vol IX app pp 66-7 19th. July 1690 for two in favour of John Kerr of Moreistoun and John Philip and Adam Maistertoun. The remit here was to a judicial committee of the Parliament itself thus taking the action away from another court.
20. For an important example of a Precognition ordered by Parliament see Acts Of Parliaments Of Scotland vol VII pp 21, 234 which give one in favour of Lord Bamff et al in a case where they were charged with the slaughter of John Gordon of Barralmd together with a prorogation of the same. 29th. January 1661, 24th. May 1661.
21. Quoted in Gray: 'Judicial proceedings' p 136. See Sir G. Mackenzie: The Laws And Custome Of Scotland In Matters Criminal (Edinburgh, 1699).

22. Rait: Parliaments Of Scotland pp 10-12.
23. For example in Acts Of Parliaments Of Scotland vol VII pp 241-44th. June 1661 case of Jean Countess of Annandale versus 'tenants and occupiers of twentie pund land of Lochmaben'.
24. Gray: 'Judicial proceedings' p 139.
25. The sentences of outlawry and horning passed by Justiciary courts on those who failed to attend did not mean they had been found guilty of the charge. Horning was imposed for failure to appear in court and 'underly the law' and could be lifted, whereupon the case would proceed.
26. For the treason trials see Gray: 'Judicial proceedings' pp 139-42.
27. Acts Of Parliaments Of Scotland vol VII pp 248-50 7th. June 1661 case of Duke of Hamilton versus James Campbell of Arkinglass; ibid p 301 9th. July 1661 case of Murdo Maclean of Lochbuie versus John MaCalaster Roy et al.
28. For example Acts Of Parliaments Of Scotland vol IX p 154 27th. June 1690 case of Robert Adair of Kinhilt versus heirs of Archibald Edmondstone of Duntreath.
29. Thus both of the cases cited in note 27 dated from the 1640's. For another example see Acts Of Parliaments Of Scotland vol VII pp 105 3rd. April 1661 case of John Murray of Polmaise versus Alexander Crawford of Manuelmiln.
30. ibid pp 247-8 has commissions for the trial of witches in Belstoune, Gullane and Samelstoun and one for trying one Patrick Clerk for bestiality all dated 7th. June 1661; ibid pp 233-4 has commissions granted on 22nd. May 1661, for the trial of witches in Fisheraw and Saltpreston as well as one directed to the Earl of Callandar to try 4 people (named as Gregor McGregor, Donald Stewart, John McCoull and Helen Smart) for various crimes including robbery.
31. A.R.G. McMillan: The Evolution Of The Scottish Judiciary (Edinburgh, 1941) pp 72-4.
32. Register Of Privy Council Of Scotland 3rd. series vol I pp 159, 472 6th. February 1662, 15th. December 1663 gives the legislation concerning oysters; ibid pp 450-2 20th. October 1662 has the Act on superscription of coins.
33. Register Of Privy Council Of Scotland 3rd. series vol III pp 282-4, 301-3 11th. January 1672 and 2nd. March 1672.
34. So much so that during the 1660's there was not a single sitting of the Council which did not involve legal action of some description.
35. In this it was very like the local courts examined in chapter 4 above where all actions other than possessory ones were styled 'bills of complaint' - the actual style used by the Council was:

"And anent the Complaint given in by (pursuers name)
against (defenders name) Makand Mentione (description)"

36. For example Register Of Privy Council Of Scotland 3rd. series vol I p 55 1st. October 1661 case of Alexander Pettigrew versus William Yair; ibid p 249 1st. August 1662 case of Viscount Stormont versus Walter Smith and David Couppar.
37. The letters of horning which are most accessible are those issued by the Justiciary court and contained in Records Of Justiciary Court : Register Of Criminal Letters SRO JCl8/1-8. The title is misleading - these records actually contain only letters of horning, intercommuning and remission.
38. See for example Register Of Privy Council Of Scotland 3rd. series vol III pp 492-3 6th. March 1672 where the letters are directed against Sir William Sinclair of May et al. The fact that this procedure was available and used suggests strongly that the full rigour of horning was often not effected.
39. This is clear from the documents contained in Records Of Justiciary Court : Register Of Criminal Letters SRO JCl8/1 where the letters of revocation make clear that it is the outlawry which is lifted, not the original charge.
40. See Register Of Privy Council Of Scotland 3rd. series vol II pp 116-8 14th. December 1665 for an example of this : here the accused, John Campbell of Levages et al, had been horned in connection with a charge of rape brought against them by Jean Campbell relict of umguill Archibald Campbell of Ardchattan, and her kin;
- "at the process of the which horn the saids persones have continually sensyne lyen and abidden and yet daylie repaires and haunts to all public places".
41. This was easily the most frequent item of business before the council. For a typical example see ibid pp 81-4, 27th. July 1665 case of James Earl of Southesk and Walter Scott his tenant versus Earl of Traquair.
42. For an example of this see Register Of Privy Council Of Scotland 3rd. series vol III pp 465-70 22nd. February 1672 where we find two such cases, one brought by William Gray of Innereichty et al against the magistrates of Forfar and a counter-suit brought by the named defenders.
43. Register Of Privy Council Of Scotland 3rd. series vol VIII pp 159-60 14th. July 1681, case of Lord Advocate and Major John Lyon versus John Mclachlan in Edinburgh. The penalty was £1,000 scots assythment.
44. For example see Register Of Privy Council Of Scotland 3rd. series vol III p 544 9th. July 1672 case of John Hamilton of Barr versus William Cunnyngname there, his tenant.
45. Register Of Privy Council Of Scotland 3rd. series vol I pp 129, 138-40, 147, 152, 158; 2nd. January 1662, 16th. January 1662, 23rd. January 1662, 30th. January 1662 and 6th. February 1662 respectively give the details of this case, an action of rape brought by Sir James Stewart of Kirkhill and Mr. John Stewart of Kettlestoun his brother against William Hamilton of Binnie for the "rapt and ravishing" of Nicola Stewart daughter to the said Sir James, with one Elizabeth Burnet and Elizabeth Patterson, Nicola Stewart's maid charged as accessories. The actual details, given on pp 138-40 show

that what had happened was a clandestine marriage between Nicola Stewart, a minor, and Hamilton, arranged by the two women even though the two pursuers were determined to present it as a case of abduction and rape. Elizabeth Patterson and Hamilton himself spent some time in gaol before being released while Elizabeth Burnet was banished from the Lothians after parading through Edinburgh wearing a placard with "Here is a seducer of young gentle ladies" written on it. Sadly the fate of Nicola Stewart herself is not recorded.

46. Register Of Privy Council Of Scotland 3rd. series vol VII p 160 14th. July 1681.
47. Register Of Privy Council Of Scotland 3rd. series vol I p 91, 19th. November 1661.
48. For such a case from Stirlingshire see Register Of Privy Council Of Scotland 3rd. series vol VII p 150 5th. July 1681 case of Lord Advocate versus Adam Campbell of Gargunock for resetting two rebels - Robert Rainy and - Mcilhose.
49. For example see Register Of Privy Council Of Scotland 3rd. series vol II p 231 4th. December 1666 where Neilson of Corsack and Hugh Mckell were put to the boot; ibid pp 494-5 22nd. July 1668 where Anna Ker was the victim; Register Of Privy Council Of Scotland 3rd. series vol IV pp 500-1 6th. January 1676 case of Mr. James Mitchell.
50. See for example the terms of the commission in ibid pp 266-7 3rd. September 1674.
51. For just two examples see Register Of Privy Council Of Scotland 3rd. series vol I p 47 18th. September 1661 for the release of James Edmondstone of Walmett, imprisoned for over a year on a charge of slaughter and ibid, case of Barbara Drummond, imprisoned on charges of witchcraft from 1664 to 1667.
52. ibid p 26, 2nd. August 1661 case of Katherin and Elizabeth - Black and Elspeth Crockett.
53. ibid p 75, 1st. November 1661.
54. ibid p 78, 7th. November 1661, cases of John Rae elder and younger in Samuelstoun (theft of sheep) and Agnes Williamson (witchcraft). The two Raes were tried before the Justiciary court on 21st. January 1662 and Agnes Williamson was tried (and acquitted) on 27th. January 1662. See W.G. Scott-Moncrieff (ed): Records Of The Justiciary Court Edinburgh 1661-79 (2 vols, Scottish History Society, Edinburgh, 1905) vol I pp 24-26. The sentence on the two Raes was imposed at the behest of the Council.
55. Register Of Privy Council Of Scotland 3rd. series vol I p 164 13th. February 1662 case of David Miller, merchant in Stirling versus Janet Doig. The printed records say she:

"hes carryed with her the petitioners whole household stuff and plenishing to the value of £500 scots and above ... so that the petitioner hes nothing left him of a weil plenished hous bot bair walls and not a pillow whairon to rest his heid".

56. ibid pp 193-4 2nd. April 1662 case of Thomas Rae in Dumfries.
57. For example ibid p 138, 9th. January 1662 which gave the power to arrest John Kincaid for pricking witches; ibid p 183, 4th. March 1662 giving the Stewart of Menteith power to arrest John Graham in Menteith; ibid pp 194-5 2nd. April 1662 giving power to arrest one Lawrence Rintoul. These last two, like most others were requested by individuals although the actual warrant was directed to a court-holder.
58. Register Of Privy Council Of Scotland 3rd. series vol V pp 373-4 28th. February 1678 case of John Innes.
59. Register Of Privy Council Of Scotland 3rd. series vol I 26th. November 1661 case of James Sinclair of Asserie and - Steil. The case had been called in the Justiciary court on 13th. November 1661 - the charge was breaking prison. W.G. Scott-Moncrieff (ed): Justiciary Records vol I p 22.
60. As in the case mentioned in note 20 above, of George Lord Banff et al, charged with the slaughter of John Gordon of Barralmad which also appears in Register Of Privy Council Of Scotland 3rd. series vol I p 71 5th. November 1661 where the parties ask for a further prorogation because negotiations for a friendly settlement were underway.
61. See Register Of Privy Council Of Scotland 3rd. series vol II pp 115 - 6 7th. December 1665 case of James Graham versus David Henderson, merchant in Stirling et al for one good example. Here the Council ordered the process to be stopped. The case can also be found in Scott-Moncrieff: Justiciary Records vol I p 139.
62. See for example ibid vol 1 pp 53, 151 case of relict and son of John Coltherd versus Sir William Bannatyne of Corehouse for slaughter. The indictment was read on 11th. September 1662 and the precognition produced on 4th. November 1662. For the manuscript record see Records Of Justiciary Court, Edinburgh : Books of Adjournal SRO JC2/10.
63. Quoted in J.I. Smith (ed): Selected Justiciary Cases 1624-1650 vol II (Stair Society, Edinburgh, 1972) p 327; See Mackenzie: Laws And Customs pp 220-3
64. Register Of Privy Council Of Scotland 3rd. series vol I pp 452, 467 20th. October 1663, 1st. December 1663 case of William Porteous in Glenkirk versus William Geddes.
65. ibid p 530 19th. April 1664.
66. Mackenzie: Laws And Customs p 222
67. Smith: Selected Justiciary Cases vol II pp 327-8 makes this point, one well illustrated by the cases already mentioned, particularly that of Graham versus Henderson cited in note 61 above. Because the main purpose of a trial was to test the verity of a libell, mitigating circumstances could not always be raised in the court, as not relevant.
68. Register Of Privy Council Of Scotland 3rd. series vol I p 492 2nd. February 1664 case of Alexander Baylie, William Thomson, James, Arthur and David Brodie.

69. ibid p 244 28th. July 1662 case of John Crichton in Garland, convicted at Stirling of stealing sheep but had his sentence reduced to banishment because it was his first fault and the animals had been returned. See also Register Of Privy Council Of Scotland 3rd. series vol III pp 234-5 3rd. November 1670 case of William Mckie - a case of slaughter.
70. P.G.B. McNeill: The Jurisdiction Of The Scottish Privy Council (Glasgow University, D.Phil, 1961).
71. For example Register Of Privy Council Of Scotland 3rd. series vol III pp 87-90 11th. November 1669 for the commission granted to Sir James Campbell of Lawers for apprehending thieves in the Highlands.
72. See Register Of Privy Council Of Scotland 3rd. series vols V, IX.
73. Register Of Privy Council Of Scotland 3rd. series vol XIII pp 413-4 6th. June 1689 case of Mary Reid alias Roy in Auchilty in Cantoun in Ross-shire.
74. This can be seen most clearly in cases of witchcraft where the commissioners state either "who has confessed to the abominable crime of witchcraft" or else "imprisoned and suspect guilty of..."
75. The actual text of the commission always says "for the trial of (names)" or "to try and execute justice upon the persons afternamit....".
76. Register Of Privy Council Of Scotland 3rd. series vol V p 501 15th. August 1678 case of Katherine Liddell is a good example of this. She had been imprisoned and tortured for witchcraft, without a warrant, by John Rutherford baillie in Prestonpans and - Cowan. The Council ordered her to be set at liberty and caused summon the two magistrates to Edinburgh to face charges.
77. Register Of Privy Council Of Scotland 2nd. series vol VIII pp 182-3 1649.
78. Register Of Privy Council Of Scotland 3rd. series vol III pp 44-5 15th. July 1679 prints the commission to the Sheriff of Stirling to try William Galbraith in Glencavert for bestiality; ibid pp 79, 95 30th. September 1669, 11th. November 1669 have respectively the commission for the trial of Janet Din in Blacksyd of Boquhan for incest with the said William Galbraith her sister-son and her supplication for release from custody following her acquittal.
79. Register Of Privy Council Of Scotland 3rd. series vol I pp 197-8 10th. April 1662.
80. Thus ibid pp 188-9 1st. April 1662, has the case of the minister at Rhynd and others who had arrested and tortured several women and then used their confessions to extract a commission from the Council and put these unfortunates to death following which they had gone on to arrest more women without a warrant. The Council ordered the women to be brought to Edinburgh and the Minister and his associates to come to Edinburgh also, to face charges.

81. Thus the trial of Janet Din cited in note 78 above is stated to have been held by the Sheriff Depute and John Preston Justice Depute while the order for the retrial of the three Stirling witches cited in note 52 above names Alexander Colvill of Blair, the senior Justice Depute.
82. The other persons consistently named in the commissions were the Sheriff-Deputes, particularly William Livingstone of Westquater, the provost of Stirling and certain people who, we may assume, were J.P.'s. In the last group were people such as Seton of Touch, Murray of Polmaise and Buchanan of Arnprior. Surprisingly there do not seem to be many commissions directed to people of the Graham connection. Sometimes the baillies of Falkirk would also be named. See for example Register Of Privy Council Of Scotland 3rd. series vol I p 238 26th. June 1662 where there is a commission directed to the Earl of Callandar, William Livingstone of Westquater, Norman Livingstone of Milnhill (both Sheriff-Deputes), Robert Livingstone and James Burn "baylies of the regalitie of Falkirk and barony of Callandar" for the trial of John Crichton in Garland and Robert Chalmers in Easter Jaw for theft. This is the same thief as the one cited in note 69 above. It is worth pointing out that people sometimes refused to take up the commission: Register Of Privy Council Of Scotland 3rd. series vol II pp 359-60 14th. November 1667 has a commission directed to magistrates in Stirlingshire to try Isobell Young in Denny for infanticide. ibid p 377 11th. December 1667 has an item noting that Seaton of Touch, Murray of Polmaise and Elphinstone of Quarrell were all refusing to take up the commission. The implications of this is that the people to whom the commissions were directed were not necessarily those who had requested them.
83. Thus in a case cited in a previous chapter, that of John Glas McWilliam, tried by the Sheriff-Depute of Stirling on a Privy Council writ for murder, the case is entered in the court books of the sheriff court so presumably the sheriff court had sat, armed with extraordinary powers. See Records Of Stirling Sheriff Court SRO SC67/1/3 16th. April, 10th. May 1648. On the other hand the persistent references to "ane Justice court, holdit at etc" do imply that a special court had been erected and fenced, as do the terms of the commissions which always give the power to "call and fence ane court."
84. Thus the figures for the 1660's are 1661, 21 issued; 1662, 75 issued; 1663, 13 issued; 1664, 14 issued; 1665, 14 issued; 1666, 16 issued; 1667, 23 issued; 1668, 11 issued; 1669, 2 issued. Between 1669 and 1672 32 were issued. See Register Of Privy Council Of Scotland 3rd. series vols I - III.
85. For a typical murder commission see Register Of Privy Council Of Scotland 3rd. series vol II p 495 23rd. July 1669 case of John Forsyth in Aberdeen; for one from Stirlingshire see ibid p 336 23rd. August 1667 case of James Johnstone in Balmidken; for a theft case see ibid p 258 14th. February 1667 case of Andrew Adam in Waterside of Carron for theft of sheep from Robert Armour and William Burn in Campsie; for a typical bestiality entry see Register Of Privy Council Of Scotland 3rd. series vol III p 584 9th. August 1672 case of Jon Wright in Dumfries.

86. It would seem that cases of rape were very often concluded by a private settlement, even more than in other offences. For a formal registration of such an agreement in the Council's records see Register Of Privy Council Of Scotland 3rd. series vol I p 337 16th. February 1633 case of Sir William Douglas of Glenbervie versus Sir James Strachan of Thorntoun. For a commission to try a rape case see ibid p 258 14th. February 1662 case of Elizabeth Dundasse.
87. Register Of Privy Council Of Scotland 3rd. series vol V p 554 4th. March 1678.
88. One would guess that at least half of Scotland is represented in the applications, so far as their geographical distribution is concerned. Given that the number issued is not considerable to say the least.
89. See for example S.A. Gillon (ed): Selected Justiciary Cases 1624-1650 (Stair Society, Edinburgh, 1954) p iv.
90. See in this connection the comments of Smith: Selected Justiciary Cases vol II pp iii - iv.
91. This was most notable in 1662 when the Council used its powers to restrain many zealous locals. For the way this worked in Stirling see app^{no} 5 below.
92. See for example Register Of Privy Council Of Scotland 3rd. series vol I pp 220-1, 12th. June 1662 where three commissions were granted, for the trial of witches in Roxburgh, Nairn and Greenock, all containing the clause. These were among the first to be issued after the Act titled "Ane proclamation anent the manner of apprehending persons suspect of witchcraft" for which see ibid p 198 10th. April 1662.
93. This was also the way some contemporaries saw matters. Register Of Privy Council Of Scotland 3rd. series vol VII pp 151-2 5th. July 1681 has a protest by George Marquis of Huntly that the granting of a commission to try Archibald Milne in Logie for theft and murder would infringe his rights in the regality of Spynie. The Marquis says:
- "The petitioner conceives that this procedure would form a dangerous precedent not only to subvert his own jurisdiction but that of all other regalities."
- For the actual commission see ibid p 146 30th. June 1681
94. Amongst the differences one can point to are the extreme localism of Scotland's political and judicial system as opposed to the relatively more centralised structures in England; the marked difference in the power and position of the aristocracy in the two countries; the continued importance of kin-ties in Scotland as opposed to their disappearance in England and the markedly differing roles of central institutions, particularly Parliament.
95. See D. Stevenson: Revolution And Counter-Revolution In Scotland 1644-1651 (London, 1977) pp 241-2; and also D. Stevenson: Alasdair McColla And The Highland Problem In The Seventeenth Century (Edinburgh, 1980).

96. The evidence suggests that the South-East was the more economically developed with the North-West much more dependent upon cattle rearing. The North-West was largely gaelic speaking and at least two of the parishes, Buchanan and Drymen, belonged in the Highlands rather than the Lowlands. In political terms the division is clear : the North-West gave some support to Montrose while the South-East supported the Covenant yet in 1715 it was the East and South-East which were 'out' although admittedly this concealed deep divisions, not least in Falkirk.
97. I. Whyte: Agriculture And Society In Seventeenth Century Scotland (Edinburgh, 1979) pp 176 - 94.
98. This meant of course that such Scots magnates were more independent of the crown than their English counterparts and exclusion from the centre of power was not always the shattering blow it represented to the political fortunes of English aristocrats. People like Huntly and Argyll were still powerful and important figures even if they were in disgrace and excluded from the national political scene, because their local power base remained. This state of affairs is sometimes criticised because it bred 'over-mighty subjects' and made revolt possible. These however are semantically loaded terms - overmighty in whose eyes for instance? The use of words like revolt implies that the political order lent itself to irresponsible opposition to legitimate authority. However one could just as easily say that it enabled local communities and their leaders to resist the encroachments of the centralising state. One more neutral way of describing this political system is to stress that effective power and even sovereignty were divided and localised rather than centralised at national level.
99. Certainly James VI thought so, arguing in his Basilikon Doron that his main problem was great lords who had private jurisdictions. See the citation of this passage in G. Donaldson: Scotland James V to James VII (Edinburgh, 1965) - p 225.
100. As it had such extreme powers, the abolition of the Council in 1708 could not fail to have far reaching consequences. See chapter 7 below.
101. For this see appendix no 3 below and E. Hobsbawm: 'Scottish reformers of the eighteenth century and capitalist agriculture' in E. Hobsbawm et al (eds): Peasants In History : Essays In Honour Of Daniel Thorner (Oxford, 1980) pp 3-29.
102. J. Buckroyd: Church And State In Scotland 1660-1681 (Edinburgh, 1980).
103. Acts Of Parliaments Of Scotland vol VIII p 352 16th. September 1681.
104. Thus ibid contains no fewer than 284 such Acts of Ratification.
105. The original style is:
- "The Lords of His Majesty's Secret Council do grant that commission is ordained to be direct to"

while the preamble used after 1663 reads:

"Charles, be the Grace of God etc. Foresameikle as we and the Lords of our Privy Council being informed (details of case) wee, with advyce of the Lords of Our Privy Council, have given and granted and by these presents, gives and grants our full power, authority, commission, express bidding and charge to....."

106. Register Of Privy Council Of Scotland 3rd. series vol VII pp 304-6 7th. January 1682.
107. For the Contable's jurisdiction see Sir G. Mackenzie: The Laws And Customs Of Scotland In Matters Criminal (Edinburgh, 1699) pp 184 - 6. This court is still officially in existence whenever the monarch is in Scotland, the current holder of the office being the Countess of Erroll.
108. ibid pp 197-9.
109. ibid pp 186-7; Various: An Introduction To Scottish Legal History (Stair Society, Edinburgh, 1958) pp 392 - 5. This court was in desuetude by this time and its jurisdiction was effectively in the hands of the Convention of royal burghs. See T. Pagan: The Convention Of The Royal Burghs Of Scotland (Glasgow, 1926) pp 10-12.
110. Besides these there are also Registers of Criminal Letters; Registers of Bonds of Caution; Dittay Books; Dittay Rolls; Signet Minute Books - all of which contain some useful material.
111. Records Of Justiciary Court : Process Papers SRO JC26/12-80 cover the period 1637 - 1699. These have recently been cleaned and sorted and a comprehensive index is being compiled.
112. For example the case of Robert Fforbes at Mill of Melgum, prosecuted by John Ross of Strathmore for an act of blooding - an assault of the type commonly tried by local courts. See Scott-Moncrieff: Justiciary Records vol II p 150 25th. June 1666; Records Of Justiciary Court, Edinburgh : Books Of Adjournal SRO JC 2/10.
113. Smith: Selected Justiciary Cases vol II pp v-ix, xvii-xx.
114. ibid pp v - vi.
115. For two very good examples of this, both cases of witchcraft see Scott-Moncrieff: Justiciary Records vol I pp 24-6 27th. January 1662 case of Agnes Williamson; ibid pp 13-19 10th. September 1661 case of Janet Cocks or Clerk in Dalkeith. See Records Of Justiciary Court, Edinburgh : Books Of Adjournal SRO JC 2/10; Records Of Justiciary Court : Processes SRO JC26/27-28. The bundle of documents concerning the second case is particularly useful.
116. Stair Gillon: Selected Justiciary Cases p 13.
117. For example Scott-Moncrieff: Justiciary Records vol I p 50 5th. September 1662, James Dewar and his cautioner fined; ibid p 190 21st. December 1666, Thomas Baikhall in

Bodichraw fined.

118. For instance ibid pp 27, 28, 32, 35, 28th. January 1662, 10th. February 1662, 12th. February 1662, 17th. February 1662, 3rd. March 1662, 7th. March 1662, 5th. May 1662, case of Laird of Glenlyon versus Hugh Roy which ended with the case being abandoned. See Records Of Justiciary Court, Edinburgh : Books Of Adjournal SRO JC2/10 - the entries are all simply brief continuations of the case until the last diet when it was abandoned.
119. For example see Scott-Moncrieff: Justiciary Records vol I p 3 5th. July 1661 case of Janet Richmond - accused of infanticide at Icnverlochty.
120. For a very clear example of this, from a later date, see Records Of Justiciary Court : Dittay Books SRO JC 16/22 - Stirlingshire. The other columes in the series, dealing with other shires all have similar material.
121. For an example of such a 'writ of dittay' see Records Of Justiciary Court : Dittay Rolls SRO JC 17/2 where a complete one is preserved which reads:

"IMair, By vertue of the Lord Justice General, the Lord Justice Clerk, and Remanent Lords of Justiciarie their precept, directed to the Sheriff of Perth and his deputes of the date the....day of... yeares. And the Sheriff depute his precept thereupon directed to me, Lawfullie Summond, Warn and charge you to compear before the clerks one or more, appointed by the saids Lords of Justiciarie, at Perth the....day of.... yeares, betwixt the hours of eight and nine in the forenoon and there to give up dittay against all Delinquents, in manner and form, as is appointed, by the saids Lords of Justiciarie their precept, and that under all Highest Pains and Charge, this I give you upon the day of 1700 and years before these witnesses."

N.B. The blanks are present in the original and this was clearly a standard form, used regularly with the clerk simply filling in the relevant names in the spaces. For the kinds of people cited by writs of this type see Records Of Justiciary Court : Dittay Books SRO JC 16/1-24 which contain the records of the last great use of this procedure.

122. In Records Of Justiciary Court : Dittay Books SRO JCl7/2 the section for Lanarkshire has an item entitled:

"Directions for taking up of dittay - That either upon publick fame or particular informatiune given the persons entrusted with taking up of dittay do further enquire as to the particulars following.

1. What the cryme may be to be set down with the manner how it was committed.
2. Who committed the same and who was accessory thereto their names and designations.
3. Where or about what place the same was committed.
4. When or about what day or whatever day or tyme.

5. With what aggravating circumstances to be partly noted."
123. Thus ibid states clearly that dittays should be taken up on the basis of either "particular information" or "publick fame".
124. Smith: Selected Justiciary Cases vol II pp vi - vii.
125. Records Of Kilsyth Kirk Session SRO CH2/216/1 5th. June 1709 where Jean Buchanan was charged with slandering John Shearer by saying:
- "he had gone to Stirling to delate her to the Justiciary for the intended murder of her bairn"
- She admitted having said this and claimed she believed it to be true.
126. This point is discussed by Smith: Selected Justiciary Cases vol II pp viii - ix. As he says the problems presented by refusal to co-operate on the part of a local community can defeat even a modern criminal investigation department. This provided yet another reason for the division of labour between local and central courts. However for central government the problem must have seemed insuperable most of the time.
127. This was particularly the case with the crimes of infanticide and incest which almost always arose out of Kirk session or local court prosecutions. See for example Scott-Moncrieff: Justiciary Records vol I p 62 24th. June 1664 case of Margaret Taylor and William Wallace charged with adultery and (in her case) infanticide following confession to the regality court of Bo'Ness which had referred the case on dittay. The dittay is in the Book of Adjournal for the period, see Records Of Justiciary Court, Edinburgh : Books Of Adjournal SRO JC2/11.
128. The point is also discussed in Smith: Selected Justiciary Cases vol II pp XLII - XLV.
129. Mackenzie: Laws And Customs pp 20-34.
130. ibid p 223.
131. Smith: Selected Justiciary Cases vol II p vi : J.Irvine Smith (ed): Selected Justiciary Cases 1624-1650 vol III (Stair Society, Edinburgh, 1974) pp 796-809 prints the case of Patrick Bald.
132. Smith: Selected Justiciary Cases vol II p vi.
133. Scott-Moncrieff: Justiciary Records vol I pp 32-3, 36 13th. March 1662, 6th. June 1662.
134. To some extent this was still the case right up to the introduction of full time police in the nineteenth century and even, many would say, after that date as well. However the difference that existed between the investigative system described by Irvine Smith and its eighteenth century successor should not be minimised. The first was largely

concerned with investigation after a case had been started by criminal letter or indictment while the latter was intended to investigate cases prior to their being 'delated'. See Smith: Selected Justiciary Cases vol II pp x - xviii. The only major exception to this rule were the investigations and examinations made by Kirk sessions which often preceded the formal indictment. For contrast see J.H. Langbein: Prosecuting Crime In The Renaissance : England, Germany, France (Cambridge, Massachusetts, 1974).

135. Smith: Selected Justiciary Cases vol II pp vi - vii.
136. ibid pp viii - ix.
137. The first reaction of almost any reader of the records is to wonder why on earth such long-winded disquisitions were allowed or indulged in, particularly considering the variety of successful objection to relevancy. Putting it bluntly - what point or purpose did all this learned disputation serve? One possible answer to the question is suggested by the content of the speeches and submissions. Leaving aside the usual element of special pleading, these were often serious and elevated debates upon the theory and philosophy of law, points of difficulty and in particular the relative weight and application of statute, common law and civil (i.e. Roman) law authorities. These court debates on relevancy were thus one of the fora in which seventeenth century Scots lawyers discussed and refined their concepts of law and jurisprudence. It is worth noting in this connection that Mackenzie in his Laws And Customs often cites, and quotes at length from, depositions made by himself and others before the Justiciary Court.
138. Smith: Selected Justiciary Cases vol II pp LI - LII.
139. ibid pp XLV - LI.
140. ibid pp xxx - xxxii, 414 - 23.
141. It would seem that although the new indictment had to contain new details or instances it need not allege a completely different crime. Thus, in a case of witchcraft one indictment might list a series of acts of maleficium, in addition to the central charge of renunciation of baptism and entry into a demonic pact, and upon its failing be replaced by a second which alleged different acts while retaining the central accusation.
142. Scott-Moncrieff: Justiciary Records vol I pp 6-9, 11-13 20th. August 1661, 10th. September 1661; Records Of Justiciary Court : Processes SRO JC26/27 - this makes it clear that the first prosecution failed because it did not 'prove' a demonic pact. It was clearly this rather than maleficium which was the basis for the imposing of a death sentence.
143. Scott-Moncrieff: Justiciary Records vol I pp 27-9 5th. and 6th. March 1662.
144. ibid p. 81. This pair of cases shows how the courts and juries were in the habit of judging each case on its individual merits, taking into account mitigating and aggravating circumstances. Thus, in cases of infanticide such as that of

Barbara Smith where the child was actually deliberately killed the death penalty would automatically be imposed whereas in other cases the women could be acquitted. Juries and magistrates would base their decisions upon a body of personal knowledge of the case and 'upon 'common-sense' principles of natural justice. It is this as much as anything which accounts for what by modern standards were irregular and arbitrary procedures, verdicts and sentences.

145. ibid p 29, 6th. March 1662; for another example of this see ibid pp 47, 49 1st. August 1662, 20th. August 1662 case of Marion Lawson - she was sentenced to be flogged and banished from Mid-Lothian and Lanarkshire. This practice, of imposing an arbitrary punishment in cases of statutory infanticide, was a recognised and regular part of Scots legal procedure. See Mackenzie: Laws And Customs p 80.
146. Scott-Moncrieff: Justiciary Records vol I pp 54, 57 26th. November 1662, 3rd. February 1663. The penalty in this particular case was imposed at the behest of the Privy Council, whose advice had been sought.
147. ibid p 6 8th. August 1661.
148. ibid pp 34-6 21st. January 1662 case of John Rae elder and younger - this is the same case as that cited in note 54 supra.
149. Mackenzie: Laws And Customs p 98 argues forcibly that theft should not be a capital crime giving no fewer than five distinct reasons why this should be so. Perhaps paradoxically his views on the question of adultery were harsh - ibid pp 86-96 argues that adultery is defined as a capital crime by Dueteronomy 20:22 and that, despite the absence of statute, the Justices had the power to impose the death sentence even for 'single' adultery.
150. Thus in 1661 out of the 38 people whose eventual fate is recorded 20 were sentenced to death while in 1663 out of 19 recorded sentences 10 were capital. What we do not know is the eventual fate of the very large number of people who failed to appear and were declared fugitive nor of the level of royal pardons, if any. Clearly in years such as 1671/2 when the court tried large numbers of people accused of adultery and various minor offences the 'death-rate' was much lower.
151. Extra-judicial settlement of this sort was explicitly allowed for in older Scots laws and in Regiam Majestatem but by this period the whole thrust of legal theory was against it. Even so there would seem to be little doubt that 'privie agreements' did take place. The problem is that unless such an agreement was reached after court proceedings had begun or the parties had the settlement read into a formal record, no documentary record will survive. Thus although we can talk about cases where settlement was reached after litigation had begun we cannot even begin to estimate the number of cases where such settlement preempted resort to law - there is simply no adequate source.
152. For a very good example see Scott-Moncrieff: Justiciary Records vol I p 81 15th. December 1663; Records Of Justiciary Court, Edinburgh : Books Of Adjournal SRO JC2/10 case of Hugh

Crawford of Sundieshaw who having been charged with the slaughter of one George Wylie produced a remission showing that he had agreed to pay assythment to the victim's kin. The remission was a formal royal pardon in the form of a letter or writ - presumably both sides would submit material which would be used in the ext of the remission itself. For another example showing how the procedure worked see the case of William Somerville, pursued by Thomas McMath his brother in law for parricide (the killing of Bessie Renton his mother). Having appeared before the Justiciary court on 24th. December 1669 he was reprieved by the Privy Council on 23rd. August 1670. Then, on 3rd. November 1670, he was granted a remission with his agreeing to pay assythment and 2,000 marks costs to the pursuers after which he was to be banished. However, the Council on 19th. January 1671 was forced to order him put in irons until he should pay, which would seem to have had the desired effect, for on 2nd. March 1671 he was banished by an Act of the Council. See Scott-Moncrieff: Justiciary Records vol II pp 1-7 24th. December 1669; Register Of Privy Council Of Scotland 3rd. series vol III pp 215,234, 272, 303 23rd. August 1670, 3rd. November 1670, 19th. January 1671, 2nd. March 1671.

153. See for example Scott-Moncrieff: Justiciary Records vol II pp 285-6 18th. June 1674 case of William Denniestoun in Cowgate versus John Maxwell of Blastoun and John Maxwell indweller in Paisley - according to the printed record they were:

"indited for assasination and mutilation in sua far as the said John Maxwell in Paisley, having borrowed his sword from the other John Maxwell, he did therewith Assasinate the Complainer at the house of Alexander Home in Paisley, when he was pissing at a wall in Paisley, and therewith did wound him on the brow, and having thrust him to the ground, did wound him in the arm and leg. All which he did tanquam insidiator et per industriam and by way of fforeththought felony....".

yet notwithstanding the action was deserted "consent of both parties". See also ibid pp 287-94, 305 13th. July 1674, 29th. July 1674 case of Margaret Dalmahoy versus William Mason for the slaughter of her husband. Here the jury found Mason had acted in self defence yet even so an agreement was reached whereby he would pay compensation to the widow and:

"the relict upon payment and security of the saids sumes to grant a sufficient discharge of the samen in satisfaction of all she and the children of the defunct can ask or claim upon the accompt of the alledged slaughter of her husband."

145. Smith: Selected Justiciary Cases vol II p vii makes this point. The importance of restitution as a motive for prosecution was clearly recognised in seventeenth century Scotland and found expression in the Act of the Scots Parliament of 1661, titled "Act appointing the pursuer of the thief to have the goods stollen from him restored" and reading:

"Our Soverane Lord understanding that when thieves are taken and execute for theft or declaired fugitives,

their whole estate and the goods stollen also doth fall to his Majestie and to the lords of Regalities and others Justiciars pretending right to the goods stollen; For Remeid whair of his Majestie with advyce and consent of the Estaits of Parliament Statuts and Ordaines. That any persone haveing goods or geir stollen from him, and haveing persewed the stealer thair of, Shall have his oune goods agane wherever the same can be apprehended And Wher the stollen goods cannot be had the pursuer of the thieff shall have the just value of the goods and geir stollen from him out of the readiest of the thieffs goods with the expences waived out by the pursuer, he always pursuing the thieffs usque ad sententiam Reserving always to the Sheriff or other Magistrates and takers of the thieff the expences waived out by them in the taking and putting of the thieff to execution."

See Acts Of Parliaments Of Scotland vol vii 22nd. May 1661 p 228. For an example of a case of theft brought to gain restitution see Scott-Moncrieff: Justiciary Records vol I pp 59, 61, 10th. June 1661, 15th. and 16th. June 1663 case of Sir John Fforbes of Craigevar and George Mitchell his tenant versus George Farquharson, Andrew Shaw, Lachlan McIntosh, John Ferguson, William Reid, Thomas Dan and Christian Mudie - for theft of 12 cattle. Here, according to the printed record, proceedings against the last four were delayed while discussion of an act of restitution took place.

155. See for example Scott-Moncrieff: Justiciary Records vol I pp 48-50 case of Marion Mayne in Stirling versus ----- Edmondstone and ----- Thomsone for 'uplifting' of cows where an accusation of theft was declared to be a civil suit. The point discussed in Smith: Selected Justiciary Cases vol II pp XLI - XLII.
156. Scott-Moncrieff: Justiciary Records vol I pp 41-4, 3rd, 5th. - and 7th. July 1662; Records Of Justiciary Court , Edinburgh : Books Of Adjournal SRO JC 2/10; Records Of Justiciary Court : Processes SRO JC 26/27.
157. So for example in 1669 Alexander Adamson of Braco was charged with destroying trees belonging to John Kerr of Ardicharrald. Scott-Moncrieff: Justiciary Records vol I pp 270, 306 10th. November 1668, 7th. July 1669.
158. For analysis of the period before 1660 see Smith: Selected Justiciary Cases vol II pp XXXVI - XLI. In the 1660's crimes of personal violence were the largest category in every year except 1661, distorted by the witch-craze. Two points need to be made however. One is that made above in the text on the difficulty of classification : should crimes such as robbery and invasion count as crimes of violence or property crimes? The other is that the concept of 'justifiable homicide' was only making its first tentative appearance during the seventeenth century. This was due to the fundamental belief that crimes were actions which caused 'skaith' or harm to an individual - in consequence any killing could lead to prosecution because, even if accidental and unpremeditated, it had caused such harm.

159. On the question of circumstantial evidence see Smith: Selected Justiciary Cases vol II pp LIII - LV. For a classic example see Scott-Moncrieff: Justiciary Records vol I pp 68-9, 20th. August 1663, 24th. September 1663, 2nd. October 1663 case of William Dodds, for the murder of Andrew Hardie of Tullockshill - the evidence here is exiguous in the extreme albeit very suggestive. Interestingly, his sentence was delayed until 2nd. October:
- "with certification of he produce not an assythment
from the partie against that time they will proceed"
- he was unable to do so and was executed.
160. Although there are cases of women being charged with theft (even burglary in one case) and even murder, it was adultery, incest, infanticide and witchcraft which provided most of the female defendants. Thus between 5th. July 1661 and 1st. June 1664 only 7 women were charged with crimes other than witchcraft and infanticide - 3 for adultery, 3 for theft, one for slaughter as opposed to 11 for infanticide and 18 for witchcraft.
161. For such a case see Scott-Moncrieff: Justiciary Records vol II pp 211 - 8 19th, 20th and 21st January 1674 case of Alexander Birnie versus Robert Stewart and James Mckenzie; see also ibid vol I pp 50-2 6th. September 1662 case of James Dewar in Barnhill versus Alexander Baxter and George Bell.
162. On falshood see Mackenzie: Laws And Customs pp 134-44.
163. ibid pp 160-5.
164. ibid pp 86-7.
165. For example see the case cited in note 127 supra found in Scott-Moncrieff: Justiciary Records vol I p 62 24th. June 1663 case of Margaret and Agnes Taylor - the first was charged with both adultery and infanticide, done to conceal the adultery.
166. On the crimes of incest, sodomy and bestiality see Mackenzie: Laws And Customs pp 81-3. As Mackenzie points out sodomy and bestiality were common law crimes, prosecution being based upon Leviticus 20 whereas incest was a statutory offence under act 14 cap 1 James VI. The Problem of the definition of incest taxed the Scots Parliament and from basing it upon the traditional prohibited degrees they moved by 1649 to a definition which made sexual intercourse with the sister or relative of a previous lover incestuous. This particular definition was undoubtedly put into practice during the 1640's and 1650's at least, by both church and secular courts. See Acts Of Parliaments Of Scotland vol VI pp 475-6 1649. For one famous, or rather unfamous, case which involved all of the 'atrocious moral crimes' see Scott-Moncrieff: Justiciary Records vol II pp 10-15 9th. April 1670, case of 'Major' Thomas Weir and his sister Jean Weir. They were convicted of incest, adultery and bestiality.
167. See Mackenzie: Laws And Customs pp 119-24.

168. Thus in 1661 there were no fewer than 19 separate indictments brought but after that the rate fell off to less than 2 per year until the last series of outbreaks at the end of the 1670's. See C. Lerner: Enemies Of God : The Witchhunt In Scotland (London, 1981) pp 69-79.
169. Smith: Selected Justiciary Cases vol III p v.
170. For a case of making seditious speeches see Scott-Moncrieff: Justiciary Records vol I pp 54-5 5th. December 1662 case of William Dobie, weaver in Glasgow; for a massive trial of participants in the 1666 uprising see ibid pp 158-89 4th. December 1666.
171. For an example of a case of cutting green wood see ibid p 81 22nd. December 1663 case of James Scott versus Mungo Noble et al.
172. See for example the comments of Scott-Moncrieff: in ibid p xi and Smith: Selected Justiciary Cases vol II pp xxviii-xxx.
173. Certainly it does not seem to have been the division uppermost in the minds of seventeenth century Scots lawyers. Thus Mackenzie: Laws And Customs pp 12-13 which discussed the division of crimes does not use this formula even though he lists six other ways of doing this.
174. see ibid p 86.
175. In particular this may lead us to see the purposes and goals of the courts and legal system in a very different way from their contemporaries. This in turn can lead one to apply standards of rectitude, failure and success which contemporaries would not have applied.
176. There are of course others - Mackenzie: Laws And Customs pp 12-13 sets out six ways of dividing crimes such as statutory and non statutory, occult and manifest, atrocious - and lesser, capital and non capital, and public and private with the last two corresponding roughly to the two approaches used in the text. Yet who is to say which are more valid? An ideal analysis of the morphology of crime and law would make use of all of these and of other categories.
177. The key question to ask about prosecution in any legal system, other than how it works, is why do people bother to prosecute? In many cases they do not - modern employers often allow for a substantial amount of 'shrinkage', a euphemism for theft by employees. Until recently a similar position obtained with regard to shoplifting - the cost and trouble of a prosecution outweighed the benefits. In a legal system depending to a great extent upon private initiative this question of motive is very important since people would have to be strongly motivated, for whatever reason, to be prepared to endure the costs and delays of judicial actions - hence the Act of 1661 cited in note 154 supra. This was true even for a dittay, though obviously the inconvenience involved was much less than in a case brought by criminal letter.
178. As for example in the case of Fforbes of Craigevar cited in note 154.

179. Scots law at this time recognised that the victims of theft could chose to pursue either before a civil court for restitution only or in a criminal action for both restitution and penalty. See for example the case cited in note 86 to Chapter 4 above tried in the burgh court of Stirling. The problem is that the records of the Court of Session are astoundingly voluminous and it is therefore very difficult to determine if suits arising out of theft were a common part of its business, although one may suspect that they were. It is worth saying that in a pre-industrial society such as seventeenth century Scotland theft may well be rare except in peculiar areas because of the extreme difficulty of fencing stolen goods. Hence the typical pattern whereby, apart from the theft of livestock which was often a large scale commercial enterprise, most thefts are of goods for personal use, such as food, fuel and clothes.
180. So Mackenzie: Laws And Customs p 98 says:
 "The life of the malefactor is ordinarily taken, where the crime cannot be repaired."
181. In other words there is a scale of retribution matched against a scale of injury which in many legal system is matched by a scale of compensation for injury, often finely graded.
182. Except perhaps, as said, in the case of invasion. Here the motive for resorting to the courts would seem to have been to establish that the act of seizure was wrong and that therefore prime right to the disputed property belonged to the pursuer.
183. See Mackenzie: Laws And Customs pp 42-56 argues that the three relevant points are the renunciation of baptism, the entering into a demonic pact and the presence of the devil's mark. This was reflected not only in the indictment, which always gave pride of place to these points, but also in the confessions of witches which always contained accounts of how these three things had been done, using a standard form and structure.*
184. This is very clear in the case of witchcraft where, it is argued, accusations commonly derived from the need to release the tensions existing within the community by the identification of 'outsiders' who were both a source of tension in themselves and ideal scapegoats. For various reasons, poor, single, old women fitted this bill better than most, particularly those cursed with a sharp tongue. See Larner: Enemies Of God pp 20-23, 92-102; A. Macfarlane: Witchcraft In Tudor And Stuart England (London, 1970).
185. This division, given by Balfour, is taken directly from Regiam Majestatem and was clearly the long-standing traditional division. Mackenzie: Laws And Customs p 1 argues that this is too vague and imprecise and ought to be dropped.

* For further development of the literary analysis of these confessions see appendix no.5 below.

186. This meant not only offences such as treason, leasing making and murder but also 'crimes against nature' such as incest, bestiality and witchcraft which were seen as threatening the general moral order, as well as bringing down God's wrath upon the community. Theft, slaughter and aggravated assaults such as rape or hamesucken could fall into this category but often did not, being in this mode of analysis 'intermediate'.
187. Mackenzie: Laws And Customs p 2 says: "That is a crime whereby the public place is immediately disquieted" - clearly all assaults and many thefts and even robberies fell into this category.
188. Scott-Moncrieff: Justiciary Records vol I p 34 17th. April 1662, case of James Welsh.
189. For the rise of this view and its consequences see M.Foucault: Discipline And Punish : The Rise Of The Modern Prison (London, 1977) passim but particularly pp 1-130.
190. For a discussion of this point see Smith: Selected Justiciary Cases vol II pp LVI - LXII. The acceptance of criminality as one rebarbative aspect of human nature did not however prevent Scots from dividing criminals into the casual and the incorrigible, the latter being the persistent and 'notour' offenders most likely to receive severe and condign punishment. This kind of approach is typical of most 'primitive' legal systems where, as Mair puts it, people may be prosecuted for 'the crime of being a bad lot'. See L. Mair: An Introduction To Social Anthropology (Oxford, 1972) pp 146-8.
191. It is the lack as yet of truly adequate information on this point which makes firm conclusions about the significance of the geographical provenance of cases almost impossible.
192. See Langbein: Prosecuting Crime In The Renaissance pp 21-54, 104-25.
193. The position today is that all serious crimes are tried in the High Court. In the seventeenth century a certain proportion would be tried in local courts for several reasons but not least because the Justiciary court lacked the infrastructure of police and investigative magistrates enjoyed by its modern counterpart. In simple terms it could only hope to try those cases where the pursuer wished to resort to it and the physical circumstances made it possible. Its jurisdiction was national in scope and it could try all categories of crime but it did not have either a practical or theoretical monopoly.
194. Smith: Selected Justiciary Cases vol II p LVIII
195. It was thus fulfilling one of the central functions of the monarchy as described above pp 303-8 . The changes which took place in the function and structure of the court after 1660 partly reflect changes in 'demand' as the role of the state altered - this pressure however came not from the 'general public' but sections of the political ruling class and from the rising economic group.

196. The superiority of the Council was clearly recognised - see for example the quote in Scott-Moncrieff: Justiciary Records vol II p 319:
- "as the Session is a Judicatory meerly civil, so the Council is a Judicatory above both, and being so far competent in the cognition of crimes that they take precognitions in criminall causes; they modify and qualify the sentences of the Criminall Court; they determine intricate cases remitted to them by the Justices in point of law".
- McMillan: Evolution Of The Scottish Judiciary p 63 argues that the holding of ayres was primarily the responsibility of the King and Council and when the latter chose to exercise this power, as it did on more than one occasion during the period, the Justices would not go out. The Justices were thus seen as substitutes for the Council, exercising the criminal portion of its jurisdiction.
197. For one example see Scott-Moncrieff: Justiciary Records vol I p 4 29th. July 1661 where a joint court was held at Musselburgh to try witches, the holder of the regality of Musselburgh being Lauderdale.
198. Thus James VI and Charles I both attempted to set up regular circuits and to increase the power of the Justices of Peace. This state of development and uncertainty is clear from Mackenzie: Laws And Customs where the author repeatedly says first that the traditional state of affairs is one thing and then argues, often citing court record, that this is either no longer so or ought not to remain so.
199. Various: Introduction To Scottish Legal History p 344.
200. Register Of Privy Council Of Scotland 3rd. series vol III pp 282-4, 11th. January 1671, 301-3 2nd. March 1671. These edicts were reenacted by the Parliament in the following year.
201. G.Donaldson: 'The legal profession in Scottish society in the 16th. and 17th. centuries' in Juridical Review vol xxi (1976) pp1-19.
202. Register Of Privy Council Of Scotland 3rd. series vol III p 301.
203. Thus a circuit had been held in the West in 1666/7 but this was mainly a 'political' circuit and its records are in the privy council papers. There may have been circuits held which have left no record but if so they also left very little mark on the central records, unlike the 1671 ayre.
204. These are preserved in Records Of Justiciary Court : Circuit Court Minute Books SRO JC 10/3.
205. ibid 25th. - 28th. April 1671. Judges John Baird and Alexander Dunnun.
206. ibid names the parties as follows - John Guidlat of Abbottshaugh indicted for adultery with Agnes Burne his servant and adultery with Margaret Aitkine in Falkirk; William Kincaid of Auchinreoch - mutilation; John Craig of

Cult - adultery with Catherine Finnison; Robert Kerr glover in Stirling - lese-majeste (by saying "the King was a fool for making bishops and he would sla' them all"); Robert Buchanan in Din - theft; John Burmont miller at Balloch - arson; Thomas Campbell burgess of Stirling and John Robertsons glover there - blooding; Andrew Lyll in Duntreath - theft of sheep; John Miller in Phinnockhaugh - theft; Walter King in Baldernock - adultery with Margaret Craig; James Lermonth in Maddistoun - adultery with Christian Robertsons; Robert Johnstone in Cambusbarrone - adultery with Janet Weir; John Barr in Balerno - adultery; Margaret Aitken in Falkirk - adultery; John Gillfillan in Fintry - blooding and beating; James Trumble in Corsban - bearing forbidden weapons; John McNeik in Auchingoch - incest with his mother's sister; George Mcfarlane in Auchintollie - theft of sheep; Bartholomew Mckinlay in Kippen - theft of sheep; John Mckinny in Kilbryde - theft of oats; Robert McGregor - theft of cows; James Liddell in Phinnockhaugh and ---- Liddell his son - "divers thifts"; John Logan in Carron - arson; Bartholomew Miller - theft of a horse; James Anderson in Blairweckie - theft of hides; Margaret Tailyour in Campsie - adultery with William Lennox in Mugdock; William and Alexander Galbraith in Dennie - cursing their mother; Janet Mungall - adultery; John Ronald in Kilsyth - arson; George Adam in Blair - theft; James Reddoch in Carronmure - theft; William Finlaysone taylor in Stirling - usury; Thomas Mcilhose in Garden - adultery with Margaret Mcilhose, accessory to the murder of their child and robbery; James Murdoch in Garden - theft of cloth; Marion Mclaw in Mauchline - blasphem (by drinking to the good health of the devil and his servants); Archibald Shaw of Kilmore - troubling the Kirk; William Mitchell - oppression; Andrew Mckelvie in Buchanan - adultery; Gilbert Mortoune in Buchanan - adultery.

207. Thus in the case of Andrew Mckelvie the adultery was 11 years old. This seems to have been a general pattern throughout Scotland - Scott-Moncrieff: Justiciary Records vol II pp53-4 19th. June 1671 prints a case where 5 persons found guilty - of adultery at a circuit court held in Jedburgh in May produced documents from the Cromwellian court which were upheld. For the case of John Guidlatt see ibid pp 57 10th. July 1671, 74 5th. Debruary 1672.
208. Records Of Justiciary Court : Circuit Court Minute Books SRO JC 10/3 - the two counts against John Guidlatt, those against John Craig of Cult and James Lermonth went to an assize, that against Margaret Tailyour was continued. Guidlatt was found guilty of adultery on the first count and of fornication only on the second; the verdicts in the cases of Craig and Lermonth were guilty and not proven respectively.
209. ibid - the cases of Tobert Johnstone and Thomas Mcilhose were deserted, the rest simply record the accused's having confessed guilt.
- 210 ibid - only the case of Andrew Lyll went to trial, the verdict being 'not proven'. Of the 2 other cases besides the 10 which were continued, in one (James Murdoch) the diet was deserted while in the other (John Miller) an absolvitor was produced.

211. In these cases, there are no verdicts recorded for Marion Mclaw (blasphemy) and Archibald Shaw (disturbing the Kirk), the cases of John Logan (arson), John Ronald (arson), William Finlaysone (usury), Thomas Campbell and John Robertstone (not recorded) and Thomas Mcilhose (murder and robbery) were all deserted, the case of the Galbraiths (cursing mother) was continued, William Mitchell's (oppression) simply records his having confessed. The cases of William Kincaid (mutilation), Robert Kerr (lese majeste) and John Burmont (arson) were all referred to an assize, resulting in verdicts of not proven, guilty and not proven respectively while John Gilfillan (blooding and beating) and James Trumble (carrying forbidden weapons) both produced an absolutor. This and the previous note show how few conclusive verdicts were reached at the circuit - a pattern very similar to that of 1652. It would seem the purposes of the two circuits were also the same, to identify and settle all outstanding cases, 'laying them to rest' and giving the new court, so far as possible, a fresh start.
212. These were the cases of John Miller - for theft - from the regality of Glasgow; John Gilfillan for blooding - from the barony of Culcreuch; James Trumble for bearing forbidden weapons and blooding - from the barony of Newton.
213. Thus in the case cited in note 208 above the court records state that the penalties imposed by the English judges were only reluctantly accepted due to their going against traditional Scots practice.
214. So for example see Scott-Moncrieff: Justiciary Records vol II pp 57-8 10th. July 1671, case of John Craig of Cult; p 58 10th. July 1671 case of Walter King in Baldernock; p 74 5th. July 1672 case of John Barr in Balerno; p 58 10th. July 1671 case of Margaret Aitkin and Janet Mungall.
215. This happened for example in the cases of John Guildlatt, Margaret Aitkin and John Barr. See ibid p 74, 5th. July 1672 for Guildlatt and Barr; p 61 13th. November 1671 for Aitkine.
216. This was the case of John Craig of Cult - see ibid pp 79-80 19th. February 1672 when he was declared fugitive; pp 110 19th. August 1672, 127-8 27th. January 1673. For another example see ibid p 59 24th. July 1671 case of Walter King.
217. Thus in ibid pp 53 19th. June 1671, 84 4th. June 1672 is the case of James Liddell in Phinnockhaugh charged with 'divers thifts' - this was one of the cases which had been continued.
218. Because of the policy followed by the Privy Council of sending its members out on ayre the Justiciary Court would not have gone on circuit as well - what circuits were held have their records stored in the Council's papers.
219. These circuits are recorded in Records Of Justiciary Court : Circuit Court Minute Books SRO JC 10/4 & 5. The first, from 29th. August 1679 to 3rd. October 1684 relates mainly to proceedings against rebels after Bothwell Bridge, the second, covering 27th. January 1677 to 15th. Debruary 1677 is concerned with a witch trial at Paisley.

220. This shows in the central records as well where the years 1671 - 4 with a great mass of criminal business of all sorts are followed by several years dominated by political crimes.

CHAPTER. 7The Crisis And Demise Of The Old Order 1690 - 1747

So, throughout most of the seventeenth century the central courts, particularly session, Parliament, Privy Council and High Court of Justiciary, continued to fulfill their traditional function in a legal system very different from today's. They were part of a system of law and courts which helped to maintain social order by upholding and enforcing private right. The idea of public right and hence of public wrongs was slow to take root, so strong was the concept of law as a force which regulated relations between individuals and groups, upheld and supported by the state rather than as a creation of that state which imposed order upon society. In this system the position of the royal courts was indeed central, in more than one sense. They both regulated and supervised much of the work of local courts, tried cases which for one reason or another the local courts could not and handled the most serious delinquent acts. However they were only one part of the system. Much of the maintenance of order depended upon the local, often private courts which grew directly out of the local communities described elsewhere in this thesis. * In seventeenth century Stirlingshire, apart from the 1650's and 1671, the larger part of the task of upholding order fell upon the Sheriff, barony and regality courts together with Kirk sessions: for most people the legal system meant the court of their feudal superior or the Sheriff. In general only very grave offences and those involving people of substance came before the Privy Council or the High Court. On the other hand, as the system of commissions shows, both local and central courts needed each other: for the entire system to

work effectively both parts had to exist and co-operate. The central courts bound the disparate local courts together and regulated them while the local courts did most of the work of investigation and enforcement of central edicts in the locality - if they chose to.

This was a system with many elements of great antiquity. During the middle years of the seventeenth century these elements can be made out, despite the changes which had taken place over the years, particularly after 1587. Any historian writing a history of Scots law which ended in 1650 would have to emphasize continuity and gradual development rather than dramatic change.¹ The same is true for other aspects of Scottish history such as the economic and social structure of the country. In some ways this resistance to radical change persisted after 1660, despite severe strains and some marked changes. Not only the monarchy but the entire old order was restored in 1660: it looked as though the frontal assault of the years 1637 - 1660 had been beaten off and that the traditional order had reasserted itself. Yet, as said earlier, the problems which had caused the upheavals of those years remained unresolved, even exacerbated by the Restoration. In the years after 1660, as well as much political unrest, change was happening in the legal system as elsewhere which, while not having a dramatic impact made more radical change possible. Radical change there certainly was. In 1688 James VII fell and the monarchy which had ruled Scotland for over three hundred years was overthrown: as one commentator has said this, rather than the Union was truly the "end of an auld sang".² In the years after 1700 a veritable tidal wave of change struck Scotland: by the end of the eighteenth century many of the great traditional institutions had vanished into history and the economy, political and social structures and

had all been transformed. So much so in fact that many Scots of that time had lost all sense of continuity with their country's past which was seen as barbarous and alien. It was only the genius of Scott which created an acceptable version of that past.³ The changes in the legal system were as dramatic as any - the disappearance of Parliament and Privy Council, the agrandisement of the courts of Session and Justiciary, the abolition of heritable jurisdictions being the most obvious. By 1720 the old legal order was moribund and many changes had already taken place. Then in 1747 the remnants of the old order were swept away. These seemingly abrupt changes came about because of two things: the piecemeal, 'preparatory' changes described earlier and the coming to a head between 1690 and 1707 of a threefold tension within Scottish society.

The word 'crisis' is one of the most overused in modern historiography but when speaking of Scotland between the revolution and the Union we can use the term in its strict medical-derived sense of a time when tensions and conflicts reached a decisive point of intensity and were resolved.⁴ The crisis of those years was, as said, threefold - political, economic and social.

The destabilisation of Scotland's political order by the union of crowns had not been resolved, despite several attempts and by 1690 it was still not clear what sort of structure of politics and government Scotland ought to have. The policies of Charles II and James VII had been rejected but the radical alternatives of the later Covenanters had no support amongst those with power. The divisions within Scots society were so deep that it was almost impossible to conceive of any political settlement which could command assent and be generally regarded as legitimate.⁵ The most pressing question

of all, that of the status and position of Scotland's ruling class within the united kingdoms had still not been answered. On the one hand they could decline to the position of a backward provincial gentry, far removed from the centre of power and its fruits or on the other hand they could try to gain an important and significant place in the councils of the now anglicized monarchy. This meant taking part in the politics of the English state and clearly implied union. The drawback here was that they ran the risk of alienating themselves from their own society and destroying their ultimate political base -- as the first Duke of Hamilton had almost done. One possible solution to this dilemma, advocated by such as Fletcher of Saltoun, was the reform of the Scottish state and economy, to enable Scotland and England and their respective ruling classes to treat on more equal terms. However, events conspired to make this impracticable. The economic pressure of the 1690s, the war with France and the general political situation in Britain all made a solution of some kind imperative.⁶

The economic crisis was even more acute. The 1690s were a time of economic recession marked by falling trade, harvest failure and dearth. At the end of the decade came the disaster of the Darien scheme which wiped out most of the nation's liquid capital.⁷ Throughout the decade trade was hit by war and the general slump in Europe.⁸ Most pressing of all was the agricultural crisis which led to these times going down in folk memory as "The Seven Ill Years of King William". In 1695 the harvest failed and it failed once again the following year and yet again in 1698-9. This series of failures produced a desperate subsistence crisis, the last great famine in Scottish history.⁹ The accounts of later years, with their pictures of people lying dead beside the road with their mouths full of grass or dragging themselves into churchyards

to die, may well be exaggerated reflecting the fact that this was the very last great famine in Scotland. The last major period of dearth experienced by a population is often remembered as the worst and tends to pass into folklore.¹⁰ Even so these accounts reflect a truly desperate situation, which, according to Fletcher of Saltoun, led to the death of a fifth of the population. This famine was caused by the pressure of population upon an inadequate subsistence oriented agriculture coupled with a series of very harsh winters and cold, wet summers. The 1690's were a decade of bad weather throughout Europe, the last fling of the 'little ice age' and some places such as France and Scandanavia suffered even more than Scotland.¹¹ Other parts of Europe however managed to cope and the weather of the 1690's had such a devastating effect on Scotland because the agricultural system left the rural economy with little reserve: the loss of production was therefore disastrous.

At the same time there were tensions within the social structure which were becoming more apparent and important. The 1690's saw many noble houses going under financially and marked the start of a very rapid turnover in the membership of the landowning class. The strategy adopted by most noble proprietors and other members of the property owning class had produced the first signs of radical change at the grass roots, in the make up of rural society.¹² The shift to single tenancies in many parts of Scotland and the economic policy of creating local market economies had created a class of small to middling property owners, made up of large single tenants and feuars, those traders who had managed to accumulate wealth because of their favoured position within the local economy and the increasing number of well-to-do townsmen.¹³ All of this put the

traditional social order under strain in many ways and taken with the seemingly sudden economic crisis again made the need for some kind of decisive action seem imperative.

This threefold crisis was as acute and easy to see in Stirlingshire as in the rest of Scotland. The political order of the shire had been profoundly shaken by the events of the years from 1660 to 1688. Sectarian strife had divided local communities with militant prebyterians the disgruntled faction before 1688 and a substantial minority of episcopalians afterwards. Many important families, most notably the Livingstones, were Jacobites, opposed to both the religious and secular settlements of 1688/90. As a result they were excluded from any effective exercise of power at the centre. The local impact of the economic crisis is easy to make out, with the session records which survive for the period full of references to the desperate straits of the poor and the pressing need for charity.¹⁴ The commission of 1692 speaks volumes for the fallen state of the burgh, even allowing for special pleading.¹⁵ The court books of the regality of Falkirk show the desperate financial straits to which many were reduced in such a local community, with people pleading sheer poverty and destitution as reason for non-payment of debts.¹⁶ Because many simply could not pay their rents, either in money or in kind because of the dearth, the Earl was hit very hard as well. He was sued several times in his own court for substantial debts, which he clearly could not meet.¹⁷ The need for choice was as clear at the local as at the national level.

Those choices were made: between roughly 1690 and 1710 decisions were made and actions taken, some quite deliberately, others in response to immediate circumstances, which led ultimately to far reaching change. This came about

partly as a result of quite conscious decisions made by Scotland's rulers and also because of pressures from England.¹⁸ The net effect was to make those two decades in retrospect a watershed in Scottish history, the start of a 'new story'.

Some of those actions have already been touched on earlier in this thesis. Individual landlords began to move more markedly towards commercial farming and the adoption of new agricultural techniques. At the national level the convention Parliament passed several important measures of economic reform the most important of these being the "Act Anent Lands lying Run-Rig" and the Act For Division of Commonty.¹⁹ There had of course been reforming legislation before but not often of such radical stripe. Previous Acts had been limited in scope and often specific; these were far reaching and general.²⁰

Indeed, during the 1690's it was the Parliament which was at the forefront of movement for reform. It came out of the revolution of 1688 - 90 with greatly enhanced powers and importance and was for the short remainder of its existence as active and as influential as it had ever been.²¹ In 1690 its constitution was reformed and the Lords of the Articles were finally abolished for good.²² In 1693 Tweeddale, in his capacity as commissioner, made an address urging the passage of reforms in several areas and the Parliament obliged, not least in the area of law. Several technical Acts were passed, designed to improve procedure and to regularise the practice of the central courts. One Act was passed empowering the creation of a commission to enquire into the entire legal system with power to make "Orders, Acts and Constitutions for regulating the same in tyme coming".²³ These measures, like the agricultural Acts cited above, had little immediate effect: they are more important perhaps in the long term and for what

they reveal about the state of mind of Scotland's rulers in these troubled years. In all fields, whether trade, agriculture or law there was a willingness to contemplate fundamental change, even to admit such changes might be both necessary and desirable. The ruling class were being pushed towards a policy of abrupt 'modernisation' which involved abandoning many of its traditional institutions of rule.²⁴ The 1690's were a time of intellectual change, seeing as they did much writing and publication of ideas in the fields of economics, agriculture and politics where there was a clear move away from the religious, medieval style philosophy which had dominated Scots political thought for most of the seventeenth century.²⁵ In the field of law, this was the decade which saw the triumph of the first and greatest Institutionalists with the definitive publication of Stair and Mackenzie's great works. The victory of their, particularly Stair's, ideas would seem to have been total.²⁶

As well as passing many reforming Acts the convention Parliament in its various sessions carried out much judicial business. As in the years after 1640, the abolition of the Articles and the reassertion of Parliament's rights led to a great increase in judicial work and the final flowering of its function as a court of law.²⁷ It also attempted to establish its preeminence beyond doubt, by the Act of 1692 asserting its right to hear appeals from any court, including the Session.²⁸ The status and activity of the Privy Council at this time is not so clear but it would seem that in the first part of the decade at least it was very much weakened, finding it difficult to attain a quorum.²⁹ It may be that the vicious struggles of the previous thirty years had compromised it while many were now excluded from membership by their opposition to the settlement of 1690.

In general the movement of the 1690's so far as the Parliament was concerned was to enhance the power of Scotland's traditional central institutions by reforming them and asserting their power over other portions of the polity. This fits the 'third course' identified above and would have been popular, given the growing nationalist sentiments of the time. This direction of policy can be seen in the development of the other courts as well, particularly the Session and High Court. The period between the revolution and the Union would appear to have seen a growth of their power, with much greater assertion of the powers of the central courts and in particular much more use of the power of advocacy.

Advocation, as defined by Mackenzie, was a procedure whereby a case pending before a lower (i.e. local) court could be transferred to a higher one, meaning usually the Session or the Justiciary court.³⁰ There were several recognised grounds for starting the procedure including partiality on the part of the court, particularly where the judge or holder was kin to one of the parties : the existence of a state of "deadlie enmity and feud" between the magistrate and the defendant: the inherent significance of the case, which required that it be tried by the highest possible court and the assertion that the court involved was not competent to try the case in question.³¹ An advocation could be raised in two ways. It could be started by one of the central courts on their own initiative, as in the case of the Sheriff-depute of Inverness versus Angus Mackintosh from 1665 which Mackenzie cites more than once.³² However it was much more common for the action to be started at the behest of one of the parties to the case. The first step was to draw up a petition, stating the reasons why the case should be advocat, directed formally to the monarch but in fact sent to one of the

central courts. If this was accepted a formal document would be drawn up, known as a letter of advocacy, which ordered all process in the lower court to stop and transferred the case to a higher judicatory.³³ That was not however the end of the matter: when the case came before the Session of Justiciary court they could 'repell' the advocacy and remitt the matter back to the local court. The use of the word 'remitt' in this connection is highly significant: it shows that the case remained in theory under the Jurisdiction of the central court which had simply chosen to devolve its handling back to the local body. That this was the actual position is clear from the way local courts had to apply to the centre for authority to cite witnesses in such instances.³⁴

Advocations were brought before the 1690's but they were infrequent and were almost invariably remitted.³⁵ After 1688/90 they became much more common and most were not remitted. The earlier records of Falkirk regality court contain no instances at all of such actions: there are 2 from the earlier 1680's and at least 6 from the period after 1688.³⁶ So it would seem that the central courts were enforcing their powers to the full, putting pressure upon the local jurisdictions, particularly the heritable ones. Certainly in Stirlingshire the period after 1688 saw a falling off of business in the local courts. This may have reflected declining crime rates but the possibility of its being due to that pressure cannot be excluded. In Scotland in general the impression gained from study of the local court records is that the years after 1688/90 saw a clear decline in the importance of these jurisdictions. This went with the changed economic policies of many landowners - as the policy of maintaining a local 'feudal market economy' was abandoned so the institutions which supported it were also

deserted both by their holders and perhaps by their 'customers'.

However it was the Union of 1707 and its aftermath which brought about the decisive rupture. The failure of the Darien scheme, the Alien Act of 1705 and the pressing problem of succession to the throne all contrived to push the Scottish elite down the road to Union between 1700 and 1707.³⁷ As the 'third course' described earlier became impracticable so Union came to seem the only political option. It also fitted the 'new economic policy' being increasingly followed north of the border, leading as it did to the creation of a very large free trade area - the largest in Europe in fact. So, in 1707 after much heated debate the Scots Parliament voted for Union and its own dissolution in the new United Kingdom Parliament. The survival of an independent system of Scots law, including heritable jurisdictions, was specifically allowed for in the Treaty of Union but the new circumstances brought about by that Union combined with existing pressures for change and led to, as said, a decisive break.

In the first place Parliament, the ultimate authority in the old legal system, was gone and the United Kingdom Parliament in London, dominated by England, could not replace it. Moreover in 1708, as the result of manoeuvres by the political faction known as the Squadrone, the Privy Council was abolished.³⁸ So, in just over two years the Scottish legal system lost both of its central regulating and coordinating bodies. The effects were far-reaching. Parliament, consisting as it did of all the major court holders and representatives of the minor ones, had held the local courts together, providing them with a common law and an ultimate authority which could clarify awkward points of law. It was Parliament which linked all the local courts together to form a national system:

although personal links between court holders and magistrates survived 1707 these had lost their institutional expression and became increasingly local rather than national in scope. While the Scots Parliament existed local court holders, whether gentry or great nobles, retained ultimate control of the law and the legal system. They could make and influence law at the national level, either through political pressure or by private legislation. After 1707 they no longer had this ability, given the composition of the Westminster Parliament. The abolition of the Privy Council was, if anything, even more serious.³⁹ The Council had regulated the local and central courts and governed relations between them; it had controlled, by means of its commissions much of the criminal jurisdiction; it had provided many of the authoritative, regular day-by-day decisions which the system required for its functioning as well as being the source of much legislation. It had provided a permanent institutional link between the centre and the locality making possible the system of autonomous local and devolved criminal jurisdiction described earlier. The Council played such a vital, pivotal role in the old order that its abolition meant it could no longer function fully.

Among the manifold consequences of the demise of Parliament and Privy Council five demand our attention. Firstly, after 1708 the nature of Scotland's national law underwent a sea-change. Although Parliament and Privy Council had left behind them a legacy of statute law there would be no further additions to that body from a Scottish legislature. Given the United Kingdom Parliament's lack of both interest and knowledge, this meant that for many years after the Union Scots law was made and shaped by its two main courts, particularly the Session and came to reflect the ideas and purposes of full time lawyers. Scots law is to a remarkable degree lawyers law, a

position reflected in the uniquely high status given to certain writers whose work can be cited as authority in a case, alongside case, statute and common law.⁴⁰ Also a result of the Union, the status and position of the Court of Session and High Court of Justiciary were drastically altered. Before the Union they had worked under the watchful eye of the Council and Parliament, subordinate to them and subject to direct intervention and control. Their jurisdiction was a devolved one, both in theory and practice. With the Council and Parliament gone, the Session and the High Court became truly supreme courts, completely independent.⁴¹ They were no longer subject to intervention by the Council at the behest of powerful locals, often court holders, so the relationship between them and the local courts was markedly altered. Indeed the most important consequence of the abolition of Parliament and Privy Council, both in economic and political affairs as well as legal, was the breaking of the link between the national community of the elite and the small local communities in which most Scots lived.⁴² These were now drawn inexorably into a new system, marked in the economic sphere by the emergence of a national market economy and in the area of law by a strongly centralised structure of law enforcement.

The events of 1707 - 8 had two practical consequences. A system of commissions and local Justiciary trials was no longer practicable as the supervising body had been abolished. This made the need for a truly effective system of circuits even more pressing. Moreover there was no longer an ultimate court of appeal which could cut short 'due process' by executive action - this meant that some kind of judicial hierarchy of appeals became necessary with all that implied for judicial specialisation and division of labour.

Thus, the three years after the union saw the final decisive change. In many ways the reforms of those years had the same form and purpose as those attempted by Cromwell in 1652 - 60 and by others in more moderate style in 1671 - 2. This time however they were successful. We can identify three key measures: a change in the position and role of the Justices of Peace, bringing the Scottish situation into line with that in England; radical reforms of the dittay system and a general change in the route whereby cases came to the High Court; a shakeup in the working of the High Court of Justiciary - in particular the successful establishment of regular ayres.

In the very year of the Union the government of Queen Anne issued a proclamation, given statutory backing by the Act Q Anne 6 caput 6, which gave general instructions to the Justices of Peace, extending their powers greatly and bringing them almost into line with England.⁴³ This amended the Instructions to Justices issued in 1661 by the Scots Parliament and effectively restored the situation of the 1650's so far as the powers of J.P.'s were concerned.⁴⁴ As the system had fallen into a state of decay in many parts of Scotland, the Act provided that Commissions of the Peace should meet in September 1707 (on the 9th. for lands North of the Tay, on the 23rd. for lands south of it).⁴⁵ The records which have survived from Lanarkshire suggest that the J.P.'s gradually grew in importance till by about 1725 they had established themselves on a level with their English counterparts although one must be cautious on this point. Attempts to enhance the powers of J.P.'s had been made before under James VI, Charles I and Cromwell but these had all failed for one reason or another. This time the government was able to persist in its policy, unlike the Cromwellian regime and it does not appear to have faced the same degree of opposition to J.P.'s from the

franchise court holders as its predecessors. This reflected the changing interests and modus operandi of Scotland's rulers who came to find the role of Justice of Peace more useful than that of baron. What is certain is that the newly strengthened J.P.'s were soon put to work, following upon the reshaping of the High Court of Justiciary.

In 1708, the High Court went out on ayre for the first time in many years, establishing a routine that would survive for over a hundred years.⁴⁶ The first full circuit was completed in October 1708 with the Judges sitting at Stirling on the 21st. and 22nd. of that month. After that the circuit court for Stirling was held regularly twice a year in May and October, on or about the 21st. of each month. They managed this even in 1745 and the only break in continuity came between 1715 and 1717, due to the first Jacobite uprising and its aftermath.⁴⁷ The records for the initial circuits of 1708/9 are much fuller and more accessible than for 1671 or the 1650's and one can construct a fairly detailed picture of how the ayre was organised and run.

At the start of August 1708 the circular asking for the 'taking up' of dittays was sent out to all the Sheriffs and burghs. For every shire in Scotland there is a preserved dittay book, consisting of the original question, the names of the people to whom it was put and their replies. The question simply says more or less "do you know of any persone within the shire of who have committed...." followed by a comprehensive list of crimes, starting with treason and ending with such pecadilloes as steeping lint in running water.⁴⁸ The book then records the names of those questioned and their occupation and lists the names of those people given up along with the crimes they were supposed to have committed. Often this

is all that is recorded but sometimes details and particulars of the alleged offence are entered, such as when it was committed or its history. The more detailed testimony which made up the actual dittay is preserved in the process papers though even these are often very terse.⁴⁹ The books record the taking up of dittay in 1708 and 1709 : no such records exist for subsequent years for reasons which will become clear. As well as the dittay books for 1708 - 9 the circuit court books have survived in a continuous run from 1708 onwards. There are also the process papers for the circuits and the various cases tried at them, while the run of central records in the shape of Books of Adjournal continues throughout the period.⁵⁰ All of these have been indexed by the record office so that comparisons can be made between Stirlingshire's particular experience and that of the entire nation.

Between the 20th. and the 23rd. of August 1708 37 people gave up dittay, naming 57 individuals as guilty of various crimes ranging from adultery to murder.⁵¹ Most of the deponents only named one or two people but some, such as John Wilsons, session clerk at St. Ninians and John Neilsone merchant in Falkirk accused several.⁵² Some parties were accused by several deponents: thus Thomas Ffin in Auchinbouwie and Margaret Mcleiry were indicted for adultery by three people.⁵³ It is not clear whether these were all indictments made in response to direct orders in the form of a writ: some may well have been 'privat informations' given voluntarily. Thus John Doss baillie in Stirling was accused of blasphemy by saying:

"God almighty never thought it worth his whyle to fyle his fingers in making the lyke of Robert Simpstone merchant in Stirling"

the dittay was given by none other than Robert Simpstone.⁵⁴

<u>Type Of Crime</u>	<u>Dittay Books 1708</u>		<u>Circuit Court 1708</u>	
	<u>No. of Persons</u>	<u>No. of Cases</u>	<u>No. of Persons</u>	<u>No. of Cases</u>
Adultery	42	25	33	22
Murder	3	3	3	3
Infanticide	1	1	1	1
Blooding	1	1	1	1
Theft	5	3	2	1
Blasphemy	1	1	1	1
Bestiality	1	1	1	1
Breaking prison	3	2	1	1
Falsehood	1	1	1	1
Other	1	1	-	-
	—	—	—	—
<u>TOTAL</u>	59	39	44	32
	—	—	—	—

However such cases seem to be exceptional with most clearly coming in response to writs. Altogether 43 persons were called to appear before the circuit court when it sat on the 21st. and 22nd. of October 1708, in a total of 32 actual cases with one person charged with two separate crimes.⁵⁵ As the first table shows the commonest crime by far was adultery. Three cases of adultery mentioned in the dittay book never came to trial and in another three only one of the two parties cited in the dittay was charged to appear in court.⁵⁶ One case of prison breaking involving the rescue of a woman charged with infanticide from the tollbooth of Stirling was not tried at the circuit with two accusations of theft also not being raised.⁵⁷ All the cases tried at the circuit court were derived from the dittays - there were no private prosecutions. Amazingly only one case, that of Elizabeth Becock or Lake, charged with infanticide, had a positive result: she was found guilty and hanged.⁵⁸ In the one case of theft which came to the court a decret of the regality of Montrose was produced which ended the matter.⁵⁹ In 3 of the adultery cases the woman involved did not appear and was declared fugitive and put to the horn.⁶⁰ In every other instance however the records state that the diet had been deserted i.e. that the trial had been abandoned. In most cases the records say:

"The court deserts the diet and discharges the
said (name of defender) from any further
trouble"

but in some the entry simply says "Diet deserted". This was no minor point as the two entries had quite different implications. In the first instance the court had declared the case closed and no further prosecution from any source was, in theory, allowed. By contrast the second formula meant only that the particular

trial set for a specified date had been abandoned: it was still possible for the party involved to be prosecuted before a subsequent circuit or another court. Thus in the case of John Foyer in Baldernock, charged with blood and battery the court deserted the diet

"but allow him to be pursued for the said crime before the judge ordinar, Justices of Peace or other judges competent".⁶¹

Again, William Brown of Seabegs indicted for art and part of the murder of George Robetsone, had the diet of his trial deserted in 1708 but was reindicted and put to a trial by jury in the following year.⁶²

The High Court returned to Stirling in May of 1709 and tried a further 10 cases and 13 individuals.⁶³ Of these, only one can be found in the 1708 dittay records - this was the case already mentioned of John Foyer in Baldernock who clearly had been prosecuted before another court in the meantime. The entry concerning him reads:

"In respect of the decret of the baillie of the barony of Calder....the court deserts the diet etc".⁶⁴

There were however 4 cases which do occur in the dittay book which was formally drawn up three months later! *⁶⁵ In fact this sitting of the court was quite different in character from its predecessor both in composition and result. Three of the cases involved former ministers charged with 'intrusion' meaning unlicensed preaching and celebration of the sacraments particularly baptism. All three appeared and were ordered to desist and to remove out of the shire.⁶⁶ There were three cases of adultery all of which produced a result: two went to trial by assize with the parties being sentenced to remain in gaol

until October of that year while in the other the man and woman both admitted guilt and were sentenced to stand at Falkirk mercat cross wearing a placard saying "these are adulterers" from 11 to 12 a.m.⁶⁷ In another case, a certain Andrew Adam in Belhenning was charged with falsehood and stellionat - his case was sent to Edinburgh for trial where he was found guilty and hanged.⁶⁸ The only instances where the diet was simply deserted were 2 cases of theft.⁶⁹ This sitting of the court was thus far more decisive so far as cases going to a trial and verdict was concerned.

The dittay books contain a further round of dittays, stated to have been collected between the 10th. and 15th. August 1709. These name no fewer than 91 people, 19 of whom had already been before the court, either in May 1709 or October 1708. Again the dittay roll is dominated by cases of adultery and fornication (see table No.2). When the court next sat in October of 1709 not one of these adultery or fornication cases came forward to a trial. Instead the court books reveal that at that sitting and the next one in May 1710 the court tried the most serious cases, most coming from the dittays but some arising out of private prosecutions.⁷⁰ Of the 22 cases tried in those two sessions all but 8 derived from the dittays.⁷¹ So far as verdicts went in 6 the accused did not appear and were declared fugitive; in 4 a trial by assize was held which brought in a verdict of not proven; in another 4 a decret from a local court was produced while 2 were sent to Edinburgh and one to the J.P.'s. The diet was deserted in four while one saw the offenders given a spell in gaol, plus the distraint of their property.⁷²

What can be made of this body of evidence? At first sight these two dittay rolls and four court sittings present a somewhat confusing picture. However, if one thinks of all of

STIRLINGSHIRE DITTAY BOOK 1709

<u>Offense</u>	<u>No.of Cases</u>	<u>No.Not Tried</u>	<u>No. also in 1708</u>	<u>No. Tried May</u>	<u>1709 Oct.</u>
Adultery	21	18	10	2	1
Fornication	18	18	-	-	-
Infanticide	3	-	-	-	3
Murder	3	-	1	-	3
Ryot	2	2	-	-	-
Dist.Kirk	2	1	-	-	1
Intrusion	2	1	-	1	-
Steeping Lint	2	2	-	-	-
Slaying Fish	1	1	-	-	-
Others	4	1	-	-	3
TOTAL	58	44	11	3	11

N.B. The figures for cases tried only refer to those found in both the dittay book and the court book. There were also cases tried which do not occur in the dittay.

these as one unit, a single historical event, things become clearer. If the judicial activity of the years 1708 - 10 is seen as one process this explains several points, firstly about the dittays as recorded in the dittay book. There is almost no overlap between the dittays from 1708 and those from 1709 as regards the names of deponents.⁷³ Only one name is found in both years. This looks very strange given that the idea of taking up dittay was to direct the writs to people of good repute and standing in each parish whose position (e.g. as miller or smith) gave them much information as to their neighbours doings. If this were so why send the writs to a completely different set of people in each of two years? Moreover, as mentioned, the dittays dated from August 1709 contain the names of several people who had already been tried by the circuit court in May - in several cases on the basis of those dittays!⁷⁴ These difficulties disappear if we assume that the collection of dittays had been going on since the arrival of the original writ in the hands of the Sheriff. In that case the dates of August 1708 and 1709 would lose much of their meaning: they were probably the dates when the various depositions were put together to form a roll and most of them signed and publicly sworn to by the deponents.

Viewing the years 1708 - 10 as one unit also enables us to reinterpret the four sittings of the circuit court and the distinctions between them, particularly between the first and the rest. The first sitting was primarily concerned to try minor crimes and those for which punishment of some kind had already been exacted. Thus in almost every single adultery case the records state that 'satisfaction' had been made to the Kirk. There were some accusations of more serious crime brought to trial as well but most of these were based on nothing more than

hearsay or were technically faulty - hence the deserting of diets in cases of 'murder'.⁷⁵ By the time of the second sitting, in May 1709, the minor cases had almost all been cleared away and this and subsequent diets were to concentrate on the grave crimes. Thus the adultery cases tried in May 1709 were all, for various reasons, more serious than those tried six months earlier.⁷⁶ In one instance two cases which were, to say the least, intimately related were tried separately at two different sittings. In October 1708 William Binny at Dalquharn was charged with adultery: he produced evidence that he had satisfied the Kirk session of Slamannan and the diet was deserted.⁷⁷ However the woman with whom he had committed the adultery, Margaret Easton, did not come to trial until exactly one year later in October 1709 when the indictment was for the much more serious crime of infanticide. (She did not appear and was declared fugitive).⁷⁸ This was despite what the Slamannan session records call 'strong presumptions' that Binny had been equally responsible for the infanticide.⁷⁹ Presumably the collectors of dittay had been influenced by the session's inability to prove this while Margaret Easton's guilt was manifest. So the case was split, with the man going to be tried for the lesser offence at the sitting reserved for them and the unfortunate woman being indicted for the graver crime at one of the 'serious crime' sittings.⁸⁰ Some cases which had been deserted temporarily at the first sitting were raised again in 1709. Thus the accusation of murder against William Brown of Seabegs was, as mentioned above, brought to a trial by jury in October 1709, the verdict being not proven.

With most of the less significant cases cleared away by the sitting of October 1708, the next three circuits tried more serious ones with a further division of labour. The May

1709 circuit tried mainly intrusion and serious adultery cases. By contrast the sitting in October 1709 was concerned mostly with crimes of violence such as infanticide and also serious thefts. The circuit held in May 1710 tried 8 cases from Stirlingshire and was dominated by serious sexual offences or ones where the parties were proving recalcitrant. This circuit clearly marks the conclusion of the three year long judicial process: by October 1710 the system whereby most cases came to trial had changed radically and the volume of business handled by both central and circuit courts fell dramatically, as well as changing markedly in composition.*

What then was the nature of this complex and three year long judicial process? Quite clearly it was an event of the same sort as the Cromwellian circuit of 1652 and the circuit of 1671 associated with the establishment of the High Court of Justiciary. Like them it was a judicial purge, designed to clean out the system at the local level and to give a reformed structure a 'fresh start'.⁸¹ The years 1708 - 10 saw a massive clearing up operation, intended to freeze the judicial system all over Scotland at one particular moment by establishing everywhere which cases and disputes were outstanding in the localities and to deal with them in five distinct ways. Firstly, in all but the most trivial cases reported by the dittays to determine if the case had been tried by a court and a verdict reached and if so to record it and declare that case permanently closed. This was done by the desertion of the diet with the proviso that the case should not be raised again and by the deposition in the archives of the High Court of written proof of this, in the shape of either a decret from a civil court or a testimonial of satisfaction from a church court. This was why the court cited persons to

appear when it knew from the evidence given in the dittay that they had already been tried and had doom pronounced against them.⁸² So for example the dittay given up against Margaret Lapsley and Margaret Brisban her daughter by Archibald Brown officer at Mugdock stated clearly that they had been tried before the regality court there "and subscribed one act of banishment".⁸³ This act and the relevant records from the Montrose regality court were submitted by the two women and put into the High Court's process papers, where they remain to this day.⁸⁴

Where an offence was alleged in the dittay book but no trial had taken place the court had three options open to it. In cases where the information was inadequate with no prospect of improvement the case would be closed by a complete desertion of the diet. In others a full trial would be held wherever possible and a verdict reached. When a party was absent they would be formally declared fugitive and put to the horn and thus a record of all fugitive persons was built up at the four circuits.⁸⁵ It was possible for a fugitive to turn up at a later date and for the case to then be closed: in 1708 two people in Buchlyvie, Archibald Forrester and Anna Robertstone were indicted for adultery and cited to the court, where he appeared and had the case against him closed while she was declared fugitive for non-compearance.⁸⁶ However she made an appearance at the May 1710 sitting and the case against her was closed as well.⁸⁷ Finally, in the most trivial cases, such as fornication, the court simply recorded the dittays and took no further action. All of this is very similar to the pattern of 1652 - 6 described in a previous chapter with one major difference - this time the operation had lasting effect.

This process, of clearing up and concluding as much

as possible of the outstanding judicial business, was reflected in the national records and statistics. As the attached graph shows there was a truly gigantic increase in the number of people indicted and tried by the High Court in the years 1708 - 10 with the peak quite clearly in 1709. In fact of all those people tried or indicted before the High Court between 1700 and 1720 no less than 37% had a brush with the law in 1709 and 54% of the total came from the three years of 1708 - 10. This huge surge of business is shown by the index to the Justiciary records for that period to have taken place almost entirely in the three circuits with almost 80% of the cases from those three years in the circuits being either adultery or fornication.⁸⁸

After this great purge there was as stated, permanent change. Foremost was a change in the way cases came to trial. This is clear from the series of records classified as JC 17 in the Scottish record office. The second volume, cited in a previous chapter, contains detailed descriptions of how dittays were to be taken up which were clearly followed in 1708/9. The third and subsequent volumes show a very different system, in which persons were 'delated' for trial by subordinate local jurisdictions in the August and March of each year.⁸⁹ The 'delation' was a complete indictment, reflecting previous investigation by the local jurisdiction. The whole system of indictment was thus institutionalised and no longer reflected the feelings of those individuals, so often smiths and millers, who had been 'required to give up dittay' under the old system. Moreover the phenomenon of the voluntary dittay, given up as 'private information' disappeared. Instead the delations reflected the interests, activities and ideology of the local magistrates - particularly the Justices of Peace. The records show that delations were made by all sorts of local courts,

including burgh, Sheriff stewardry and regality courts yet it was the Justices of Peace who dominated the process, reflecting their enhanced status after 1707.⁹⁰ They had in fact become what the system had previously lacked, a pre-indictment investigative magistracy. Whether they performed that duty well or not is another matter: there is some evidence that they did not.⁹¹ One important point is that while all these changes took place in the system of public indictment, private prosecutions by criminal letters continued in the same fashion as before.⁹² There were several important prosecutions brought in this way after 1710, including the successful prosecution in 1729 of Walter Buchanan of Boquhan, the most notorious of Stirlingshire's freebooters.⁹³ Indeed the private criminal prosecution remains a part of contemporary Scots law albeit in virtual desuetude and has been revived in one notorious and recent case. However the eighteenth century would appear to have seen the relative decline of the criminal letter and its replacement by the indictment as the main route whereby malefactors ended in court.

This change in the method of the High Court is one reason for the change in the composition of business after 1710. In the West Circuit records there are no prosecutions recorded after that date for adultery, fornication, usury or such minor offences as slaying red fish.⁹⁴ Instead the records are dominated by two crimes - murder and theft.⁹⁵ This reflects the establishment of a true judicial hierarchy with the High Court abandoning its cumulative jurisdiction. It also reflects the diminished power of the church courts, one aspect of the most significant change to follow after the purge of 1708 - 10 - the decline of the local courts.

When the purge of 1708/10 was taking place the local and private courts were clearly still an active and important

part of the legal system. One sign of this is the number of cases heard at the circuit where decreets from local courts were produced, no fewer than 7 in fact whereas there was only one case in all the later years when this happened.⁹⁶ There was clearly close co-operation between private and royal courts in 1708/9 as earlier: thus in the case of adultery mentioned above where the parties were sentenced to stand wearing a placard the record says:

"and recommends to the Baillie of the regality of Falkirk to see this sentence put into execution as he will be answerable."⁹⁷

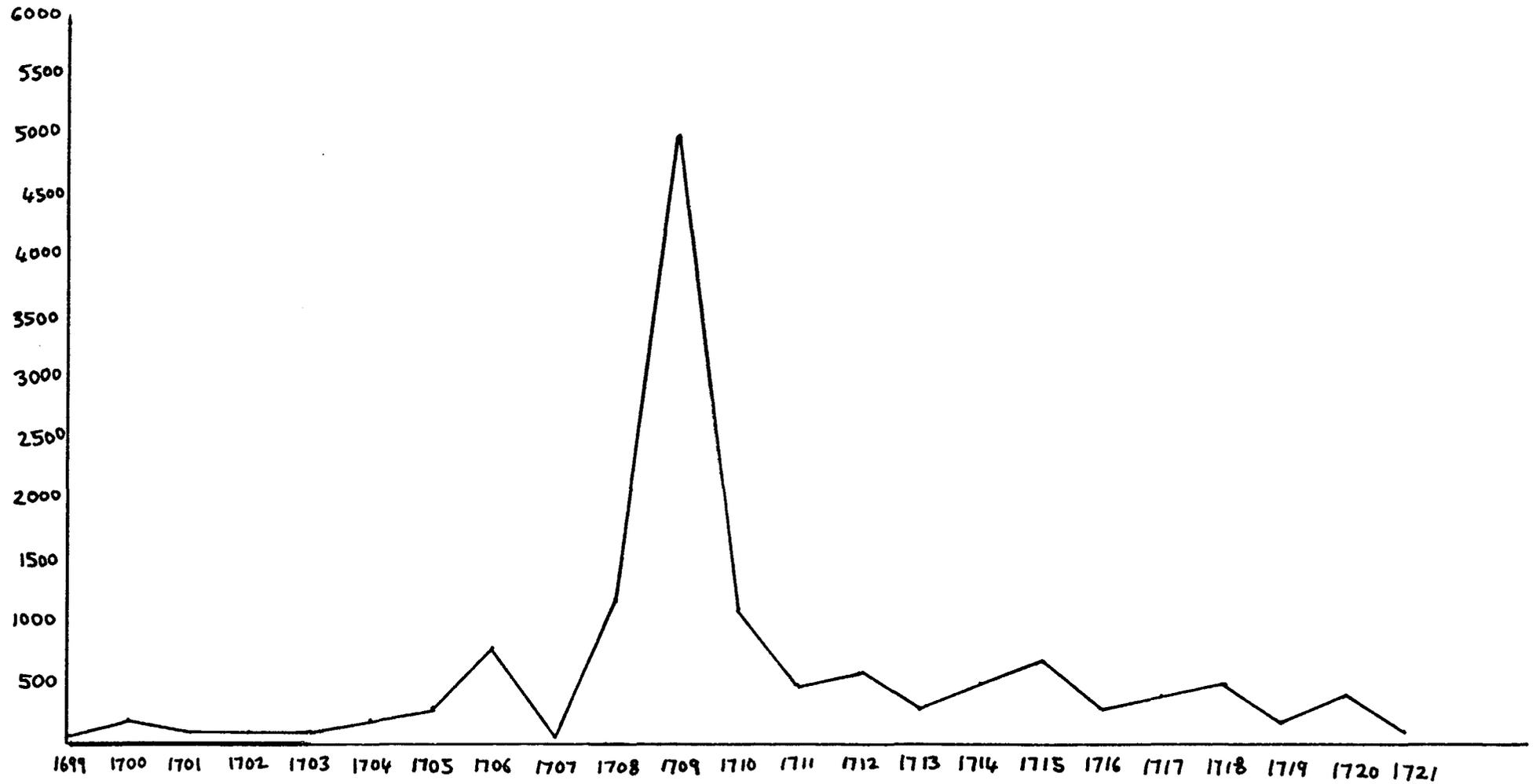
This sort of entry does not occur in the later records. Of course it may be that this and the absence of produced decreets only means that the High Court was no longer concerned to insist on recording the verdicts of local courts after 1710 and that they were left to exercise their jurisdiction in peace after then. This may well have been the case in parts of the Highlands and in Stirlingshire the Montrose regality court was still active well after 1710.⁹⁸ However, as the process papers of that very regality show there was a decline in the activity of the court during the eighteenth century while in Falkirk the decline was dramatic and swift even before the jurisdiction was extinguished in 1715.⁹⁹ Moreover the eighteenth century saw a continuation of the policy of granting advocations from franchise courts with many recorded and those years also saw a rigorous and strict interpretation of the scope of regalities' jurisdictions derived from Mackenzie.¹⁰⁰ Thus, when in 1708 the baillie of the regality of Alloa demanded the repledging of a case of adultery this was refused, although he was allowed to sit with the judges hearing the case but without having a vote.¹⁰¹

The final permanent change worth noting was one in the total amount of business transacted which can be described both as a decrease and an increase. There was a very marked fall in the circuits from the levels reached in 1708 - 10. While those three years alone saw no fewer than 63 cases between October 1708 and May 1710 the next thirty seven years saw only 33 cases with 3 of them in October 1710.¹⁰² On the other hand this level of just under one case per year on average should be compared with the complete absence of circuits before 1708. As the graph shows, in Scotland as a whole, the level of activity by the High Court remained higher after the 'purge' than before it, reflecting the increased 'reach' of the court and the corresponding decline of other courts' criminal jurisdictions.¹⁰³

So, the years immediately after the Union saw not only the demise of the two central bodies of the old Scots legal order but also a series of radical changes in the workings of the criminal central court and its relations with the locality. The traditional dittay system was used in 1708 to produce one last general survey of outstanding cases, after which it was abandoned and replaced by another based upon the Justices of Peace. The dittay books of 1708/9 are thus the records of the last major use of the traditional means of raising public indictment. The newly established circuit courts used the information provided to clear up all the outstanding cases where possible and to clear the way for the new system by minimising the chances of judicial conflict and confusion. In August 1710 the new system of delation came into effect and the first circuit court held under its auspices took place in October of that year. After that the High Court, both in Edinburgh and on ayre settled down to a diet of serious crime and political offences with much of the business that had occupied the old Justiciary Court fading away.¹⁰⁴ It was no longer a service court,

NUMBER OF PERSONS INDICTED/TRIED BEFORE JUSTICIARY CENTRAL AND CIRCUIT COURTS 1699-1721

(N.B. all figures have been rounded up to the nearest hundred)



closely integrated with the network of local courts by the way indictment and investigation took place while the institutional link between centre and locality provided by the Privy Council had gone. Instead by the year 1712 or thereabouts the High Court had become recognisably a modern criminal court. Elements from the old system such as the private prosecution and the action for assythment remained part of its workings well into the nineteenth century but as the years went by they came to be seen for what they were, survivals from the past rather than an integral part of the system.

This shift to a more modern mode of procedure showed itself in other ways as well. The legal principles laid down by Stair and Mackenzie were being applied in the regular activity of the courts. In the field of criminal law this meant firstly following Mackenzie in applying a rigorous and strict definition of the scope of state and private jurisdiction, at the expense of the latter.¹⁰⁵ It also meant altering the definition of crime: thus there seems to have been a move towards a positive theory whereby crimes were defined as acts prohibited by express statute, a change advocated strongly by Mackenzie.¹⁰⁶ Again the evidence of the eighteenth century justiciary records suggests that in that court the old distinction between slaughter and murder had broken down and been replaced by the present day division of homicide into culpable and non-culpable.¹⁰⁷ This again was a change which had been advocated by Mackenzie who was very critical of the traditional division.¹⁰⁸ In all prosecutions, even those raised by criminal letters the Lord Advocate came to dominate matters far more than had been the case earlier.¹⁰⁹ His ultimate right to prosecute even where the injured party refused was now clearly and firmly established.¹¹⁰ The demise of the Privy Council, not only ended the system of local commissions it also stopped the practice of precognition,

so clearing the way for a move to the modern idea of 'due process'.¹¹¹ All of these technical changes reflected a shift in the definition of crime which was now coming to be seen as a public wrong, a breach of state made law. This was also reflected in the penal policy of the court. The years after 1709 saw a move towards increasing use of the penalty of imprisonment and a decline in the number of private settlements although these still happened.¹¹² Also increasingly popular was the sentence of transportation, usually to the American colonies.¹¹³ This change in penal policy, away from one based on restitution and towards reformatory punishment was well advanced by 1747.

Meanwhile the local courts were left for the time being untouched and in them, particularly the franchise courts, much of the old system survived. However they were now isolated from the mainstream of judicial activity by the changes of 1708/9 and the demise of the Privy Council. This last and the passing of Parliament meant that they could no longer be seen as forming part of a national system of complementary jurisdictions: increasingly each baron and regality court was an isolated institution, living on the past. At the same time the social and economic structure upon which they rested and which they derived from was being transformed as a consequence of the quite conscious decisions made by most of the Scottish ruling class after the trauma of the 1690's. Many private courts vanished as a consequence of the failure of the 1715 uprising. Falkirk regality being one of them, and the survivors dwindled to mere shadows of their former selves. Eventually the 1745 rebellion provoked the Westminster Parliament into taking action and in 1747 the Act abolishing heritable jurisdictions was passed which swept away hereditary sheriffs, stewards and regalities and reduced the baron courts to mere ciphers.¹¹⁴

During the same period the church courts, once so active, went into rapid decline until by 1750 they had become by comparison with what they had been marginal and peripheral institutions. Interestingly as the relevant chapter notes the decline began for most church courts sometime between 1706 and 1710¹¹⁵

It remains to assess the significance of the Act of 1747. Was it indeed an epochal measure, ending a system and form of rural society which went back at least to Robert I, even to Malcolm Canmore? Historians should be wary of dramatic claims for either the significance or total insignificance of the Act. On the one hand there was undoubtedly much continuity; for the great majority of Scots life went on much as before. Yet on the other hand 1747 is clearly a milestone in the course of Scottish history even if only because the Act recognised and made explicit the changes of the previous fifty-nine years. In one sense it was a coup de grace for a moribund system, already undermined by the changes consequent upon the Union and the policy of economic modernisation followed by the landowners. On the other hand it did amount to more than a certification of death or even an act of euthanasia. In the Highlands and Islands its effects were far reaching as it, along with other measures taken by the government, combined to destroy the last institutions of the old Highland society already undermined by population pressure.¹¹⁶ Also many of the individuals who held courts did derive a substantial income from them even at this stage - hence the monetary compensation paid to courtholders. Again, the heritable courts had continued to try cases, even grave ones and although the number tried in this way in any one area such as Stirlingshire was small on the national stage it was significant. This is reflected in the figures for transportation to the colonies by the High Court which show a

steep increase after 1747.¹¹⁷ At the purely local level the Act removed competition for the Sheriffs and Justices of Peace. The abolition of heritable courts left the new, 'modern' legal system which had emerged clear to view, unencumbered by more than a few survivals from the past. Last but by no means least, the Act of 1747 had great symbolic significance, representing as it did the abolition of the feudal system in its most obvious form, which had thriven so hardily for so long. The Act was the coda to a process of gradual change which had transformed Scotland's social order since 1600. It was not a revolutionary measure, as Cromwell's reforms were, because it did not cause for most of Scotland an abrupt and fundamental change. What it did do was to conclude and finish off a process of change, bringing it to an unusually clear and abrupt conclusion. The legal system which existed in Scotland after 1747 was clearly and distinctly modern with no significant survivals from the old order. For a change of this magnitude to take place without any major political convulsion was remarkable.¹¹⁸ Between 1637 and 1747 the means whereby social order was maintained in Stirlingshire and elsewhere in Scotland changed completely in their nature and form from a system with many pre-modern characteristics to one as 'modern' as any in Europe. The nature of the law, the courts which enforced it and the way in which they worked had all been transformed. At the same time the state had grown in power and the long standing institutions of a traditional rural society had finally disappeared.¹¹⁹ In this process the years between 1690 and 1710 were, as said, crucial. In those years the contradictions which had come to plague the old order in every sphere reached a critical level and in the field of law and order these were largely resolved by the successful transformation

effected between 1707 and 1710, a change concluded and given a full stop by the Act of 1747. Law and order in Stirlingshire in 1640 and 1750 were two quite different things.

Notes

1. On this point see the work of Lord Cooper, particularly his essay 'The dark age of Scottish legal history 1350 - 1650' in Lord Cooper: Selected Papers 1922 - 1954 (Edinburgh, 1957) pp 219 - 36. In his model the mid-seventeenth century is the watershed.
2. R. Mitchison: A History Of Scotland (Edinburgh, 1970) p 290.
3. The attitude referred to was very widespread among the elite and showed itself in things such as the habit of calling Scotland 'North Britain'. What Scott did in works like Waverly, Old Mortality and The Heart Of Midlothian was to create an acceptable image of the past by 'taming it' and giving much of it a Romantic aura. It can truly be asserted that he more than anyone created the image of their country's past held by most modern Scots.
4. Or indeed in its original greek meaning of a time of critical choice between several alternative paths of action.
5. On the state of Scottish politics in these years see P.W.J. Riley 'The structure of Scottish politics and the Union of 1707' in T.I. Rae (ed): The Union Of 1707 : Its Impact On Scotland (Glasgow, 1974) pp.1-29.
6. Thus ibid p. 4 says "By 1696 the government of Scotland had reached the point of collapse".
7. One the economic crisis in general see Mitchison: History Of Scotland pp 290 - 9; on the Darien scheme . see J. Prebble: The Darien Disaster (London, 1975) and G.P. Insh: The Company Of Scotland Trading To Africa And The Indies (London, 1932).
8. T.C. Smout: Scottish Trade On The Eve Of The Union 1660 - 1707 (Edinburgh, 1963).
9. Mitchison: History Of Scotland pp 291 - 2; I. Whyte: Agriculture And Society In Seventeenth Century Scotland (Edinburgh, 1979) pp 246 - 51.
10. see ibid p. 247.
11. For example see E.Juttikkala: 'The great Finnish famine of 1696 - 7' in Scandanavian Economic History Review vol III (1955) pp 48-63.
12. On this see Mitchison: History Of Scotland pp 293-6; Whyte: Agriculture And Society pp 257 - 62.
13. ibid pp 190 - 4.

14. So for instance Records Of Kirk Session Of Baldernock SRO CH2/479/1 25th August 1696 has an entry which reads:
 "The which day the session, considering the many straits the poor in the parish are reduced to and also the Act of Counsall ordaining the several sessions to uplift what money they have in bonds that it may be given for the relief and supply of the poor and considering that they have no money that can be raised at the present because of the great scarcity of money....therefore the session judged it not amiss to deliver into the hand of Walter Buchanan of Orchard a broken silver cup of small worth....to be sold by him that the money gotten for it may be employed for the present relief of the poor".
 They managed to raise £21/17/0 Scots which was given out to 23 persons in all.
15. See J D Marwick (ed): Register Containing the State And Condition Of Every Burgh Within The Kingdom Of Scotland In The Year 1692 (Miscellany of Scottish Burgh Records Society, Edinburgh, 1881) pp 66-8
16. See Records Of Regality Of Falkirk SRO SC67/2/3 passim.
17. ibid, 30th January 1694, 13th February 1694, 20th February 1694, 6th March 1694 contains no fewer than 9 cases of debt where the Earl was being pursued. The Earl's response to this was firstly to enlarge his coalworkings and force his tenants to use them: ibid 19th August 1698 has an entry where three of his coalhewers John Baird, James Fainservice and George Mielhouse bound themselves not to absent themselves from the coalworks or to threaten or abuse their neighbours to do the same under pain of imprisonment and 14 days in the stocks so there was clearly opposition to this policy from those affected. The Earl's second response was to enclose much of his land and encourage his lairds and tenants to do this as well. For evidence of this see ibid 25th February 1696 for a very complex case and Act enclosing the lands of Bantaskin.
18. Whyte: Agriculture And Society pp 257-62. For a longer view see E Hobsbawm 'Scottish reformers of the eighteenth century and capitalist agriculture' in E Hobsbawm et al (eds): Peasants In History: Essays In Honour of Daniel Thorner (Oxford, 1980) pp 3-29.
19. Acts Of Parliament Of Scotland vol IX p 421 gives the 'Act Anent Lands Lying Run-Rig' while the 'Act For Division Of Commonties' is in ibid p 462.
20. Whyte: Agriculture And Society pp 105-9.
21. K Stewart: 'The scottish Parliament 1690-1702: a study of scottish parliamentary government' in Juridical Review vol XXXIX (1927) pp 10-37, 169-90, 291-312, 408-33;
 R S Rait: The Parliament Of Scotland

- (Glasgow, 1924) pp 105 - 7.
22. Acts Of Parliament Of Scotland vol IX p 113.
 23. ibid p 330; Stewart: 'The Scottish Parliament 1690 - 1702' pp 27 - 8, 35 - 8.
 24. On this see Hobsbawm: 'Scottish reformers' pp 10 - 12.
 25. Whyte: Agriculture And Society pp 252 - 5;
A. Fletcher: Two Discourse Concerning The Affairs Of Scotland (Edinburgh, 1698).
 26. The definitive editions of Stair's Institutions and Mackenzie's Laws and Custom were published in 1693 and 1699 respectively. On the impact of Stair's work see Lord Cooper: 'Some classics of scottish legal literature' in Cooper: Selected Papers pp 39 - 52 and in particular pp 42 - 6.
 27. Stewart: 'The Scottish Parliament 1690 - 1702' pp 426 - 30.
 28. Rait: Parliaments Of Scotland p 474.
 29. Stewart: 'The Scottish Parliament 1690 - 1702' pp 10 - 11.
 30. Sir G. Mackenzie: The Laws And Customs Of Scotland In Matters Criminal (Edinburgh, 1699) pp 218 - 21.
 31. ibid pp 220 - 1.
 32. ibid pp 107, 220.
 33. For an outstanding example from Stirlingshire see Records Of Justiciary Court : Processes SRO JC 26/83/D 77 Case of Margaret Lapsley 26th. June 1704 - the advocation reads:

"Anne by the Grace Of God etc, Greeting:
Forasmuch as it is humbly meane and shewene to us by our leige Margaret Lapslie relict of the deceased Archibald Brisban in Burndarroch and John and Margaret Brisban there her children. That where the saids complainers are all indicted and accused before the baillie of the Regality of Montrose at the instance of James Graham procurator fiscal of the said regalitie and Hugh Mcfarlane of Keithtoun his informer As having upon one or other of the days of October, November, December and January last bypast stolen and away taken several sheep belonging to other of their neighbourhood and spared their own which extended to the number of fourty four sheep belonging to them before they were apprehended prisoners and their said crymes discovered which was upon one or other of the days of the said month of January last which sheep being searched for weralledgit to

be found in the saids complainers house which lybell concludes that the saids complainers ought to be punished with the paine of death and confiscation of their moveables and contains and contains a list of the inquest and wittnesses as the samen with the coppie of the citation under the officers hand written on the foot thereof shewes To the lords commissioners of our Justiciary ... In the which process the baillie of the said regalitie intends to proceed albeit both suspect of partiality and truely incompetent for the causes following. In the first the saids complainers are indicted upon the old lawes inferring death which lawes are old and in desuetude Secondly the indictment in matter of fact does only bear presumptions and conjunctures scarcely sufficient to infer a prickerie or resett of prickerie much less theft Thirdly neither reif nor stouthreif is lybelled nor any theft that by the present law or instances is known to be capital Fourthly both Keithtoun the informer and the baillie without any order of law did seaze and spoulze the complainers goods lykeas Keithtoun did unwarrantably search for and seaze their persones without any authority or so much as a written information contrary to the late Act of Parliament...In Respect whereof the said criminal action and cause aught to be advocate from the said Baillie of the Regalitie of Montrose to our saids lords as only competent judges thereto and he ought to be discharged from all farder proceeding therein in tyme comeing."

It is worth quoting this document at length because, - apart from its intrinsic interest, it shows clearly the structure and typical content of letters of Advocation which followed a set form, i.e. Royal greeting: Forasmuch as it is humbly meane and shewene (details of the petitioners) That whereas (details of the case naming the court and the pursuer and then giving an extract from or summary of the bill of complaint raised in the inferior court) In the which process the (name of court and pursuer) intends to continue despite (reasons for this not being allowed) In respect whereof (formal request for advocation). There then follows an act passed under the signet ordering the advocation to take place. For the form of such acts see Mackenzie: Laws and Customs pp 220. The reasons given for the advocation in this instance are again typical, the only common one not developed being partiality on the part of the magistrate. The phrase "humbly means and shews" was the standard formula used to start any legal petition or request. The act of advocation ordered all the papers relevant to the case to be sent to Edinburgh - hence the passage in this document reading "Which lybell...as the samen...shewes ". The document in this case, a

large, bulky court roll containing the libell, list of inquest and witnesses along with their depositions and the record of citation is preserved in the same bundle as the letter of Advocation. As a result there is no record of this case in the records of the regality of Montrose.

34. Thus in the case of Margaret Lapsley the advocation described above was remitted on 26th. June 1704. The bundle of papers contains a document titled "Bill of Supplement" dated the 3rd. August 1704 which asks the Justiciary court to give the regality power to cite witnesses for the trial, particularly when they came from outside the bounds of the regality. See Records Of Justiciary Court : Processes SRO JC 26/83/D 77.
35. So for instance see W.G. Scott-Moncrieff (ed): Records Of The Justiciary Court, Edinburgh 1661 - 1679 (Scottish History Society, Edinburgh, 1905) vol I p 196 5th. February 1667 where an advocation was raised by a certain John Logan against the Lord and the Master of Herries holder and chief baillie of the regality of Tarreglis; see also ibid pp 191 - 5, 24th, 26th and 29th January 1667 where the case of Alexander Wardrop of Carntyne versus John and Robert Redies coalhewers (for drowning a coalheugh) was advocat from the regality of Glasgow, where they had been prosecuted under Quoniam Attachiamenta caputs 68 & 69, because the offence was a statutory treason. Both were repelled although in the second case the local court was ordered to desert the criminal suit and pursue a civil action instead.
36. Records Of Regality Of Falkirk SRO SC 67/2/2 & 3.
37. Whyte: Agriculture And Society pp 255 -6 ; Mitchison: History Of Scotland p 311.
38. Riley: 'Structure of scottish politics' pp 27 - 9.
39. P. Rayner, G. Parker & B. Lenman: Records For The Study Of Crime In Early Modern Scotland (National Bibliography Society, 1982) pp
40. On this point see W. Twining & J. Uglow (eds): Law Publishing And Legal Information : Small Jurisdictions Of The British Isles (London, 1981) p 6.
41. On this see J.R. Philip 'The judicial immunity of the Lords of Session' in Juridical Review vol XXXIX (1927) pp 1 - 9.
42. It was this which more than anything else made possible the Jacobite uprisings in 1715 and 1745 by destroying the mechanism which had kept the Highland clan communities in some kind of contact with the centre and under control even if only through the extraction of bonds of caution from the chiefs.
43. See C.A. Malcolm (ed): Minutes Of Justices Of Peace For Lanarkshire (Scottish History Society, Edinburgh,

- 1931) pp XXVI - XXVII.
44. For the instructions of 1661 see Acts of Parliaments Of Scotland vol VII pp 306 - 12 9th. July 1661.
 45. Malcolm: Minutes Of Justices Of Peace p XXVI.
 46. The pattern, of two judges going round each circuit in May and October was one which had been tried before in 1587 and again under Charles I. See G. Donaldson: Scotland James V to James VII (Edinburgh, 1965) p 223.
 47. The disruption of the circuits was particularly severe in the case of Stirling, presumably because the uprising had more effect in that area with most of the actual fighting taking place there.
 48. Records Of Justiciary Court : Dittay Books SRO JC16/22.
 49. For these see Records Of Justiciary Court : Processes SRO JC26/87/D252 (1708)
 50. Records are Records Of Justiciary Court : Dittay Books SRO JC16/1-24 (none of these contain material from after March 1710); Records Of Justiciary Court : Dittay Rolls SRO JC17/2-8 (these go up to 1733); Records Of Justiciary Court : West Circuit SRO JC13/1-8 (this is a continuous run up to 1749); Records Of Justiciary Court : Books Of Adjournal SRO JC3/2-26 (these cover the period 1706 to 1748); Records Of Justiciary Court : Processes SRO JC 26/81 - 136 (these boxes cover the period 1700 to 1747 and are currently being sorted.)
 51. Records Of Justiciary Court : Dittay Books SRO JC16/22.
 52. ibid 23rd. August 1708. John Wilsons named Janet Richardsone and George Williamsone in Airth for adultery; Andrew Adam and Isobell Madrell - adultery; Thomas Ffin and Margaret Mclery - adultery; James Wands and Mary Mclay - adultery; Robert Pattersone and Janet Dick - adultery; Daniel McGregor and Anne Mackenzie - fornication; David Din - bestiality. Most of these cases are to be found in the records of St. Ninians Kirk session. See Records Of Kirk Session Of St. Ninians SRO CH2/337/4 - 7th. November 1702 Case of Thomas Ffin and Margaret Mclery; 30th. July 1702 Case of Andrew Adam and Isobell Madrell; 25th. April 1706 Case of James Wands and Mary Mclay; 14th. September 1701 Case of Janet Richardsone and George Williamsone; 2nd. March 1706 Case of Robert Pattersone and Janet Dick. John Neilsons for his part named Alexander Sword and Christian Paton - adultery; William Brous or Brockhous and Margaret Wood - adultery; John Forrest of Bankhead - breaking of prison 10 years earlier. Once again these cases can be traced - see Records Of Kirk Sessions Of Falkirk SRO CH2/400/4 9th. November 1701 Case of Alexander Sword and Christian Paton; 11th. August 1709 Case of William Brous and Margaret Wood. Examining these records helps to cast some light on the question of why these particular cases occurred in the dittays - thus

Madrell and Richardsone were relapses in adultery with Madrell being referred to the civil authorities for contumacy, the case of Pattersone and Dick was long drawn out and controversial with both parties denying the adultery which was proved by witnesses. For John Forrest of Bankhead see Records Of Regality Of Falkirk SRO SC67/2/3 & 5 28th. November 1693 and 23rd. July 1714 where he was charged with blooding and trublance respectively. It is not clear from the regality court records if the 1693 case was somehow connected with the accusation of prison breaking in 1708.

53. They were named by John Wilson, John Douglas and Archibald Neilson - all in 1708. The dittays dated 1709 also contain references to them - they were named by John Steven and William Hendry Records Of Justiciary Court : Dittay Books SRO JCl6/22 23rd. August 1708, 11th. August 1709.
54. ibid 23rd. August 1708. Another example of what may have been a private indictment on the same date came from Andrew Alexander tenant in Logie who reported that James Forrester of Logie carried a pocket pistol for shooting Andrew Alexander or his son and servants - whichever he saw first.
55. Records Of Justiciary Court : West Circuit SRO JCl3/1 21st. and 22nd. October 1708.
56. The three adultery cases which did not come up were those of Michael Dounie and Margaret Aitkine, Daniel McGregor and Anne Mackenzie and - Brown in Grants regiment and - Campbell. The three cases where only one party was cited were Archibald Finlaysone and Martha Buchanan, Janet Richardsone and George Williamsone, Robert Pattersone and Janet Dick. The three missing parties (Buchanan, Williamson and Dick) were all deceased.
57. These were cases of Humphrey and John Neilson (theft); David Mckillip and John Mcfarland (for breaking into the tollbooth of Stirling and carrying away Rachel Mckillip); James Forrester in Kirkland (theft).
58. Records Of Justiciary Court : West Circuit SRO JC 13/1 21st. October 1708.
59. This involved the two sheep thieves mentioned in notes 33 and 34 above - Margaret Lapsley and Margaret Brisban her daughter. The decret and act of banishment which sentenced the two women to remove out of the bounds of the regality on pain of death is dated 1st. September 1704 but is to be found in Records Of Justiciary Court : Processes SRO JC26/87/D280 from 1708.
60. Records Of Justiciary Court : West Circuit SRO JCl3/1 Cases of Anna Robertsone, Isobell Madrell, Janet Richardsone.
61. ibid - he had been named by James Bullock smith in Baldernock for a ryot committed against the said James

Bullock and William Adam in Campsie on the Sabbath. For the incident in question which also involved drunkenness see Records Of Kirk Session Of Baldernock SRO CH2/479/1 27th. July 1708, 12th. September 1708. The church court laid the sentence of lesser excommunication upon him but lifted it on 10th. July 1709 after a public display of penitence.

62. Records Of Justiciary Court : Dittay Books SRO JC16/22 - he was named by John Grindlay Miller at Water of Bonny on 23rd. August 1708 and by Duncan Keir smith in Falkirk on 11th. August 1709. Both also mentioned that he had committed adultery with one Mary Forrester twenty four years earlier. The desertion of the diet with respect to the charges of adultery was final and he was discharged from further trouble. No such statement was made regarding the murder charge. For the two entries concerning that see Records Of Justiciary Court : West Circuit SRO JC13/1 & 2 21st. October 1708 and 21st. October 1709 - the second is the full trial - and Records Of Justiciary Court : Processes SRO JC26/87/D283 & D380. William Brown of Seabegs must have thought 1708 was a bad year - he also had to appear before Falkirk Kirk session for fornication - see Records Of Kirk Session Of Falkirk SRO CH2/400/4 6th. September 1708 Case of Agnes McNeill in Seabegs and William Brown of Seabegs.
63. Records Of Justiciary Court : West Circuit SRO JC13/1 21st. and 23rd. May 1709. The cases were 3 of intrusion (Andrew Shirray, James Hunter and Walter Stirling); 3 of adultery (John Mcleiry and Margaret Cornwell, Thomas Smith and Janet Walker, James Elder and Janet Hendersone); 2 of theft (James Renny and John Marshall); one each of blooding and falshood (John Foyer and Andrew Adam).
64. ibid - he had been pursued by the same person who had named him in the dittay.
65. These were the cases of James Hunter, John Mcleiry and Margaret Cornwell and Thomas Smith and Janet Walker. See Records Of Justiciary Court : Dittay Books SRO JC16/22.
66. in ibid the dittay against Mr. James Hunter reads that he kept a meeting house with "The lairds of Polmaise, Touch, Garden and Bannockburn his normal heirers". James Murray of Polmaise was his cautioner at his court appearance. He had intruded in the parishes of St. Ninians and Stirling by preaching, marrying and baptising - all of this being done at Livilands. Two days after his trial the Sheriff Depute of Stirlingshire - Mr. Charles Bennett of Livilands - was rebuked by the commissioners of Justiciary because he had not shut the meeting houses kept by dissenting ministers (!) and when ordered to get bonds of caution from them had "only made a show thereof". Hunter was the former minister at Stirling, Charles Bennett was the son of the episcopalian minister at St. Ninians until 1685, while Walter Stirling was the late minister at Baldernock. See Records Of Justiciary Court : West Circuit SRO JC13/1 21st. and 23rd. May 1709.

67. ibid; for the record of this case in the church courts see Records Of Kirk Session Of Muiravonside SRO CH2/712/1 26th. September 1702; Records Of Presbytery Of Stirling SRO CH2/722/9.
68. Mackenzie: Laws And Customs pp 144 - 5 defined stellionat as a cheat or fraud done by deceit - what sould now be called a 'con -trick'. As it was a common law crime the punishment was arbitrary. The case was brought up again at the next circuit - see Records Of Justiciary Court : West Circuit SRO JC13/1 & 2 21st. May 1709, 21st. October 1709. For his trial at Edinburgh see Records Of Justiciary Court : Books Of Adjournal SRO JC3/2.
69. Records Of Justiciary Court : West Circuit SRO JC13/1 Cases of James Renny at Kirk of Kippen (theft of cows) and John Marshall cooper at Dennymlne (theft of sheep).
70. Records Of Justiciary Court : West Circuit SRO JC13/3 21st. October 1709, 20th. May 1710. The first sitting tried 3 cases of infanticide (Elspeth Callander, Jean Richardsone, Margaret Easton); 3 of murder (Alexander McGregor, William Brown, William Bruce of Auchinbowie); one each of cursing and beating ones parents (Robert Cowie and Robert Boyd); one of blooding (David Geddies) and one each of theft, falshood, deforcement and rioting in the Kirk (John Stirling, Andrew Adam, John Glen in Elrig et al, John Glen and Peter Brown both in Muiravonside). The second sitting, in May 1710, tried 3 cases of adultery (Anna Robertstone, Walter Mcfarlane and Janet Whyte, John Mcalpin); 2 of fornication (Mary McGregor in Killearn, Walter Buchanan of Boquhan et al); 2 of theft (Thomas Young, John Menteith); one each of steeping lint and deforcement (Robert Miller, John Gilfillane).
71. ibid These were the cases of John Stirling, Andrew Adam, John Glen et al, Robert Miller, John Gilfillane, Thomas Young, John Menteith, Walter Buchanan et al.
72. ibid Those declared fugitive were Elspeth Callander, Jean Richardsone, Margaret Easton, Alexander McGregor, Mary McGregor, John Mcalpin; the trials by assize Robert Cowie, Robert Boyd, William Brown, John Stirling; decreets produced David Geddies (regality of Falkirk), John Glen and Peter Brown, (regality of Airth), Robert Miller, John Gilfillane; sent to Edinburgh William Bruce, Andrew Adam; referred to Justices of Peace Walter Buchanan et al; diet deserted in cases of Anna Robertstone, Thomas Young, John Menteith, Walter Mcfarlane and Janet Whyte. The gaol sentence was given to John Glen et al.
73. The only name to occur in both is that of John Young in Campsie.
74. For example in the cases of John Mcleiry and Margaret Cornwell, Thomas Smyth and Janet Walker.
75. Thus in Records Of Justiciary Court : Dittay Books SRO JC16/22 the entry concerning the charge of

bestiality against David Din reads:

"Reported that David Din in St. Ninians was guilty of bestiality and had confessed the samen to John Allan in Stirling for the which he was incarcerat but then sett free because he was thought mad".

For a faulty indictment see the case of Andrew Burn in Autermeny, charged with the murder of James Young - he had battered him and he had then died fifteen days later. The indictment failed to show that the assault was the direct cause of death despite the elapsed time and so, following standard usage, it was rejected.

76. Thus in the case of John Mcleiry and Margaret Cornwell he was a relapse in adultery - this is stated in the dittay which also names him for adultery with - Scrymgeour a year before he fell with Cornwell. For her case which occupied much of the local session's time see Records Of Kirk Session Of Muiravonside SRO CH2/712/1 25th. September 1698, 14th. January 1700, 2nd. February 1701, 4th. May 1701, 7th. December 1701, 24th. January 1703, 6th. January 1706 - she had been excommunicated for contumacy and imprisoned by the Justices of Peace at the behest of the session. The cases of Smith and Walker and Elder and Hendersone were both 'notour' and in the case of Smith and Walker the offence was aggravated by the fact that a servant had displaced a wife. See ibid 26th. September 1702.
77. Records Of Justiciary Court : West Circuit SRO JC13/1 21st. October 1708.
78. Records Of Justiciary Court : WestCircuit SRO JC13/2 21st. October 1709.
79. For the records of this case, cited in chapter 3 above, see Records Of Kirk Session Of Slamannan SRO CH2/331/1 18th. October 1706, 22nd. January 1707, 24th. January 1707. On the first date, accused of fornication she denied pregnancy. On the second the session noted that the body of a dead infant had been found floating in the Eden Water - they sent to Bothwell to fetch Margaret Easton. On the third date she appeared before the session, brought by the Sheriff of Hamilton. She at first said the child was still-born and that she had cast it into the river after labour then, after questioning she confessed "she had used physick to make her part with the child" and named William Binny as the father and accused him of making her take the abortifact. He, cited by the session because of 'strong presumptions' and the 'fama clamosa of the countrey' admitted adultery but denied any link with the abortion. She was put in the tollbooth of Falkirk by the baillie of the regality but, according to the dittay, broke out soon thereafter and had not been seen since.
80. This was typical insofar as in such cases it was the woman rather than the male partner who bore the brunt of prosecution punishment and odium since she was the

individual directly responsible. Even if the man had encouraged or even forced the infanticide (e.g. by procuring and administering an abortifacient) he could always deny any connection in the knowledge that proving his guilt would be very difficult indeed.

81. The essential elements of this process, found in 1652, 1671 and 1708 - 10 were these. Firstly to compile a list of all the crimes which were outstanding, unsettled or which had been tried within memory. Secondly the recording of verdicts in as many cases as possible either by putting them to a trial or by taking note and formal record of verdicts already arrived at. Thirdly the compiling of a list of fugitive and recalcitrant persons. One important distinction should be made between the Cromwellian circuits of 1652 and 1655 and those of 1708 - 9. The latter were much more successful in attaining the second objective with the Cromwellian judges clearly having difficulty. In the 1650's many cases were simply abandoned without any verdict being recorded because of the failure or refusal of both pursuers and defendants to appear, not to mention witnesses. In the majority of these cases the charge was simply 'left to lie on the table' to use a modern phrase, whereas by contrast in 1708 - 10 few people failed to appear and they were all declared fugitive.
82. This had also happened at previous circuits - see Record Of Kirk Session Of St. Ninians SRO CH2/337/2 4th. April 1671 where William Russall asked for a testificate to present "to the justiciars at Stirling" that he had satisfied for adultery with Janet Weir. There is no record of his case in the court books for 1671 which suggests his testificate prevented his being cited for trial at Stirling. One may ask why it was felt necessary to establish this record of decreets. One possible explanation is that this was intended to prevent judicial clashes and entanglements between the central courts and the local judiciary. One feature of the old legal order was the complete absence in practice of any rule of double jeopardy : this led not only to people pursuing the same case before several jurisdictions at once (e.g. in a slander case before baron court, commissary court and Kirk session) but also to the revival of old charges. By establishing and recording the decisions made in cases already tried by local courts the central courts were being protected from litigious pursuit which could lead to conflict with other jurisdictions.
83. Records Of Justiciary Court : Dittay Books SRO JCl6/22 Brown added sourly that despite their having subscribed to the act of banishment they still continued to live and haunt within the bounds, in open defiance of it. For evidence of this see Records Of Kirk Session Of Campsie SRO CH2/51/1 22nd. August 1709 where Margaret Brisban appeared charged with fornication - Browns words were:

"and subscribed an act of Banishment and notwithstanding thereof they both live within the parish of Campsie."

In ibid 18th. February 1697 we have the case of William Brisban, husband to Margaret Lapsely charged with taking in sturdy beggars - suggesting they had lived there for some time.

84. Records Of Justiciary Court : Processes SRO JC26/87/D280.
85. This obviously similar to the compilation of fugitive rolls during the 1650's by the Commission For The Administration of Justice. Presumably this was designed as an aid for the magistrates particularly the local ones.
86. Records Of Justiciary Court : West Circuit SRO JCl3/1
21st. October 1708.
87. Records Of Justiciary Court : West Circuit SRO JCl3/3
21st. May 1710.
88. Index To Justiciary Court Records 1699 - 1720
(Typescript in Scottish Record Office).
89. Records Of Justiciary Court : Dittay Rolls SRO JCl7/3
shows the change quite clearly when compared with the previous volume in the series.
90. For an example of a delation by a regality see Records Of Justiciary Court : Dittay Rolls SRO JCl7/4 May 1713 where Charles Hutchesone a vagrant was delated by Sir John Erskine of Alva and Mr. George Erskine chief baillie of the regality of Alva. However this was unusual - the Justices of Peace made the majority of delations in the volume and were asked regularly by the court, unlike other local jurisdictions.
91. On this see A.L. Murray: 'Administration and law and the Union' in Rae: The Union Of 1707 pp 30 - 57 and in particular p 32 where he quotes an attack on the quality of Justices of Peace by Sir John Clerk of Penicuik.
92. So see for example Records Of Justiciary Court : West Circuit SRO JCl3/4 20th. May 1720 Cases of Alexander Waddell of Roshiehill versus Thomas Russell of Midlring for oppression and riot - the complainer did not press his suit - and Thomas Howie excise officer in Alloa versus John Marshall brewer in Alva. Here the charge was breach of peace, bearing a hackbut, shooting a horse and oppression. This was referred to an assize who found the libell proven and Marshall was fined 20/- sterling and ordered to pay £8 compensation - the sum was low because it was shown that the horse was sick and only fit for the knackers.
93. Records Of Justiciary Court - West Circuit SRO JCl3/6
20th. May 1729 Case of Robert Benteine of Mildowan versus Walter Buchanan of Boquhan. James Buchanan of Wester Glenbog, James Lyll in Gartfarren, James Duncan in Boquhan, John Din in Bramshogle and William Louder in Ballikinrain for oppression, theft, robbery and herschip (i.e. cattle rustling). For an account of this case see W.L. Thomason: 'The trial of Walter Buchanan of Boquhan and others the Killearn freebooters' in

Transactions Of The Stirling Natural History And Archaeological Society vol XXXV (1912-13) pp 56-76. This was not the first time criminal letters had been raised against Buchanan - see Records Of Justiciary Court : West Circuit SRO JC13/5 20th. May 1725 case of Jean Dougal relict of Andrew Mcfarland of Buchlyvie now spouse to William Key merchant in Stirling versus Walter Buchanan of Boquhan, Helen Wilson his spouse and ll others on no fewer than ten charges to wit, arson; attempted arson; attempted poisoning; theft and depredation; resett of theft; harbouring, outhounding and maintaining of thieves and robbers; sorning and levying blackmail; killing and eating other peoples sheep. This libell was passed from as the court books record that the diet was deserted upon agreement but it attracted enough notoriety to be commented upon by Hume in his Commentaries.

94. Records Of Justiciary Court : West Circuit SRO JC13/3-8
95. ibid has in all 30 cases from Stirlingshire between 21st. May 1711 and 20th. May 1746 of which 10 were cases of theft and 9 of murder, (including 4 cases of infanticide).
96. Records Of Justiciary Court : West Circuit SRO JC13/6 20th. May 1732. Case of Thomas Walker indweller in Plean versus John Callandar there - a decret was produced from the barony of Plean.
97. Records Of Justiciary Court : West Circuit SRO JC13/1 21st. May 1709 Case of Thomas Smith and Janet Walker.
98. See Records Of Regality Of Montrose : Processes SRO GD220/6/418-53.
99. So in Records Of Regality Of Falkirk SRO SC67/2/5 the decline in the volume of recorded business and in the quality of the record is clear - this covers the period 1705 to 1715.
100. For example see Records Of Justiciary Court : Processes SRO JC26/87/D654 where there is one by William James from the baron court of Innes and Garmouth.
101. Records Of Justiciary Court : West Circuit SRO JC13/1 21st. October 1708. Case of John Archibald and Helen Brown - the baillie, Mr. George Erskine, formally protested the court's action.
102. There were also people from Stirlingshire being prosecuted directly in Edinburgh rather than in the circuit. For one such see William Cobb sclaiter in Kilsyth charged with murder in 1720. Records Of Justiciary Court : Processes SRO JC26/D1720.
103. One must add that it also reflects several very large mass prosecutions for riot and deforcement made after 1710 such as the prosecution for a riot against custom and excise officers at Kirkaldy in 1715. See the typescript Index To Justiciary Records 1699-1720 for this.

104. Thus these years saw the ending of witchcraft, adultery, killing red fish, steeping lint and fornication as common items of justiciary business. The evidence of the West Circuit Court Books suggests there was also a decline in prosecutions for casual minor violence and crimes such as oppression, invasion and riot with greater concentration upon serious violence, particularly homicide, and theft.
105. Throughout his Laws And Customs Mackenzie consistently interprets the jurisdiction of the royal courts in a maximalist and the local courts in a minimalist fashions. See below, appendix no. 2 for discussion of this.
106. Mackenzie: Laws And Customs p 2.
107. Thus in Records Of Justiciary Court : West Circuit SRO JCl3/7 20th. May 1735 there is the case of John Pattersone shoemaker in Fullibody charged with the murder of John Lee there - the man had died as the result of a public affray yet the term murder was used. In fact Slaughter becomes a rare term as the century progresses.
108. Mackenzie: Laws And Customs pp 57 - 9 argues that murder should mean any deliberate homicide, not just a concealed one while slaughter should mean a killing done in self-defence or accidentally.
109. Thus, in the case of Walter Buchanan of Boquhan cited above, although a private prosecution all the citations were done in the name of the Lord Advocate, Duncan Forbes of Culloden.
110. See Records Of Justiciary Court : West Circuit SRO JCl3/3 21st. October 1710. Case of Charles, Master of Elphinstone where the Lord Advocate formally asserted his right to take up a deserted libell.
111. By this is meant the idea that each court should form part of a judicial hierarchy with the various levels having clearly defined and limited jurisdictions while cases should always go through a uniform standard procedure based on clearly defined 'stages'. While this has many advantages it is also largely responsible for the unconsionable length, cost and slowness of legal proceedings which have rendered the modern English legal system for one almost useless for the citizen.
112. For an example see Records Of Justiciary Court : West Circuit SRO JCl3/6 20th. May 1732. Case of Janet Provan relict of William Finlay tailor in Greening of Westerfair and her children versus William Boog writer in Falkirk for murder or manslaughter. Here the diet was deserted after the case had been referred to an assize.
113. Sometimes this was done at the request of the accused - see Records Of Justiciary Court : West Circuit

SRO JC13/8 20th. May 1746 Case of Charles Brown, charged with theft and housebreaking for an example of this. Sometimes the sentence did not always work smoothly - Records Of Justiciary Court : West Circuit
SRO JC13/6 20th. May 1732 has an appeal from William Lauder who had been found guilty along with Walter Buchanan of Boquhan and, like him, sentenced to transportation for life to America in 1729. In it he says he had remained in prison ever since his trial and conviction as no one would undertake to transport him with the result that he was "in a most miserable and starving condition".

114. This was the Act 20 Geo II caput 43. Baron courts survived but had their jurisdiction limited to matters of 20/- Scots or less, as under Cromwell's regime.
115. This is no coincidence - both declines reflected changes in the structure of rural society and in the ideology of the ruling class and its perception of its interests.
116. R.A. Dodgshon: Land And Society In Early Scotland (Oxford, 1981) pp 318 - 20.
117. I am indebted to Dr. Roger Kirk of Peterhouse, Cambridge for this information.
118. The unique feature of the modernisation of the Scottish legal system as opposed to those carried out elsewhere is that it was done by an elite rather than by a reforming absolutist monarchy. The consequence of this was the creation not of a centralised, absolutist state (the Scottish state apparatus had after all been dismantled) but rather a unique form of class rule with a combination of a modernised legal system, highly uniform and centralised, with a minimal state and very free economy.

Conclusion

Conclusion

This study has sought to describe the old legal order of Scotland in its final years, as it worked in one medium-sized area, and to lay bare those changes which transformed it and brought about its demise. In this it has also tried to answer a variety of questions, some of them posed in the introduction, and two in particular. How was what we would call law and order maintained and enforced in the years before the abolition of heritable jurisdiction in 1774 and what in fact constituted crime during this period? The two questions are intimately interwoven, indeed one might say that they are two aspects of the one question. In any event, when put to the records they produce very different answers for 1637 and 1747.

In any conceivable human society, even utopia, there will inevitably be delinquent acts committed by anti-social individuals as well as deviant ones which offend the mores of that society. At the same time, in a world of scarcity (in the technical sense) there are always conflicts and strains within the social order, between groups and between individuals, which may lead to violence and, if unchecked, to the breakdown of the social bond. All organised societies have some means whereby such conflicts are dealt with and their graver consequences averted. Moreover any social order other than a Stirnerite union of egoists also has a mechanism by which acts which are recognised as delinquent or gravely deviant are punished. Such systems can take many forms. At one extreme are the highly complex, 'informal' and personal systems of such societies as the Ibo, Nuer or classical Ireland and Iceland: these have no concept of the state, positive law or institutional law enforcement. In the last analysis such a system depends for its functioning on the existence of a consensus as to what constitutes deviancy and delinquency shared by almost all persons in the society. At the other end of the scale are legal systems such as those of modern industrial societies which are formalised, institutional and in the last resort dependant upon the state. In any system where the state or a particular class has come to monopolise the function of maintaining 'law and order' it is

the attitudes and ideology of that dominant group which determine which acts are deemed deviant or delinquent although more general social attitudes are still clearly of great importance.

All legal systems have a number of goals or functions derived from the primary ones described above. The foremost of these is the imposition of punishment on those held to be delinquent or deviant. This serves the purpose of upholding social solidarity and cohesion, often in the interests of a particular class. It is also meant to deter, by striking fear into the beholders and by establishing the principle that all delinquent acts in theory carry a penalty. Since it is impossible to punish all who qualify for such treatment by whatever criterion, some mode of selection is followed. This usually means the picking out of individuals on the basis of the supposed gravity of their offence or their having certain characteristics (such as membership of a marginal group) together with the selection of others on a relatively random basis such as apprehension. Clearly the balance between these two can and does vary. Another central purpose is the restoration and maintenance of amicable relations between groups and individuals and hence the limitations of personal violence or else its direction into acceptable forms. Closely linked to this is the granting of redress to persons who have suffered injury or loss. Finally some systems seek to impose penalties which have the purpose of correction rather than punishment, that is penalties which are designed to reform and reshape the character of the delinquent.

The legal system which existed in Scotland in general and Stirling in particular during the seventeenth century was a mixed one, occupying an intermediate position between the two extremes described earlier yet moving rapidly towards the 'modern' role. This process of development can be traced far back into Scotland's history but it was during the years covered by this study that it reached fruition. The most marked change took place in the structure of the system. The old order, the product of a long process of evolution was one which combined a network of almost independent local courts with a body of royal courts based in Edinburgh, the two being connected via

the Privy Council and Parliament. The local courts, based on the local communities of burgh and estate were directly responsible for most of the task of maintaining order and were also the chief route, other than the church courts, whereby the edicts of the centre were enforced and malefactors arrested and sent to the central courts. All this reflected a highly decentralised and locally-based economy and polity. The church courts were again local, based upon the unit of the parish, but were bound together through the hierarchy of presbyteries, synods and General Assembly into a truly national judiciary: it was in the Kirk that the local and the national met and were united. These courts enforced throughout those parts of Scotland where they functioned a standard 'moral law' controlling the behaviour of lowland Scots and in the longer term, moulding their character. They, as much as any court were the investigative limb of the legal system, its hands, eyes and ears. The central courts in the seventeenth century had a clearly defined role to play alongside the local courts. They tried cases which satisfied certain criteria, as to the gravity of the offence and the rank of the persons involved, and also could intervene directly in the locality if the workings of local courts threatened the wider stability of the realm. Their position vis-a-vis the local courts was not a simple one of superiority but more complex, as they were recognised to have an ultimate authority in matters such as interpretation of law but were also not in any meaningful sense of the term ordinary courts of appeal exercising a clear cut supervisory jurisdiction. They were rather the courts which tried those cases which, for one reason or another, concerned more people than just the members of one local community. They were the courts of the kingdom as the others were courts of the locality.

By 1748 this structure had been completely reshaped. The system of church courts was dwindling into insignificance. The local courts had either been abolished or transformed, losing their independent status to become the lower levels of a single, hierarchical jurisdiction ruled by two supreme courts in Edinburgh. The law itself had been systematised and made uniform so that there was only one law enforced by a single system of state courts run, not by

aristocrats but by full-time lawyers.

Along with this went a change in the way the system of criminal law operated. Under the old order, still functioning in the mid-seventeenth century, the responsibility for enforcement of the law ultimately rested with individuals and communities who had been injured. The idea of a general obligation to enforce the law was barely developed beyond its most primitive form. By 1750 a decisive move had been made towards a system where prosecutions were brought by the state in the name of the general community rather than by the specific injured individuals. This inevitably meant a marked change in the way delinquent individuals were brought to trial, with the reform of the ditty system and the growth of Justice of Peace courts as investigative bodies.

This was intimately linked to changes in the motives for prosecution, the forms of punishment imposed and, increasingly, the makeup of the courts' business. Under traditional Scots law the major motive for criminal prosecutions was redress; the eighteenth century saw a shift towards ideas of punishment and reformation. Although the action for assythment remained part of Scots law until the later nineteenth century it no longer had a central place in the processes of criminal law. As compensation became less important as a penalty, so forms of punishment such as imprisonment and transportation became more important. Most dramatic in some ways was the change in the composition of the body of cases tried by the courts. Until 1710 the criminal courts were much exercised by moral offences such as adultery. After that date this particular type of business almost vanishes from the record. At the same time the criminal courts stopped hearing cases of 'good neighbourhood' and public nuisance such as steeping lint. This again is linked to the emergence of a clear distinction between civil and criminal actions which by 1750 were clearly two separate categories of court business. By contrast in the earlier period this distinction is not clear at all.

So the years between 1637 and 1747 saw a radical change in the structure of the legal system and the way it worked. The system changed from being predominantly localised, with no clear hierarchy,

to being highly centralised and with a clearly structured hierarchy. There was a shift from a system largely dependent upon personal initiative to a more formal and public one. There were also changes in the penalties imposed and in the types of actions prosecuted which reflected an ideological shift, a changed perception of what constituted crime. There had in fact been two great changes; in the way order was maintained, both in the local communities of Stirlingshire and at the national level, and in the very concept of order. This last clearly implies a change in the concept of deviancy and delinquency. In the old legal system order was kept by extra-legal sanctions, supported by legal institutions which were directly controlled by a ruling class of landlords and burghers. The institutions in essence provided a service, aiding individuals to gain redress and settle disputes. They were the means by which a class system was supported and public order maintained within a complex and localised social structure, a mechanism used by members of the community to settle disputes, exact redress for injury and to punish acts which had in some sense harmed the entire community or threatened its rulers. In this scheme of things 'order' meant not adherence to law but rather the absence of violent conflict between individuals or groups. Actions which violated social mores were punished partly because they could, if unpunished lead to conflict but primarily because the act of prosecution and punishment reinforced shared values and strengthened the coherence and solidity of the community. Actions which did not threaten social harmony or the position of the rulers would not be prosecuted under this system because the motive for doing so did not exist and there was no clear mechanism for people not directly involved in a dispute or conflict to bring a prosecution.

In the system which had emerged by the mid to late eighteenth century a different concept of order had triumphed, one which conceived of it not as something created and maintained by society but rather as a condition of compliance by individuals with promulgated laws, created by the state. Order to this way of thinking is enforced from above, by a system of institutions manned by

professionals. Crimes are not in the first instance harmful or delinquent actions (although they may be that) but rather breaches of law. An act which does harm to another individual but is not expressly prohibited by law is thus not a crime but a civil offence. On the other hand acts which harm no one but the perpetrator but are illegal are crimes. In the legal systems which reflect this idea of the enforcement of law and order it is the state which comes to have a monopoly.

Why though had this change in the concept of order and the structure of the legal system taken place? How was it related to the other changes in Scottish society during the same period? One pitfall to avoid is fruitless arguments about cause and effect, over which particular changes are seen as 'causes' and which as secondary 'effects'. The transformation of Scottish society between 1603 and 1750 involved changes in many areas all of which ultimately reinforced one another. Change in the legal system, economic change and the transformation of the social and political structure were thus all causes and effects of each other. As the seventeenth century wore on many factors forced a change in the economic structure of rural society. A national market began to emerge, along with a more general emphasis upon the buying and selling of surplus produce and changes in the technique to create such a surplus. This undermined the closed or semi-closed economy of the local estate and led to changes in the relationships between landlord and tenant, tenants and sub-tenants, rulers and ruled. At the same time the union of the crowns destabilised the political order and changed the nature and position of Scotland's ruling elite. These in turn led to greater pressure for changes in agriculture and reformation of the economy while economic developments expedited changes in the composition and nature of the elite. The development of the Scottish economy and political events outside Scotland pushed the country's rulers towards union with England and the liquidation as a result of the merger of a separate Scottish state apparatus. All of this led to and encouraged change in the legal system. The economic changes undermined the local, feudal courts, based as they were upon the economic and social entity of the self-sufficient estate. The political changes brought

about a fundamental change in the central portion of the legal system, with Parliament and Privy Council abolished and the courts of Session and Justiciary having their status and position radically altered. These legal developments in turn reinforced the economic and political movements: the decline of local seigneurial jurisdiction made it easier to introduce economic reforms while the reshaping of the central courts was a vital step towards a new national political system.

By the latter part of the eighteenth century Scotland had passed through a process of 'modernisation'. The economy, social and cultural life and political and legal orders had all become recognisably 'modern' whereas only a hundred years earlier they had all possessed many 'medieval' or 'traditional' features. This process of change, both complex and many faceted, was carried through in a unique fashion, not by the fiat of an 'enlightened despot' or state nor yet by a revolution of any sort. It was rather due to the actions of a ruling class which for the sake of its own survival had abandoned the traditional institutions of its rule, merging the state with a neighbouring one and abandoning the local bodies which had supported its power. The change described in this study, of the means whereby order was maintained through a legal system, was one part of this process and not the least significant. The transformation of Scottish society left only two great national institutions: the Kirk and the legal system, the latter created to serve the new economic, social and political order of a nation with no national state, a free market economy and a highly individualistic culture which had grown out of the events of the seventeenth century.

Appendices

Quantitative Analysis And The Use Of The Computer - A Waste Of Time?

Any historian who seeks to analyse and explain the workings of a criminal legal system is eventually forced to face the problem of quantitative analysis and its concomitant, the use of the computer. Many of the questions which a historian would wish to put to the records of a court are of a sort which in an ideal world should produce a precise, quantified answer. Thus for example what is the role of various crimes per head of population? What proportion of the work of a given court consists of offences against property as against the person and how do these change over time - and so on.

All this raises several acute questions of historical methodology. In the first place there is the question of whether one should use quantitative analysis at all. Some historians, such as Barzun, have argued that this is a form of analysis and procedure which is appropriate for a physical or biological science but not for a discipline of the humanities such as history. Such methods, it is said, undermine the position of interpretation as opposed to description in the writing of history and have implications which are dangerous for the very discipline of history itself. This line of argument can be rebutted from a variety of starting points, some of them philosophical, but mainly on the grounds that any form of investigation which enhances and enlarges our understanding of the past must surely be welcome. Quantitative methods can do this by providing the historian with information of a kind not otherwise available which makes possible a new level or form of analysis. Clearly pure description is not sufficient and must be coupled with interpretation but this distinction is dubious in any case since any description of the past, being selective, contains within it an interpretation of that past.

Assuming then that some element of quantitative analysis is desirable the next question must surely be is it possible? Simply raising this question opens up a whole range of issues and most particularly in the case of historical criminology. In the first place

there is the peculiar and dangerous nature of the statistics extracted from the records of the criminal law, which can be highly misleading. By their very nature courts' records only record criminal acts which have led to prosecution. Attempts to deduce general crime rates from such figures are very dangerous, even in the case of nineteenth century records. Where the pre-industrial period is concerned caution is even more appropriate. By a seeming paradox another major problem is that of the volume and quantity of data. Even though legal systems only try a proportion of delinquent acts enough still pass through the mill to produce truly enormous quantities of information. Quite simply, it is impossible to analyse such a mass of data by manual methods within a reasonable time or without the expenditure of an unconsionable number of man-hours. The solution to this problem is the use of automatic data processing devices, which means today the computer.

The historian who, having accumulated his data in the archive, wishes to process the material via a computer finds his problems have only begun. These fall under three heads, input, processing and data quality. So far as input is concerned, no computer yet devised can accept 'raw' data - all input has to be, in the jargon of the trade 'machine readable'. This means that all the information must be put into a standard, often coded, format before being loaded. This has two very serious implications, the one obvious the other not. Quite clearly the process of transforming data extracted from an archive into a standard input format is immensely time consuming. The obvious solution would seem to be to take information from the archive and put it directly into the standard input by use of a common pro forma, such as those used in the analysis of parish registers. This procedure can be very effective but it is very difficult to use when one wishes to process information from very different sources within a single file. Thus it would be relatively easy to design a standard data-sheet for use in the study of church courts but difficult to apply that same sheet to other types of court or legal record. Moreover there is, as said, a more serious and less obvious difficulty which the use of a pro forma raises

in acute form: unconscious pre-interpretation of the data. The input format applied by the historian pre-determines what information is recorded and put into file, what operations are possible on that file and not least the possible forms of output. In other words the structure given to raw data by its being put into a standard form already contains within it basic assumptions which limit possible interpretation and can lead and direct any subsequent analysis. It determines the content of the file, its internal structure, the questions that may be put to it and the content and form of the output/answer. This problem is unavoidable and the only real 'solution' is to be as aware of it as possible and to try to make any assumptions explicit.

Once the data has been entered the problem of what to do with it arises. Here historians, like other workers in the humanities and social sciences, are let down by the quality and nature of most computer software. Most languages are 'number crunchers' and have great difficulty in handling and processing alphabetic and alpha-numeric data. In particular no simple package has yet been devised which can cope with the problems posed by personal names. Complex algorithms have been devised which tackle this but none is truly satisfactory and all are extremely complex and often machine specific. Finally, even after the questions of input and processing are dealt with there remains the basic point of the quality of the data and its sources. If these are inadequate then computer processing will be simply a method of dressing up dubious information with a garment of spurious pseudo-scientific accuracy. American wit has expressed this in the famous GIGO law - Garbage In Garbage Out.

In the case of this thesis it was decided at any early stage to attempt a quantitative analysis simply because many of the questions and issues raised by thesis asked for a quantitative answer. The sheer amount of data accumulated after about two and a half years research made the use of a computer imperative, particularly for the identification of individuals who appeared in more than one record. It was decided to use a single file with standard input - a decision with extensive ramifications. It was clear from an early stage that there could be no question of drawing conclusions as to general crime rates,

particularly for the secular courts. In the case of the church courts the level of prosecution of certain offences would appear to have been sufficiently high to make such an analysis viable but then only for certain offences such as fornication and not for others such as adultery or disorderly conduct. What was at issue therefore was the analysis of the courts' business and the people who came before them. In setting up the standard input it had to be decided which variable or items of data would be used. Here the determining factor was the varying quality of the record. Had the church court records been analysed separately it would have been possible to input information such as the length of time taken by the case, the behaviour of the parties, particularly the men and the performance of penalties. The records of the other, secular courts however were not of sufficient quality to justify such an approach. As a result it was decided to confine the analysis to only six variables, the name of the court, the date of the initiation of the case, the penalty (where recorded) and the names of the defendants and pursuers. Besides these, each case was given a particular number and certain cases were distinguished by their being marked with a particular code: this meant that they were unusual cases of particular interest. So far as the variable 'type of crime' was concerned the terms used by contemporaries were adopted wherever possible and conflation of cases into a few categories was kept to the bare minimum to prevent any element of unconscious interpretation creeping in. In the case of the variable 'form of punishment/result of case' there was no conflation at all, even though this led to a very long code-list of almost 50 values. When the data had finally been put into machine readable form there were found to be almost 10,000 cases and over 22,000 individuals entered. Some idea of the quantity of information contained in the input can be gained from the fact that the total run-time was over six and a half hours.

The quality of the data meant that sophisticated analysis, using such devices as graph-plotter packages was almost impossible for anything other than the simplest of questions. For example it was not possible to obtain automatic estimation of levels of recidivism

or of the number of cases where a party appeared before more than one court. This was firstly because of the gaps in the record which vitiated any such attempt. So if such an analysis had been made it would have been of little value because only a very few secular court records have survived, so reducing the number of instances where record matching could be done. More important however was the problem of personal names. On the one hand seventeenth century Scots had very few personal names to choose from - particularly women who were almost all called Margaret, Alison, Elizabeth, Mary, Jane or Janet, Catherine, Christian and Helen. The structure of rural society meant that many people in the same locality would share the same surname as well - there were no fewer than 6 separate James Livingstone's recorded in the file, all from the area round Falkirk. All this makes it very difficult, if not impossible, to distinguish between different people with the same name and so produce accurate figures. The usual solution to this problem, of constructing an algorithm which will identify two people as the same person only if other variables match was not possible because of the limited nature of many of the records. On the other hand, although Scots may have had few names to choose from they certainly had a wealth of spellings and forms available. This often quite marked variation in the spelling and form of names, sometimes even in the one text, obviously poses acute problems for any computer program.

It was therefore decided to massage the data by sorting and structuring it using combinations of the variables given earlier. The file could then be printed out or accessed in a variety of ways and the information thus presented given a further 'manual' analysis. There were no fewer than 10 forms of output but only 8 of these were used for further statistical analysis. The other two modes, by order of input or case number and of those cases marked as unusual were intended to produce only a reference source. The first of the other forms of output was to print all the cases in chronological order. This made it possible to determine how many cases were recorded in the surviving records for any particular year. The next form was to print all the cases according to the alphabetic order of

defendants names. This printout could then be checked against the fuller records made in the archive to establish cases of recidivism and of multiple appearance. So for example it was possible to discover when and where people tried by the Justiciary Court for adultery in 1709 had previously appeared. The data was also printed out in chronological and alphabetic order for each value of the 'name of court' variable, i.e. by court. This made it possible not only to construct tables and graphs for the size and composition of any court's business over time but also to check for recidivism and to identify 'trouble makers' who were constantly in hot water with one court. This was supplemented by printing the data by 'crime' i.e. by all the values of the variable 'type of crime' so that all the murders would be printed together, all the fornications and so on. These were further ordered either chronologically or by the names of the defendants. Lastly the data was sorted by crime sub-ordered by penalty so that for example all the instances of adultery would be printed, divided up into groups such as those hanged, those banished, those flogged and so on. This made it possible to discover patterns of punishment by establishing what proportion of those prosecuted for a particular offence suffered particular penalties. This was particularly valuable in the case of the church courts, as the relevant tables in chapter 3 reveal but it proved very difficult to do for the secular courts because of the poorer quality of the record.

One key point is that all of this analysis of the structured file was done by hand and eye rather than by the computer itself, for the reasons mentioned earlier. This and the actual writing of the input were both exceedingly tedious and time consuming jobs. This inevitably raises the question was all this worthwhile or cost effective or was it rather a waste of time? The answer must be that partly, at least it was not cost effective with the labour expended greatly exceeding the benefit acquired. It still seems worthwhile overall and particularly valuable where the church courts were concerned. Here the use of the computer made possible some analyses that would otherwise have been very difficult to carry out, e.g. of the Kirk's sentencing policy. However in retrospect the use of computer

analysis was not justified where the secular courts were concerned, particularly the local ones. There was nothing done that could not have been done by old-fashioned 'shoebox' methods. The Justiciary Court is a different case again. Here sophisticated computer analysis could produce very valuable results but the amount of work required would be immense. In this instance it was decided that limitations of time meant it could not be done.

What general conclusions can be drawn from the particular experience of this thesis as regards the position of quantitative analysis and the use of the computer in the study of crime in the pre-industrial period? First that although such procedures are useful and important they cannot occupy the central place. It is not possible at present to construct a research work or monograph entirely around a statistical presentation of a body of data: the quality of that data is doubtful and the means for processing it are not yet properly developed. Secondly that despite the seeming disadvantages it makes more sense to have a separate file and input format for each type of court and to compare the different classes of jurisdiction by a file-matching program rather than to put all of the data into one, ordered file. This is because the differences between the various courts as regards their procedures, type of business and quality of record are so great that each requires a distinct and independent input format: using only one is unduly restrictive. Thirdly with particular reference to Scotland, that the records of the church courts are vastly more amenable to such analysis than those of the secular courts because of their much superior quality. The inferior quality of much secular court records when coupled with the known low level of litigation and high 'dark figure' of unrecorded crime mean in fact that anything more sophisticated than the most basic statistical treatment will be sophisticated in the perjorative sense - i.e. spurious and lacking in substance. Finally we can say that in general, with the type and quantity of data available to the student of pre-industrial criminal law and the difficulty of processing such data as personal names, any truly widespread use of the computer must wait until the Josephson junction and bubble memory have produced a machine capable of feats similar to those

performed by that much underrated instrument, the human brain.

The Institutional Writers And Their Role.

In the history of Scots law those great lawyers given the title of 'Institutional' hold a hallowed place. Foremost among this select group is the first Viscount of Stair and not far behind comes Sir George Mackenzie of Rosehaugh, 'bluidy Mackenzie' to the Covenanters and their supporters but a figure of high repute to all Scots lawyers.

What the institutional writers did was to write comprehensive legal treatises, derived from abstract first principles but supported and buttressed wherever possible by actual practice, which purported to describe or formulate the law of Scotland. These were taken by contemporary and later lawyers as authoritative models and guides. The consequence was that Scots law was recast and altered to fit a theoretical model. Scotland, unlike England, had a 'reception' of Roman law but with the peculiar distinction that this came about not because of action by an absolute sovereign but as a consequence of the influence of outstanding lawyers, two in particular.¹ What though were Stair and Mackenzie trying to achieve and what was the nature of their works - were they truly descriptive or were they rather polemical and exhortatory?

The figure of Stair dominates the history of Scots law. Raised almost to the status of a saint or object of worship by subsequent generations of lawyers he is credited with having invented the body of Scots law entire, like Athena springing fully grown from the brow of Zeus.² In his great work, *The Institutions of The Laws of Scotland*, Stair built up an entire system of law from first principles, starting with abstract premises and working from them to actual legal practice - the reverse of the normal lawyers mode of proceeding. His first principle was equity or natural justice, defined very widely and identified with natural law, this being in the last analysis the creation of God.³ What Stair went on to do was to identify this equity or natural law with firstly the system of 'civil' or Roman law, secondly the works of continental jurists and thirdly those aspects of Scots law of which he approved and which had developed in the intellectual forcing

houses of the courts of Session and Justiciary.⁴ His work purports to describe a system of law, systematise it and identify the principles upon which it was based, so making further orderly development possible. It is thus presented as a piece of clarification, of drawing out and displaying of already existent structure and principles.⁵ In fact it does nothing of the sort; Stair's work is as much propaganda as description. It has been said that what Stair did was to identify the practice of Scots law with his natural order or equity and so make explicit its philosophical base.⁶ It is not clear, to say the least, that pre-Stair Scots law possessed any structure like that identified by him or followed from the principles which he set out. What he did was to construct a model of law and apply this like a stencil to the reality of Scots law, interpreting those parts which conformed to the framework as being its expression or consequences and ignoring the other parts which did not fit. This does not make his intellectual achievement any less - rather the reverse. It does mean however that his work should be used with very great caution when trying to describe the legal system of his own time and earlier.

Stair's work was necessarily mostly concerned with civil law. The great authority on the criminal law was Mackenzie. He also, like Stair, wrote a general work, again entitled 'Institutions of The Laws of Scotland' but his greatest and most original work was 'The Laws and Customs Of Scotland In Matters Criminal'.⁷ This had a profound influence upon the subsequent development of Scots criminal law and was regarded as authoritative until the publication of Hume's definitive work.

Mackenzie's 'Laws And Customs' is for the historian a very valuable, even vital source of information on the practice and nature of criminal law in seventeenth century Scotland, written as it was by the leading criminal lawyer of the time. It is a more purely descriptive work than Stairs and gives much valuable information upon forms of procedure. However the book is very much also a commentary, even a polemic as much as description of actual legal practice. Mackenzie in this work is concerned as much to argue for what ought to be the form of criminal law as to describe its actuality. Moreover

his use of authorities is often tendentious and designed to put forward a view of criminal law and Jurisdiction which was novel when compared with the work of authorities such as Balfour or his near contemporary Thomas Hope.⁸

The first novel feature of Mackenzie's work is his method, commencing as he does with a statement of abstract principle as to what constitutes crime. His definition is theoretical and based upon the Roman law concept of 'peccatum' or transgression of authority - he says

"Transgression or peccatum is made the root of all enormities and is divided into delicta, quasi delicta and crimina. Quasi delicta are such faults and transgressions as are not so hainous that they deserve to be punished criminally, such as small ryots. Delicta are such as deserve a more severe punishment, but yet because they tend not to wrong the commonwealth and publick security immediatly, therefore do not deserve to be punisht by any express law as crimes. Crimes are those injuries done to the commonwealth which are so immediat and hainous, as that they are punished by express law."⁹

From this definition Mackenzie proceeds to deduce which actions are crimes and delicta - a very different method from that of Balfour and Hope who simply describe the various acts which could lead to action at law and then attempt some kind of rough categorisation.

Mackenzie's premise leads him to a novel definition of crime. After quoting Balfours definition of a criminal action as one touching life or limb, itself taken from Regiam Majestatem, Mackenzie rejects this and argues

"The true nature of a crime then may be comprehended, under these general conclusions: First, that is a crime, which is declared such by an express statute, as murder, Treason; and it were to be wisht, that nothing were a crime which is not declared to be so, by a statute; for this would make subjects inexcusable and prevent the arbitrariness of judges. And I find by the general consent

of criminalists, nothing is to be accounted a crime or punished criminally; but what is forbid by the law, under an express pain or punishment; for they observe, that as there can be no punishment inflicted but where a delict is comitted: so there can be no delict but where the law hath appointed a punishment".¹⁰

Mackenzie's definition of crime as transgression of law thus leads him into an overtly polemical (and tautologous) argument. However he then admits that there are non-statutory crimes, saying

"Thus incests and rapt, were accounted crimes with us, before they were declared to be such by an express law. And bestiality and sodomy are crimes: though yet we have no statute against them". and "That is a crime which long custom hath punished by corporal punishment, or by a pecuniary mulct, in the Justice court, as single and manifest adultery".¹¹

He goes on to admit the principle of desuetude stating

"Our statutes, or Acts of Parliament, are our proper law; but even these may run in desuetude, so far that they cannot be the foundation of a criminal pursuit" and "Nor can the people be thought to have contemned, what they cannot be presumed to have known. And our Judicatorys, by ordaining such ancient laws to be renewed by proclamations, do confess, that before these proclamations, these laws were not binding".¹²

Mackenzie however then tries to restrict the implications of his earlier statements by arguing

"But desuetude must be universal, ancient and notorious, else the want of any of these three qualifications, will alter this conclusion".¹³

Mackenzie then, having defined crime, attempts to divide it into categories. He gives six principles of division but in pride of place he puts the Roman law principle of public and private delict, saying

"crimes are divided by the Civil Law, into publick crimes and privat crimes; publick crimes are defined to be those which any privat person may pursue for publick revenge, and whereof the punishment is stated by an express law. And a privat crime which none can pursue, but the party injured and which is not declared to be a publick crime by an express law".¹⁴

This is very different from the type of division given by Balfour and Hope who categorise crimes on the basis of the penalty imposed and the concealed or overt nature of the offence. Mackenzie lists these two principles of division but criticises them, particularly the division of crimes into occult or hidden and manifest. Here, against all the weight of tradition he argues that murder is a manifest, not an occult crime.¹⁵

Mackenzie then proceeds to analyse a whole range of crimes.¹⁶ What is most notable in his treatment of them is his persistent interpretation of authority, abstract principle and precedent to argue that almost all serious crime was expressly reserved to the royal courts and excluded from the jurisdiction of private courts, even regalities. Thus he argues that because persistent blasphemy can merit capital punishment it can only be tried by the Justices and not by lords of regality.¹⁷ Later he argues that poisoning and arson are always reserved to the jurisdiction of the Justices and in the case of witchcraft asserts that "this should also be tried only by the Justiciary Court and criticises the practice of allowing it to be done on commission."¹⁸ Again he argues that all forms of falshood, rape, incest, sodomy and bestiality and even adultery do not fall within the jurisdiction of regality courts while in the case of fore-stalling and regrating he says that this can be tried by any court but ought to be reserved to the Chamberlain.¹⁹

All of this clearly flies in the face of the actual reality of Scots criminal law in Mackenzie's time. Nor is this the only area where he draws conclusions opposed to traditional practice. He argues for instance for a radical re-definition of murder to make it cover any deliberate homicide, reserving the term slaughter to a killing done in self defence.²⁰ Again he argues that remission

of killing should not be allowed under existing law but admits that it often is.²¹ Yet again, when in the second part of his book he deals with jurisdictions, that of the feudal courts is narrowly defined and restricted while that of the royal courts is interpreted in the most advantageous manner.

Mackenzie's work is thus as said not merely a work of description but a polemic, intended to argue for a particular interpretation and select use of the complexity of old Scots law. Thus although very useful it must be used with very great caution when describing the law and its workings in seventeenth century Scotland. The most valuable parts are perhaps those where Mackenzie describes practices of which he disapproves (such as the system of precognition).

The earlier Scots legal writers Bissett, Craig, Skene, Balfour and Hope were all concerned mainly to describe and understand the existing practices of Scots law. Where Stair and Mackenzie are concerned we may paraphrase Marx and say that they, in their writings, were concerned not only to describe and understand Scots law but to change and direct it. In this endeavour they most certainly succeeded.

1. J D Wilson: 'The reception of Roman law in Scotland' in Juridical Review vol ix (1897) pp 361-94.
2. Thus see Lord Cooper: 'Some classics of Scottish legal literature' in Selected Papers 1922-1954 (Edinburgh, 1957) pp 39-52 and particularly p43 where he says (of Stair) "who in the very infancy of Scots law provided Scotland with a ready made legal system".
3. ibid. pp 42-6; A H Campbell: The Structure of Stairs Institutions Glasgow, 1954).
4. ibid. R Sutherland: Lord Stair And The Law Of Scotland (Glasgow 1981).
5. ibid. p5; Cooper, Selected Papers pp 43-4.
6. Campbell, Structure Of Stairs Institutions passim.
7. Sir G Mackenzie: The Laws And Customs Of Scotland In Matters Criminal (Edinburgh, 1699).
8. P G B McNeill (ed): The Practicks Of Sir James Balfour Of Pittendreich (2 vols, Stair Society, Edinburgh, 1962/63); J A Clyde (ed): Hopes Major Practicks (2 vols, Stair Society, Edinburgh, 1937/38).
9. Mackenzie, Laws And Customs p1. In using this definition Mackenzie was in line with much contemporary thought. Thus Hobbes uses almost exactly the same formulation in Chapter 27 of 'Leviathan'. See J Hobbes: Leviathan (London, 1914 - Everymans Library edition) pp 154-63. See also pp 164-89 'Of Punishments And Rewards'.
10. Mackenzie, Laws and Customs p2.
11. ibid.
12. ibid. p3.
13. ibid.
14. ibid. p12.
15. ibid. pp 12-13.
16. ibid. pp 14-181.
17. ibid. p15
18. ibid. pp 35-7; 37-40; 42-56.

19. ibid. pp 81-3; 83-5; 86-96; 116-18.
20. ibid. pp 57-71.
21. ibid.

THE SCOTTISH BARONY AND REGALITY
AS ECONOMIC AND SOCIAL UNITS

Before 1600 and for some time thereafter the basic unit of economic and social life in Scotland was the freehold estate, held by a single proprietor.¹ The estate was an area of land held by a heritable owner and inhabited by subordinate classes of tenants, sub-tenants, labourers and craftsmen. There was much variation between estates as regards size, shape and wealth: some were small, compact areas, while others covered vast territories, such as the Campbell estates in West Scotland; some were single, discrete blocks of land while others consisted of land scattered over several shires; some were rich, blessed with good soil, while others were poor. Yet despite all these differences, within Lowland Scotland at least, we can talk of 'the estate' as a distinct type of community.

For much of the seventeenth century the estate was a distinct, self-contained unit. It was an essentially self-sufficient economic entity and it, rather than the nation, was the forum for most economic activity. Estates were often distinct political entities as well, having their own internal hierarchy and institutions for regulating and ordering community life.² Foremost amongst these was the court and the estate was also the ultimate building block for the structure of the legal system. In fact, in some cases the estate constituted an autonomous or near independent society.

The people who lived on the lands of an estate almost all derived their income and livelihood from working the soil. Because of the agricultural system employed, they tended to live not in large, nucleated settlements, but rather

in the distinctively Scots type of settlement known as the 'ferm-toun'. The individual ferm-toun was normally incapable of meeting all of the economic needs of its population and there was therefore a division of economic functions between the various ferm-touns of an estate: one would contain the smithy, another the mill, yet another the Kirk. Central services would be provided by the ferm-toun which contained the residence of the proprietor, known as the mains of the estate. The people who lived in these touns did not only grow food and raise livestock. Many were also craftsmen so that an estate would have its own smith, farrier and leatherworkers as well as weavers, spinners and carpenters. This meant that there was little need, if any, to go outside the estate for goods or services as these were provided within its bounds while the produce of the estate would be produced and circulated internally, often by barter rather than buying and selling, although these took place as well. Much of what surplus was produced went to the proprietor in rents paid in kind: much of this was consumed by him and his household and the rest returned to the tenants via a notional sale.³

Within the estate there was a complete social hierarchy, making it a kind of miniature social order. Below the proprietor at the very top came those tenants with some form of security of tenure, followed by the great mass of direct tenants. After them came the sub-tenants or cottars and finally the landless labourers and living-in domestic servants. In the very large estates there would often be at least one relatively large settlement, often with burghal status, and here one could find urban craftsmen and even merchants.⁴ All of these people were in law feudal

dependents of the proprietor and he could therefore call them out to fight in his interest. Nor was this mere theory: it was put into practice during the seventeenth century and again in 1715 and 1747. In the Highlands this feudal bond was strengthened greatly by its close connection with the tie of kinship: the inhabitants of an estate would tend to belong to the same kin group. By the seventeenth century this was not true of the Lowlands, though it had been so at an earlier date.⁵

The social order of the estate found expression through a series of formal institutions and offices. There was the factor responsible for the day to day running of the estate, the chamberlain who ran its financial affairs and officers who actually carried out the will of the proprietor, organising the tenants. In some estates there would be specialised officers such as the forrester, responsible for administering the timber reserves and moss grieves who controlled the extraction and use of peat.⁶ However, the most important institution by far was the court. Every freehold proprietor had the right to hold a court for the tenants living on his lands: the jurisdiction was seen as springing from the heritable ownership. The term court can mislead the modern reader, accustomed to the narrow and precise meaning which the word has today, to suppose that it was a purely judicial body. In fact it was responsible for running most of the affairs of the estate, in particular its economic life.⁷ Indeed one may go so far as to say that by the mid-seventeenth century economic management was the court's major role. So for example, at Balgair in West Stirlingshire, the court fixed rents and arranged for their collection, determined how many livestock any one tenant

could keep and which crops were to be sown and where.⁸ Three times each year the tenants of an estate would be called to a head court, held at the 'caput' of the estate. This meeting would pass and enact laws and regulations, decide policy and elect the birlaymen. These were tenants who sitting together made up the birlow court, which enforced quite literally the 'by-law', meaning farm or land law. This was a code of practice regulating the relations between the different tenants and theoretically ensuring the smooth running of the estate community. The birlaymen were also involved in the administration of the estate, assisting the officers.⁹ The most important figure in the court was the baillie normally, like the factor and chamberlain, a substantial tenant. At an earlier period he had only presided over the court with the suitors to the head courts and the members of a jury at lesser meetings actually taking the key decisions. By the seventeenth century the baillie was a much more powerful figure, often announcing laws on his own account as well as trying cases alone and choosing the birlaymen.¹⁰ However, the extent of this varied from one place to another: in Balgair the dominance of the baillie was complete but in Falkirk the head courts were still important while in places like Glenorchy the old ways would seem to have survived.¹¹

In many estates, perhaps a majority, the proprietor held the estate 'in baroniam' and the court was a baron court. During the sixteenth and seventeenth centuries the barony was the basic unit of estate management. Some proprietors held just one estate or barony with the two terms synonymous. In other cases one proprietor would hold several estates, acquired by purchase or inheritance, each with its own court.

These put together would form one large estate consisting of a collection of baronies. Proprietors were usually anxious to have their lands erected into baronies, if they held substantial property which lacked that status, while very large estates or collections of the kind described were frequently erected into regalities. Here each individual estate would retain its own institutions, court and officers but there would also be a set of institutions for the entire collection, exercising a superior authority and running the affairs of the entire, large estate. So for example in Stirlingshire by 1640 James Livingstone of Almond (as he then was) had acquired the estates of Falkirk, Callandar, Muiravonside, Almond, Manuel, Dundags, Dunipace and Slamannan, each of these being a barony. In 1642 all the estates were erected into a regality, creating a court with powers over all the various small estates, now formally bound into one large one.¹² The new regality court was also given jurisdiction and authority over other freehold estates in the area, held by men who were bound to the Earl of Callandar, as he by then was. Amongst these were Beancross, Westquater, Kerse and Bantaskin. The head court records of the regality distinguish between the direct tenants of the Earl and such lairds, who are termed 'vassalls'.¹³ That the original estates retained their separate identities is clear from the head courts, which list absent suitors by barony and which always have an entry where the baillie for the whole regality asks each baron baillie if there were any outstanding cases.¹⁴

As stated above, such large estates when erected into regalities would have institutions to govern them and regulate the whole. These could often be very elaborate, with all the officers of a feudal monarchy reproduced on a

local scale and the holder truly a 'regulus' or little king. Thus the regality of Montrose, stretching over four shires had its own legal order complete with Justiciar, its own chancery and Constable. One regality (St.Andrews) even had an Admiral!

However, does it still make sense to think of such large units as communities? The answer is surely yes. As in the single estate there was a complete social hierarchy, frequently cemented by the bonds of kinship. There were also, as argued, institutions which worked to unite the various parts of the large estate, even when these were scattered. Most important of all however the policy pursued by most proprietors was designed to make their estates, whether single or conglomerate, into self-contained economies. Indeed economic regulation was probably seen by contemporaries as the central function of proprietorial courts, whether of lands, barony or regality. In trying to maintain the estate, single or complex, as a closed and basically self-sufficient community the proprietors were assisted by the type of agricultural economic system described above and in an earlier chapter but the period after 1600 also sees a deliberate attempt to direct and control the forces of economic change, to produce an economy where market forces operated but only at a local level, within the social, political and economic entity of the estate.

The policy followed by many landowners can be seen very clearly in the records of the regality of Falkirk, and also in the printed records of Urie and Stichill.¹⁵ In the first place the proprietors could and did use their courts to impose new agricultural practices, such as the use of lime, the planting of trees, division of commonty and the

abolition of run-rig tenure.¹⁶ They could also feu out much of their lands, so creating a class of mini-proprietors while retaining the jurisdiction and ultimate control exercised through the baron court. (If the lands of a barony were given away or sold the original proprietor would still retain the jurisdiction so long as he owned the caput and it became established that purchase of the caput brought with it the jurisdictional rights).¹⁷ Thirdly, proprietors could seek to encourage trade, the use of money and manufacture within the bounds of the estate: this often meant the erection of a burgh of barony or the obtaining of a license to hold a fair and market.¹⁸ This did two things: it encouraged trade, the use of money and the hiring of labour for wages and yet at the same time it meant that these phenomena were limited and checked as they were only allowed to take place in the burgh or at the fair where they could be regulated by the proprietor through the terms of the sett or charter of the burgh and via the legislative action of the court.¹⁹

The other side of that coin was the very strict regulation, or even prohibition, of trade and other economic links which cut across the boundaries of the estate. Thus one of the acts passed by the Falkirk court prohibited the sale of meal to anyone who was not an indweller while in 1644 three people were fined for importing ground malt into Falkirk.²⁰ Last, but not least, the proprietors used their courts to impose tight controls upon the workings of the market, particularly through price fixing and licensing. In Falkirk the prices of all the basic commodities were fixed by the regality court: for example the price of beer was fixed in 1639 at 1/2 scots per pint, raised in 1641 to 1/4 per pint and any attempt to charge more was punishable by a fine of

£5.²¹ Prosecutions for selling goods without a licence were a regular feature of the court's business while the civil action brought in 1646 by Alexander Wright against Janet Findlay shows clearly that the licences gave the licensee a monopoly within a particular area of the regality.²² There was no question of a free market economy - what was wanted was a limited market economy within the estate but under the control of the proprietor and with no significant external economic links. Much of what surplus was produced would be extracted by the proprietor through rents; he could then either return it to his tenants via a sale or sell it outside the estate, so governing its 'export trade'.²³

This policy originated in the interests of the ruling class and the position they found themselves in by the early seventeenth century. Faced with the challenge of a growing market economy marked by the increased use of money and wage labour, all of which was leading to greater mobility and enhanced division of labour the response of most members of the ruling class was to try to create a form of feudal capitalism, combining elements of two economic orders to produce a curious hybrid.²⁴ The main features of this hybrid economy were the continued control of economic life by the class of freehold proprietors, the maintenance of the estate as a self-contained economic and social unit and the establishment of a limited form of market economy within the estate. This went along with a political strategy of re-asserting the power and importance of many traditional institutions, and found expression in the basically conservative programme of the 1637 revolution.²⁵ Again, support for a purely Presbyterian form of church government fitted in with this, as it tended to increase the power of

the local landholders.

However, by the 1690's it had become apparent that this particular economic strategy was not working out in many places. The later records of Falkirk regality, starting in 1688, have far less in the way of economic management in them than those for the 1638 to 1652 period and gradually this type of entry disappears until only the most basic estate management remains.²⁶ The contradiction in the overall strategy, particularly that between a policy of encouraging new agricultural techniques on the one hand and the restraint of trade on the other must have become increasingly acute. At the same time more general economic pressures were forcing the ruling class to make hard and critical choices by the late 1690's

The result, as Hobsbawm has recently argued, was that during the 1690's and 1700's most members of the Scottish ruling class quite consciously abandoned the policy described earlier, of trying to contain market forces within a feudal mould and instead espoused wholeheartedly the move to a national, market economy.²⁷ This meant not only fundamental change in agricultural practice but also the gradual abandonment of the local estate as the basic economic and social unit, with its replacement by a truly national economy such as the one Adam Smith knew.²⁸ Most important of all for our purposes it meant the disregarding as increasingly redundant of the institutions of the estate community, including of course the local court. It was still very useful no doubt to have a court where you could cite your tenants to pay rent but it was ever less necessary to have a body with truly wide ranging and extensive powers.

Study of the internal workings of seventeenth

century estates, single and complex, leads to the conclusion that they were economic and social units with the institutions such as baron and regality courts the institutional super-structure through which the class order and community expressed themselves. The seventeenth century saw a serious attempt to contain change within these social and institutional structures. This was abandoned at the end of the century and this was one of the main reasons, perhaps the central reason, why these institutions were allowed to die.

NOTES

1. For a general discussion of this see I. Whyte: Agriculture And Society In Seventeenth Century Scotland (Edinburgh, 1979) pp 29 - 86; M.H.B. Sanderson: Scottish Rural Society In The Sixteenth Century (Edinburgh, 1982) pp 21 53. For a view of the same subject over a longer period see R.A. Dodgshon: Land And Society In Early Scotland (Oxford, 1981).
2. Whyte: Agriculture And Society pp 41 - 51.
3. On rents in general see Sanderson: Scottish Rural Society pp 27 - 38; for the idea of a notional sale see Whyte: Agriculture And Society pp 33 - 38.
4. Whyte: Agriculture And Society pp 29 - 41; Sanderson: Scottish Rural Society pp 6 - 21, 41 - 46.
5. Whyte: Agriculture And Society; pp 139 - 141; Dodgshon: Land And Society pp 104 - 113. See also the evidence presented in J. Stuart (ed): List of Pollable Persons Within The Shire Of Aberdeen (2 vols, Aberdeen, 1844).
6. Whyte: Agriculture And Society pp 41 - 50.
7. Sanderson: Scottish Rural Society pp 10 - 19; Dodgshon: Land And Society pp 166 - 9.
8. J. Dunlop (ed): Court Minutes Of Balgair 1706 - 1736 (Edinburgh, 1957).
9. On the birlaymen see Dodgshon: Land And Society pp 166 - 7; Whyte: Agriculture And Society pp 47 - 49.
10. As for example in Ballikinrain in Stirlingshire. See Court Book Of Barony of Ballikinrain NLS 9303. (This manuscript is housed in the National Library of Scotland).
11. For the records of Glenorchy see C. Innes (ed): The Black Book Of Taymouth (Edinburgh, 1855).
12. Records Of Regality Of Falkirk SRO SC 67/2/1 - see for example the head courts held on 26th. January 1647 and 4th. May 1647 where the various estates are all distinguished in the roll.
13. ibid makes this clear with the absents list clearly separating tenants from 'feuars and vassells'.
14. Also there are some entries in regality court records which show the continued existence and functioning of lower baron courts. Thus Records Of Regality Of Falkirk SRO SC 67/2/1 21st. November 1651 has a decret of the Baron Court of Dunipace written into the record.
15. D.G. Barron (ed): Court Book Of The Barony Of Urie 1604 - 1747 (Edinburgh 1892); C.B. Gunn (ed): Records Of The Baron Court Of Stichill (Edinburgh, 1905). The Urie records are particularly informative.
16. Whyte: Agriculture And Society pp 45 - 6 and references.
17. W.C. Dickinson (ed): Court Book Of The Barony Of

Carnwath (Edinburgh, 1937) pp XXII-XXIV.

18. Whyte: Agriculture And Society pp 178 - 94
19. So for example Records Of Regality Of Falkirk SRO SC 67/2/1 25th. November 1651 has a whole series of acts governing and regulating the holding of markets in the burgh.
20. ibid 4th. December 1638 has the act mentioned; 11th. November 1644 case of John Benny in Falkirk, James Livingstone and Margaret Hall in Jaw.
21. ibid 11th. January 1639; 30th. April 1641.
22. ibid 10th. January 1640 Case of John Fleming, Andrew Hodge, Hew Livingstone et al is just one example; 31st. March 1646 case of Alexander Wright in Plinmeadow versus Isobell Findlay in Carroniveir where the defendant was pursued for selling ale in the area where Wright's licence gave him a monopoly.
23. Whyte: Agriculture And Society pp 192 - 4.
24. This was a common response on the part of aristocrats in sixteenth and seventeenth century Europe. See for example W.Kula:Feudal Capitalism : Towards A Model Of The Polish Economy (London, 1976).
25. D. Stevenson: The Scottish Revolution 1637 - 44 (Newton Abbott, 1973) pp 304 - 10, 133 - 7.
26. Records Of Regality Of Falkirk SRO SC 67/2/2 - 5.
27. E. Hobsbawm: 'Scottish reformers of the eighteenth century and capitalist agriculture in E. Hobsbawm et al: Peasants In History: Essays In Honour Of Daniel Thorner (Oxford, 1980) pp 3 - 29.
28. ibid pp 4 - 19.

THE STIRLINGSHIRE VALUATION ROLL OF 1709

The roll, found in the gifts and deposits section of the Scottish Record Office, is a very useful source for the pattern of landholding in late seventeenth century Stirlingshire. The roll lists every freehold in each parish along with its valuation in pounds sterling, down to shillings and pence. Two pieces of information can be extracted without any great difficulty: the total valuation of each parish and the number of separate freeholds. When rounded up, the valuations of the parishes range from £20,867 for St. Ninians to £1,745 for Baldernock, with a total for the entire shire of £107,160 (See Table No.1). In fact, as the table makes clear, 56% of the total comes from just five parishes with two of them, St. Ninians and Falkirk, providing 37%. This reflects not only on the size of the parishes concerned, but also their density of population, natural fertility and general wealth. It is interesting to compare these valuations with those given in the Old Statistical Account seventy years later: as may be seen, the difference is minimal except in the case of Falkirk where there has been a fall of over £5,000. It is not clear why this should have happened, though one should bear in mind the remark recorded in Macfarlane's Geographical Collections that the parish suffered considerably after its loss of regality status in 1715.

The number of listed heretors also varies widely: St. Ninians and Falkirk are again at one end of the scale with 118 and 103 listed while, at the other extreme, Alva has only 3. In total 545 heretors are listed but this is undoubtedly

an underestimate: in several of the parishes are entries saying: 'Feuars of.....' and giving a total valuation without listing the feuars, while some of the baronies and estates mentioned are known to have been feued out before 1709; e.g. the barony of Mugdock in Strathblane. One thing which is very clear from the lists of heretors is the extent to which estates and the lands of baronies were being subdivided, or 'portioned' as the contemporary term had it, by the end of the seventeenth century. Thus the lands of the barony of Muiravonside are divided amongst eleven 'portioners', those of Seabegs in Falkirk among five, those of Newton in Bothkennar among six and the lands of Carntoun in Logie among seven. It is noticeable that the parishes where this process was most advanced were all areas where arable farming was most developed, particularly the east of the shire as opposed to the west and centre. The parishes with the most concentrated landholding at this time were Alva, where the Earl of Mar had 79% of the total value, and Kilsyth, with 85% owned by the Viscount of Kilsyth. The process of division continued through the eighteenth century: the Old Statistical Account mentions that Kippen had 24 heretors (as opposed to 11 in 1709) while Denny, which in 1709 had just 7 heretors and very concentrated ownership, was owned in 1791 by 2 large proprietors and 100 feuars, the latter holding 75% of the total. On the other hand, in Campsie and Kilsyth there was virtually no change by the 1790's while in Fintry concentration had increased with only two proprietors instead of four.

Clearly, with not much more than 525 proprietors, land ownership in late seventeenth century Stirlingshire was still highly concentrated, but how concentrated was it

exactly? Simply taking the total valuations and numbers of heretors gives us the picture of Table 3, but even cursory perusal of the document shows that this is not accurate as there is substantial deviation from the averages. A more accurate estimate may be gained by the breakdown shown in Table 4 which shows the marked concentration of ownership which existed even in parishes with many heretors, such as St. Ninians where 23.35% of the parish's value was shared amongst 100 heretors, each with less than one per cent of the total. Estates which comprised more than 10% of the value of their parish made up 59% of the total value of the shire, even though there were only 60 of them. On the other hand 239 small proprietors could only raise 3.71% of the total value. Thus the estate of Kilsyth made up 3.1% of the total value while the three largest estates of St. Ninians together made up 7.8%. (See Table 5). In fact the 21 largest estates made up 32.6% of the value of the shire. So, despite the trend towards division mentioned earlier, the degree to which landed wealth was concentrated in a few hands was remarkable.

It is difficult to determine the exact relation between the values given and the rents levied by the heretors. The Old Statistical Account entry for Bothkennar mentions that rent was levied at a rate of £215 per acre but 'when the price of grain is high it may be considerably more' while the entry for Campsie states that money rents rose from £800 in 1715 to £7,000 in 1793, even though the valuation had not increased. One final point of interest is the number of baronies in the shire: many estates are listed as 'Barony of' and from this and other records one can state firmly that, of the 21 estates in Table 5, at least 17 were baronies while many of the smaller estates also had baronial status. Thus the parish

of Airth, by no means a large one, contained at least three baronies: a fact which gives one some idea of the sheer number of baron courts in just one shire.

TABLE 1

PARISH	TOTAL VALUATION	PERCENTAGE OF VALUATION OF SHIRE	VALUATION IN O.S.A.
St. Ninians	£20,867	19.47	20,861
Falkirk	£18,870	17.60	13,521
Airth	£ 8,636	8.05	8,639
Campsie	£ 6,439	6.00	6,429
Drymen	£ 5,057	4.71	5,069
Gargunnock	£ 4,097	3.82	4,128
Muiravonside	£ 4,975	3.70	
Kilsyth	£ 3,918	3.65	3,918
Bothkennar	£ 3,534	3.29	3,592
Dunipace	£ 3,199	2.98	
Kippen	£ 3,139	2.92	
Killearn	£ 2,840	2.65	
Buchanan	£ 2,745	2.56	
Larbert	£ 2,624	2.44	
Denny	£ 2,483	2.31	
Slamannan	£ 2,445	2.28	
Strathblane	£ 2,415	2.25	2,500
Balfron	£ 2,088	1.94	
Logie	£ 2,032	1.89	
Alva	£ 2,032	1.89	
Fintry	£ 1,980	1.84	1,900
Baldernock	£ 1,745	1.62	1,744

TOTAL: £107,160

TABLE 2

NUMBER OF ESTATES/HERETORS IN EACH PARISH

St. Ninians	118	TOTAL: 545
Falkirk	103	Average of 25 per parish
Slamannan	49	100 + 2 parishes
Muiravonside	40	50 + 0 "
Drymen	36	40 + 2 "
Bothkennar	22	30 + 1 "
Airth	21	20 + 2 "
Killearn	19	10 + 10 "
Campsie	15	10 - 5 "
Logie	14	
Baldernock	14	
Balfron	14	
Gargunnoch	12	
Kippen	11	
Strathblane	11	
Dunipace	10	
Buchanan	10	
Larbert	7	
Denny	7	
Kilsyth	5	
Fintry	4	
Alva	3	

TABLE 3

PARISH	AVERAGE VALUE PER HERETOR	AVERAGE PERCENTAGE PER HERETOR
St. Ninians	£ 177	0.84
Falkirk	£ 183	0.97
Airth	£ 411	4.76
Campsie	£ 429	6.66
Drymen	£ 140	2.77
Gargunnoch	£ 341	8.33
Muiravonside	£ 99	2.50
Kilsyth	£ 787	20.00
Bothkennar	£ 161	4.54
Dunipace	£ 320	10.00
Kippen	£ 285	9.09
Killearn	£ 149	5.26
Buchanan	£ 274	10.00
Larbert	£ 374	14.28
Denny	£ 355	14.28
Slamannan	£ 50	2.04
Strathblane	£ 220	9.09
Balfron	£ 149	7.14
Logie	£ 145	7.14
Alva	£ 677	33.33
Fintry	£ 125	7.14
<u>OVERALL:</u>	£ 204	0.19

TABLE 4

DISTRIBUTION OF LAND OWNERSHIP BY PARISH

ESTATES CONTAINING	OVER 10%	5 - 9%	3 - 5%	1 - 3%	Less than 1%
St. Ninians	39.39 (3)	11.11 (2)	11.80 (3)	15.35 (10)	22.35 (100)
Falkirk	19.00 (1)	15.39 (2)	10.97 (3)	29.93 (18)	24.71 (79)
Airth	59.33 (4)	11.05 (2)	16.47 (4)	9.65 (5)	3.50 (6)
Campsie	34.52 (2)	53.53 (7)	8.29 (2)	2.76 (1)	0.90 (3)
Drymen	30.27 (2)	5.29 (1)	34.86 (9)	23.27 (13)	6.31 (11)
Gargunnoch	76.19 (3)	-	14.28 (4)	8.53 (4)	0.80 (1)
Muiravonside	35.21 (2)	23.49 (4)	-	36.61 (20)	4.69 (14)
Kilsyth	84.95 (1)	-	12.30 (2)	2.00 (1)	0.75 (1)
Bothkennar	30.07 (2)	37.36 (5)	14.89 (4)	15.52 (8)	2.16 (3)
Dunipace	65.34 (4)	29.77 (4)	4.12 (1)	-	0.84 (1)
Kippen	81.77 (6)	11.77 (2)	-	6.46 (3)	-
Killearn	45.75 (4)	6.86 (1)	42.09 (11)	5.30 (3)	-
Buchanan	73.54 (2)	-	13.68 (3)	12.78 (5)	-
Larbert	68.12 (3)	31.88 (4)	-	-	-
Denny	94.30 (4)	-	4.02 (1)	-	1.68 (2)
Slamannan	-	-	38.77 (9)	56.31 (34)	4.92 (6)
Strathblane	59.53 (2)	20.36 (3)	15.47 (4)	4.64 (2)	-
Balfron	68.37 (4)	20.38 (3)	4.64 (1)	5.25 (3)	1.40 (3)
Logie	65.83 (3)	18.25 (2)	4.42 (1)	7.41 (3)	4.09 (5)
Alva	92.76 (2)	7.28 (1)	-	-	-
Fintry	96.97 (3)	-	3.03 (1)	-	-
Baldernock	67.95 (3)	11.68 (2)	16.71 (4)	1.14 (1)	2.52 (4)
<u>TOTAL:</u>	58.58 (60)	14.33 (45)	12.30 (67)	11.08 (134)	3.71 (239)

TABLE 5

NAME OF ESTATE	PARISH	VALUE IN £.	PERCENTAGE OF PARISH	PERCENTAGE OF SHIRE
Kilsyth	Kilsyth	£ 3,329	84.90	3.1
Callandar	Falkirk	£ 3,585	19.00	3.3
Carnock & Plean	St.Ninians	£ 3,212	15.39	3.0
Polmaise	St.Ninians	£ 2,848	13.64	2.7
Sauchie	St.Ninians	£ 2,163	10.36	2.0
Kerse	Falkirk	£ 1,678	9.00	1.7
Airth	Airth	£ 1,633	18.90	1.5
Alva	Alva	£ 1,611	79.24	1.5
Elphinstone	Airth	£ 1,576	18.24	1.4
Buchanan	Buchanan	£ 1,568	57.12	1.4
Leckie	Gargunnoch	£ 1,549	37.80	1.4
Glorat	Campsie	£ 1,337	20.70	1.2
Abbotsgrange	Falkirk	£ 1,235	6.50	1.1
Touch	St.Ninians	£ 1,200	5.75	1.1
Craigforth	St.Ninians	£ 1,120	5.36	1.0
Drymen	Drymen	£ 976	19.29	0.9
Kersie	Airth	£ 966	11.18	0.9
Letham	Airth	£ 951	11.00	0.9
Auchenbowie	St.Ninians	£ 933	4.47	0.9
Almond	Muiravonside	£ 929	23.37	0.8
Kinneil	Falkirk	£ 890	4.7	0.8
<u>TOTAL:</u>		£36,445		32.6

The Stirling and Alloa Witch-Hunt of 1658-61.

Any historian who looks at the records left by law enforcement bodies in seventeenth century Scotland will sooner or later come upon a record, a grim memoir of an outbreak of witch-hunting. One such panic was the one which seized the area around Stirling and Alloa in 1658/9 leading to a great witch trial at Stirling in 1659 which can be seen as a forerunner of the great national panic of 1661-62. This panic has left records, in the small papers of the Justiciary court, the presbytery of Stirling's minutes and the register of the Privy Council, which show how this particular witch-hunt developed and the way the legal system worked to first promote and then check the panic.

In March 1659 the Commissioners for the Administration of Justice appointed by the English military government came round to Stirling on ayre. The main item of business before them was the trial of no fewer than 12 persons accused of witchcraft.¹ The record of this trial which survives in the court book is very bare indeed but is supplemented by a large bundle of process papers, containing no fewer than 18 items.² These papers cast much more light on the sanguinary proceedings of March 1659 and enable us to answer several questions as to the origins of the trial and its background.

In the first place it is clear that what looks in the court books like one trial in fact consisted of three separate and distinct trials, each tried by a separate jury. The bundle of papers contains separate jury rolls for each of the three trials, made up of people from the locality concerned along with three separate lists of witnesses for each one.³ There is also a list of all the accused which actually divides them up into three groups.⁴ Three women, Bessie Stevenson, Isobell Bennett and Magdalen Blair came from the burgh of Stirling while Margaret Gourlay, Janet Miller, James Kirk, Isobell Keir and Margaret Harvie all hailed from the shire of Stirling, from the parish of Kippen. Lastly there were four women from Alloa in Clackmannanshire - Elizabeth Black, Catherine Black, Elspeth Crockett and Barbara Erskine. The trial of 1659 was thus the product of three separate

witch-hunts, in Stirling, Kippen and, not least, in Alloa.

It was in fact at Alloa almost a year earlier that this particular bout of witch-hunting had broken out. The course of this panic can be traced firstly by study of the records of the presbytery of Stirling - these have been the subject of an article in a journal.⁵ The presbytery minutes contain two entries on this matter, the first dated 19th May 1658 is brief and says simply

"The said day Mr George Bennett and Mr Matthias Symsonne are appointed to goe to Alloway and confer with the persones who are there apprehendit for witchcraft and to endeavour to bring them to a confession".⁶

The second entry is dated 23rd June 1658 and is far longer, containing several lengthy and detailed confessions.⁷ The first and longest of these is that of Margaret Duchill in Alloa "now deid". This confession is in fact a transcript of the minutes of the Kirk session of Alloa for 11th May 1658 and begins

"At Alloway the elevint day of May 1658 yeires Margaret Duchill indweller in Alloway for sundrie dilations against her to the minister be severall elders of her scandalous carriage in the sinne of witchcraft wes cited before the session the said day and aftir the said dilations wes read to her before the session sche denyit them all except that sche confessid that sche had said to William Moresone elder that if they should tak and burne her there sould better wyves than herself in Alloway be burnt with her. Upon wich confessioun with many presumptiouns agaynst her the Minister and Eldars sends ane letter to the Justices of Peace with ane of the elders and Clerk of the session who returned ane order direct to the Constables of Alloway to seize the person in clos prison and ane guard night and day attending her and eftir severall visits maid be the minister and some elders with many gude exhortations and pithie prayers with severall demands concerning that sinne of witchcraft sche did at last confess as follows".⁸

From this it would seem that the initial course of the panic was as follows. Some time before the 11th May Margaret Duchill was brought

before the Alloa session: following her foolish admission she was imprisoned, probably deprived of sleep (by 'pithie prayers' and other expedients) and eventually on the 11th May she made a detailed confession.

This confession follows the standard form of the overwhelming majority of witchcraft confessions. Any study of these documents will soon reveal that they follow a standard, even rigid format with a fixed structure as regards both form and content.⁹ The typical witchcraft confession describes first the renunciation of baptism and entry into a demonic pact: this description almost always makes use of common metaphors and images - thus the devil is always described as a young man wearing dark clothes.¹⁰ Secondly the confession describes the imposition of the devils mark, often giving great detail.¹¹ Then follow two things: detailed accounts of acts of 'maleficium' and descriptions of witches meetings which involve the naming of other witches. This pattern is not confined to Scotland - it can be found for instance in the 'Examen of Witches' of Boguet which comes from Franche-Comte in 1602.¹² The descriptions given in the first two sections are so standardised and rote like that one is driven to the conclusion that they were made in response to a pre-set list of questions - questions of the 'have you stopped beating your wife' variety.

Margaret Duchill having confessed to a demonic pact and various acts of malefice went on to name 10 other women, to wit Bessie Paton, Catherine Black, Elspeth Black, Margaret Tailyour, Catherine Rainy, Janet Black, Barbara Erskine, Elspeth Crockett and Margaret Demperstoun and Janet Reid.¹³ The response of the Alloa session was to apply to the Justices of Peace and on 3rd June 1658 four of these women, Bessie Paton, Catherine Rainy, Margaret Tailyour and Janet Black were arrested and subjected to an examination by several ministers and elders and two Justices of Peace, the lairds of Kennett and Clackmannan.¹⁴ The details of this meeting and the confessions extracted from three of the women (Bessie Paton remained obdurate) are also contained in the presbytery minutes for 23rd June.¹⁵ The next step was a joint meeting of the presbytery and Justices of Peace for Clackmannanshire "who were present be virtue of their office anent the trying of the witches".¹⁶ Also present, as he had been on 3rd June was Mr

John Mitchell of Coldone, the ruling elder of Alloa Kirk session. This meeting heard farther, more elaborate confessions from all of the women, particularly Catherine Tailyour, and decided to send a letter

"to the judges competent in criminal causes representing the case forsaied unto them and desyining that they may tak course with the saids women as accords of law".¹⁷

Ferguson says that the four women were tried in June 1658 by a local court consisting of various JP's and the minister of the second charge of Stirling, Matthias Symsonne but there is no record of any such trial and he may have been misled by the preamble to the joint meeting of 23rd June which uses the word 'tryall' in its wider sense to mean examination.¹⁸ On the other hand something must have happened to the four women concerned for none of them were put to trial at Stirling in 1659 while four of the other women named by Margaret Duchill were - Elspeth Crockett, Barbara Erskine, Catherine Black and Janet Black.

Moreover the process papers for 1659 do contain two very long and comprehensive documents concerning the four women, the first Bessie Paton and Janet Black the second Catherine Rainy and Margaret Tailyour.¹⁹ These look at first sight to be dittays of witchcraft drawn up according to the text at Clackmannan on 22nd July 1658 and signed by the lairds of Clackmannan and Kennett. However the depositions by witness which make up the bulk of the two documents consist almost entirely of accounts of the confessions made by the four women as reported by people who heard them.²⁰ Some of this material can be 'matched' with the confessions recorded in the presbytery minutes but much of it, particularly that concerning Bessie Paton, cannot.²¹ With this in mind the two documents come to look very like accounts of a local 'trial' made to look like a dittay and it may well be that summary justice had been exacted upon the four unfortunate women.

The confessions in the Stirling presbytery minutes and those recounted in the two process papers also tell us something about the initial motive for the Alloa witch-hunt. These confessions all show another standard feature of such documents - the 'interlocking' nature of the accounts of events given by them. Where two confessions describe the same event (e.g. an act of malefice) they complement each other exactly. This is something which never happens in real

life as any road traffic accident investigator can testify.²² The single event recounted in this way which dominates the four confessions is the putting to death by witchcraft of two children of John Mitchell of Coldone, the ruling elder of Alloa Kirk session.²³ Margaret Duchill had stated that she and other witches had been responsible for the death of the two children, at the very end of her long confession, almost casually but presumably in response to a question. The question of how this act of malefice had been done became the main matter of interest when the other four women were questioned.²⁴ It is therefore of more than passing interest to note that Coldone was present at every meeting where they were tried and examined as well as the original meeting which heard the confession of Margaret Duchill. It seems more than likely that he was the original motive force behind the arrest of Margaret Duchill and the other women, though he clearly had eager helpers, not least Mr Matthias Symson.

It would seem therefore that the pattern of the Alloa witch-hunt was the arrest of a single person whose incriminating testimony led to the further arrest of others who gave mutually incriminating confessions.²⁵ Two of the women named by Margaret Duchill, Janet Reid and Margaret Demperstoun are not recorded as being tried in 1659 nor is there any other record of their fate though they are mentioned in the other confessions.²⁶ However there are several documents relating to the other women, particularly Elspeth and Katherine Black. In 1658 the latter wrote a "humble supplication" from her prison in Alloa to the Commissioners for the Administration of Justice which reads

"Sheweth, that where be instigatioune of certaine evil disposed persones to your petitioners honestie, she is most maliciouslie branded and delaited and comitted to prison upon Suspition of Witchcraft, wherein she has remained prisoner above three months bygone. And albeit your petitioner be maist innocent of that cryme yet she is maist maliciouslie keiped in prisone without aither offering to put her to ane legall tryall or liberating her upon cautioune albeit earnestlie sought for by her

friends. Through which hard and unchristian usage your honest petitioner hes contracted heavie sickness lyklike to dye of the samen".²⁷

There is also a response to this petition from the Commission dated the 14th December 1658 and saying they

"do heirby give order to the Justices of Peace for the said Sherifffdome to cause put the said Katherine Black immediately forth of their prison".²⁸

The process papers also contain a paper dated 16th March 1659 in which Katherine Black lodges a further petition saying that she had been released but had then been wrongfully reimprisoned.²⁹ This was overtaken by events for the circuit court sat and tried the witches on the 22nd and 23rd March 1659. When the trial came round all four of the Clackmannanshire witches were convicted; Barbara Erskine was burnt while Elspeth Crockett and Katherine and Elspeth Black were sentenced to banishment forth of the three kingdoms.³⁰ After the trial both Katherine and Elspeth Black lodged a third petition with the Commission which although signed by both was clearly written by Katherine. In it she said that although their innocence had been made clear at their trial to the judges who had apparently expressed their views during the course of the proceedings yet they had been convicted by a vote of 8 to 7. As a result, she argued, there should be a delay in sentencing then a retrial.³¹ Any action on this petition was cut short by the collapse of the English regime shortly thereafter.

The presbytery records contain nothing about the local panics in Stirling and Kippen but the relevant documents have survived in the Justiciary process papers. These show that the Stirling case was a classic example of accusations of charming and the actual practice of that offence leading to a witch-trial.³² All three women were formally charge with both witchcraft and charming - Bessie Stevinsone was convicted of both and burnt, Magdalen Blair was acquitted while Isobell Bennett, who had confessed charming but denied witchcraft was convicted of charming and absolved of witchcraft by a majority verdict. She was flogged.³³ There are in the process papers several documents. One contains depositions against all three women but particularly Bessie

Stevinsone describing their 'charming' practices - they were all clearly cunning women while Magdalen Blair, as Larner says claimed "powers of malison".³⁴ There is also a deposition, quoted by Larner, wherein William Luckisone describes how six years earlier he had been ill and Magdalen Blair had, in effect, told him that Isobell Bennett was the cause of it.³⁵ Another document records a series of depositions taken at Stirling on 13th, 14th and 18th January 1659, all against Blair.³⁶ This collection of information seems to have been done by the burgh council rather than the Kirk session or presbytery. There seems little doubt of the truth of the accusations of charming and evidence to support them can be found elsewhere. Thus the minutes of Stirling Kirk session for 1st August 1659 contain a supplication from James Anderson, baxter which reads

"That your supplicant about sevine yeires since being verie sick did make use of one Isobell Bennett (since convicted of and punished for charming) for cure which as it hath greatly offended the people of God in this place so it hath verie much hitherto afflicted the spirit of your supplicant and he hopes it sall be for the future a warning to him to tak head of the snares of Satan".³⁷

The witches from Kippen, Margaret Gourlay, Janet Miller, Isobell Keir, Margaret Harvie and James Kirk were again indicted on charges arising out of accusations of charming. The delations against them were gathered by several Justices of Peace notably the lairds of Herbertshire, Bannockburn and Touch but the English garrison commander Thomas Read also seems to have been involved, at least in the cases of Margaret Gourlay and Janet Miller.³⁸ In the event Kirk and Margaret Harvie were absolved, Margaret Gourlay and Janet Miller were banished and Isobell Keir burnt.³⁹

This trial or set of trials was not the end of the matter. For one thing some people were not pleased with the verdicts for on 30th March 1659 the Stirling session asked the presbytery for advice about what to do with "witches and charmers upon whom civil justice is not execute" - this presumably referred to Isobell Bennett and those defendants who had 'only' been banished.⁴⁰ One solution, it would seem

was to keep them in prison for in 1661 Katherine and Elspeth Black and Elspeth Crockett lodged a joint petition with the Privy Council, stating that they had been kept in goal since 1659 and asking for liberation or a trial.⁴¹ The Council used its power to alter verdicts and set aside the verdict of the 1659 trial ordering a new trial to be held at Stirling.⁴² This order does not seem to have had any effect for some months later a second petition was submitted by the three women, stating that they were still imprisoned and no trial had been held.⁴³ This is the last written record which we have of any of these unfortunate women and their final fate is unknown.

The records of these three witch-hunts and the great trial which they led to, show the way local panic arose and developed and the role of the legal system in this. All the cases seem to have originated in personal slights or grudges coupled with a 'bad reputation' on the part of the accused, derived from the actual or perceived practice of charming. The hunt actually got under way when accusations of witchcraft were taken up by the local elite, the lairds and small proprietors who held the office of Justice of Peace and ran the sessions.⁴⁴ It was from people like this that the pressure for arrests and trials came and in the J.P. Courts and church courts they had the means whereby to achieve this. The local elite were able to use their power as local magistrates and rulers of the Kirk to first seize and incarcerate the initial suspects and then by one means or another to extract highly structured confessions.⁴⁵ By contrast the national elite, operating through the Privy Council or, before 1660, the Commission For The Administration of Justice acted as a restraining, limiting force. Paradoxically their most effective means of checking a witch-hunt was to order the accused to be given a trial. In some cases this would lead to acquittal since the evidence would be revealed as inadequate, even within the rules of the witch-belief. More generally the holding of a trial would tend to bring the affair to a conclusion and would prevent any further incriminating confessions being made and so check the spread of the panic. What all these documents show is that the motivation for witch-hunts came from below, from lesser lairds, feuars and clerics working through the interconnected local jurisdictions: in order

to fully understand the motives for the witch-hunt we need to reconstruct the local community, so far as this can be done. In particular it is desirable to know the relations, personal and official between the various magistrates whose courts and judicial powers worked to create the panic. In Stirling and Alloa in 1659 all the factors which made for a witch-hunt existed - tensions between individuals within the community, a widespread belief in the power of magic and witchcraft and most vital a sharing of that belief by the leaders of the local community who had in the various courts which they controlled an instrument which could be used to promote and then sustain the hunt for "Satans servants".

1. Records Of Justiciary Court: Circuit Court Minute Books SRO JC10/2 22nd & 23rd March 1659.
2. Records of Justiciary Court: Processes SRO JC 26/26 - 1659.
The items in the relevant bundle are numbered.
3. ibid. documents numbers 7,8 & 9 are lists of witnesses for Clackmannan, Stirling and Stirlingshire respectively drawn up by the baillies in Stirling and the JP's in the two shires; documents 5, 12 and 14 are the assize rolls for Stirling, Stirlingshire and Alloa respectively (the Stirlingshire roll is also a list of suitors).
4. ibid. document number 6.
5. R M Ferguson: 'The witches of Alloa' in Scottish Historical Review vol IV (1907) pp 40-48.
6. Records of Presbytery Of Stirling SRO CH2/722/6 19th May 1658.
7. ibid. 23rd June 1658 - Ferguson's article is almost entirely an account of this which he quotes from 'in extenso'.
8. ibid.
9. See for example the examples from May and June 1661 printed in Register Of Privy Council Of Scotland 3rd series vol I pp 647-51, which show this very well.
10. He also often told the witch to call him by a particular name - Margaret Duchill was told to call him John. For examples of this see C Larner: Enemies of God: The Witch-Hunt In Scotland (London, 1981) pp 146-50.
11. Thus Margaret Duchill was given "ane nip in the eybrie" while another of the Alloa witches, Margaret Tailyour was given the mark "in her secret parts".
12. H Boguet: An Examen Of Witches (London, 1608) - this is a translation of an original published in France as Boguet was a magistrate in Franche-Comte. He quotes many confessions from cases he was involved with, often in a 'skeleton' form. See for example pp 54-7 (This work is in the Manchester Central Reference Library).
13. Records Of Presbytery Of Stirling SRO CH2/722/6 23rd May 1658
14. ibid.
15. ibid. - Bessie Paton's deposition reads
"being posit if sche wes ane witch Answered no

except that sche haid beine caried in spirite while asleepe And if so that sche knew not And denyed all that was formerlie written and that sche nevir spoke of ane gentlewoman with ane blak pok but tht some bade her say tht sche haid said that the rest myht therby be induced to confess".

16. ibid. - the JP's were the lairds of Clackmannan, Kennett, Menstrie & Tullibody. The last laird, Sir Charles Erskine was a younger brother of the Earl of Mar; the holder of the regality of Alloa. Also present were "Mr James Cunningham and some other gentlemen".
17. ibid.
18. Ferguson, 'Witches of Alloa' p48.
19. Records Of Justiciary Court: Processes SRO JC 26/26 1659 - documents numbers 2 & 3.
20. ibid. - the content of the 'confessions' is mostly accounts of meetings with the devil and detailed narratives of the killing by witchcraft of the two children of John Mitchell of Coldone. All of the accounts, like the confessions before the presbytery on 23rd June by Tailyour, Black and Rainy, say that "ane gentlewoman with ane blak pok" was present at several of the acts of malefice, including the doing to death of the two children. Margaret Tailyour also mentioned another "woman in ane whyt cloke" but neither she nor any other of the women would or could name these mysterious persons despite many exhortations to do so.
21. Thus when Bessie Paton was questioned by the JP's and presbytery on 23rd June she said nothing concerning the events described by the other witches - the minutes say

"The said Bessie Paton being posit whither sche wes at any tyme in the company and at the meiting of witches and whither she wes carried in her sleepe and dreamed of witches sche said sche cannot tell"

When confronted with Margaret Tailyour who asserted that she had been at two meetings at least

"The said Bessie denyit the same and affirmit that sche wes nevir at anie of these meetinges bodilie".

See Records Of Presbytery Of Stirling SRO CH2/722/6 23rd June 1658. By contrast the depositions contained in Records Of Justiciary Court: Processes SRO JC 26/26 1659 document number 2 says that she made detailed confessions of attendance at witch-meetings and had been directly responsible, along with Margaret Tailyour for the death of Coldone's two children.

22. In fact given a single event and several participants and eye-witnesses it is almost impossible to obtain even two exactly matching accounts.
23. In Records Of Justiciary Court: Processes SRO JC 26/26 1659 documents numbers 2 & 3 there are recounted matching confessions from the four women - these say that after going to Coldone's house Bessie Paton and Margaret Tailyour went upstairs and Katherine Rainy, Janet Black and Margaret Duchill waited at the foot of the stairs along with the mysterious lady in the 'blak pok'. Bessie Paton is alleged to have said
- "the night the first bairne died there died ane Bitch with him, and the night the seconde bairne died there died ane Catt with him"
- presumably referring to the magic used to kill the two children.
24. Records Of Presbytery Of Stirling SRO CH2/722/6 23rd June 1658.
25. For a discussion of this type of pattern see Larner, Enemies Of God. pp103-19.
26. Margaret Demperstoun was also mentioned by Margaret Tailyour and Janet Black.
27. Records Of Justiciary Court: Processes SRO JC26/26 1659 document number 4.
28. ibid. - the document was signed by Moseley.
29. ibid. - document number 13.
30. Records Of Justiciary Court: Circuit Court Minute Books SRO JC 10/2 22nd and 23rd March 1659.
31. Records Of Justiciary Court: Processes SRO JC 26/26 1659 document number 14.
32. At Alloa all the women were asked if they had ever used charms to cure beasts or men. Bessie Paton's examination starts
- Sche being pasit whither at the desyre of any seik persone sche went to Sybilla Drummond in Dunblane who was burnt for a witch Answered that at the desyre of Katherine Black spouse to Thomas Masone in Alloway sche went to the said Sybill Drummond and desirit her to come and helpe Elspet Bryce who was then travelling in child-birth about 19 yeires since and that the said Sybill refusit to goe with her because said sche the saide seik woman wold doe no gude; But bade put a look salt in her mouth and a soup fouth cunning water and a look of a mole hill on tilled land and give her and that the deponer (Bessie Paton) told this cure to

Janet Baxter servant to the said seik woman and David Carron her husband and that the seik woman forsaied died shortlie thereafter".

(The Katherine Black referred to was the same as the one imprisoned and indicted.) Involvement in the case of charms was a feature of all the women in Alloa – even in this exiguous way.

33. Records Of Justiciary Court: Circuit Court Minute Books SRO JC10/2 22nd March 1659.
34. Records Of Justiciary Court: Processes SRO JC26/26 1659 document number 11; Larner, Enemies Of God pp141-2
35. ibid. Records Of Justiciary Court: Processes SRO JC26/26 document number 16.
36. ibid. document number 17.
37. Records Of Kirk Session Of Stirling SRO CH2/1026/4 1st August 1659 Case of James Anderson. It goes on

"May it therefore please yoursel that your supplicant may be admittit this aftirnone eftir sermon to declair befare the congregatioun his unfeigned desyre to be humbled for any offense committit etheir agaynst God or his people in this matter"

- this shows clearly the fear of contagion through contact with a witch and the way witch-hunts promoted solidarity and conformity.
38. Records Of Justiciary Court: Processes SRO JC26/26 1659 documents numbers 15 & 18.
39. Records Of Justiciary Court: Circuit Court Minute Books SRO JC10/2 23 March 1659.
40. Records Of Presbytery Of Stirling SRO CH2/722/6 30th March 1659. The matter was sent to the Synod who simply sent it back.
41. Register of Privy Council Of Scotland 3rd series vol I p 26 2nd August 1661.
42. ibid.
43. ibid. p 75 3rd December 1661.
44. See Larner, Enemies Of God pp 87-8, 114.
45. One important point is that because of their overlapping membership this could be done by either magistrates or session or both together – it was mainly a question of which 'hat' to wear.

Witchcraft And Charming In The Seventeenth And Eighteenth Centuries.

The records of seventeenth and early eighteenth century Scottish Church Courts contain many cases of what was called 'charming'. This meant most often the use of, or providing of spells, charms and incantations for a variety of purposes. These cases often contain detailed and vivid accounts of a wide range of traditional folk customs and beliefs and can give an insight into an important part of the ideology of the majority of Scots men and women of this period. They also cast some light on the differences between popular and elite ideology and the changes which took place in the latter over this period.

In examining these records we need to ask four main questions. In the first place what was the actual nature of the offence of charming - what kinds of activity led to prosecution before the church and secular courts? Clearly we must then ask what this shows about the beliefs and attitudes of the people involved, on both sides of the legal fence. In the third place is the question of what relationship, if any, there was between beliefs and the body of legal cases which derived from them on the one hand and the crime of witchcraft on the other. Most difficult to answer is the question of why the rulers of Scots society sought to prosecute certain activities defined as charming through the courts and how their approach towards this changed as time went on.

The first form of activity which led to prosecution for charming was the practice of resorting to 'holy wells'.¹ That this was a widespread practice may be judged from the minutes of the Kirk session of Gargunock for 7th May 1626 which state

"The quilk day Because of the great abuse amongst people in going upon the Sundays in May in a superstitious and idolatrous manner to Christies well for the recovering of their health. Therefore by common consent and advice It is established and ordained that whatsumever persons shall be found culpable thereof in tyme coming, they shall make their public repentance in the public place appointed therefore, in white sheets and shall pay 40/- advance for pious uses and if any persons shall suffer their children to go there in that case they shall

pay the said penalty".²

In 1631 the presbytery of Stirling's records contain two cases of women resorting to Christies well, again to get water to help sick persons recover their health so the custom was clearly continuing.³ Again in 1668 three people in the parish of Airth were charged with taking Agnes Symsonne to "ane holey well" she being "one that is distracted" (i.e. suffering from mental illness, most probably dementia).⁴ In the records several wells are mentioned as being resorted to, including St. Ninians, St. Lawrences (in the parish of Slammanan) and one in Strathearn, as well as Christies well.

The activity for which people were most frequently prosecuted however was that of resorting to cunning men and women who were held to have some form of esoteric knowledge or power. The records show that cunning men and women were resorted to for three main reasons: curing the sick, for gaining some economic benefit and for purposes of divination, particularly in order to discover lost or stolen goods. Thus in 1697 James Elis appeared before the session of Campsie, charged with "using of charms and spells to cure a sick bairn". He admitted that he had consulted Donald Ferguson in Strathblane "of bad fame" who told him to get

"a bit of millstone a quater as broad and as long as his child and he, Donald, would make a salve of it."⁵

Donald Ferguson appears in the records of more than one session for in 1696 the session of Baldernock charged William Winning and Marion Shearer his spouse for employing him to charm their cattle. Winning's deposition reads that he

"Confessed he went to Strathblane and brought the said Donald to his hous in order to the charming of his beasts as he and his wife had consulted before and that the said Donald came in the evening and went to the byre and took every cow by the ear and spoke some words unknown to him for which the said William gave to the said Donald a peck of oatmeal and Donald said to him that his byre was not free of witchcraft for fourtie year to which he said and answered 'it may be so for my kine have thriven this many a day' and the said Donald

promised to cleanse the byre for half a boll of corn which he refused, because he thought it too dear".⁶

In 1700 James Marshall, charged by the session of Kilsyth with using charms to cure sick beasts declared he had only employed "a man skillfull to cure beastes who is used for that purpose" while in 1665 Archibald Russell in St. Ninians was prosecuted for taking his sick brother "to a man for cure".⁷ He said he had been advised to do so by John Allan in Buckisburne who in turn

"declared that he desyred Archibald Russell to tak his brothers shirt to an excommunicat man Robert Craig at whom he had been asked if he had brought any of his brothers clothes he would have told them his disease".⁸

The use of cunning men and women for divination was also frequently recorded. In 1723 several people in Kilsyth were charged with consulting "a dumbie" about stolen goods and money while in 1661 Jean Andersone and Alexander Lamb, both in St. Ninians, confessed going to see the gardner of Elphinstone, "a certaine man who is supposed to be a wizard" to ask him about some stolen money.⁹ Perhaps the most remarkable example of divination comes from the parish of Muiravonside where in 1672 William Boog, Elspeth Glen and Frank Platt in Linlithgow were accused of slandering Margaret Rid by saying she was a witch. Boog and Glen both admitted going to see Platt in Linlithgow where he "showed them several persons in this parish as witches, in a glass".¹⁰

Finally people could be prosecuted for the actual casting of spells. This does not seem to have been as frequent as prosecution for the use of charms but instances of it still occur in the records. In Kilsyth in 1721 Andrew Gray, an apprentice mason, was charged with charming - it seems he had been telling fortunes with the aid of palmistry books.¹¹ In Gargunnoch in 1626 Steven Maltman was charged with charming and making spells, all of which he freely admitted to the presbytery of Stirling while in 1671 a woman in St. Ninians was charged with casting a spell of impotence.¹² Some session minutes contain warnings to the congregations against resort to wizards - thus

in 1697 the session of Killearn publicly warned the congregation against the use of charms and spells and against persons who cast them and
 "to particularly take heed that they do not employ one
 Donald Ferguson alias Redhood in Strathblane".¹³

Just a year earlier the Baldernock session had made public intimation that none were to employ Donald Ferguson as "The said Donald follows the sinfull trade of charming".¹⁴

From all these cases and others we can begin to draw a picture of folk beliefs concerning magic and charming which were prevalent at this time. What emerges is a pattern very similar in many ways to that presented two hundred years later by Campbell and in the contemporary situation by Marwick and Evans-Pritchard.¹⁵ On the other hand there are some elements which we may suppose to have been derived from the elite's belief at that time and which were distinctive.

The most basic belief was that in the power and efficacy of charms and rituals. This was shown clearly in the case of William Winning, cited above and Campbell describes a similar ritual, saying

"When a newly purchased animal is brought home ... its allurements to its new haunts is secured by blowing into its ear and saying 'A blowing into your right ear, for your benefit and not your hurt, Love of the land under your foot. And dislike to the land you left...' "¹⁶

Sometimes it was held that a charm or ritual would work for any person under any circumstances. So for example in 1723 Catherine Cameron and William Mcildoe were brought before the session of Strathblane because

"qhen Elizabeth Stephen had ane horse dyen of some disease and people standing about the horse Catherin Cameron in Easter Cull came and called for ane catt and caused William Muldoe, Elizabeth Stephen's servant stand on the one side of the horse while she stood on the other side And she gave the catt over the horses back to him and he gave the catt under the horses belly to her and so they passed the catt three times round about the horse and the horse immediately recovered".¹⁷

Very often however the spell would only work at a particular time or place, when certain rituals were observed or for a particular person. Thus in the case of Agnes Symsonne in Airth, taken "to a well in Strathearn" part of the ritual was that she was bound with tethers made of hair.¹⁸ In 1669 Isobell Forrester came before the session of St. Ninians for going to St. Ninians well at midnight - she said this was because

"it was to a sick man and it is thought drink of such cunning well is good for one of his disease".¹⁹

She said further that she went to the well at midnight and did not speak to those washing at the well because

"she heard folk say it would not have any vertew if she had not observed these things" while Janet Smart who had gone with her declared "she was forbidden to speak to anybody till they returned and that the water was to put sugar in and give to her father to drink".²⁰

Again it is clear from the cases cited earlier that many charms were held to derive their force from the person who performed them, the cunning or skilful man.

In fact another very obvious part of the magic beliefs of Scots at this time was the idea that certain places and people had an inherent magical power. This is a world-wide phenomenon, a belief held in almost every society known and studied.²¹ Thus the Azande, according to Evans-Pritchard believe that certain people have an inherited magical power, known as 'mwangu', which is derived from a substance in the stomach.²² The witch in this way of thinking has acquired the powers of witchcraft by way of inheritance rather than through a bargain or pact. Very similar is the traditional Highland belief recounted by Campbell of the power of the 'sight' which was again inherited rather than acquired and was often seen as a curse rather than a blessing.²³ In seventeenth and eighteenth century Stirlingshire there was clearly a widespread belief in people who had magical power of some kind, such as Donald Ferguson in Strathblane or James Freibairne alias Clellands in New Monkland of whom the Kilsyth session

said

"he does frequent many places in the parish charming the beasts And that he openly professes that he can either take off or inflict diseases upon beasts as he pleaseth"²⁴

How though had these cunning men got their power? In one case we know what the man himself thought for in 1626 Steven Maltman told the Stirling presbytery of his powers

"he had thame of the farye folk whom he had sein in bodilie shape at sundry tymes and places"²⁵

This however is unusual and what is clearly absent from charming prosecutions, at least in their early stages, is any belief in the demonic pact and the other paraphernalia of witchcraft as described in *Malleus Malificarum*.²⁶ This negative evidence suggests that the powers were learnt (from the fairies or others) or were inherent. The point is that in the eyes of the mass of the population they were not diabolic but part of the natural order, perhaps regrettable (often expensive!) but inevitable.

This points to the third major strand of magic belief, a conviction of the existence of a 'hidden kingdom' of ghosts, fairies and magical beings which existed alongside the world of men. We know much of the details of this from the pioneering work of Robert Kirk 'The Secret Commonwealth Of Elves, Fauns And Fairies' written about 1691.²⁷ In this work Kirk describes the 'hidden kingdom' of invisible fairy beings which exists alongside the world of men but is only visible to those possessed of the 'sight' who can gain favours from the fairies and who also have healing powers, such as the ability to cure scrofula, and other abilities like divination which are typical of the accounts of cunning men.²⁸ Kirk argues that to doubt this is to be guilty of 'Sadduceism' (i.e. scepticism and rationalism) but also asserts that the powers of those who have the sight are not of any diabolic origin because they are acquired not by any paction or agreement but rather by inheritance with no element of free will on the part of the person concerned.²⁹ He also upholds the powers of charms and gives examples of them, often quoting in extenso.³⁰

Certainly there is evidence in the court records to support

the accounts of folk belief in ghosts and fairies - evidence which often gives an insight into the psychology of such beliefs. Thus as well as the case of Steven Maltman, cited earlier there is the case of James Eason in Greenyards charged by the session of St. Ninians in 1705 with using charms and in particular asking John McFarlane from Buchlyvie to 'conjure ane ghost'. The testimony reads

"James Eason and his wyffe compearing and being posed if he was troubled with a ghost answered that severall tymes something came to his window earlie before the tyme of rising and on tyme be att the window and another tyme had a singing kind of voyce and thindlie that it said a venance upon the account of motherlesse children and stepbairnes At whych tyme the said James said he would know by the strength of God what it was and presentlie arose but it was gone and being pressed if he went to John Mcfarland's hous to imploy him to confure the ghost denyed the same but that he mett with him accidentalie at Stirling and inquyred if he would come and take a nights quaters from him. The said John consented and went home to his hous, where, when the said James had told him the story inquyred seeing he was reported to be a man who understood such things for what cause this could be. He answered that it was upon the account of the said James his wyffe being a stepmother and was concerned and said they would never be troubled with it againe ---".³¹

All of these are folk beliefs of the kind that may be found in many rural societies.³² However the records also show the existence of distinctive ideas, found mainly in Europe and typical of the supposedly elite dominated witchcraft ideology of the renaissance. Thus in 1671 William James and David Buchan in St. Ninians were arraigned for slander by saying their mother was a witch. James, who was the source, said that when he told his mother he would marry Alison Grange she said she would hinder it and "when next he saw her a black, dog like creature came between them" - this story clearly reflects belief in the idea of the witches familiar.³³ Even more interesting is another

case from 1671 in St. Ninians, that of Isobell Pattersone. On the 26th April of that year she accused George Blair of slander by saying "at his marriage she had borrowed a napkin and had casten knots upon whereby she had rendered him unable to doe dew benevolence to his wife".³⁴

On the same day George Blair complained against her, alledging that "as he was informed by Alexander Leckie in Stirling and Agnes Mclay in Craigforth (she) did let the saids informers see the napkin with 3 knots upon it which she did cast and that she said as long as these knots were upon it George Blair would not have carnall dealing with his wife the which to the said George his detriment proved in effect to be true".³⁵

The witnesses called by the session all confirmed the story and gave circumstantial details as to the casting of the knots at the wedding. Apart from showing the power of suggestion this is an example of the use of a cincture to impose impotence, one of the typical activities of witches as recounted by *Malleus Malificarum*.³⁶

What was the attitude of the investigative authorities towards these activities? One attitude was to regard them as "heathenish superstitions" but many of the investigative magistrates were clearly of the opinion that such practices as the use of charms and spells were of diabolic origin and that powers of 'sight' and healing, while they existed, were also diabolic and derived from service of the devil.³⁷ Such ideas died hard: in 1723 in Kilsyth

"An overture is to be brought by the minister, to the session, against consulting the devils servants or instruments anent stolen goods or any other particular".³⁸

This leads one to the problem of the relationship between charming and witchcraft. Did these popular beliefs and customs and the attitude of the godly and elite towards them play any part in witch-hunts or put another way how far were witch crazes attacks upon traditional customs? Legally what was the relationship between the two offences - did the one lead into the other? From the evidence of the church court records it would seem that they played a major part, with the desire of the godly to attack 'diabolic' practice an important motive

behind local witch panics while prosecutions for charming could and did develop into witchcraft cases. A classic example is the case already cited of Steven Maltman or Malcolm from Leckie in Gargunnock. On 12th May 1626 Janet Lockhart, spouse to James Miller in Leckie was cited to the Gargunnock session for falling to her knees and asking "eardlie and unearldie wights" to restore her cow's milk - she confessed doing this and said she had done so on Maltman's advice.³⁹ Both were sent to the presbytery. Matters continued until Maltman was arraigned before the presbytery on 17th April 1628 when, as said, he confessed to charming and resorting to fairies while detailed evidence as to his activities was given from Stirling, St. Ninians, Logie, Kippen and Gargunnock parishes.⁴⁰ He was referred to the civil magistrates for trial along with another 'charmer', Agnes Hendersone, this time from St. Ninians parish.⁴¹ A Privy Council commission must have been applied for, as in the records of that body for 3rd July 1628 there is the record of a commission of Justiciary directed to the Sheriff-deputes of Stirling and the lairds of Keir and Polmaise to try Maltman and Henderson, of whose guilt "there is now ane cleere discovery"⁴² Nor was this the only such case: in 1633 the Stirling presbytery tried Janet Tailyour from Cambus in Alloa for witchcraft which she 'freely' confessed to. The minutes contain accounts of her many activities as a 'charmer' and state that in January 1629 the Alloa session had warned her that if she continued to use charms she would be burnt as a witch: she had not heeded this warning.⁴³ In the same year Marriane Matthew from Stirling was also charged before the presbytery while Helen Keir in Clackmannan, delated by Janet Tailyour appeared as well.⁴⁴ Following upon these cases the Stirling presbytery passed two acts, one against consulting "charmeris, witches and sorcerors" under pain of public repentance in limming cloth and another declaring that any 'charmners' found were to be handed over to the Justices (i.e. the Justiciary court).⁴⁵ This may well have happened in the cases cited above for none occur in the Privy Council records: however we should not assume this. They may well have been tried locally for in 1636 the presbytery records contain evidence that this did sometimes happen. Two of the entries for January contain the confession

of witchcraft made by a certain Andrew Aikin.⁴⁶ Then, on 4th February is a long entry which starts

"The quilk day there was produced befor the brethren of the presbytery of Stirling ane extract of ane act of the court buik of the regalitie of Falkirk of the dat following, against Andrew Aikin quhair of the tenor followes".

The quoted document states that Aikin had been tried for charming and witchcraft by the regality on 8th July 1624 and had been released under the two conditions: that he would never again reside within the lands of the Earl of Linlithgow or any parish within his jurisdictions and secondly

"in caice that in any tyme hereafter he is apprehendit, tryed or found to be within the samen that he sall take upon him the said cryme of witchcraft for the qlk he has been apprehendit, wardit and accused and shall suffer the daith therefore confirme to the lawes of the realme."⁴⁷

It would seem from these cases that the dividing line between witchcraft and charming was a thin one which people could stray over quite easily. Given the belief that powers of charming were of diabolic origin and the almost total dominance of the witchcraft ideology amongst the educated this is not surprising. In this connection it is important to stress that the powers of the cunning men and women were not always seen as benign or well used. James Freibairne claimed to be able to cause sickness as well as take it off. The case of Frank Platt and Margaret Rid from Muiravonside cited above had a long history of this sort for in 1670 Margaret Rid had been rebuked for calling down God's curse upon Elspeth Glen while on the same day Platt had also received a rebuke for saying Rid was a devil and had done skaith to Glen's cow.⁴⁸ Again, in 1644 one Janet Harvie brought suit of slander against one of her neighbours in the Gargunnoch session, alleging that the neighbour, Walter Drummond had called her a witch and said she had made his wife sick in revenge for a slight.⁴⁹ When beliefs like this joined with the elites' fear of diabolism and their hostility to the folk customs of the poor the machinery of the criminal law was always liable to go into action.

Always that is until sometime in the 1670s or 1680s.

The charming cases found in the church courts also give clear evidence of a shift in the attitudes and beliefs of the political elite, the class which controlled the legal system. It is clear from the evidence of the various session minutes that hostility to folk magic and belief in its diabolic nature were still strong amongst the godly who ran the sessions after 1690. However prosecutions for charming no longer led to witchcraft trials and local panics as they had in the 1630s and 1640s. 51 Indeed it would seem that notorious 'charmners' like Donald Ferguson could carry on their trade with relative impunity. The reason for this was clearly the split between church and secular courts after 1688 and the spread of a rationalist ideology among the upper classes. (By contrast it would seem that old ideas survived among the lower classes and the class of major tenants and feuars which had come to dominate the sessions.) All this meant that the secular courts were no longer 'available' for the prosecution of charmners on charges of witchcraft. By contrast, what happened earlier was that a case of charming would be heard by a session containing several courtholders and, if serious, sent to the presbytery containing still more local magistrates - these would sometimes sit in their capacity as Justices of Peace rather than as elders.⁵² If it was decided to refer the case to the civil magistrates' it was a simple matter for these people to either ask for a Privy Council commission to hold a court of Justiciary or else, if they had the power, to try the unfortunate person themselves. After 1690 these courtholders would probably not be in the session or presbytery and would most likely give any request for a trial a dusty answer.

When a case of charming came before the civil courts several other developments took place which are worth mentioning here. The first was the gradual transformation of the evidence with the introduction of the classic paraphernalia of demonology such as the devil's mark, the sabbat and the demonic pact. Under the influence of torture highly structured confessions were extracted from the accused which transformed them from 'charmners', cunning men and women, into witches, servants and accomplices of the devil.* Another

*for an account of one case where this took place see appendix no 5.

development was what may be termed a 'filter process' which excluded men from the more serious charge of witchcraft. The evidence of the records suggests that most 'charmners' were men and Kirk supports this, saying that it was rare for a woman to have the 'sight' or its associated powers. Much more work needs to be done on this but it would seem that it was at this stage of the witch-hunt that the anti-feminine obsession of the witch ideology had its effect. As women were held to be more susceptible to the wiles of the devil than men and more liable to become his servants it was women rather than men who would be suspected of having an actual demonic power derived from a pact - unless like Steven Maltman they were foolish enough to 'admit' a pact of some kind.

The cases of charming found in the records of church courts are thus of more importance than one might suppose. Besides their intrinsic interest they also cast light upon popular customs and beliefs, highlight the conflict of ideology between the godly and the mass and give us valuable information on the background to and motives for many local witch-hunts. Not least they also show the impact at the 'sharp end' of the legal system of changes in the ideology of people with power.

1. On the general subject of holy wells see J G Campbell: Witchcraft And The Second Sight In The Highlands And Islands Of Scotland (Glasgow, 1902) pp 101-2.
2. Records Of Kirk Session Of Gargunock SRO CH2/1121/1 7th May 1626.
3. Records Of Presbytery Of Stirling SRO CH2/722/5 13th October 1631. Cases of Janet Maire in Cambusbarron who had "gone to get water for sick bairnes" and Janet Norbell also in Cambusbarron.
4. Records Of Kirk Session Of Airth SRO CH2/683/1 9th February 1688, 17th May 1688. Case of John Symson in Airth, John Symson servant to Powfoulis and James Mitchell.
5. Records Of Kirk Session of Campsie SRO CH2/51/1 6th December 1697, 28th January 1698. Case of James Elis; for another example see ibid. 2nd & 31st June 1699. Case of Christian Mclay given a sessional rebuke "for directing one Grizell Maiklann to get sabbath meal to end or mend a child".
6. Records Of Kirk Session Of Baldernock SRO CH2/479/1 15th & 28th May 1696, 7th August 1696. The entry for the last date reads

"This day the session thinks it fit to leave it on record that a little time after William Winning and Marion Shearer his wife had employed Donald Ferguson to charm their byre and cattell their dwelling hous with all their plenishing and their byre with all their horse and kine were consumed by fire".
7. Records Of Kirk Session Of Kilsyth SRO CH2/216/1 7th March 1700. Case of James Marshall.
8. Records Of Kirk Session Of St. Ninians SRO CH2/337/1 5th & 17th July 1665. Case of Archibald Russell and John Allan.
9. Ibid. 9th & 22nd October 1661. Case of Jean Andersone and Alexander Lamb; for another example see ibid. 12th & 26th March 1663, 16th April 1663, 4th June 1663. Cases of Janet Muirhead "for consulting with a woman counted to be a witch" to get medicine for a sick child, Janet Lawrie, Marie Fletcher, Helen Thomsons and Janet Livingstone. The 'witch' consulted by all of them was a woman called Helen Stirling. For the Kilsyth cases see Records Of Kirk Session Of Kilsyth SRC/CH2 216/2 23rd June 1723, 21st July 1723. Cases of Henry Marshall, Henry Sim, Margaret Graham and Janet Cob for consulting the 'dumbie' about stolen cloths and William Clelland for consulting him about stolen money.

10. Records Of Kirk Session Of Muiravonside SRO CH2/712/1
14th April 1672. Case of William Boog, Frank Platt and Elspeth Glen.
11. Records Of Kirk Session Of Kilsyth SRO CH2/216/2 8th, 15th
& 20th January 1721. Case of Andrew Gray in Kilsyth.
12. Records Of Kirk Session Of Gargunnoch SRO CH2/1121/1 12th
May 1626. Case of Janet Lockhart and Steven Maltman both in
Leckie; Records Of Presbytery Of Stirling SRO CH2/722/5
17th April 1628. Case of Steven Maltman; Records of Kirk
Session Of St. Ninians SRO CH2/337/2 26th April 1671. Case
of Isobell Patterson.
13. Records Of Kirk Session Of Killearn SRO CH2/468/1 3rd
October 1697.
14. Records Of Kirk Session Of Baldernock SRO CH2/479/1 12th
June 1696.
15. Campbell, Witchcraft And Second Sight; M Marwick (ed):
Witchcraft And Sorcery (London, 1970); E E Evans-Pritchard:
Witchcraft, Oracles And Magic Among The Azande (Oxford, 1937).
16. Campbell, Witchcraft And Second Sight pp 71-2.
17. Records Of Kirk Session Of Strathblane SRO CH2/510/3 1st
& 5th December 1723. Case of Catherin Cameron and William
Mcildoe.
18. Records Of Kirk Session Of Airth SRO CH2/683/1 9th February
1688.
19. Records Of Kirk Session Of St. Ninians SRO CH2/337/2 13th
& 27th July 1669. Case of Isobell Forrester and Janet Smart.
20. ibid.
21. See Marwick, Witchcraft And Sorcery passim.
22. ibid. pp 27-36.
23. On this point see Campbell, Witchcraft And Second Sight pp 120-
35; A Ross: The Folklore Of The Scottish Highlands (London,
1976) pp 39-45.
24. Records Of Kirk Session Of Kilsyth SRO CH2/216/1 9th July
1703.
25. Records Of Presbytery Of Stirling SRO CH2/722/5 17th April
1628.

26. M Summers (ed): Malleus Malificarum (Oxford, 1928) pp 99-103.
27. S Sanderson (ed): Robert Kirk - The Secret Commonwealth & A Short Treatise Of Charms And Spells (Cambridge 1976)
28. ibid. pp 35, 67-9, 51-2, 56-61; For an example of the persistence of the belief that scrofula could be cured by the touch of a king see Records Of Kirk Session Of Airth SRO CH2/683/1 17th April 1664 where John Raynie younger was given a testimonial

"intending to repair to London to the Kings Majesty to get his disease alledged to be the Kings Evil cured"
- See also Records Of Kirk Session Of St. Ninians SRO CH2/337/2 18th March 1673 where Thomas Miller was given 5/- sterling to help him to go to London to see the King and be touched for scrofula.
29. Sanderson, Secret Commonwealth pp 33-5, 81-103.
30. ibid. pp 105-14.
31. Records Of Kirk Session Of St. Ninians. SRO CH2/337/4 15th & 20th December 1705, 3rd January 1706. Case of James Eason.
32. Marwick, Witchcraft And Sorcery pp 38-40 and passim.
33. Records Of Kirk Session Of St. Ninians SRO CH2/337/2 26th September 1671. Case of William, James and David Buchan. This was "found to be a criminall matter and referred to the judge competent".
34. ibid. 26th April 1671 Case of Isobell Pattersone and George Blair.
35. ibid.
36. Summers, Malleus Malificarum pp 117-20.
37. On this see Sanderson, Secret Commonwealth pp 81-95.
38. Records Of Kirk Session Of Kilsyth SRO CH2/216/2 7th July 1723.
39. Records Of Kirk Session Of Gargunnock SRO CH2/1121/1 12th May 1626.
40. Records Of Presbytery Of Stirling SRO CH2/722/5 17th April 1628.

41. ibid. 12th June 1628 - the entry says the presbytery concluded
 "ane commission should be presented for putting the said
 Agnes Hendersone to ane assize according to law"
42. Register Of Privy Council Of Scotland 2nd series vol II p353
 3rd July 1628.
43. Records Of Presbytery Of Stirling SRO CH2/722/5 20th, 30th
 & 31st January 1633, 20th & 21st February 1633. Case of Janet
 Tailyour.
44. ibid. 7th, 20th & 21st February 1633. Case of Marrienne
 Matthew, 3rd, 4th & 10th April 1633. Case of Helen Keir.
45. ibid. 4th April 1633.
46. ibid. 14th & 21st January 1636. Case of Andrew Aikin.
47. ibid. 4th February 1636.
48. Records Of Kirk Session Of Muiravonside SRO CH2/712/1 4th
 May 1670. Cases of Margaret Rid & Frank Platt.
49. Records Of Kirk Session Of Gargunnoch SRO CH2/1121/1 22nd
 September 1644. Here Drummond and his wife were made to
 pay a joint penalty of 40/- and were given a joint public rebuke
 after which they had to publicly crave Janet Harvie's pardon.
50. On the decline in elite belief in witchcraft during these decades
 see (Larner: Enemies Of God: The Witchhunt In Scotland
 (London 1981) pp 176-91. For the way in which charming
 cases could develop into full witch trials see ibid. pp 139-45.
 For the case cited by Larner of Magdalen Blair in Stirling see
 Appendix no 5.
51. Except perhaps in the Highland areas which were only just start-
 ing the process of 'Christianisation' - it is notable that in the
 Scottish Record Office's index to the Justiciary records for
 1699-1720 the witchcraft cases almost all come from the North
 circuit.
52. For an example of this see Records Of Presbytery Of Stirling
 SRO CH2/722/6 23rd June 1658. Case of Margaret Duchill.
 (This case is discussed at greater length in Appendix no 5).

Bibliography Of Sources Used And Consulted.

Any person researching the past of the legal system soon comes to some realisation of the sheer bulk of the record left by most legal bodies. Courts of law typically leave behind them not only the formal records of their work in the shape of court books or official minutes but also a mass of small papers of the most varied sort. Scotland's old legal system is no exception to this rule. The volume of record which has survived for the Justiciary court alone is remarkable while the productivity of the church courts leaves feelings akin to awe in the mind of the modern reader. However anybody who having entered the Scottish Record Office starts to search through a portion of this mass soon also becomes aware of another feature of legal records: their variable quality. This can be seen both when comparing the output of one court with that of another and when making comparisons within the records of a single jurisdiction. If the aim of the student is the study of the criminal law then it will also become apparent that much of this impressive array of sources is not relevant or, more frustrating still, not useable for some reason. Even after all this is taken into account the researcher still has a very large body of source material to mine.

The records of the Scottish legal system can be classified roughly as falling into nine broad categories; the records of Parliament and Privy Council; records of the Court of Session; Admiralty Court records; the records of the High Court of Justiciary and its predecessors; other central court records; the records of Sheriff, burgh, franchise and church courts. Of these categories the records of the Court of Session, being mainly concerned with civil litigation are not relevant to a study of the criminal law. (There are cases which would now be described as criminal preserved in the Court of Session's archives but the labour involved in extracting these is vastly in excess of any derived benefit). The same can be said of the various minor central courts. The High Court of Admiralty has left very interesting records with much criminal material but these

are of very limited relevance to a local based study such as this. Thus six categories remain - Parliament and Privy Council, Justiciary Court, Sheriff, burgh, franchise and church courts. The records of both Privy Council and Parliament are available in printed form, the latter in the standard 'Record' edition by Thomas Thomson and Cosmo Innes, the other in the government sponsored series of volumes the third series of which has now reached 1690.

The records of the church courts are in many ways the most impressive of all the courts' relics. Each Kirk session and presbytery was in theory obliged to keep a register which recorded the names of the ministers and elders present at every meeting and a near verbatim account of the business carried out. Most sessions and presbyteries would seem to have been most scrupulous in this respect, with the minutes often written by the minister or the clerk of the session or presbytery. These records, when they have survived, are normally comprehensive, carefully kept and written in clear, easily read script - this perhaps reflecting the educational standard of the authors. They contain much that is of interest not only for the study of the legal system but also for the information it provides for such subjects as the way of life and attitudes of the poor, the administration of poor relief and the political and religious history of the times. The underutilisation of this outstanding source seems incredible to anyone who has discovered it. There are however gaps in the record, at least in those available in the Scottish Record Office, for two reasons. In the first place there is a comparative dearth of material dating from before 1688. This was because when most of Scotland's clergy were purged from their livings in 1688-91 the majority took their Kirk's records with them and these have never been recovered. In Stirlingshire only the parishes of Stirling, St. Ninians, Gargunnoch, Falkirk, Muiravonside and Fintry have left session records from before 1688. However this list does include the three largest and most important parishes so the position is far better than it might appear at first sight. So far as the presbyteries are concerned, the events of 1688 did not lead to similar disruption. The presbytery of Glasgow has no surviving records from this period

but Stirling, Linlithgow, Dumbarton and Dunblane have all left voluminous records going back to the early seventeenth century and in the case of Stirling to the formation of the very first presbyteries in 1582. The second problem concerning church court records, of lesser and diminishing importance, has to do with their location. Although it has been the policy of the Kirk for some years now that its records should be deposited in the Record Office a number of session records remain in the hands of the ministers and sessions. When research for this study was begun the session records of Stirling, Balfron, Drymen, Gargunnoch and Buchanan were all unavailable because of this. The records of Buchanan and Gargunnoch sessions became available during the course of research and have been used. Those of Stirling arrived in the Scottish Record Office towards the end of the research period and although they have been consulted, it did not prove possible to undertake detailed analysis in the time available.* All the other session records have been studied in detail and, so far as possible, in their entirety. Of the presbyteries, although the records of both Dumbarton and Linlithgow were consulted no detailed study was made because the majority of their work came from outside the bounds of Stirlingshire. By contrast the records of the Stirling presbytery were studied in detail.

The High Court of Justiciary and its predecessor, the Justiciary Court, have left a great mass of material. In the first place there are the official records of the Edinburgh sessions of the court - the minute books and books of Adjournal. In theory these two classes of record are distinct with the minute books providing a verbatim account of the court proceedings, the books of Adjournal a fuller, written up account which includes formal proceedings and transcribed documentation. In fact the two records are for all practical purposes identical. Much space is taken up in both by the very learned and extremely long winded arguments put as to the relevancy of the libel with the process of objection, reply, duply and

* The records of Drymen and Balfron sessions have become available within the last eighteen months.

so on sometimes going to a sextuply! Linked with the books of Adjournal are the series of process papers - these are the actual documents arising out of each case and bundles contain such material as criminal letters and indictments, recorded depositions by witnesses, lists of trial jurors together with the minutes of the trials and sometimes records of sentence. These are in many ways more informative and useful than the formal record of the books of Adjournal. However making use of these records is very difficult because of the condition of many of them, which leaves much to be desired, and, most important, the lack until recently of a truly comprehensive index. The circuits of the Justiciary Court have left two runs of record, one containing the surviving material from the 1650s, 1670s and later, the other a series of circuit court books commencing in 1708. Other records from the early circuits can be found in the miscellaneous records of the court. The circuit court records are supplemented and enhanced by the dittay rolls and the dittay books compiled in 1708-10. Amongst the other records left by this court which contain relevant material are the registers of criminal letters and the signet minute books which unfortunately only survive from after 1703.

The local courts have also left record but, compared to the church and central courts, this is patchy both in its quality and its survival. The Sheriff court has a complete run of court books as well as a corresponding series of processes which are however virtually unusable because of their condition. The burgh court of Stirling, like the Sheriff court, has left a long run of court books, as has the Stirling guildry court. The many heritable jurisdictions which operated before 1747 have left comparatively little record, considering their numbers but what has survived is both interesting and significant. Baron court books have survived from Balgair, Callander, Edinbellie, Ballikinrain and Cambuskenneth - the last being preserved in the Stirling burghal records as the 'baron' was the masters of Cowans Hospital. The regality of Falkirk is recorded in a series of court books while the regality of Montrose has left not only several court books from the various jurisdictions which came under its umbrella but also a great run of process papers which are

of immense value. All of these local records however have two weaknesses: poor quality script and recording and general inaccuracy. The writing and quality of the documentation is markedly inferior to that of the church courts and it soon becomes clear that much business is not recorded, particularly in the later private court records where the recording of business becomes positively slipshod. Despite all of this, these are in many ways the most significant of the surviving legal records and yield some of the richest rewards.

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Records Of Presbytery Of Dunbarton SRO CH2/546/1-6,10; volume 1 1639-54; volume 2 1657-60, 1662-84; volume 3 1684-88; volume 4 1689-95; volume 5 1695-1704; volume 6 1704-14; volume 10 1740-47.

Records Of Kirk Session Of Airth SRO CH2/683/1 - 1660-69.

Records Of Kirk Session Of Baldernock SRO CH2/479/1-2; volume 1 1690-1738; volume 2 1742-1854.

Records Of Kirk Session Of Buchanan SRO CH2/606/3-6; Volume 3 1710-12; volume 4 1714-18; volume 5 1718-1731; volume 6 1739-44.

Records Of Kirk Session Of Campsie SRO CH2/51/1; 1689-1717.

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Records Of Kirk Session Of Fintry SRO CH2/438/1-3; volume 1 1640-59; volume 2 1659-99, 1727, 1738-41; volume 3 1742-69.

Records Of Kirk Session Of Gargunnoch SRO CH2/1121/1-2; volume 1 1625-58; volume 2 1658-60.

Records Of Kirk Session Of Killearn SRO CH2/468/1-2; volume 1 1694-1717; volume 2 1727-43.

Records Of Kirk Session Of Kilsyth SRO CH2/216/1-2; volume 1 1690-1713; volume 2 1713-25.

Records Of Kirk Session Of Logie SRO CH2/1001/1; 1688-1700.

Records Of Kirk Session Of Muiravonside SRO CH2/712/1; 1667-1814.

Records Of Kirk Session Of St. Ninians SRO CH2/337/1-5; volume 1 1653-67; volume 2 1667-95; volume 3 1660-1753 - this is a transcript of all the entries relating to mortcloths and grave places; volume 4 1695-1724; volume 5 1724-34.

Records Of Kirk Session Of Slamannan SRO CH2/331/1-3; volume 1 1693-1707; volume 2 1709-24; volume 3 1716-51.

Records Of Kirk Session Of Stirling SRO CH2/1026/3-5; volume 3 1627-49; volume 4 1655-77; volume 5 1695-1701.

Records Of Kirk Session Of Strathblane SRO CH2/510/1; 1711-31; 1744-68.

Sheriff Court Records.

Records Of Stirling Sheriff Court: Court Books SRO SC67/1/3-5, 10-15; volume 3 1648-52; volume 4 1653-55; volume 5 1655-59; volume 10 1682-87; volume 11 1687-94; volume 12 1694-98; volume 13 1698-1703; volume 14 1703-6; volume 15 1706-9.

Records Of Stirling Sheriff Court: Processes SRO SC67/7/1-7 - these cover the period 1644-61.

Burghal Records.*

Records Of Burgh Court Of Stirling: Court Books SRO B66/16/9-13, 37-9; volume 9 1643-45; volume 10 1646-51; volume 11 1651-57; volume 12 1657-62; volume 13 1662-71; volume 37 1739-41; volume 38 1741-42; volume 39 1742-44.

Records Of Burgh Court Of Stirling: Registers Of Decrees SRO B66/13/1-6 - these cover the period 1713-32.

Records Of Stirling Guildry Court PD6/1/2 1669-1733. (This volume is in the Central Regional Council archive in Stirling).

Franchise Court Records.

Records Of Regality Of Falkirk SRO SC67/2/1-5; volume 1 1638-56; volume 2 1682-89; volume 3 1689-98; volume 4 1698-1702-16, vol 5.

Records Of Regality Of Montrose: Head Court Rolls SRO GD220/6/416 1684-1738.

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Records Of Regality Of Montrose: Court Book SRO GD220/6/463 1710-36.

Records Of Regality Of Montrose: Justiciary Court Books SRO GD/6/467 1708-18; 1735-38.

*It would seem these records have now all been transferred to the Central Regional Archive in Stirling, while retaining their call numbers.

Records Of Regality Of Montrose: Court Minute Books SRO GD220/6/465 1720-32, 1735-37.

Records Of Regality Of Montrose: Processes SRO GD220/6/418-53 - these boxes cover the period 1691-1748 in a continuous run.

Records Of Regality Of Lennox: Court Book SRO GD220/6/491 1705.

Records Of Regality Of Lennox: Papers SRO GD220/6/492 1713-46.

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Records Of Barony Of Callender SRO SC67/2/6 1722-25.

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Records Of Barony Of Ballikinrain NLS ms 9303 1666-1729. (This document is housed in the National Library Of Scotland).

Records Of Barony Of Edinbellie SRO GD1/223/1 - 1623-39. See also the printed records of Balgair, cited below.

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Records Of Justiciary Court: Circuit Court Minute Books SRO JC10/2-5; volume 2 1655-59 & 1666; volume 3 1671; volume 4 1679-84; volume 5 1677 & 1697-99.

Records Of Justiciary Court: West Circuit SRO JC 13/1-8 - these volumes cover the period 1708-49 continuously.

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Records Of Justiciary Court: Registers Of Criminal Letters SRO JC/18/1-3,6,8. volume 1 1647-50; volume 2 1652-57; volume 3 1661-72; volume 6 1684-1721; volume 8 1728-51.

Records Of Justiciary Court: Signet Minute Book SRO JC20/1 1703-92 but contains some seventeenth century material.

Records Of Justiciary Court: Processes SRO JC26/13-80 cover the period 1643-99. The papers for the period 1699-1720 which are in boxes 81 onwards have been indexed.

Records Of Justiciary Court: Miscellaneous Papers SRO JC27/4 - this box contains, along with much else, the Stirling court book for 1652.

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1. Because of the very complicated publishing history of this society it has been decided to follow the format used by C S Terry in his Publications Of Scottish Historical Clubs.