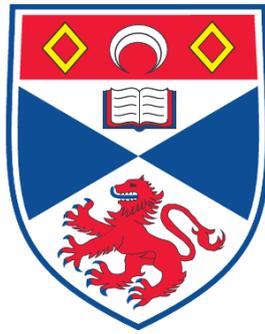


**LAW AND ORDER ON THE ANGLO-SCOTTISH BORDER,
1603-1707**

Catherine Mary Faith Ferguson

**A Thesis Submitted for the Degree of PhD
at the
University of St. Andrews**



1981

**Full metadata for this item is available in
Research@StAndrews:FullText
at:**

<http://research-repository.st-andrews.ac.uk/>

Please use this identifier to cite or link to this item:

<http://hdl.handle.net/10023/2787>

This item is protected by original copyright

Catherine Mary Faith Ferguson

Abstract to Law and Order on the Anglo-Scottish Border, 1603-1707.

Thesis submitted for degree of Ph.D., St. Andrews University, May 1981

For centuries the Borders were notorious for their lawlessness and were regarded as beyond redemption by those in London and Edinburgh. Undisturbed, the landowners had assumed extensive powers and the population organised themselves into virtually autonomous clans. For James VI and I, however, the Borders symbolised the Union of the Crowns, for 'be the happie union' they were now 'the verie hart of the countrey'. It was thus, intolerable that the Borders should remain in their old state and so from 1603 there was a new drive to pacify the region.

Previous studies have either considered the region from one side of the frontier only, or have stopped at some date within the seventeenth century. It is however, important that the Border counties of England and Scotland be considered as a whole, for although divided by man-made divisions, they were united geographically, topographically, economically and socially. It is equally vital that the seventeenth century be regarded in its entirety, for the pacification of the Borders was a gradual process, of which the final stages were not reached until the last quarter of the century.

In order to examine the whole process of the pacification and how the region gradually adapted to its new role as the Middle Shires of Britain, the thesis looks at the whole range of law courts operating in the area - from the central courts in London and Edinburgh, down to the local burgh, franchise and ecclesiastical courts. A chapter is devoted to each level of court and examines the role of a particular type of court in the judicial hierarchy of England and Scotland - its methods, procedure and personnel and the type of offender and offence dealt with. Perhaps the most important chapter in this respect is that

on the Border Commissioners who were the body most intimately concerned with pacifying the region and who made a lasting impression upon every aspect of Border society. The Commissions have spanned over 80 years and more than any other judicial body shaped the Borders into the Middle Shires, yet no detailed study of them has ever been undertaken before.

The combined effect on the inhabitants of all the law courts operating in the Borders, is measured in the Conclusion, where it can be seen that the life and ways of the Borderers had changed significantly between the Unions of the Crowns.

LAW AND ORDER ON THE
ANGLO-SCOTTISH BORDER, 1603 - 1707

by

CATHERINE MARY FAITH FERGUSON

THESIS SUBMITTED FOR DEGREE OF
DOCTOR OF PHILOSOPHY,

ST. ANDREWS UNIVERSITY, 1981



TABLE OF CONTENTS

Table of contents		ii
List of maps, tables and graphs		iv
Acknowledgements		vii
Preface		ix
Conventions		xv
Introduction		3
Chapter I	: The Central Government	27
Chapter II	: Assizes and Justice Ayres	59
Chapter III	: The Border Commissioners	99
	I. The Commissioners and their activities	99
	i. The Commission and the Commissioners	99
	ii. Activity: 1605-1611	113
	iii. 1611-22	132
	iv. . 1622-25	142
	v. 1625-37	146
	vi. 1637-50	152
	vii. 1650-60	154
	viii. 1660-84	159
	II. The work of the Border Commissioners' courts	
	i. Securing the offenders	168
	ii. Dealing with offenders	188
Chapter IV	: The Sheriff Courts	206
Chapter V	: The Justices of the Peace	248
	I. The Scottish Justices	249
	The work of the courts: Scotland	252
	II. The English Justices	269
	The work of the courts : England	279
	The English Border Justices : special features	308
Chapter VI	∴ The Franchise Courts	320
	I. The Scottish Franchise Courts.	321
	i. Competence	321
	ii. Procedure	344
	iii. Relations with other courts	349
	II. The English Franchise Courts	353
Chapter VII	: The Town Courts	369
Chapter VIII	: The Ecclesiastical Courts	407

Conclusion		459
Abbreviations		480
Preface	: Notes	481
Introduction	: Notes	482
Chapter I	: Sources and Notes	485
Chapter II	: Sources and Notes	490
Chapter III	: Sources and Notes	500
Chapter IV	: Sources and Notes	522
Chapter V	: Sources and Notes	530
Chapter VI	: Sources and Notes	547
Chapter VII	: Sources and Notes	558
Chapter VIII	: Sources and Notes	566
Conclusion	: Notes	575
Bibliography		578

List of maps, graphs and tables

Maps

Page

1. Map of the Anglo-Scottish Border showing principal towns and counties 1
2. Map of the Anglo-Scottish Border showing franchises and villages mentioned in the text 2

Tables

Table	1. Distribution of Population in Scotland in 1691	5
	2. Number of Days with sleet or snow likely to have fallen at Rydal, November 1689-April 1693	7
	3. Seed yields in Cumberland and Westmorland on Sir John Lowther's lands, 1598-1605	14
	4. Crop yields on the Cassillis Estates, Wigtownshire, 1655-1661	15
	5. Exports from Whitehaven, 1672, 1680, 1684	19
	6. England: hierarchy of justice in the seventeenth century	25
	7. Scotland: hierarchy of justice in the seventeenth century	26
	8. Persons before Star Chamber in the reign of James I	34
	9. Cases removed from Northumberland and Cumberland quarter sessions by writ of <u>certiorari</u> , 1668-1700	41
	10. Cases from the Borders decided before the Scottish Privy Council, 1605-78	49
	11. Commissions issued from the Scottish Privy Council to officials in the Borders for the trial or apprehension of named persons, 1603-91	58
	12. Scottish justice ayres in the seventeenth century	61
	13. Cases before Scottish justice ayres in the seventeenth century	63
	14. Verdicts imposed by the Scottish justice ayres, 1656, 1658, 1659, 1671	64
	15. Number of persons indicted before the summer assizes at Newcastle, 1602, 1604, 1605, 1606, 1608, 1616	77
	16. Indictments from Northumberland before the Northern Circuit Assizes, 1660-92	78
	17. Indictments from Cumberland before the Northern Circuit Assizes, 1660-92	79
	18. Indictments from Westmorland before the Northern Circuit Assizes, 1662-92	80

	<u>Page</u>
Table 19. Number of prisoners delivered from the gaol at Newcastle by the assize judges, summer, 1628 and 1629	81
20. Comparison of the three main sources for the proceedings at the Border Commissioners' courts, 1605-7	114
21. Punishments imposed by the English Border Commissioners' courts, 1605-76	186
22. Punishments imposed by the Scottish Border Commissioners' courts, 1611-76	187
23. Scottish Border sheriffdoms in the seventeenth century	212
24. Cases before Peebles sheriff court, 1652-1706	225
25. Cases before Jedburgh sheriff court, 1610-15, 1634-58, 1665-71	226
26. Cases before Peeblesshire justices of the peace, 1656-9, 1660, 1664-6, 1670, 1677	256
27. Cases before Roxburghshire justices of the peace, 1656-9	257
28. Indictments before Northumberland quarter sessions, 1604-30	283
29. Indictments before Northumberland quarter sessions 1675-1705	284
30. Indictments before Westmorland quarter sessions, 1655-67	285
31. Indictments before Cumberland quarter sessions, 1668-1701	286
32. Cases before Melrose regality court, 1605-9, 1657-76, 1682-4	328
33. Cases before Stitchill baron court, 1655-1707	329
34. Cases before Kelso baillie court, 1623-6, 1641-51, 1659-74	330
35. Cases before Hexham manorial court, 1606, 1616, 1619, 1622, 1624-30	361
36. Cases before Gilsland manorial court, 1611-13	362
37. Cases before Newcastle-upon-Tyne civil court, October 1656-March 1657	378
38. Recognizances before Newcastle-upon-Tyne justices of the peace, 1650-1	383
39. Cases before Berwick-upon-Tweed justices of the peace, March 1695-March 1696	385
40. Cases before Dumfries burgh council 1663	399
41. Cases before Kirkcudbright town council, 1606-17, 1630, 1650	400
42. Cases before Jedburgh kirk session, 1672-5, 1678-81, 1684-7	425
43. Dumfries kirk session: referrals to civil magistrate, 1648-61, 1668-9	432
44. Percentage of cases before visitation courts in Doncaster and Frodsham deaneries, 1590, 1613 and Northumberland archdeaconry, 1604-5	446

	<u>Page</u>
Table 45. Cases before the Durham High Commission, from all the diocese, 1626-37	455
46. Network of thieves on the Anglo-Scottish Border after 1660	475

Graphs

1. Percentage theft of all cases before the assize judges 1660-92	83
2. Monthly meetings of the sheriff courts of Jedburgh and Peebles, 1611-1686	220
3. The number of meetings per year of the presbytery of Jedburgh and Kelso, 1605-60, 1671-5	414
4. Percentage of gentlemen involved in thefts in Northumberland 1601-90	464
5. Percentage of craftsmen involved in thefts in Northumberland, 1601-90	465
6. Percentage of yeomen involved in thefts in Northumberland, 1601-90	467
7. Percentage of labourers involved in thefts in Northumberland, 1601-90	468
8. Percentage of women involved in thefts in Northumberland 1601-90	469

ACKNOWLEDGMENTS

In researching and preparing this thesis, I have received a considerable amount of help from a number of people, whom I should here like to thank for their contribution.

For the first three years of research, I received a grant from the Social Science Research Council, whose support in that respect I gratefully acknowledge.

The thesis has drawn to a large extent on the Crawford MSS in the John Rylands Library and I am indebted to the Earl of Crawford and Balcarres for giving me his permission to read and cite these manuscripts. From the staff of the various record offices I visited, both national and local, I have received considerable help and assistance, and I am especially grateful to the staff of Durham University Department of Palaeography and Diplomatic.

My most sincere thanks goes to my two supervisors, Mr. Bruce Lenman and Dr. Geoffrey Parker, whose contribution has been inestimable. They have both given me inspiration and encouragement and have never failed to provide helpful suggestions and comments on the script of the thesis. For their assistance on general and specific points, I wish also to thank Mr. A. Upton, Dr. K. Wrightson, Dr. L. Smith, Mr. S. Davies and Dr. A. Foster. For the unenviable and arduous task of typing the thesis, I am indebted to Mrs. Joyce Siddle.

I wish also to thank my husband for his tremendous assistance during the years of my research. And last, but certainly not least, to my parents, for their unfailing support, I owe far more than I could say.

Catherine Mary Faith Ferguson

St. Andrews, 1981

I declare that this thesis has been composed by myself, that the work of which it is a record has been done by myself, and that it has not been accepted in any previous application for a higher degree. The thesis, entitled 'Law and Order on the Anglo-Scottish Border, 1603-1707' is submitted for the degree of Doctor of Philosophy, for which degree I first matriculated at St. Andrews University in October 1977.



Catherine Mary Faith Ferguson, May 1981

I declare that Catherine Ferguson has complied with and fulfilled the conditions of the Resolution and Regulations in the preparation and presentation of her thesis.



Supervisor

PREFACE

No more discourse of Scotch or English race,
 Nor chant the fabulous hunt of Chevy Chase.
 Mixed in Corinthian metal, at thy flame
 Our nations melting, thy colossus frame.
 Prick down the point (whoever has the art),
 Where Nature Scotland does from England part.
 Anatomists may sooner fix the cells
 Where life resides, or understanding dwells:
 But this we know, though that exceeds our skill,
 That whosoever sep'rates them does kill.
 Will you the Tweed that sudden bounder call
 Of soil, of wit, of manners, and of all?
 Why draw we not as well the thrifty line
 From Thames, Trent, Humber, or at least the Tyne?
 So may we the state corpulence redress,
 And little England, when we please, make less.
 What ethic river is this wondrous Tweed,
 Whose one bank vertue, other vice does breed?
 Or what new perpendicular does rise
 Up from her stream, continued to the skies,
 That between us the common air should bar
 And split the influence of every star?

(Andrew Marvell, 'The Loyal Scot', 1669)

The issue of law and order on the Borders is important. For centuries the region was notorious for its lawlessness and was regarded as a hopeless case by the central governments of London and Edinburgh. Left alone, it had developed its own social structure of clans (or 'surnames' as they were known in the Borders) and the local landowners had assumed extensive powers and influence. Attempts to pacify the region before 1603 had been unco-ordinated across the frontier and hampered by private faction and political friction.

x

The final paragraph in T. I. Rae's book on the administration of the Scottish border in the sixteenth century implied that the Border problem solved itself on the Union of the Crowns in 1603; but it was not to be the case. The Borders proved to be still difficult to deal with, for although the international tension had been removed with the Stuart succession in England, it was replaced by a more subtle, but equally important pressure.

To James VI and I, the Borders symbolised the Union of the Crowns. If the area he now ruled was to be the Great Britain of his hopes, then the Borders as they existed, had to be radically changed. The Border region, then, for the century between the Union of the Crowns and the Act of Union, became the focus of 'the Great Britain issue'. Each step in the pacifying of the Borders was regarded as a step further towards uniting the two nations. Moreover, the seventeenth century saw the gradual increase in the power of the state at the expense of personal monarchy. Government bureaucracy increased and the process of centralisation was visible in most areas of government activity. This was especially true in the realm of law and order. In order that the state might further increase in power and authority, it was essential that the areas hitherto 'little governed' should be brought within the system. Once again, the Borders - with the relative independence of their powerful landowners with their own jurisdictions; governed in England by that bastion of personal monarchy - the Council of the North - were symbolic in this respect.

Because the Borders and especially the issue of law and order on the Borders, were the focus of attention throughout the seventeenth century, it is important that they be regarded as a complete unit. Previous studies have either considered that region from one side of the boundary only, or have stopped at some date within the seventeenth century. This study takes as its

21

area, the 'borders' as defined by the Border Commissioners who operated after 1605; that is: Northumberland, Cumberland, Westmorland, Roxburghshire, Selkirkshire, Berwickshire, Dumfriesshire, Peeblesshire, and Kirkcudbright. Thus, it deals with the inland areas as much as those directly adjacent to the actual frontier. It seems essential that the Borders be considered as a whole region - the actual boundary line was not defined with precision until the eighteenth century, and some areas in the previous century were classed as 'debateable'. The Debateable Lands¹ in the West March were, as their name implies, neither truly part of England nor of Scotland. Moreover, the inhabitants of that area regarded themselves as part of either or neither as the whim suited them. Nor did the physical attributes of the region drastically alter on crossing the boundary, for the area was one region geographically, topographically, economically and socially. When he called them the 'Middle Shires', James VI and I grasped what later writers (with the possible exception of Andrew Marvell) have failed to understand: that once the man-made divisions were disregarded, the Borders were a single unit.

This thesis takes as its time limits, the two 'natural breaks' of 1603 and 1707, for to take any other dates within that period would be misleading. The Border problem with law and order and its gradual pacification did not stop at any definite date, but were rather a progression, with deceptive regressions and recessions. It is only when the whole area is examined over the whole century that any clear and meaningful pattern emerges.

For the same reason, it is important that no dividing line be drawn when dealing with the types of court operating on the Borders. G. R. Elton, in his introduction to Crime in England, 1560-1850² criticised the contributors to that volume for ignoring the superior courts in the capital and the lowly manorial courts; for concentrating on the quarter sessions and assizes, yet disregarding special commissions. This study seeks to preclude such criticism by covering the whole sphere of law courts operating in the area and devoting

one chapter to each level. Each chapter, then, describes the position of a particular type of court in the judicial hierarchy of England or Scotland, together with its methods, procedure and personnel and with the offences and offenders it dealt with. There are natural discrepancies in the balance of each chapter; an English court rarely being of identical importance to its Scottish counterpart and vice versa. There are also discrepancies between chapter and chapter, with the more important courts meriting a lengthier description.

The chapter on the Border Commissioners is noticeable in this respect. Yet this chapter might be considered the most important. Nowhere else in Britain did a special commission exist as it did in the Borders. Such was the central importance of the Border Commission in pacifying that area and their impact upon every aspect of Border society, that they deserve a whole book to themselves, yet they have never been studied. Journals and manuals exist which describe the methods of sheriffs, justices of the peace and assize judges; practicks and commentaries describe the central institutions, but no history has been written of the Border Commissioners who seem to have become a 'forgotten institution' over the centuries.

The analysis and examination of each type of court depends largely on the documentary evidence available. In some chapters the balance may be weighted heavily towards the individual tribunals with the best documentary survival. This is an unfortunate, but necessary evil of historical research. Even the documents where they do exist, must be treated with caution. Just as one would not expect the entries in a modern-day court record to reflect the true state of affairs, so one must not expect the same of seventeenth century material. The records only reveal the offenders and offences which were detected and brought to prosecution - many more must remain unknown because

they never came to court. Edward Hext, a Somerset magistrate and Star Chamber clerk thought, in 1590, that 80 per cent of all criminals evaded trial. We shall never know the true percentage³; but it is certain that criminals escaped justice on a large scale.

Many were never detected. Detection in the seventeenth century was always a problem in the absence of a police force. Constables were notoriously partisan and were frequently in the courts themselves for negligence. Most of the law courts, then, relied upon members of the population to supply the relevant detail to bring an offender to court. The chapter on the Border Commissioners shows that fear of revenge could prevent the population from reporting crime so that the activities of the law officials could be severely hindered.

Others concluded an extra-judicial settlement. There is sufficient evidence to suggest that this took place at all levels and at all times, although we only see the tip of the iceberg. The following case is typical. Henry Dodd of Dunebank in July 1661 complained to the assize judges that John Robson, Andrew Waugh and Thomas Waugh stole his black cow, and that William Robson 'father to the said James Robson did confess to this informer that his sonne James Robson was one of the stealers of the said Quy and offered in behalfe of his sonne twenty shillings for agreement'⁴. There must have been many of these settlements, but only the ones that went wrong are recorded.

The inaccuracies and unreliability of details in early modern assize records have been clearly pointed out by J. S. Cockburn⁵. He shows that often the indictments are so suspect that perhaps as many as 30 per cent are incorrect. Thus, any statistical analysis of crime would be meaningless, as would any quantitative research into occupation. The examples he gives of inaccuracies in place of abode and occupation tend to be rather extreme and

are also mainly confined to London where, perhaps, problems of identification and of attributing a specific occupation to an individual were more pronounced than in a close-knit agricultural society. In many towns people quite legitimately used to have various occupations - an ale-housekeeper could easily be a husbandman or craftsman. Every effort has been made in the course of this study to identify any inaccuracies in the placing of persons (and, because the jurisdiction of some courts operating in the area overlapped, checks can be made in several cases). Most of the inaccuracies seem to be in the realm of social definition, with yeoman, husbandman and labourer frequently muddled. In the early seventeenth century, however, the practice of giving everyone a nick-name helped considerably in the identification of offenders (see page 472 below). Cockburn's comments, nevertheless, are valuable and should be borne in mind when analysing such data.

The extra-judicial settlements, the inaccuracies in the documents and the unknown quantity of undiscovered crime, all make for difficulties when analysing the records. Severe problems exist in putting the tens of thousands of cases into a manageable and presentable form. Some historians have severely criticised the statistical approach to documents such as quarter sessions or assizes - but to rule out such an approach altogether is to deny valuable evidence which may come to light. Nevertheless, it is not enough to present the figures without any qualification. The quantitative approach is used with caution in this study and used to compile 'court profiles' rather than absolute figures of crimes committed. Court profiles provide a valuable and easily recognisable means of illustrating which courts dealt with what offences, and how these offences could fluctuate between periods and places. It is the relation of these figures to each other that is important, rather than the precise numerical quantities. In this respect it is hoped that the court profiles will provide helpful information which would not otherwise be known if all statistical analysis was abandoned.

Note on conventions

Spelling has not been modernised except that placenames outside quotations have been given in their present form and all contractions have been expanded. English as well as Scottish dates have been given as if the year began on the 1st January.

The sums of money mentioned in English court records were invariably in sterling; the text, therefore, does not state this. The Scottish courts used either English or Scots pounds or marks, so if the original document had stated which, this has been made clear after the sum given. One English pound was the equivalent of 12 Scottish pounds and the mark was worth 13 shillings and 4 pence Scots.

Many of the documents used were not catalogued or sorted and in some others the page numbering was so erratic as to be more of a hindrance than a help. As far as possible, all documents have been identified with (1) repository (2) call number (3) page or folio number (4) date of document. I have indicated in the source notes where this was difficult or impossible.

MAP OF THE ANGLO-SCOTTISH BORDER SHOWING FRANCHISES

AND SOME VILLAGES MENTIONED IN THE TEXT



INTRODUCTION

In the absence of censuses conducted along modern lines, it is difficult to know the exact population of the area known as the Borders, in the seventeenth century. Early modern governments occasionally commissioned surveys of the population, but they were usually interested only in certain sections of the community - those who could pay taxes, or were religious dissenters, for example. Thus, the diocesan surveys of 1563, the Protestation of 1641 and the Hearth Tax assessments of the 1660's and 1670's do not give strictly accurate numbers.¹ Moreover, this information was often collected by households and unless the exact number of persons per household in each period and each area is known (which it is not), then it is extremely difficult to convert the figure into population size. Taking these problems into account, A. Appleby calculated that the population of Cumberland in 1563 was 42,400 and Westmorland was 30,500. By 1670, the Westmorland population had declined to 28,300, but by 1688 the Cumberland population had risen to 63,100. From the Carlisle diocesan records of 1603, Appleby calculated that the population of Cumberland at that time was around 95,000 although by the time of the Protestation in 1641 it had dropped to 53,800. It would seem, then, that between 1563 and 1603 the population of Cumberland and Westmorland increased by 43 per cent; between 1603 and 1641 it declined by 9 per cent; only to rise by 10 per cent between 1641 and the 1670's and 1680's.²

S. Watts suggested that in 1584 the population of Northumberland was around 74,300 and that by 1627 the figure had risen slightly to 85,000. Taking into account the differing size of counties, it would seem that in 1584 there were 35 people per square mile in Northumberland, about the same in Westmorland and slightly lower for Cumberland, where there would be 30 per square mile. The English border counties, then, stood in contrast to the rest of England, where there was an average density over the whole country of 75 per square mile in 1600, with a total population of 3.75 million at that time.³

There is a dearth of census information for Scotland in the seventeenth century, so that, as one historian has written 'it remains very uncertain what the population of Scotland was at any point before 1750'. It was estimated, around the time of the Union in 1707, that the population of the whole country was just over 1 million. As late as 1755, 51 per cent of the population lived beyond the Tay and out of a total estimated population of 1,265,000, a mere 149,000 lived in southern Scotland. The Table 1 shows the distribution of population in 1691, from which it can be seen that the Borders were sparsely populated. Out of 57 parishes in Nithsdale, Annandale, Wigtown and Carrick, in the south-west, only 11 averaged over 20 per 1000 acres and 6 of the 11 were parishes containing a royal burgh. In human terms, the Borders were a very empty part of Britain⁴.

A great deal of the region consisted of high hills and mountains. Indeed, the highest peaks in England (Scafell and Helvellyn) are in Cumberland. The hilly topography contributed to the poor climate experienced in the Border region. The Lake District, for example, has always been noted for its high precipitation counts; between 1911 and 1950 for example, rainfall in Cumberland was the highest in Britain, with Borrowdale experiencing 130 inches of rainfall a year. Admittedly the Borrowdale figure was far higher than any of the others for Cumberland, but even the averages for Penrith (48 inches), Carlisle (32 inches), and Grasmere (95 inches) contrast strongly with the 23 inches experienced in St. James's Park, London, or the 28 inches which fell in Edinburgh on average, during the same period. Sir Daniel Fleming, a Cumberland justice of the peace, made meteorological observations at Rydal between 1689 and 1693 and produced the results shown in Table 2. It can be seen that the number of days with snow or sleet falling was far greater than the average today. Manley considers that the climate in the late seventeenth century was worse than it is today and suggests that 'the sea-surface temperatures

TABLE 1.

Distribution of Population in Scotland in 1691

(Taken from M. Flinn (ed.), Scottish Population History from the Seventeenth Century to the 1930's, p.188).

<u>Area</u>	<u>Paid Hearths</u>	<u>Deficient</u>	<u>Poor</u>	<u>Paid Hearths per 1000 acre.</u>
Edinburgh, within walls	9564	2165	396	} 106
Edinburgh and Leith	5181	2090	228	
Midlothian	9553	836	531	
Haddington Presbytery	5957	241	611	} 46
Dunbar Presbytery	1946	-	-	
Berwickshire	5470	-	-	19
Roxburgh	6425	291	391	15
Angus	14100	-	-	25
Cupar, St. Andrews and Kirkcaldy Presbys.	15376	225	514	} 54
Dunfermline Presby.	4019	184	282	
Sutherland	2175	203	5	2
Selkirk and Peebles	2958	229	267	8
Carrick	2339	-	-	} 17
Cunningham	5501	30	-	
Kyle	4904	791	141	
East Perth	8365	17	645	} 14
West Perth	14348	562	461	
Argyll and Bute	6539	-	-	3
Caithness	3348	-	-	8
Lanark	15351	870	2969	27
Renfrew	5019	130	324	32
Stirling	7492	273	349	26
Kirkcudbright	3244	116	4	6
Dunbarton	2828	-	23	18
Inverness	6541	97	151	2½
Clackmannan	1252	-	-	41
Banff	3249	-	-	8
Wilton	3380	-	118	11
Aberdeen	24098	3004	-	19
Bo'ness, Linlithgow & Queensferry	2622	173	176	} 69
Rest of West Lothian	2604	160	241	
<u>Total</u>	<u>205748</u>	<u>12687</u>	<u>8667</u>	

prevailing between Ireland and Iceland were appreciably lower than today'⁵.

Indeed, it has been suggested that from around 1645 until 1715 the climate of the world was cooler than before or after. The almost complete absence of sunspots between 1645 and 1715 was noted by leading astronomers of the late seventeenth century, such as G. D. Cassini (1625-1715) in France and John Flamsteed (1646-1719) in England. Their astronomical notebooks also reveal an absence of aurora borealis (or the northern lights) and evidence that the sun was rotating in a significantly different way in the seventeenth century. Moreover, there was a notable increase of carbon-14 (radioactive isotope of carbon (^{14}C)) deposited during the period 1650 to 1750, indicating an increase of carbon in the earth's atmosphere which could have resulted from a reduction in solar energy. In other words, there may have been a reduction in the amount of heat received on earth from the sun; a factor which would affect agriculture in no small way⁶.

The Borders were essentially an agricultural region, with most of the population working on the land. Even those who lived in the towns as craftsmen most probably worked their parcel of land in addition. In the upland areas of the Borders there was limited arable land, confined to the valley floors, with the rest of the rough barren moors used for pasture. A description of Redesdale in the seventeenth century noted the 'barren heath, high mountains and desert wastes, so that in ten miles of ground there will not be 100 acres of arable'.⁷ In England, small hamlets were occasionally clustered alongside the arable areas, but in general, isolated farms were the norm, surrounded by separately held enclosures.

Throughout the English upland Borders, agricultural cultivation followed a uniform pattern. In the spring, the closes were planted with barley (or bigg) because the growing season and the soil were too poor for wheat. Hay was grown in the meadows as winter fodder for those cattle that survived the winter slaughter. In the summer the cattle were kept on upland pastures, known as

TABLE 2.

Number of days with sleet or snow likely to have fallen at
Rydal, November 1689 - April 1693

	J	F	M	A	M	J	J	A	S	O	N	D	'winter'	
1689										?	(2)	3	29+	1689-90
1690	11	5	2	3	(2)	1	-	-	-	1	5	4	29	1690-91
1691	4	(3)	(8)	2	2	-	-	-	-	-	6	4	43	1691-92
1692	10	11	4	5	2	1	-	-	5	(0)	4	3	32+	1692-93

Rydal
1931-1970

>5 5 4 2 <1 - - - - <1 <2 3 23

Reproduced from G.Manley, 'Sir Daniel Fleming's
Meteorological Observations at Rydal, 1689-93'
T.C.W.A.A.S., new series, vol.LXXVII (1977),
p.125.

Brackets indicate uncertainties, not likely
to exceed 1-2 days.

summerings or sheilings, but in the winter they were brought down to the meadows to feed on the stubble. Wills and inventories from Cumberland, Westmorland and Northumberland, reveal the central importance of livestock. Thomas Birstead of Crossthwaite parish left, in 1570, 200 sheep, nine cows and calves, two horses and some hay, but no grain and no plough. Seventy per cent of the value of the goods of Lancelot Thirlwall of Thirlwall, consisted of livestock. It would seem, then, that although these upland Border farmers worked a small arable holding, they were mainly preoccupied with livestock and used the proceeds of these to buy grain if the arable holding proved inadequate⁸.

In the lowland areas of the English Borders,⁹ villages were more common, although the hamlet was the most typical form of settlement. There was more arable cultivation than in the upland areas, with greater diversity of crops. Whereas oats and barley were the basic crops in the upland areas, in the lowland region they also grew rye. Christopher Lowther, travelling in 1629 wrote that 'from Leaven to the river Esk, 2 miles, all this space plain very good ground, most corn ground'. Very occasionally, peas and beans were grown, but they were not a common crop in comparison with the south of England. In the lowland areas, poultry were more common than on the higher land and so were swine. However, despite the greater diversity of arable crops, the lowland farmer, like his upland counterpart, was still mostly concerned with livestock. The will of John Dalton of Crosby parish on Eden, is typical of the area: in 1614 he left cattle worth £25 4 shillings, with two mares worth £5; but only £15 worth of corn and hay¹⁰.

In Scotland, the situation was very similar, although in the upland areas the range of cereal crops was even more limited. Often, only bear (primitive barley) and oats were cultivated. The Merse in Berwickshire, however, was one of the most fertile regions in the Borders and in contrast to the rest of the area, here barley, wheat, peas and beans were grown. It was an essentially

arable area. In general, however, oats predominated in the lowland Scottish areas and were the main food crop of Scotland. As on the English side of the Border, however, livestock were of central importance and every rural family would keep at least one dairy cow. Cattle grazing was particularly important in the south-west. Hector Boece, in 1527 described Annandale, Nithsdale and Galloway as a 'store of bestiall' and Bishop Lesley, in 1577, described the same area as abounding in 'nobill pastorall'. Over most of the Scottish Borders sheep were ubiquitous, with Tweeddale especially important in this respect. As on the English side, transhumance was practised in the summer, but in the winter, large scale cattle slaughtering took place; for once the stubble had been eaten, the bleak moors offered little by way of food. Root crops for winter fodder were unknown and any oats that were available were reserved for the horses.¹¹

The Borders, then, although divided by a national boundary were united in agricultural practice. They were also united in the poverty of that agricultural life.

On the English side of the Border, the agricultural population could be divided into four economic types:- (1) the large landholder, who had a number of customary or freehold lands and tenements which were farmed by others, (2) the customary tenant with one tenement and a parcel or two of land which he worked himself, (3) the cottager, with a little plot of land beside his cottage, and (4) the sub-tenant, who rented land from the large landholder. It was this last who bore the brunt of any rack-renting.¹²

Of the other side of the Borders it has been written 'one important characteristic which distinguished rural society in Scotland from that in England was the extent to which the country was owned and controlled by a

limited number of large proprietors'. Certainly the landowners were not numerous, but neither were they homogenous, differing enormously in social prestige and economic power. At the top of the scale were the small number of great families - nobility and aristocracy, who acknowledged the King as their immediate feudal lord. The vast majority of land owners, however, were not noble and were generally referred to as 'lairds'. Some of these held land directly from the Crown, but most as sub-vassals of the nobility. In a few areas, particularly in Galloway and some areas in the Borders, were a group of small independent owners, working the ground by their own and their servants' labour. This group were known as the bonnet-lairds. These were closer in economic status to the large peasant than to the first two categories of owner-occupiers. Lairds and bonnet-lairds usually held their land by feuing. Many of the established landed families feud out their estates in large blocks to augment their estates. Feu-ferme was a form of tenure whereby, through an initial cash payment and an annual feu-duty, the grantee had security of possession in perpetuity, which possession he could pass on to his heirs on condition that the feu charter was renewed by a further payment. Many of the lesser gentry improved their social position substantially, by acquiring land in this way¹³.

Below the class of feuar, no-one had the right to occupy his land permanently and might therefore be classified as peasants. Probably as many as three out of four members of the population could be described as such. Yet these, like the landowners, were ranked according to economic status and land tenure. At the top were the tenants who held the tenancy of a farm directly from the landowner, often by lease for life or for a specific number of years. These were the aristocrats of peasant life and were similar to the customary tenants in England known as copyholders. These employed workers and

even claimed the style of gentlemen. Those employed by the tenants were the lesser orders of the peasant classes - the crofters, cottars and grassmen, who were almost always tenants-at-will. In reality, there was little difference between these people, who were probably a larger class than the tenants. They usually possessed just a hut and yard, with a small amount of arable land and the right to graze a few animals on the moor.

These were, then, in more or less the same position as the English cottagers . 14

Below these levels, in both countries, were the landless labourers and indoor farm servants who received wages, partly in money, partly in kind. These would appear to have been either the families of a poor tenant or junior members of a crofter's, cottager's or cottar's family. In terms of married males, this landless servant class was 'probably rather small'¹⁵.

The English gentry and Scottish lairds lived in substantial houses of stone; many of them, in the early part of the century, were fortified manors, or adjoined to pele towers. As the seventeenth century progressed, with the gradual pacification of the Borders, the defensive nature of the architecture became less important. By the post-Restoration period, the influence of southern English architecture was felt throughout the Borders and the traditional type of manor house became the habitual abode of the gentry and lairds.

The lesser orders of society - the majority of the Border population - were not so fortunate. The Border tenant's house had to be large enough for not only his family, but his cattle and servants. The house was usually built of stone in the manner of a 'long house' where the humans and animals slept under the same roof, although separated by a partition. The living quarters of the house were normally divided into two and called, in Scotland, the 'but' and 'ben'. The 'but' was the communal sleeping apartment of the servants. It also served as dining-room and kitchen. The 'ben' was the private apartment for the tenant and usually of the same dimensions as the 'but'. Here the family slept and entertained their social equals or

superiors - their inferiors were entertained in the 'but'.

Even this was luxury compared with the habitations of the labourers, cottars and cottagers. Christopher Lowther visited a poor thatched house in Langholm, Dumfriesshire, in 1629, the walls being 'one course of stones, another sods of earth; it had a door of wicker rods and the spiders webs hung over our heads as thick as might be; the peat fire burnt in a hearth in the middle of the floor and the smoke found its way out through a hole in the roof'. A description of Border dwellings in the 1680's showed that they had made little improvement in 60 years.

The vulgar houses and what are seen in the villages are low and feeble. Their walls are made of a few stones jumbled together without mortar to cement 'em, on which they set up pieces of wood meeting at the top, ridge-fashion, but so ordered that there is neither sightliness nor strength.... they cover these houses with turf of an inch thick and in the shape of larger tiles which they fasten with wooden pins and renew as often as there is occasion and that is frequently done. 'Tis rare to find chimneys in these places, a small vent in the roof sufficing to convey the smoke away.

Even as late as 1725, a traveller in Eskdale, Cumberland, commented:

Everywhere about us is the most melancholy dreary view I ever beheld, and as the back door of creation; here and there a castellate house by the river, whither at night the cattle are driven for security from borderers: as for the houses of the cottagers, they are mean beyond imagination; made of mud and thatched with turf, without windows, and only one storey: the people almost naked. We returned through Longtown, a market town whose streets are wholly composed of such kind of structure: the piles of turf for firing are generally as large and as handsome as the houses¹⁶.

The Border farmer's poverty stemmed from the smallness of his holding. In England, this was due, in part, to the practice of partible inheritance. As the Border Papers noted of Tynedale and Redesdale, 'if a man have issue ten sons, eight, six, five or four, and sits on a holding of but six shillings rent, every son shall have a piece of his father's holding'. A statute of 23 Elizabeth I described how 'the Inhabitauntes themselves have demynished their owne Strength by devyding ther Howses and Farnes which were

mete only for one arable Householder and Famelye into the occupacion of sondry persons commonlye being the children or other Kinsfolkes'. In Scotland, too, it seems to have been the practice to provide every son with a fragment of land, although in some areas, where there was a strong baron court, a 'stent' might be placed on the number of cottars a husbandman might have working for him, dependant on the size of his farm. In such areas, then, population pressure would lead, not to fragmented holdings (as in other parts of the Borders) but to an increased number of landless labourers. Not all areas in England, however, allowed partible inheritance. Holm Cultram Manor, for example, in 1571, forbade the practice¹⁷. J. Thirsk believes that partible inheritace must once have been the norm in England, but that by the seventeenth century, it had gradually died out in all but the most backward regions¹⁸.

The survey of the royal manors of Harbottle and Wark in 1604 revealed that the average North Tynedale farmer lived barely above subsistence level with only about six or seven acres of arable land and four to six acres of meadow, in individually held closes. In Redesdale, most of the 202 customary tenants held between four and five acres of arable land. The largest holding belonging to a member of the Routledge family on the Borders totalled 18 acres of poor arable and meadow, whereas the smallest was only 5.5 acres. In all, 42 tenants shared 530 acres, an average of 12.6 for each tenant. According to the survey of the Debateable Lands in 1604, 1065 persons held 1219 acres. In all, the Debateable Lands totalled 7403 acres, so if the remainder of this land was pasture, each person, as the average, enjoyed only one acre of arable and six of pasture¹⁹.

Moreover, the arable lands worked by the Borderers yielded poor rewards. It is difficult to work out seed-yield comparisons because of the different measurements of acres and weights in the early modern period. The systematic

TABLE 3.

Seed yields in Cumberland and Westmorland on Sir John Lowthers' Lands, 1598 - 1605

<u>Year</u>	<u>Crops</u>	<u>Yield Ratio</u>
1598-99	Wheat	3:1
	Barley	2.3:1
	Oats	2.2:1
1599-1600	Wheat	5.3:1
	Bigg *	4:1
	Oats	1.9:1
1600-01	Wheat	4.8:1
	Barley	5.3:1
	Oats	1.6:1
1601-02	Wheat	1.8:1
	Bigg	3.1:1
	Oats	3.2:1
1602-03	Wheat	2.5:1
	Bigg	2.8:1
	Oats	3.5:1
1604-05	Wheat	4.1:1
	Bigg	2.1:1
	Oats	2.7:1
<u>Somerset, 1583.</u>	Wheat	8:1
	Barley	6.6:1

* primitive barley

Taken from A.Appleby, Famine in Tudor and Stuart England, p.65

TABLE 4

Crop Yields on the Cassillis Estates, Wigtownshire, 1655-1661

	1655	1656	1657	1658	1659	1660	1661
Balker	-	-	-	-	(8.0)*	(8.0)	2.7
Balzeat	2.4	2.3	2.7	2.2	3.1 (5.0)	-	-
Culcaldie	3.5	-	-	-	-	-	-
Cullopitie	2.1	2.3	2.7	2.7	(6.0)	3.2 (6.0)	2.0 (3.0)
Cults	2.5	2.4	2.4	2.8	3.3 (6.0)	3.0 (2.0)	2.9 (2.0)
Killmirren	-	-	-	-	-	2.1 (5.0)	2.6 (4.0)
Maise	-	2.2	2.3	-	-	-	-
Uchtrelure (Nether)	2.0	1.8	2.2	2.3	2.7 (3.0)	-	-
Uchtrelure (Over)	-	-	2.0	2.4	2.0 (6.0)	-	-

Taken from I. Whyte, Agriculture and Society in Seventeenth Century Scotland, p.74

* Figures in brackets refer to bere (primitive barley), the others to oats.

records kept by the Lowther family in Cumberland and Westmorland, however, provide valuable insight into the seed yields in that area (see Table 3). When these are compared with yields in the southern English counties, for example Somerset and when it is considered that the Lowthers were vigorous land managers, keeping systematic seed records and harvest accounts, it can be appreciated that the average poor Borderer must have had a great struggle to eke an existence from his small arable holding. Table 4 reveals that the crop yields on the Scottish Cassillis Estates in Wigtownshire were little better. Yet although that area was not the most fertile, compared with the higher Border lands, it was certainly not marginal. The Scottish Borderers, then, must also have had a poor existence. Indeed, as A. Appleby has written, 'it is difficult to see how these people could have survived'.²⁰

The comparison between gentry and lairds, husbandmen and farmers can be seen not only in the type of housing and seed yields, but also in diet. The Lowther family ate bread made of wheat, used barley and oats for the servants and strangers, as also for horses and swine. They also malted their barley and oats. The household of Lord William Howard used the grains in a similar manner; feeding beans and peas to riding horses and eating ample amounts of meat, gamebirds, fish, deer and fruit. Scottish lairds, too, ate meat regularly and often fish and poultry. Such was the interest in food of one Border Commissioner in the 1670's that he went so far as to take note of a recipe for Chinese soy sauce.²¹

The average county farmer, however, had to bear with a most monotonous diet, of which oatmeal was the staple. He ate very little meat and poultry only on special occasions. If he lived near the sea, he might supplement his diet with a little fish. Large quantities of milk were consumed, although only a little was made into cheese. The smallness of his holding, his poor seed yields and the lack of diversity of farming in most of the upland regions

of the Borders, made the majority of the Border population reliant upon buying grain to supplement their diet. They were, thus, very vulnerable to grain shortages and the consequent price rises and, as a result, were in a weak position when famine conditions arose.²²

In the seventeenth century, most of the Border population lived off the land and towns were very small indeed. Kendal, for example, the largest town in Cumberland and Westmorland, had only 338 households in 1606. The other 'large' towns of that area, had very small populations by today's standards: Workington in 1563 had 140 families, Whitehaven in 1633 had only nine or ten families. Jedburgh and Dumfries probably had a population of between 2000 and 4000 each, whereas Peebles, in 1570, was able to raise only 170 able-bodied males for a muster. Newcastle was probably the largest town in the Borders, with a population of around 13,000 in the 1660's.²³

Seventeenth century Border towns consisted of large numbers of poor people. Howell calculated that 70 per cent of the population of Newcastle in the 1660's were 'poor', whereas 17 per cent were 'relatively comfortable'. Only 5 per cent of the population were 'prosperous' and a mere one per cent could be classed as 'wealthy'. The Scottish burghs seem to have been more prosperous. According to a recent study of Scottish population, 'in the town we can describe most people as belonging to the merchant class or as tradesmen', and estimated that in Selkirk, one in six of the population was of the merchant class. There were however, large numbers of craftsmen within Selkirk also, especially shoemakers. In times of grain shortage, however, the poor seem to have flocked to all towns in search of food - a fifth of the people who died in Dumfries during the hard years 1617 to 1623, were described as 'extraniers' or 'extraniers paupers'.²⁴

During the course of the century, the Scottish burghs do not seem to have grown in size: Dumfries possibly declined slightly. By comparison, the English Border urban population grew rapidly at the expense of the rural population and industry and commerce within the region grew from negligible beginnings into a thriving part of the economy of the area. It was Sir John Lowther who first established trade patterns between France, Ireland and Whitehaven in Cumberland, dealing with wine, lead, butter, cloth, salt and coal in the 1630's. It was not, however, until after the Interregnum that the business began to boom. Table 5 shows this clearly. By 1685, Sir John Lowther's grandson, also called Sir John, was able to write that

The Port of Whitehaven from a very meane & inconsiderable place, is of late yeares advanced to a Towne of some trade & Commerce by the Industry of the Inhabitants, who from ther ancient Employment of small Barques of the Importation of Cattle and Exportacon of a small quantity of Coales thither, are become owners of 30 or 40 serviceable Vessilles for any other sort of Trade as well as Coales, and for many other places as well as Ireland.

Newcastle, too, grew in size and in industrial stature during the seventeenth century. Whereas there were 400 ships engaged in coastal trade in 1625, this had grown, by the end of the century, to 1,000. The number of keels* on the Tyne grew from 40 in pre-Elizabethan days, to 400 by the end of the seventeenth century. By that time, Newcastle had firmly established itself as the centre of the coal industry in the north, with the collieries on the south bank of the Tyne producing 600,000 tons on the eve of the Civil War.²⁵

Scotland, too, was developing its commerce; acting, not only as a market for imported English goods, but also exporting large numbers of cattle to England through Carlisle. In 1621, for example, 4640 sheep and 2531 cattle were transported to England across the Eden and Esk rivers, but by 1662, the number of Scottish cattle passing through Carlisle had risen to 20,000.

* lighters

TABLE 5.

Exports from Whitehaven, 1672, 1680, 1684.

<u>Year</u>	<u>Tons of coal exported</u>	<u>Tons of iron ore exported</u>
1672	17,992	1020
1680	24,400	925
1684	32,784	1371

Taken from A.Appleby, Famine in Tudor
and Stuart England, p.173

Most of these animals were on their way to Norfolk to be fattened there for the London market. By the Restoration, this trade was so important that Scotland was described as 'little more than a grazing field for England'.²⁶

To the rural Border population in England, in the poverty of their agricultural life, the towns acted as a magnet. Penrith doubled its population in the course of the century, as did Cleator, Egremont and Harrington. Workington grew from 140 households in 1563 to 189 in 1688 and Whitehaven, with only 9 or 10 families in 1633 grew to 268 families in 1685. Kendal had grown, by 1671-3, to 454 households from 338 in 1606. These stand in contrast to the Scottish burghs.²⁷

For those English Borderers who remained in the country, there were slight improvements in their lives. The declining number of customary tenants and manors in both Cumberland and Westmorland meant that some of these tenants that remained could consolidate larger parcels of land; but in general it was the larger landowners that benefitted most. Using improved farming techniques, backed by substantial capital, landowners, such as the Howard family, the Lowthers and the Percys, could take advantage of the more peaceful state of the Borders to improve their lands. By the end of the seventeenth century, there is a diversity in the agriculture of the English Borders, that was lacking before. Inventories reveal pigs, hens, geese, the cultivation of peas, beans and hemp; and an increased number of carts indicates that transport had improved since 1603. The value of the improvements that the landowner made to his lands is reflected in the sums charged for rent. The income of the Grey estates in Northumberland rose from £1,000 before 1603 to £8,000 after 1660. Lord William Howard's receipts from Morpeth town and lordship were £588 in 1620, but rose to £644 in 1635. Yet despite the increased rents that the English Borderer had to pay out, there are indications that his lot improved during the course of the seventeenth century.²⁸

In the 1590's, 1620's and late 1640's, bad harvests and grain shortages had had a disastrous effect upon the population of northern England, because, as shown above, the peasants were unable to supply themselves with grain and had to rely upon buying it out of the money made from livestock. During the course of the century, grain prices in England gradually stabilised and the price of livestock remained strong, which meant that the peasant could concentrate on the livestock rearing to which his lands were most suited. Thus, when the terrible harvests of the 1690's occurred, the massive demographic disruption visible after the earlier famines did not occur. This was indeed a measure of the improved position of the English Borderer.²⁹

The terrible effect of the 1690's harvests on Scotland and especially on the Borders, must be seen as a measure also, of the extent to which the agricultural development of that country had lagged behind that of England. As one historian has written, 'in the course of the seventeenth century, Scottish agriculture had developed, yet clearly insufficiently to avoid a catastrophe of this magnitude'. As a result of the 1690's there was a sudden flourish of writing on agricultural improvement in Scotland. The first published works on Scottish husbandry appeared in the 1690's.³⁰

Yet still, in 1707, the Borders stood as one of the poorest areas of Britain. Buckatsch estimated that in 1693 Cumberland ranked as the poorest of the 39 English counties, Westmorland 38th out of 39, and Northumberland 37th. The Hearth Taxes of the 1660's and 1670's reveal that the towns were increasingly prosperous, as shown by the large number of multiple hearths. Sixty-four per cent of the 2,510 households assessed in Newcastle possessed multiple hearths and 73 per cent of the 454 assessed in Kendal. Yet at the same time, the Hearth Tax returns reveal the large numbers of urban poor.

Forty-one per cent of the Newcastle households were exempt and 47 per cent in Kendal. The Scottish Hearth Tax returns reveal the comparable poverty of the Scottish Borders. In Dumfries parish, for example, out of 604 households named, merely 35 per cent possessed multiple hearths. The rural communities in both countries were extremely poor - for example, of the ten rural communities adjoining Penrith to the north-west, two-thirds of the 411 households were exempt. Dumfriesshire Hearth Tax returns show that Dumfries parish was wealthy compared with the rural parishes. In Mouswald parish, only 10 per cent of the households assessed possessed multiple hearths; in Kirkmahoe, only 21 per cent; in Wauchope, only 21 per cent; and in Kirkmichael parish, only one per cent possessed more than one hearth.³¹

It was possibly as a result of their poverty, that the Borderers had, by 1603, found the need to group together in clans, or surnames. Despite the statistics shown above of the small number of persons per square mile, the Borders were actually over-populated, in the sense that there were too many people trying to subsist off too little fertile land. Population pressure on limited food producing capacity, must have meant that the larger clans were constantly needing more land and it was only by gathering into clans that the weaker surnames could have any hope of survival on their lands. Contemporaries and modern historians are generally agreed, that in order to survive, the Borderers needed to supplement their incomes and, in the absence of industry, or any other means, they turned to stealing. Sir Robert Bowes, writing in 1550 on the state of the frontier between England and Scotland concluded:-

the great occasioun of the disorder... is That there be more inhabitants within either of them [Tynedale and Redesdale] than the saide countrie maye susteyne to live truely for uppon a fyrme of a noble rent There doe inhabite in some place three or fower households soe that they cannot uppon so small fermes without any other craftes live truely but by stealing in England or Scotland. 32

As the environment had driven the Borderers into a life of theft in order to survive, so it encouraged them to continue that life unimpeded. The Borders were isolated - a lengthy journey from London by anyone's standards and although closer to Edinburgh, it could still take several days to travel to the south-west of the country. Those who had to travel to Edinburgh to the High Court of Justiciary frequently found this a wearisome journey. Sir Andrew Agnew of Lochnaw, sheriff of Galloway lamented in 1678, 'for Ten or tuelff days bygan ... we have been at for coming to this place.' The poor roads made travelling very slow and the frequently appalling weather made them treacherous. Sir William Bowes, travelling from Norham Castle into Scotland in 1597 reported 'this journey has been painfull and dangerous to us that travelled by reason of exceeding storm of snow, wind and rain.' In 1684, the Scottish Privy Council received a petition from the inhabitants of Dumfriesshire to build a road across the Lochermoss.

All passangers and travellers coming to and fro. the Borders of Scotland to the weekly mercatts kepted at Dumfries ... are forced by reassoun of ane way through a moss called Lochermosse, which is not passable, but in tyme of ane extraordinary drought in the summer and frost in the winter to ryde tenn mylles about before they can come to Dumfries.

The Border Commissioners' records often state that no meeting could be held because the weather had prevented members travelling to the meeting place.³³

The topography, the weather and the sheer distances involved, then, severely hampered any law enforcement officials who might have wished to impose law and order upon the Borderers. The records of the Border Commissioners show clearly that that body was certainly restrained by the problems of communication in the Border area. In general, the movement of letters either from Cumberland across to Northumberland, or vice versa, took about three days. If, however, as

was often the case, a Commissioner was travelling in the Borders, letters could be delayed for weeks. Letters between the Scottish and English Commissioners took around two weeks to arrive, if they ever arrived at all; several letters seem to have gone astray causing disruption in the planning and holding of courts.³⁴

The task of pacifying the Borders was formidable. Not only were the law enforcers faced with suppressing a pattern of disorder which had been entrenched over generations; they were pitting themselves against the forces of Nature. The wonder is not that they took so long to achieve their ends, but that they ever got there at all.

TABLE 6.

ENGLAND: HIERARCHY OF JUSTICE IN
THE SEVENTEENTH CENTURY

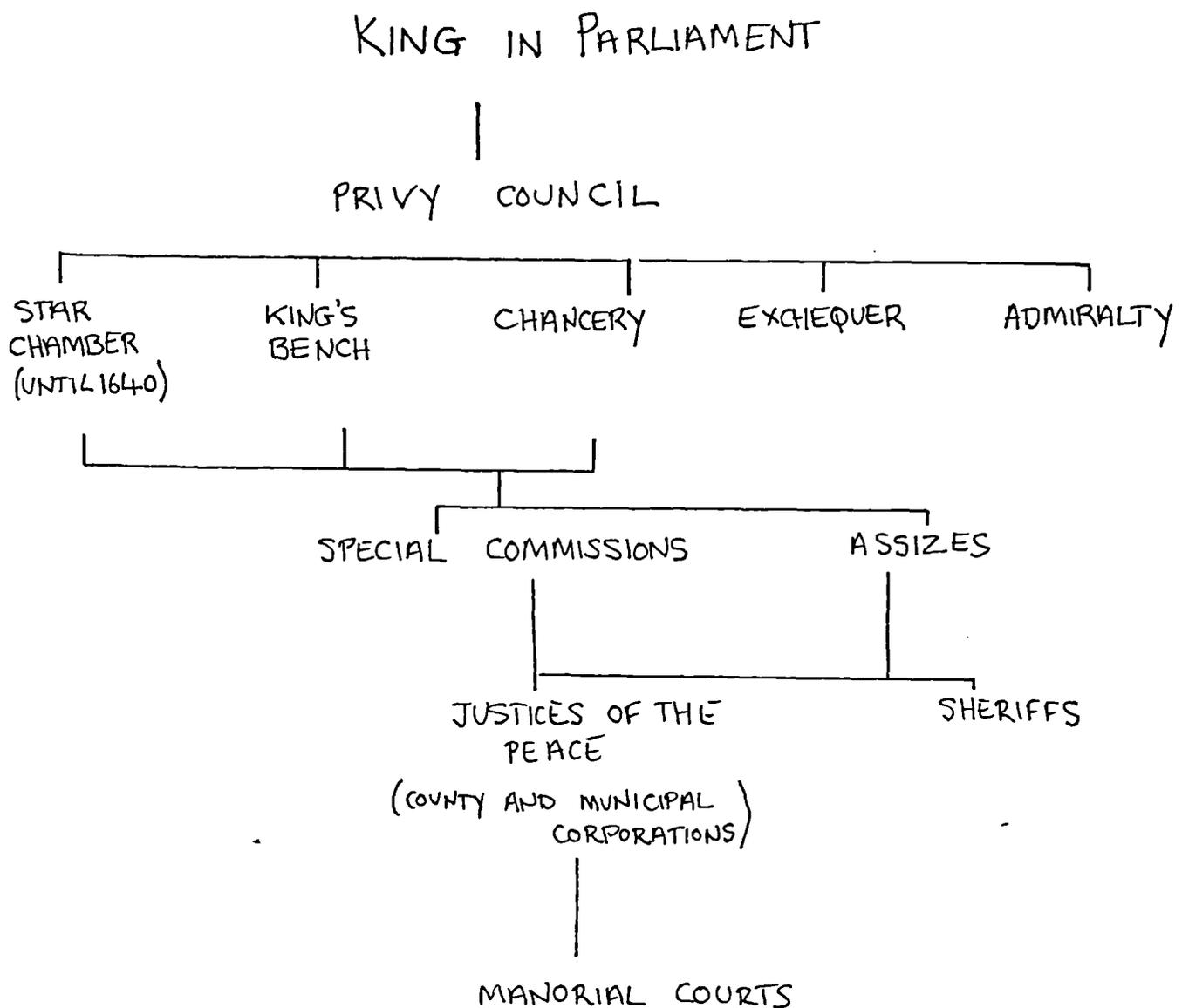
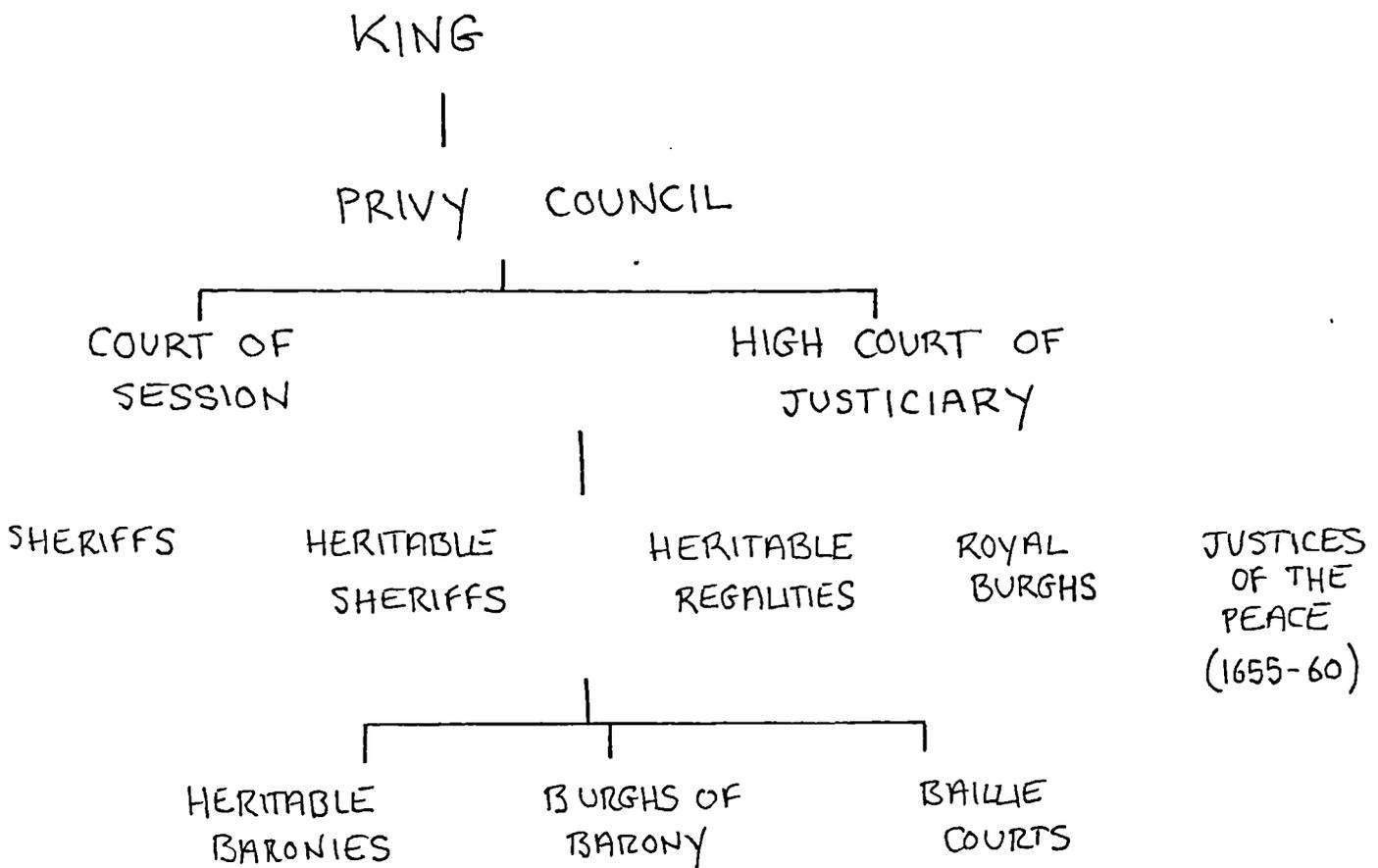


TABLE 7.

SCOTLAND: HIERARCHY OF JUSTICE IN
THE SEVENTEENTH CENTURY



CHAPTER I

The Central Government

'Princes are to be indulgent, nursing fathers to their people; their modest liberties, their sober rights, ought to be precious in their eyes; the branches of their government be for shadow, for habitation, the comfort of life, repose, safe and still under the protection of their sceptres. Subjects on the other side ought with solicitous eyes of jealousy to watch over the prerogatives of a crown; the authority of a king is the keystone which closeth up the arch of order and government, which contains each part in due relation to the whole

(Thomas Lord Viscount Wentworth's speech when he first sat as Lord President of the Council of the North, December 1628)

Wentworth's speech epitomised the seventeenth century concept of government as the 'circle of order'. Government was thought to be a balance between King and people and the implementation of just laws the King's first duty to his subjects. 'The first attribute of sovereignty', wrote Bodin in Republic, 'is to give law to all in general and each in particular.' Thus the highest courts in the land were in the capital. The early modern state regarded the administration of the nation as inextricably linked with law and order.¹

Any study of law and order, then, must include a consideration of the central administrative and judicial machinery. Although London and Edinburgh were a considerable distance from the Borders, they were all part of the same chain of government. The process of law and order was a reciprocal interaction between the central and local courts. The central courts made the laws to be implemented and the local courts referred those who broke the laws to the centre, if necessary, for punishment. Thus, the central courts provide a point of co-ordination for a vast array of local courts.

In England, the law was administered through the Privy Council and its courts and the higher courts of King's Bench, Exchequer, Chancery and Admiralty, then devolved to the localities via the judges of assize and the justices of the peace. Any one of these was merely a link in the same chain - a movement of one could easily affect them all. Despite the decentralised

complex system of Scottish courts, often in private hands (see Table 7), the central government had considerable links with law and order in the localities. The Privy Council was the guardian of political stability and domestic peace, which maintained and often asserted the right to make law and intervene at any level in the judicial structure. Important people sought justice before the Privy Council and these men were often holders of their own jurisdictions. The Court of Session and the High Court of Justiciary, the highest civil and criminal courts in the land, heard cases referred to them from inferior courts.

It is then, important to look at law and order on the Anglo-Scottish Border initially through the eyes of the central government. This is not, however, a detailed study of the history and functions of such institutions. This study is concerned with law and order on the Borders and with the effect of the central institutions on that topic. In consequence of this approach, the records of the central courts have not been subject to minute analysis, but have rather been used to illustrate the general and national context of the developments of law and order on the Borders.

In April 1603, James VI of Scotland set off for London as James I of England, to a new constitution and a new system of government. The monarch reigned in England and may even have ruled, but it was the Privy Council that governed the country. The institution of the Privy Council which greeted James I had made its appearance in that form in August 1540 as a result of Thomas Cromwell's governmental reforms. It was a well defined bureaucratic organisation, with a staff of clerks, ushers and messengers, holding regular meetings and keeping orderly minutes of all but the most secret of its discussions (when, of course, the clerks were excluded).

In 1603, there were as few as 12 members of the Council, but during the course of the century its size was to increase to 20 in 1610, 28 in 1617,

35 in 1623, 40 in 1625 and by 1630, it had reached 42. From the Restoration it continued to become progressively larger. Its members were a mixture of nobility and gentry, who were office holders and always the most important officials in the realm. Thomas Cromwell had excluded judges from the Council and from that time onwards a distinction was maintained between judicial and ordinary administration. Not all the members of the Council were equal in importance and not all were equally zealous in their duties. Thus, the general day-to-day administration was in the hands of a small group of executive ministers. These usually possessed formal titles, but in effect were acting as ministers without portfolio. The main force in this group and therefore in the Council was the principal secretary. Hallam has written of Elizabeth I's reign, that Burghley's letters give the impression that 'England was managed as if it had been the household and estate of a nobleman under a strict and prying steward ... it was a main part of his system to keep alive in the English gentry a persuasion that his eye was upon them.'²

Certainly the Council was concerned with everything that went on in England and was in constant communication with officials and bodies of local government. Local officials were expected to report on the state of affairs in each area and on the activities of their courts. John Crane, for example, wrote to Lord Cecil from Berwick in January 1604 and reported 'the appearance of contrariety in the affections of those that live here'. The activities of local officials were also reported back to the Council. In 1608, for example, Lord William Howard was accused of encouraging recusants in the north and Roger Widdrington of encouraging outlaws. In 1667, Sir Philip Musgrave reported some Cumberland justices for supporting Quakers. The Council could request that the proceedings of certain officials in their courts be sent to them for scrutiny. The Border Commissioners, for example, (See Chapter III)

were required to report their proceedings to the Council every two months at least. If any official or body of justices did not appear to be behaving suitably, the Council rebuked their irregularities in no uncertain terms. It was in such a manner that the Northumberland justices were told, in April 1618, that 'information is given to his Majestie that so little Caire is hade by you that are trusted with the government of those parts ... to the generall prejudice of the peace and quiett of the cuntry.'³

The justices of the peace, more than any other group, were subjected by the Council to a barrage of exhortations, reprimands, and rebukes. In the absence of local government officials, it was the justices of the peace who were the instruments of government policy in the counties and if the Council wished its policies to be implemented, it had to ensure that these officials carried out their duties effectively. To do this, they first had to be au fait with government policy, and the assize judges were used as messengers in this respect by the Council. In the 'charge' delivered to the judges before they set out on circuit, the central government's policies were laid out in the form in which they were to be relayed to the provinces.⁴ The assize judges were then to ensure that the justices carried out the government's wishes.

Once the judges had left a county, however, on the justices alone rested the implementation of the Council's desires and wishes. T. Barnes, in his study of Somerset has shown that government directions might not be followed at local level as closely as the central government might have wished. The chapter on the justices (Chapter V) shows the defects in the system in the north of England, which the assize judges only visited once a year. A great deal of Council correspondence, then, was directed at the northern justices, who were constantly harried to conform with the will of the central government.

A typical example occurred in December 1623, when the Northumberland justices were exhorted by the Council 'to quicken ... to the stricter execution of those laws which you are entrusted with'. The same justices, in October 1637, were told by the Council 'we cannot but much marvell at your neglect' in conforming to government orders. Chapter V shows just how much the government was forced to rely upon these unpaid volunteers for implementing its most fundamental policies.⁵

In theory, the Council had passed its judicial work on to the law courts, but in practice it retained some judicial work connected with the monarch and the state, which could not be passed on to a public court. Nevertheless, it continued to be pestered by petitions and complaints despite frequent protestations that the petitioners should use the relevant court of law. It could, however, act as a kind of tribunal des conflits, taking the role of umpire between courts and jurisdictions. The problems posed by the Border Commissioners present a good example of such a function.

A great debate went on as to where criminals from England, who had committed crimes in Scotland and vice versa, should be tried. James I had declared that a process of remanding should take place, whereby the criminal was tried in the country of his crime. This does not, however, seem to have been strictly adhered to, for clashes between the English and Scottish Commissioners over who had the right to try certain criminals, frequently occurred. The Council was often asked to settle the issue, but the problem was still not resolved even in the 1670's.⁶

The Council maintained a strict control over the findings of juries and could even over-ride the decisions of the court. This was especially the case with pardons, which could be issued much against the wishes of local officials.

In December 1680, for example, the Council issued a warrant for a remission to Robert Elliot of Blackhall, despite protestations from the Border Commissioners.⁷

As the seventeenth century progressed and the Privy Council grew larger, policy making tended to devolve on a smaller group - the 'cabinet Council'. In times of crisis, small committees had tended to decide policies, as in the secret Spanish marriage negotiations in 1621 and 1624 and in the Scottish Committee of 1640; but after the Restoration, committees began to be a regular feature. This led to resentment on the part of the Council as a whole, which forced the King to make several reforms in 1679. As he (or rather the chancellor on his behalf) explained to the Council in April that year, 'the great number of the Council ... made it unfit for the secrecy and dispatch that are necessary in many great affairs'. He had thus been 'forced to use a small number of you in a foreign committee and sometimes the advice of some few of them (upon such occasions) for many years past'. Nevertheless, the development of the 'cabinet Council' was only momentarily stayed and by the reign of James II had become a regular and accepted form of government.⁸

By 1603, the function of the Council as a court, then, had mostly been drawn off into conciliar courts concentrating solely on justice, leaving the Council to deal with administrative matters. In the sixteenth century, the court of the Privy Council had gradually evolved into the court of Star Chamber. In the reign of Henry VII, the Council had started to hold regular meetings in the council chamber at Westminster Palace, known as the Star Chamber, to adjudicate upon petitions and enforce general law and order. The reformed Council under Thomas Cromwell, in 1540, reinforced this division between the Council and so called Star Chamber by appointing two sets of clerks to keep two different sets of records.

In fact, although two entirely separate institutions, they were staffed by the same people, but with different officers attending upon each. The Privy Councillors remained the judges in Star Chamber, although normally the two Chief Justices were summoned to provide legal knowledge. The chancellor presided over Star Chamber, as he did over Chancery and, as the latter was his court of civil jurisdiction, so the former became his court of criminal justice. Despite its affiliation with the Council and the presence of the highest officers in the land, Star Chamber was an ordinary public court of the realm, with regular meetings and fixed rules of procedure.⁹

Its main purpose was to punish breaches of the King's peace by riot, assault, or scandalous words, and it could be used to suppress local risings. Its jurisdiction also covered libel, fraud, forgery and recusancy. Although some of the more spectacular cases were originated by the government, the cases before Star Chamber show that the great majority of plaintiffs were private individuals. Of the 162 cases relating to Cumberland, Westmorland and Northumberland, in James I's reign, in only 16 cases was the plaintiff the government. By far the greatest number of suits brought by private persons were those relating to the miscarriage of justice, either in the form of unjust cases or litigation, or perjury. There are 17 such cases from Northumberland, 14 from Cumberland and 9 from Westmorland - in all, 40, or 36 per cent. The next largest category was that dealing with land disputes, including forcible entry and trespass. There were 29 of these, or 20 per cent. This is in contrast to cases in which the plaintiff was the government, where 4 cases related to land disputes and none to the miscarriage of justice. It is interesting that of the 145 cases brought by private persons, only 17 relate to assault and only 6 to theft (of which 4 were deer stealing). Perhaps this is a reflection of the type of person who carried litigation to this court.¹⁰

TABLE 8.

Persons before Star Chamber in the reign of James I.

		N/umb.	C/umb.	Westm.	Totals	
Aristocracy	plaintiff	2	11	5	18	} 18
	defendant	0	0	0	0	
Gentry *	plaintiff	44	20	7	71	} 143
	defendant	37	20	15	72	
Husbandmen	plaintiff	1	4	1	6	} 7
	defendant	0	1	0	1	
Craftsmen	plaintiff	0	4	0	4	} 5
	defendant	1	0	0	1	
Yeomen	plaintiff	3	4	7	14	} 29
	defendant	4	8	3	15	
Others	plaintiff	0	0	0	0	} 5
	defendant	3	1	1	5	
Unknown	plaintiff	10	5	3	18	} 63
	defendant	19	19	7	45	
Attorney General						
	plaintiff	8	3	5	16	

* Gentry = Esquires, knights, gentlemen, aldermen, mayors and vicars.

Compiled from P.R.O. STA/8

Table 8 shows that the court of Star Chamber was dominated by persons of gentry status and above. This is not really a surprising conclusion. As a civil and criminal court, Star Chamber was ideal for the purposes of the increasingly litigation conscious aristocracy of the seventeenth century. A kind of more sophisticated type of feud could be pursued in the court. J. P. Kenyon has found that many of the individuals engaged in a suit before Star Chamber, were also engaged in parallel litigation in Chancery or Common Pleas and 'sought to strengthen their pleas or simply embarrass their opponents by accusing them, often on the flimsiest evidence' of sundry charges. Indeed, the high percentage of complaints about the miscarriage of justice could also be an indication in the same direction. To take a case to a court in London was an expensive business, both in terms of the time involved in travelling between London and the northern counties, and of the large amount of money that such a journey and the ensuing legal wrangle could incur. Few could afford such a luxury.¹¹

The court could mete out severe punishments, but in the absence of a prison system, all seventeenth century courts were forced to rely upon capital, corporal or pecuniary punishment. Star Chamber was unable to inflict the death penalty and, therefore, had to resort to such practices as cutting off ears - as in the case of William Prynne, who lost his ears twice, in the late 1630's. As such punishments were not unusual in other courts in the seventeenth century, and as the pressure of litigation in this apparently popular court never ceased even in the late 1630's, it is difficult to determine why there was such a clamour for its abolition in 1640. But Star Chamber had, during Charles I's reign, associated itself with the Laudian regime, strengthening and sustaining the ecclesiastical courts, particularly the unpopular court of High Commission. Also, Charles had tended to use Star Chamber to enforce his detested fiscal and social policies; so much so, that in April 1640, John Pym wrote, 'meum et tuum should be disputed there.'¹²

It was the expense of travelling to London, together with the obvious advantage of having an extension of Privy Council authority in the northern counties, which had given rise to the establishing of the Council of the North in 1537. The Council of the North governed the five northern counties and was the supreme executive authority north of the Trent and the supreme court of justice in that area. The Council was charged to hear and determine treasons, murders and felonies and to decide all cases between party and party by bill, witness and execution. There was a President to whom all bills of complaint were to be issued.

The survival of records for the Council of the North is extremely poor (see Notes on Sources Chapter I) but from the few that exist it is clear that the court heard actions covering a wide range of subjects. Civil cases, such as debt, rents, legacies, forgery, embezzling, defacing of bills and fines for not taking up knighthood, were heard alongside criminal actions - felonies, escapes, riots, unlawful assemblies and witchcraft. Also heard were actions dealing with religious issues such as recusancy, clandestine or unlawful marriages and scandalous ministers.¹³

The proceedings in the court began with an exhibition of a bill of complaint and answer by the defendant. The evidence of witnesses could be produced later on affidavit taken before deposition commissioners. A set day would be appointed for the case and it would be argued before the court by counsel. A jury need not be called. Letters of appearance were issued by the Council of the North to coerce the defendant to appear at the court and give his answer to the charges. If he failed to appear, a 'process of attachment' was directed to the sheriff, bailiff or mayor where he lived, so if the defendant still remained contumacious, his lands could be sequestered.

If the case was a difficult one, it could be referred to the assize judges or to Westminster; but according to R. Reid, the court seemed to find it difficult to come to a quick solution in most cases, for lengthy suits were common.¹⁴

Throughout the Tudor period, no commission of oyer and terminer¹⁵, except that delivered to the President of the Council of the North was ever read in the northern counties; not even for the assize judges. R. Reid suggests that after the Council of the Marches was established in 1596 the Council of the North gradually lost ground to the justices of the peace and assize judges. Yet the Crown Office Entry Book of Commissions, issued by the court of Chancery, shows that right up to the abolition of the Council of the North in 1641, the commission of oyer and terminer included the Lord President and members of the Council, except for two occasions in 1603 and 1635. Even the 1617 Border Commission included Edmund, Lord Sheffield, although an act of Star Chamber in 1617 declared that, with regard to the Borders, the commission of oyer and terminer 'shall stand notwithstanding the commission of York, and that to stand notwithstanding this'. Although Star Chamber proclaimed that some of the members of the Council of the North were to sit with the Border Commissioners, there is little evidence that this was done.¹⁶

It is clear, however, that members of the Council of the North sometimes sat with the other justices in the north. An order of Queen Elizabeth dated June 1602, assigning precedence to the Lord President at the assizes, was invoked in June 1633 with regard to the Carlisle assizes. In June 1617, the Cumberland and Northumberland justices of the peace responded with enthusiasm to a suggestion by the King that it might be beneficial if the Lord President kept his lent sitting at Newcastle to hold a gaol delivery there. They

replied that 'the countenance of such a great magistrate would be a great terror to all notorious malefactors'. In April 1618, the Commissioners of Survey for the Borders thanked the King for his care in repressing disorders by means of the Lord President, and requested that he might continue his charge because any failure to execute the law against malefactors would encourage them. However, although such documents show that the northern justices and the members of the Council of the North could sit together in court, the very enthusiasm of those documents for such a sitting indicate that, perhaps, this was not a common occurrence.¹⁷

At least once every year, the Northern Council was supposed to call before it all the justices of the peace within its jurisdiction, 'to inquire and know of them the state of the Countreyes and thinges and matters amisse and meet to be reformed.' Acting upon such information, the Council was 'to give charge to the said Justices for the amendment and reformation of things amisse and for the due and upright execution of Justice and punishment of offenders.' If any justice was found to be remiss, he was to be reported to Star Chamber and hand was to be taken for his appearance before the Privy Council in Star Chamber.¹⁸

There is evidence that the Council of the North also acted on its own in the three northern counties. The Mayor of Newcastle wrote to Secretary Coke in March 1633, telling of a riot of apprentices in the town, and reported that the Council of the North had arrested many of the delinquents. Such an incident, however, perhaps illustrates why the influence of the Council was declining in the three northern counties, for in July 1633, the Council held a court in Newcastle to try to clear up the issue. Yet in September of that year, the Vice President had to report that many delinquents from the riot could not be brought in to answer the charges; he feared that many of them would never

be brought to justice at all. Although the Council's headquarters were in the North, York was still nearly one hundred miles from Carlisle and one hundred and thirty miles from Berwick. It was ninety miles from the border at the closest point. The Council also had an extremely large jurisdiction outside Cumberland, Westmorland and Northumberland. It is little wonder that the justices of the peace, assizes and Border Commissioners gradually usurped its authority in the English Borders. The abolition of the Council of the North can have had little effect on law and order in that area.¹⁹

Operating alongside the courts of the Privy Council, were those of Admiralty, Exchequer, Chancery and King's Bench. Exchequer was essentially a court of revenue and therefore did not have any immediate effect on the criminal history of the Borders. The court of Admiralty was concerned with offences relating to the sea, ships and shipping, and although that included piracy, it is largely outside the range of this study.²⁰ But the court of Chancery had, by the seventeenth century developed as its main function the issue of process to arrest felons fled into unknown places and to try cases of robbery committed by subjects upon alien friends. It is the former which was of importance to the Borders, for it was through Chancery that special commissions - against piracy, for sewers, of gaol delivery and of oyer and terminer, for the assize justices, and others, were issued. It is through these commissions that the personnel of those courts can be identified.²¹

The prime interest of King's Bench was matters directly concerning the King's peace or the King. In the Middle Ages the authority of the justices of oyer and terminer and gaol delivery ceased whenever King's Bench came into the county, for King's Bench was the sovereign justice of oyer and terminer, gaol delivery, coroner or conservator of the peace of the realm, in addition to having a wide civil jurisdiction. After about 1400, King's Bench ceased to perambulate and this function passed to the assizes.

King's Bench took cognizance of those suits in which the King had any sort of interest. The court had two sides, each separately organised, one for criminal, the other for civil suits. The court of Common Pleas was the civil court, which dealt with matters concerning land, debts, detinue and accounts. Trespass was to be shared with the criminal side. Very few cases were actually started in King's Bench, most were transferred from inferior courts by writ of certiorari. It did, however, have the power to authorise itinerant justices in the counties to try the cases in the counties in which the crimes were committed. Most of the cases heard at nisi prius, as this process was called, in the seventeenth century consisted of causes stemming from injury to real or personal property. Actions on the case, that is, injury resulting from an action such as trespass, formed the largest group, followed by actual trespass, or ejection. Indeed, the trials by nisi prius were exceedingly popular in this period. The records of nisi prius proceedings are within the documents of the assizes, before whom they were held, and further discussion of such proceedings will be dealt with in the chapter on the assizes. Of cases actually removed to London, it is difficult to estimate how widespread the practice was. J. S. Cockburn estimates that 'seldom were more than three or four writs a year sent down to remove cases from assizes,' and T. G. Barnes reached the same conclusion about the removal of quarter session cases from Somerset. Holdsworth too, concedes that 'very probably it was at no period very common for ordinary criminal cases to be tried before it [King's Bench].'²²

Table 9 shows the number of cases removed a certiorari from the Cumberland and Northumberland quarter session courts after the Restoration. These indicate a steady, although not considerable stream of litigation from the counties to King's Bench. It is not easy to see why some cases were referred. Some were clearly difficult or important enough to merit the attention of the superior

TABLE 9

Cases removed from Northumberland and Cumberland quarter sessions
by writ of certiorari 1668 - 1700

	1668-9	1670-4	1675-9	1680-4	1685-9	1690-4	1695-00
Cumberland	2	9	30	38	1	22	14
				1682-4	1685-7		
Northumberland				24	43		

Compiled from C.R.O. QS/I/1, QS/I/2
N.R.O. QS/I/12 - QS/I/28

court. But for most, the reason is obscure, since they do not differ essentially from cases which were judged by the local court. The most popular reasons given for removing cases to Westminster were insufficiency in the indictment (inaccuracy) or error in process. Many also sought to buy pardon for their offences.

Certainly an appeal to London could delay punishment, for King's Bench was riddled with inefficiency. The court suffered heavy contumacy figures and the average case progressed through seven terms to its conclusion. M. Blatcher discovered that the number of cases at the end of each term, in the sixteenth century, was kept artificially low in the court records by the fact that about a sixth of all the processes enrolled disappeared from the next and subsequent plea rolls, without having reached a hearing. These cases were left in 'legal limbo' and might or might not be recalled to the court later.²³

Moreover, the ultimate fate which awaited the offender depended less upon his crime than on the amount of money he could afford to pay out. If he could afford the price of a pardon, he received one. If not, he was hanged. During the sixteenth century, the government gradually lost confidence in the ability of King's Bench to deal efficiently with matters of public concern and cases of riot and rout were increasingly directed to Star Chamber and regional courts. The trial of treasons fell to the task of special commissions. The abolition of Star Chamber had a profound effect on the business of King's Bench and arrested its decline. Certainly the number of cases from the northern counties would suggest that King's Bench was far from moribund.²⁴

1603 was a milestone in Scottish history which was felt more strongly by the central government than any other level of the judicial system. Not only

did the King leave Scotland that year, but he took with him a host of the most important people in the realm. So much so, that government found it hard, at first, to function at all. James had presumed that some form of governmental union would rapidly follow on his accession to the English throne and therefore saw no reason to make elaborate preparations for the government of Scotland in his absence. The most that was needed, he thought, was an efficient postal service which he took pains to establish.²⁵

By 1605, the union negotiations had fallen through and a system of government for Scotland by an absentee monarch, had to be formulated. By 1605, however, the Scottish predicament had been somewhat eased. Many of the officials who went with James either returned to Scotland, or else resigned their position in the Scottish government. One notable courtier, however, George Home of Spott (later Earl of Dunbar) kept his appointments as master of the wardrobe and member of the English Privy Council as well as his membership of the Scottish Privy Council. He travelled from London to Edinburgh and back at least once a year. Because he had the King's confidence and was a frequent visitor to Edinburgh, he became the lynch pin of the Scottish central government until his death in 1611 and, more than anyone else, helped to formulate the pattern of the administration of Scotland from England in the seventeenth century.²⁶

In the absence of the King, it was the Scottish Privy Council which assumed responsibility for the administration of Scotland; making almost all the crucial decisions. It really had little choice in the matter - James VI and I was never keen to over-exert himself. As Viscount Fenton observed, 'You know how it troubles him when matters are in question and don't fall, at such a time, to free himself from pain and trouble.' In other words, the King did not wish to be bothered with difficult problems such as the administration of

Scotland. Indeed, this seems to have been the attitude of the sovereigns in London throughout the century, who preferred their richer, southern kingdom. (The annual revenue of Scotland was £17,000, whereas England's was £600,000). The Scots were well aware of this and watched with increasing alarm the growing Anglicanisation of their monarchs. As a Scot wrote in 1608, 'If the Queen had a son in England, he would be King whereby Scotsman should not domineer any more in this land.' In the event their fears were well founded - James VI only visited Scotland once again in 1617 and his son only once (in 1633) before 'the troubles'.²⁷

In the documents, the meetings of the Estates of Scotland (or Parliament) and the meetings of a few selected advisers of the monarch (the Council) in the middle ages, cannot clearly be differentiated. Although by the fifteenth century it was accepted that some issues were too delicate to be discussed in open meetings, the clear distinction between Parliament and the Privy Council which was evident in England, had yet to emerge in Scotland. 'The line of demarcation', writes Donaldson, 'between the legislative powers of Council and those of Parliament, is hard to find.' Nor did the Scottish Parliament enjoy such an elevated position as its English counterpart. 'It must be stressed that the concept of exclusive sovereignty, concentrated in parliamentary institutions, was quite alien to pre-1707 Scotland.' Thus, the Privy Council is found passing, for example, an act against feuds in January 1604, acts to prevent the spreading of plague in the Borders in June 1637, and in June 1623, an act for the relief of the poor in time of dearth. The Council saw itself as the heir to the old medieval Council of Scotland, which had been the only legislative, judicial and administrative body. Although the differentiation of institutions which had comprised the old Curia Regis was completed in the

mid-sixteenth century, 'the differentiation of function in legislation, administration and judicature was never quite complete as long as Scotland was an independent nation.' It was the Council, therefore, that was the main organ of Scottish government. 'All in all,' writes Donaldson, 'the Council, in almost permanent session with usually two meetings weekly, was far more important than Parliament in the life of the nation.'²⁸

Although the Council had apparently supreme power in Scotland in matters of legislation and policy making, it continued to receive directions and instructions from the King on every matter of importance. Thus royal letters comprise a fair proportion of the documents of the Council. James VI and I, particularly, bombarded the Council with letters, exhorting, chastising, instructing and, 'occasionally, congratulating them on all sorts of issues. In December 1616, for example, he wrote complaining about the increase of crime on the Borders and concluded that such an increase must be due to a 'defect of something to be done by you'.²⁹

Although the King's wishes were followed, the Council played a large part in helping to formulate Scottish policies. It frequently called upon nobles and lairds to meet in Edinburgh, in order to ascertain local information. In November 1606, for example, 23 lairds from the Borders were summoned before the Council to give advice. In July 1617, the Border lairds were again summoned and appeared requesting that 'ane letter be written to the King's Majestie acquainting his Heynes with the petition and desyre of the landislords', that a General Band, which was in use in Scotland (whereby the landlord acted as cautioner for the good behaviour of his tenants) be extended to the English side of the Border. Such appeals helped to gain the co-operation of the powerful landowners with the Council and formed a vital link between the King

and his subjects. Such links were especially important in a nation where many jurisdictions were held by virtue of heredity and in which the royal word had no real authority unless the nobles were prepared to implement it at local level. The crucial function of the Council in gaining the co-operation and confidence of powerful landowners in enforcing the central government's policies, was further reinforced by the fact that many of the Privy Councillors and those it summoned for advice, were holders of great private jurisdictions.³⁰

The Privy Council and the King well understood that the alienation of magnates from the crown or struggles for power between the magnates could lead to outbreaks of lawlessness. The feud was the prime cause of outbreaks of violence, especially in the Borders. Often provoked by the slaughter or wounding of a member of one family, powerful, but turbulent landlords would, with the support of their tenants, seek revenge from the culprit and his family by violent means, rather than through the law courts. In September 1615, the feuding Pringle of Buckholm and Alexander Stewart of Fawlishope, drew up their tenants in battle array in Tynniss, 'disdaneing to follow oute thair actiouns be the ordinair course of law and justice and preferring a lawles, insolent and violent forme of proceiding to his Majesteis obedyence and peace of the cuntrie.'³¹

Feuds between such powerful landowners could seriously disrupt the peace of an area and be a great barrier to the establishment of law and order. James VI and I had passed acts against feuds before ascending to the English throne, but his campaign against them was given renewed vigour after 1603. In January 1604, the Council endorsed an act against feuds and thereafter was extremely active in taking assurances and summoning both parties before it. Meetings were organised between nominated representatives of each party at feud to try to reconcile the persons concerned. A typical example of the Council's attempts to assert its influence over feuds occurred in the Maxwell-Johnstone feud.

On the 21st March 1605, William Maxwell, brother to the Laird of Conhaith, on the direction of William Maxwell, brother to the Laird of Hereis, surprised and took the house of Newbie. The Council immediately ordered that no Maxwell or Johnstone should go within eight miles of Newbie, that the inhabitants of the house, and of all the surrounding houses, were to be removed and the keys of Newbie given to the Council. On 30th May, Maxwell and Johnstone were formally reconciled before the Council.³² (For the moment at least),

So successful was James VI and I's policy against feuds between powerful families, that by the time his son came to the throne, such feuds were virtually a thing of the past. The crucial role of the Council in striving for constant co-operation of the great men of the land and persuading them that their interests lay with the central government, was not latterly appreciated by the government in London. The Scottish Privy Council was abolished in 1708, an act which greatly contributed towards the success of the Jacobite risings of 1715 and 1745.

The Council's primary concern was the administration of the kingdom of Scotland and it controlled and governed the nation along roughly the same lines as its English counterpart; issuing instructions and dealing with important events as they occurred in the life of the nation. Any event which could create a potential disruption of law and order was dealt with promptly by the Council. For example, when the Borders were infested with a terrible plague in June 1637, the Council rapidly took control of the situation. All commerce and trade with the Borders was prohibited, except such as had been expressly permitted by the sheriffs and justices of the peace, by an act of the Privy Council. Further acts and proclamations were made concerning the forestalling of victual in that area during the plague. Special commissioners were appointed for preventing the spread of the plague and the full authority of the Council was given to their recommendations.³³

Unlike the English Council, the Scottish Council was also an important court and dealt with a great deal of routine legal business. Its jurisdiction ranged from civil matters, such as debt, to murder, theft, and non-conformity in religion. Table 10 shows the range of cases tried before the Council. It also emphasises the importance of the Council in dealing with civil matters. Most of the individuals concerned in debt actions were men of some importance. Nearly all the persons involved in the cases of riot and assault were likewise of some social standing, as were those in cases of violence, deforcement or fire-raising. There were few cases of theft or murder. Most of these would go before the High Court of Justiciary for trial (see below). Theft and murder were not usually (at least openly) the domain of the landed classes and as 'the ordinary criminal was most unlikely to be cited' before the Council, this is reflected in the figures.³⁴

Inferior courts could deal with persons of lower status, but when the sheriff or baron was the offender, the higher courts in Edinburgh had to be used in order to obtain satisfaction. In the face of the severe sentences pronounced by the High Court of Justiciary, settlement was sought before the Privy Council which had the reputation for more lenient punishments, with greater opportunities for kinship bonds to exert an influence over the members.

With the exception of 1631, the number of riots, assaults and violent crimes decreased from 1620 until the end of the century. This is a reflection of the state of affairs in the Borders, and especially of the government's policies against feuds. It seems possible that the figures of riot, assault and violent crimes pursued before the Council are a manifestation of James VI and I's policy against feuds.

CASES FROM THE BORDERS DECIDED BEFORE THE SCOTTISH PRIVY COUNCIL 1605-78

TABLE 10.

NAME ↓	1605-6	07-8	09-10	11-12	13-14	15-16	17-18	19-20	21-22	23-24	25-26	27-28	29-30	31-32	33-34	35-36	37-38	39	42-43	44-45	46-47	61-62	63-64	65-66	67-68	69-70	71-72	73-74	75-76	77-78	← YEAR
RIOT	9	13	11	11		6	4	5	15	1	4	2		2	2	2	1		3				1	2	1	1	2	1	1		
ASSAULT	4	25	14	16	6	25	29	29	22	8	3	12	15	14	6	6	4		2	1		1	2	1		1	1	1	2		
VIOLENT CRIMES	8	8	10	9	5	8	5	17	10	5	4	8	7	4	4	4	6	1	4	2		3	2	1	1	1	1	1	4		
THEFT	3	3	2	3				1				1	2			1									1	1			2		
CIVIL ACTIONS	12	70	51	59	27	35	54	43	9	1		5	8	14	7	4	4		9				2	5					1	1	
DISPOSSESSING OF LAND		5	6	3		5		4	1					1					1	2		4	2	1		1			1		
RELIGIOUS NON- CONFORMITY		1										4			3								2	1		1	2	1	2		
REBELLION AND RESIST REBELS	1	4	3					1		2				1															1		
MISGARRIAGE OF JUSTICE	14	24	13	6	3	8	5	2	2	4		8	2	3	5	2	2		3				1	3	3		1	1	1	3	
WITCHCRAFT					1								2	1					2												
MURDER/ SLAUGHTER	1	4	4	2	1	1									1	1	1														
PENAL STATUTES	44			1				3	2			3	2	1	1	2															

An important duty of the Council was to hear petitions, of which there are many in each volume of the Register. Often, it would appear that the Council is being regarded as a court of appeal against biased judgements of inferior courts. For example, Isobell Falconer of Aymouth was convicted by the sheriff depute of Berwickshire of witchcraft. She claimed that she was innocent and that the assize was biased, upon which the Council discharged her of her crime. Francis and John Johnston of Earshag claimed that the Earl of Queensberry, sheriff of Dumfriesshire, had burnt their houses and goods and unjustly imprisoned them in Dumfries. The Council ordered that they be brought to Edinburgh and the case re-examined. Other petitioners were people who had been imprisoned for long periods and who requested either a trial, or to be set at liberty. For example, Edie Henderson, in March 1634, who petitioned that he had been in Dumfries gaol for a year. Petitions were also received for summons to be issued against certain individuals for such crimes as they had committed against the petitioners. For example, Walter, Earl of Buccleugh, requested a summons against James Rennick and nine others, in Galalaw, for illegally cutting his trees, in May 1628.³⁵

The Register of the Council shows that cautions were frequently taken whereby parties engaged themselves to fulfill certain obligations, such as to appear in court or to refrain from certain activities. The General Band was such an obligation, whereby Border landlords undertook caution for the good behaviour of their tenants. Such bands were undertaken in September 1617 by the lairds of Bonjedburgh, Cavers, Wamphray and Dinwoodie, and an order was given for the renewal of such a band of caution in April 1631. On a smaller scale, the Register is full of cautions such as the one from Thomas Wilson, burgess of Edinburgh, to John Charteris of Amisfield, in May 1604, undertaking to pay his taxes to the sheriff of Dumfries. Other such cautions were taken

whereby one party undertook not to harm the other. These, known as lawburrows, were frequently undertaken between parties involved in lawsuits out of which contentions might arise.³⁶

Table 10 shows clearly the disruption of the Council's proceedings during the Bishops' Wars (1638-40) from which it never really recovered before Scotland was conquered by the Cromwellian army in 1651. An act of 31st January 1652 abolished in Scotland all jurisdictions existing in the name of King Charles, including the Privy Council. Eight commissioners, appointed in October 1651, took over its functions. A Council of State, appointed in September 1655, took over from these commissioners and continued the government of Scotland until the Restoration, when the Privy Council, by the Act Rescissory of 1661, resumed control. Although the Council retained its judicial function, Table 10 shows that the demand for litigation, at least from the Border area, had declined. The Register of the restored Council seems to be taken up with administrative, rather than judicial matters, suggesting that either the pattern of crime in the Borders had suddenly changed, or that the increasing importance of the High Court of Justiciary after the Restoration was making its impact on the judicial business of the Council. Other court records would suggest a combination of the two.³⁷

Certainly, the judicial functions of the Privy Council had always overlapped with those of the High Court of Justiciary in criminal cases.³⁸ In medieval Scotland, the criminal and civil jurisdiction of the King's Justiciar had been divided between several Justices, although their number had been reduced by Robert the Bruce to two - one for each side of the Forth. This division lasted until the sixteenth century, when, in 1514, Colin, third Earl of Argyll, received a commission as Lord Justice General. That family held the office until 1628, when Archibald, eighth Earl, resigned the office to the King. In 1524,

Parliament enacted that the justice and his depute should remain in Edinburgh to hear criminal actions. Thus began the centralisation of criminal justice in Edinburgh. After the Scottish defeat at Dunbar and Worcester, the Commonwealth government abolished all jurisdictions that did not exist by virtue of Parliament, the High Court suffered the same fate as the Privy Council. After June 1652, four Englishmen and three Scotsmen were appointed as Commissioners of Justice in Scotland, although only the English were, at first, allowed to judge criminal cases. The High Court was restored in 1660. Much of the work was done by deutes but in 1663 the Lord Justice Clerk began presiding, a change which was confirmed in 1672 when the office of Justice Depute was abolished and the High Court of Justiciary established, on which sat the Lord Justice General, the Lord Justice Clerk and five Lords of Session.³⁹

The jurisdiction of the Court of Justiciary covered, not only the 'four pleas of the crown' - murder, rape, arson and robbery - but also treason and rebellion, bestiality, witchcraft and adultery. During the seventeenth century, the court was increasingly concerned with business within the jurisdiction of the sheriff courts, which was brought before the Court of Justiciary. Indeed, the sheriff acted as the executive officer of the Justiciar, proclaiming his courts forty days beforehand and summoning all those who owed court service to his justice ayre. It was the sheriff's duty to report and indict all persons chargeable with crimes falling within the Justiciar's jurisdiction. These indictments were to be delivered to the Justice Clerk, and were known as porteous rolls.⁴⁰

The Justice Court did not usually act as a court of first instance. Most of the cases had previously been heard by inferior courts and so it was the more serious or troublesome cases which were passed to the High Court. As a result, the business of that court was largely concerned with the more serious crimes, often those which could not be tried by lesser courts. The sheriff courts⁴¹

for example, who were only able to try thieves when they had been caught 'with the fang', or murderers when the act had been committed in hot blood, would as a matter of course, transfer all premeditated murders and more devious theft cases to the Court of Justiciary. There were however, a large number of minor offences and moral charges brought before the court and long lists of adulterers occur in all the porteous rolls. The majority of offences were initiated by private individuals, despite an act of 1587 which conferred title on the Advocate to pursue all slaughters or other 'odious crimes, although the parties be silent or wald utherwayis privilie agree'. In practice, however, private prosecution remained the normal way of initiating criminal proceedings where a private injury was involved. The King's Advocate pursued alone mainly cases such as treason and rebellion.⁴²

From those porteous rolls sent in from the sheriffs, indictments were drawn up and the sheriff was then responsible for summoning the persons concerned to the Justice Court for trial. A large number of cases, however, never reached the trial stage. It was extremely difficult to get people to Edinburgh and there were many adjournments because of non-attendance of parties, witnesses, or assizors. Witnesses, in particular, seem to have begrudged making the journey. In January 1678, the Court received a petition from some witnesses from Galloway who requested expenses 'not only for Ten or tuelff days bygan which we have been att for comeing to this place [Edinburgh] bot lykewayis daly in time cumeing dureing our aboade heare.' Sir Andrew Agnew of Lochnaw, hereditary sheriff of Galloway, was summoned to give an account of his shire, but petitioned that he might be allowed to refrain from coming to the Court because he was 'living at a verie great distance above ane hundreth myles distant from this place.' The Court granted his petition. The long lists of absent witnesses may reveal that many more considered the journey too arduous. These lists, however, show equally that absent witnesses could be fined very heavily.⁴³

In a private prosecution, the pursuer was responsible for summoning all witnesses and even the assizors in his case to the court. Forty-five assizors were usually summoned before the High Court and from these a group of 15 were chosen to sit on the case. The assizors were called from the locality of the offender and summoned to decide a particular case. The same method was used in public prosecutions. When there was not sufficient evidence for a trial, the diet was deserted, or abandoned. In November 1669, for example, the diet was deserted against Edward Johnston of Earshag and his sons, for the alleged slaughter of a chapman by the name of Beattie.⁴⁴

Occasionally cases were referred to an inferior court; as Arthur Irving, his wife and three sons, all cattle thieves were referred to the Stewart of Kirkcudbright for trial and punishment. This was always the case if the accused could provide a decret from another court, or if the party was repledged. A typical case of repledging occurred in November 1643, when George Gladstone of Edgarston, who was accused of theft before the High Court, was repledged to the regality of Hawick. The holder of a jurisdiction was entitled to repledge, or remove the trial of a criminal charge from the court of trial to his own court, where the accused was subject to his jurisdiction as tenant or indweller and where the franchise court was empowered by charter to try that particular type of case. The right to repledge from the Court of Justiciary was restricted to cases in which the holder of the jurisdiction had anticipated either the apprehension, or citation of the accused. When the accused was cited, or apprehended first by the Justice Court, repledging by an inferior court was out of the question. The only consolation to the repledging court, in such circumstances, was that it had the right to sit in the Justice Court at the trial and to share in the fine.⁴⁵

Because of the serious nature of many of the crimes, the actions in the Justice Court seem to end almost invariably in harsh sentences. For political offences, the penalty was usually to find caution or to be imprisoned, except for armed rebellion or treason, which were punished by death, or in a few lucky

cases, by transportation. William Laurie of Blaikwood, was found guilty of being active in the 1679 rebellion, and was ordered to be beheaded. For other serious crimes, the penalty was also death or transportation. For example, nine witches were convicted in September 1678 and were burnt, a further four were to be strangled; Jean Crawford, a murderer, was to be hanged as was Alexander Agnew, a blasphemer. Alexander Martin, Commissary clerk of Lauder, was condemned to death for falsehood, oppression and malversing in his office. Conviction, however, was not automatic, and acquittals, although rare, were not unheard of. Adam Newall of Barskeoch and three others, were accused, in January 1684, of murdering Robert McClellan of Barscob. In March, they were all acquitted. James Mein in Laidlawsheill was excused the crime of rebellion (albeit because he was on his deathbed!)⁴⁶

Occasionally, remissions were granted for capital offences, usually by commuting the sentence to a fine. Andrew Dicke, for example, had his capital sentence for theft commuted to 1800 marks. For minor cases, such as assault, the penalty was usually a heavy fine, such as that imposed on William Burne in 1678, for assaulting Robert Burnes in Peebles. He was fined 500 marks.⁴⁷

It can be seen that in its jurisdiction, the Court of Justiciary overlapped that of the Privy Council. As Donaldson has written, 'It is not easy to see why certain cases came to the council and not to the ... court of justiciary.' As the Council regarded the Court of Session as an extension of itself in civil matters, so it regarded the High Court of Justiciary in criminal affairs. The Council had the right to transfer cases from other courts to itself by letters of precognition. This process was an inquiry by the Council into the facts of a criminal charge initiated by the party accused and conducted before the Council with considerably less formality than at a trial. There are numerous entries relating the granting of letters of precognition in the early years of the seventeenth century.

For a precognition was considered appropriate when persons of social consequence were involved in the crimes, such as noblemen or heads of surnames, where to remit the case to the ordinary Justice Court might aggravate a feud. It was also considered appropriate when the circumstances of the crime were such that mitigation of the penalty was necessary. In this respect, letters of precognition were especially popular, for the Council adopted a less formal attitude than the High Court of Justiciary and it was well known that outcome could be influenced by kinship and other pressures on the members. Indeed letters of precognition were condemned by Sir George McKenzie of Rosehaugh, Lord Advocate after the Restoration, on the basis that, of the many persons who applied to the Council for such letters, he had never known one who received a suitable punishment. The Council was particularly adept at removing cases out of the High Court of Justiciary by warrant of precognition. In November 1636, for example, the trial of John Rutherford, baillie of Jedburgh, John Rutherford, notary in Jedburgh and two other baillies, who were accused of the slaughter of Janet Henderson whilst she was a prisoner in their custody, was stopped by the Council in order that they might carry out their own investigations into the case. In some cases, the Lord Advocate actually obtained the permission of the Council before prosecuting men of influence and substance, and it was normal practice for a special warrant of the Council to be procured in cases of treason.⁴⁹

The business of the High Court of Justiciary, however, was not confined to Edinburgh. The court at Edinburgh was insufficient for the needs of the whole country and at intervals during the sixteenth and seventeenth centuries, attempts were made to revive the medieval justice ayres (see Chapter II). With the exception of the 1650's, these attempts were unsuccessful in establishing regular ayres. On account of the infrequency and uncertainty of these, the Council took to issuing special commissions, or writs to individuals, usually men who were holders of their own jurisdictions, for the apprehension or trial

of certain named criminals. In September 1613, for example, a commission was issued to William Douglas of Cavers, to try one George Douglas for cattle theft. Such commissions were an important part of the Council's work and between 1603 and 1691 there were 143 commissions for trial and 50 for apprehension issued to lairds or burgh magistrates in the Borders.⁵⁰

In addition, general commissions were issued to named individuals to try or apprehend all who committed a specified crime, such as that to the Earl of Dunbar, in May 1610, to try all those who killed blackfish and salmon in the Tweed, Teviot, or Whitton rivers, during certain times of the year. A similar commission was issued in January 1680, to ascertain what heritors had been involved in the Bothwell Bridge rebellion of 1679, in Merse, Teviotdale and Dumfries. In times of particular unrest, the Council could appoint, by commission, an extended committee of the Privy Council to sit in a certain area, for the suppressing of the disorders. Such a committee was appointed in January 1678, for the west of Scotland, to suppress religious disaffection and unrest in Lanark, Ayr, Renfrew and Kirkcudbright 'in that same manner as if our Privy Council were all there personally present.' All subjects were ordered to obey them 'in the same way and manner as they are oblidge and doe now obey our Privy Council which is settled and usually sits here at Edinburgh.' The most important and long-lasting of such commissions was the commission of justiciary for the Middle Shires, issued in 1605, and continuing until 1685, which held special courts, in the manner of ayres within the Borders (see Chapter III).⁵¹

CHAPTER II

Assizes and Justice Ayres

That justice may every year be derived to the people in their several countries, for their great ease and benefit, the King doth assign his justices and barons of his courts at Westminster to take assizes in every county in his realm except Middlesex where his courts of record do sit, and where his courts for his county palatines be held.

The assizes hold a unique position in the history of England. For the majority of the population, the assizes were the principal criminal courts in the realm, although they could also hear civil cases. Furthermore, the assize judges held a crucial position in the political and administrative machinery of the realm, being the major link between central and local government. The regular visits of the assize judges and their key role in law and order contrasted strongly with the Scottish justice ayre, whose visits throughout the period in question (with the exception of the years 1652 to 1659) were essentially irregular and erratic.¹

Attempts had been made to revive the Scottish medieval justice ayres or circuit courts in 1525 and 1526 and again in 1567, but these had apparently come to nothing. In 1587, it was proposed that two justices should be appointed by the justice general, for each quarter of the country, to hold bi-annual circuits and deal with offences ... great enough to come before the central courts in Edinburgh. This again, would appear to have been stillborn. In the 1620's, Charles I appointed eight senators as itinerant justices, two of whom were responsible for visiting each quarter of the country. Andrew, Master of Jedburgh and Mr. Thomas Henderson of Chesters, senator of the College of Justice, were commissioned in June 1628, to hold circuit courts of justiciary at Jedburgh, for the shire of Roxburgh and at Dumfries, for that shire with Kirkcudbright and Annandale. Sheriffs, lords of regality and the Commissioners of the Borders were ordered to sit and concur with the judges.²

It would appear that a circuit court was held at least in Dumfries, as an exemption was granted to James Johnston of that ilk from appearing at the justice court there in December 1628, on account of an old feud with 'Dumfries and his men'. In August 1630, the Council received a letter from the Justice-depute in Dumfries, informing them of the many criminals in gaol. He was ordered to hold courts there in concurrence with the Border Commissioners. There is evidence that justice courts were held in Jedburgh and Dumfries in March 1643, probably under similar conditions.³

No justice ayre was held on a regular basis until the Cromwellian period. The breakdown of law and order during the Civil War was very evident to the conquerors of Scotland and they sought to reimpose order through the justice ayre. In autumn 1652, circuits were established over Scotland, but it was decided that criminals from Linlithgow, Haddington, Berwickshire, Roxburghshire, Selkirkshire and Jedburgh should be presented at Edinburgh. For the Borderers, this rather negated the advantage of a justice ayre, and in fact the sheriffs of all Border shires except Berwickshire failed to attend or present any delinquents. It was not until 1655, when the military situation had stabilised, that another attempt was made to hold circuit courts in Scotland and not until 1656 that the judges toured the southern circuit.⁴

In contrast with earlier attempts these courts were most successful and from that time until the Restoration were held regularly each spring and summer. The southern circuit, from Glasgow to Ayr, Dumfries and then Jedburgh (or Kelso) lasted just under a month and was always conducted by English judges. The type of cases before the justice ayre are shown in Table 13, which reveals the concentration of the courts on the prosecution of adulterers, thieves, murderers and papists. In other words, the same type of cases which dominated the High Court records.

SCOTTISH JUSTICE AYRES IN THE SEVENTEENTH CENTURY

<u>Place</u>	<u>Date</u>	<u>Documentation</u>
Dumfries	12th-18th March 1643	S.R.O. JC 27/3
Jedburgh	9th April 1643	S.R.O. JC 27/3
Edinburgh	1652	S.R.O. JC 27/4
Dumfries	13th-15th May 1656	S.R.O. JC 27/3
Jedburgh	20th May 1656	S.R.O. JC 27/3, GD/123/192
Dumfries	1657	
Jedburgh	6th May 1657	S.R.O. JC 27/4, GD/123/192
Dumfries	9th-10th April 1658	S.R.O. JC 10/2
Kelso	14th April 1658	S.R.O. JC 10/2, GD/123/192
Dumfries	2nd-5th April 1659	S.R.O. JC 10/2
Jedburgh	7th April 1659	S.R.O. JC 10/2, GD/123/192
Dumfries	12th May 1671	S.R.O. JC 10/3
Jedburgh	20th-25th May 1671	S.R.O. JC 10/3
Jedburgh	15th September 1679	S.R.O. JC 10/4
Dumfries	May 1683	
Jedburgh	11th May 1683	S.R.O. JC 26/62, JC 10/4

The English conquerors of Scotland had ordered that Scottish law be brought in line with English law, as much as Scots law would allow and it was as a result of this qualification that the cases before the justice ayre did not assume an identical pattern to those before the assizes in England. Thus, despite the English judges, there was a strong element of continuity between the business of the new justice ayres and those held before 1650 and the High Court. One of the major differences was the introduction of convocation and riot cases before both the reconstituted High Court and the justice ayres. Nor did the procedure differ from that used before the High Court.⁵ The sheriffs of each county acted as the courts' executive officers, summoning the relevant people to the courts and assuming the responsibility for their safe arrival. Those accused who failed to appear were denounced fugitive and those who failed to pursue the relevant criminals were liable to a heavy fine.⁶

As the justice ayres dealt with the most serious cases, they could impose heavy penalties. Witches suffered death by strangulation and burning; thieves and murderers could be hanged or banished. Table 14 shows the penalties imposed before the courts of the 1650's together with those of the justice ayres in 1671. Out of the post-Restoration justice ayres, 1671 had the most complete punishments recorded, but even so there are 99 out of 187 cases which remain unknown. This high proportion, 53 per cent, seriously distorts the figures and makes any comparisons with the 1650's (where only 7 per cent remain unknown) subject to much qualification. For the 1650's courts it can be seen that only 11 per cent of those accused were absolved, either absolutely or by the diet being deserted against them, while 50 per cent were found guilty. Of those that were found guilty, 12 per cent could expect to die. Most adulterers were fined and just as most of the offences before the court were adultery, so most of those found guilty were fined. Poor people usually paid £1 sterling, but landed offenders, like Robert Scott of Howpaislot, could be required to pay as much as £50 sterling.⁷

TABLE 13

CASES BEFORE SCOTTISH JUSTICE AYRES IN THE SEVENTEENTH CENTURY

CRIME	DUMFRIES MARCH 1643		EDINBURGH 1652		DUMFRIES MAY 1656		JEDBURGH MAY 1656		DUMFRIES APRIL 1658		KELSO APRIL 1658		DUMFRIES APRIL 1659		JEDBURGH MAY 1659		DUMFRIES MAY 1671		JEDBURGH MAY 1671		JEDBURGH SEPTEMBER 1679		TOTAL
MURDER/ SLAUGHTER	8				5		11		2	4		3	1	10	7	3						51	
THEFT	16	4			3		9		4	6		3	1	5	7	4						62	
WITCHCRAFT		1							3			11		2	8	6						31	
RAPE									1													1	
ADULTERY	2	22			157		54		5	3		2	2	28	15	52						322	
INCEST					1		5		2					2								11	
BESTIALITY					1		1			1			1									4	
MUTILATION					1					1		1		1		4						8	
RIOT					2				2	3		6		2								15	
DEFORCEMENT					4		1															5	
FALSIFYING									4			1			3							8	
GAOL BREAK															1	2						3	
REBELLION																549						549	
RESIST OF REIGES																17						17	
NOT ATTENDING THE HOST																15						15	
CONVENTICLES														29	54	28						111	
DISOBEDIENCE MARRIAGE														3		1						1	
USURY *		2			1		18															24	
PARISTRY					37		12															49	
MAVERISING IN OFFICE														4	2							6	
MISCELLANEOUS		3			4									2	2							11	
UNKNOWN		2							3			1										6	
Total	26	34	196	111	25	19	25	5	88	99	682	1310											

* ALL REFERRED TO CIVIL

VERDICTS IMPOSED BY THE SCOTTISH JUSTICE AYRES, 1656, 1658, 1659, 1671

TABLE 14.

GUILTY	DUMFRIES MAY 1656	JEDBURGH MAY 1656	WELSO APRIL 1658	DUMFRIES APRIL 1658	JEDBURGH APRIL 1659	DUMFRIES APRIL 1659	JEDBURGH MAY 1671	DUMFRIES MAY 1671
	HANGED	2	3	1	1	1		2
BURNT	1		1	2	1	9		
BANISHED		3			1			
FINED	95	48	4	8	2			2
UNKNOWN	4	1		2			11	16
NOT GUILTY								
ABSOLVED	8	7	1	1		2	4	4
DIET DESERTED	9		6	4		4	29	5
MISCELLANEOUS								
CAUTIONED	37	10						
REFERRED TO ANOTHER COURT	6	16	1	1		2		3
CONTINUED	23	11	3	4		5	8	12
DIED		4	1					
UNKNOWN	11	8	1	2		3	34	57
TOTAL	196	111	19	25	5	25	88	99

COMPILED FROM

- S.R.O. JC 10/2
- JC 10/3
- JC 10/4
- JC 27/3.
- 90/23/192

THERE WAS INSUFFICIENT DOCUMENTATION FOR ANALYSIS OF THE 1657 CASES.

In contrast with the earlier and later periods, there were no cases repledged from the justice ayres because of the abolition of heritable jurisdictions.⁸ Seven per cent of the cases before the court however, were referred for trial or punishment to local courts, such as those of the sheriff, justices of the peace, burghs and even the kirk session. In April 1658, for example, the justice ayre at Kelso remitted James Robson, accused of sheep stealing, to the justices of the peace for trial; and in April 1659, the issue between Janet Lowrie and John Smith was remitted to the provost of Dumfries to trial. Those accused of sexual offences were usually obliged to satisfy their own kirk session in addition to sustaining punishment from the justice ayre. This was normal practice outside the 1650's also. All cases of usury seem to have been automatically referred to a civil court.⁹

Twelve per cent of the cases were continued to a later court, sometimes in Edinburgh and at other times to the justice ayre the following year. Four cases from the Dumfries ayre in April 1658 (Allan Gill, James Weir, James Murray and James Greir) were heard again the following year.¹⁰

The willingness of the Cromwellian justice ayres to use the existing local courts must have helped to make the system a success. On the one hand, the frequent visits of the justice ayre meant that the local courts were supervised on a regular basis. By referring cases to these courts, the justice ayre acknowledged the importance of those courts whose authority and judgements were thus reinforced by the superior court. Thus, the once diverse local courts were drawn closer together and through the justice ayre, were drawn closer to the judicial, political and administrative centre in Edinburgh. On the other hand, as shown above, the Cromwellian justice ayres followed an established and traditional Scottish pattern which the local courts immediately recognised and found easy to work with. This was crucial to the effectiveness of the justice ayre for, as later chapters will show, these courts had an important role in the judicial process.

There were, however, two vital differences between the ayres of the 1650's and those outside that period. Firstly, the regularity of their visits was totally new in the seventeenth century. Secondly, the judges were nearly always Englishmen outside the Scottish political system. The traditional justice ayres had always been administered by persons who might have a powerful vested interest in the decision of lawsuits - such as noblemen and landowners; so for the ayres to be conducted by persons whose only interest was law and order, must have improved the quality of the justice meted out by those courts. In these respects, during the 1650's the efficient and effective system of the assizes in England was emulated in Scotland. When estimating the success of the Cromwellian justice ayres, however, it should be borne in mind that during the period, there was a ratio of one soldier to one hundred Scotsmen. Such strict military supervision must have greatly facilitated the success of the justice ayres.¹¹

The first justice ayre of the Restoration was held in 1671, followed by ayres in 1679 and 1683. The underlying purpose of these courts can be seen clearly in the court profiles in Table 13. In accordance with the traditional types of justice ayre, there were a large number of adultery cases and a fair proportion of theft and murder cases. But in 1671, the courts were dominated by actions against those who attended conventicles - a feature of many courts during this period of mounting religious disaffection. Fuelled by religious discontent, the Bothwell Bridge rebellion took place in June 1679, and the justice ayre in September that year was a direct response. This is clearly reflected in the cases before the court, where 549 persons were prosecuted for taking part in the rebellion, 17 for resetting rebels, and 15 for not attending the King's host - the military force raised from the freeholders of the shires to suppress such uprisings. Without the cases of religion and rebellion, however, the court profiles of the ayres reveal that they followed the traditional pattern.

The ayre held in 1683 was again a response to the political and religious situation brought about by the Rye House plot, although the porteous rolls reveal that the courts were still trying to clear up cases from the 1679 rebellion. The Test Act was administered at the ayre courts and those who did not take it were indicted before the court.¹²

The 1683 justice ayre was the last one to be held in Scotland during the seventeenth century - indeed, before 1708.

Despite the fact that the ayre actually went into the shires themselves to hear cases, the absentee rate still seems to have been very high. At the Jedburgh court in May 1656, for example, 65 persons who had been charged to appear by the sheriffs failed to do so and were denounced as fugitives; whereas at the Dumfries court that month 246 failed to appear. At the 1671, 1679 and 1683 courts, hundreds also were denounced fugitive for their contumacy. These high figures would seem to indicate that the mechanism for ensuring that those who were accused actually attended the courts, was not as efficient as it might have been. Moreover, as most of the fugitives were adulterers, it would suggest that the problem was not one of tracking down nomadic thieves, but simply of non co-ordination at the parish level. Taking into account the usual efficiency of the kirk session in rooting out such moral offenders and in co-operating with the High Court in order that a civil punishment might be imposed upon them, it would seem that it was the fugitives themselves who did not hold the justice ayre in particularly high esteem or awe.¹³

An essentially erratic occurrence, it must have been difficult for the justice ayre to instil into the population the sense of awe that exuded from the English assizes. If a person failed to appear at one ayre, it could be years before he or she would be asked to appear again and by that time the offence would probably have been forgotten. Even if the person was summoned to Edinburgh, the High Court could do little about those who were persistently

absent. Regularity was the key to efficiency, as can be seen in the lists of fugitives from the justice ayres of 1658. From the Dumfries court, there were no fugitives from Kirkcudbright, and only five from Wigton. At the Kelso court that year, there were no fugitives from Berwickshire, Peeblesshire or Selkirkshire and only two from Roxburghshire. The 1658 ayres were the third series in succession and must have started to make considerable headway with law and order.¹⁴ It was, moreover, the third year in which Cromwellian justices of the peace had been established in Scotland, with jurisdiction over moral offences. The justices attended the ayres and sat with the judges and thus formed an important link in the chain of central justice, itinerant justice and the parishes.¹⁵

During the 1650's, the English conquerors of Scotland tried to emulate the English system of itinerant justice in that country. Given time, they may well have achieved a similar situation; but in a few years, the Scottish ayres could not reach the heights of importance, power, influence and comprehensiveness enjoyed by the assizes in England.

Superficially, it would appear that the seventeenth-century assizes were the direct descendants of the medieval justice ayre, in that the ayre, as a group of judges, visited the nation in 'circuits'. However, in the twelfth century, the ayre had not been the sole group of itinerant justices. Other groups acting under more limited commissions than the ayres were authorised to visit the shires in between the ayres' visits. The necessity to deliver felons from gaol had at first been entrusted to the ayres, but as such visits became increasingly infrequent, groups of local knights were appointed to deliver particular gaols or, in certain cases, all gaols in a specific county. From the mid-twelfth century onwards then, the duties performed by the ayre, including the trial of civil cases, were usually taken over by panels of local gentlemen and knights,

numbering about four. Later, professional justices from the central courts started to infiltrate and eventually more or less took over such panels. In 1273, professional justices were first appointed to conduct assizes in groups of counties and to hear some criminal cases. The whole system was reorganised in 1292, when the 'local knight system' was totally abandoned and commissions issued to panels drawn from professional judges, royal servants and the more influential local knights. In 1328 and 1330, statutes regrouped the assize system into six circuits: Home, Midland, Norfolk, Oxford, Western and Northern.

As a result of this complex development, the assize judges commission by the seventeenth century, was divided into three parts, all of which were issued out of Chancery upon fiat from the Lord Keeper or Chancellor. First was the commission of 'oyer and terminer' which enabled the judges literally to 'hear and determine' all felonies, misdemeanours and treasons. This was directed to the two professional judges, who alone were of the quorum and the leading justices of the peace in each county on the circuit. Secondly, the judges were authorised to hear civil actions by virtue of the commission of nisi prius from one of the three Westminster common law courts. Thirdly, the commission of gaol delivery empowered the named commissioners to deliver the county gaols, either by trial or proclamation. From the mid-thirteenth century onwards, it had been the intention of the central authorities to limit the determination of felonies to the professionals and efforts were made to discourage justices of the peace from delivering gaols under their general peace commission. Yet even in the seventeenth century, the assize judges had failed to secure a monopoly of provincial gaol deliveries.¹⁶

Lambarde and Smith writing at the end of the sixteenth century showed that the situation was very ambiguous - so much so that Cockburn has written 'the law governing gaol delivery was by this time [1595] confused and contradictory.' For although the assize judges were in general delivering the gaols, there is evidence that justices of the peace and civil corporations were also delivering

them.¹⁷ In the north of England the situation was very complex. Unlike the rest of England, the assize judges only visited the three northern counties once a year and so felons could have languished in gaol for up to 12 months. Thus non-professional gaol delivery commissions were issued to justices of the peace and other nominated officers, as part of a special commission of oyer and terminer for the Borders.¹⁸ These Border Commissioners, although acting under the same type of commission as the assize judges, could operate independently of the assizes and hold their own courts, and deliver gaols throughout the year, in addition to attending the assizes.

A general commission of oyer and terminer was also issued to the Council of the North. Although legal members controlled the Council's judicial business and important or difficult points of law were referred to the judges at Westminster or on circuit, the Council could hold nisi prius sessions and deliver gaols in the absence of the circuit judges. This position was deeply resented by the assize judges and gave rise to complaints by Archbishop Hutton and Baron Savile and to the dispute over precedence between Serjeant Yelverton and the Council of the North.¹⁹

Like the Council of the North, the assize judges were supervised by Star Chamber. It was in Star Chamber that the 'charge' or pre-circuit instructions were delivered to the judges. Such charges were, in time, repeated to the assize courts in the various locations throughout the realm. These charges underline the clear political function of the assize judges, for they suggested to the judges the policies of the central government and how they were to make the King's will felt in the counties. In the assize courts would be gathered all the influential and wealthy people in each county. As Sir John Davis stated at York in 1620, 'when I speake to yow I conceave that I speake to the whole countye of Yorke for yow represent the whole bodye of this whole countye.' Thus,

as the 'four rivers of paradise' going out to 'water the whole kingdom', the judges of the assize circuits were in an extraordinarily good position to make the King's wishes known in the counties and to relay information back to the Privy Council and the King. The Kings themselves, were well aware of the value of their assize judges as a weapon of propaganda.²⁰

J. Cockburn has shown that particularly under James I and Charles I, pressure was brought to bear on the judiciary to carry out the enforcement of the royal prerogative. James I regarded the common law with respect, for in his coronation oath he had sworn to uphold it, but he also assumed the law was open to the interpretation of the King and the royal judges beholden to enforce it. The King's revision of the constitutional position of his judiciary led to the dismissal of Coke in November 1616, for Coke, as an assize judge had refused to enforce the prerogative at the expense of the common law. Under Charles I, the judiciary were expected to enforce Archbishop Laud's high church policies and the King's schemes for arbitrary taxation. The strength of feeling which emerged in the Long Parliament (and in England as a whole) in 1640 against the King's policies, together with the harsh condemnation of the judiciary, was in many ways, a measure of the efficiency of the assize judges in conveying and in implementing royal policies. Indeed, in August 1641, the Commons acknowledged the unique propaganda value of the assizes when they decided that the impeached judges, although able to sit at Westminster, were forbidden to ride circuit.²¹

The ensuing Civil War meant the interruption of assizes in many areas. The Crown Office Entry Book shows that no commissions were issued for the Northern Circuit between January 1642 and December 1644. Following the King's execution in January 1649, six judges refused to accept office and thereafter the necessity of rallying support for and confidence in the Cromwellian government dominated assize proceedings. For the summer assizes of 1649, all judges were required to take the oath of loyalty to the Rump Parliament before going on circuit. At the

Restoration little change took place in either the personnel or the position of the judiciary and the assize judges were expected to enforce such acts against conventicles, quakers and seditious assemblies according to central government charges.²²

The political function of the assizes was two-way. Not only were the judges the King's mouthpiece in the provinces, they were also to 'carry the two glasses or mirrors of state, For it is your duty on these your visitations to represent to the people the graces and care of the King and again upon your return to present to the King the distastes and griefs of the people.' On their circuits the judges were expected to collect local gossip and political feelings - either through informal conversations or through the more formal private interrogations of local magistrates and gentry. It would, however, seem that the 'mirror of state' was somewhat one sided; with the King, Council and judges pre-occupied with their own concerns rather than with those of the majority of the population.²³

Assize judges have often been associated with the appointing of justices of the peace, for it was at the assizes where new justices took their oaths of office. In the seventeenth century, in fact, the appointment of justices was the duty of the Chancellor who acted upon the advice of the Lords Lieutenant of the counties and of leading magnates in the area. The assize judges, however, could play an important part in the dismissal of justices of the peace, for the justices were directly under their supervision and it was their duty to report negligent and slothful justices to the central authorities.²⁴

The decision as to which judges should ride which circuit lay with the judges themselves. Normally two judges rode each circuit and the selection of circuit was made in order of superiority; the Chief Justices of the King's Bench and Common Pleas and the Chief Baron of the Exchequer had the first choice. Nine judges were made available from these three courts together, although in the period 1604 to 1614 an extra judge was added to each of the two superior courts.

Theoretically the choice of circuit was a free decision, although subject to royal confirmation. A judge, however, was not allowed to ride a circuit which embraced his residence or native county, although special permission could be obtained for a relaxation of this rule by a patent of non obstante.²⁵

The judge's choice of circuit was usually governed by the question of profitability and comfort. In both these respects, the Northern Circuit came at the bottom of the list and so was rarely chosen by a chief judge. It was normally left to the junior judges to suffer the intense physical discomforts of the long wet journey north. Roger North, who rode the Northern Circuit in 1676 described the 'hideous road along by the Tyne' by which the judge was forced to travel from Newcastle to Carlisle, which, with 'many and sharp turnings and perpetual precipices' meant that it was 'for a coach, not sustained by main force, impassible [and] his lordship was forced to take horse and ride most part of the way to Hexham.'²⁶ The annual salary for judges was a meagre £20 in 1611 and had only risen to £23 6 shillings in the 1630's. Most of the profit, then, came from expenses. These expenses were often not necessary because the judges were entertained lavishly by the knights and gentry in the counties. Indeed, the Long Parliament abolished the practice of allowances and gave a fixed salary of £1,000 to include such expenses, but the earlier practice was resumed after the Restoration.²⁷

After choosing their circuits, the judges received the Star Chamber charge. The use of the charge as a political weapon has been discussed above, but apart from its political significance, the charge exhorted the judges to maintain law and order, supervise local officials, to enforce religious practice and the poor laws. Written instructions from the King could be received instead of a charge, which was the case occasionally in the early seventeenth century. After the Civil War and Interregnum when the charge had fallen into disuse, it was

never revived. The places and times of the circuit courts were then decided and the sheriffs of each shire informed and expected to make the necessary arrangements for the jurors and gaol calendars.²⁸

Throughout most of England two circuits a year were held, usually in February or March and July and August.²⁹ The courts were held in the county town or another important town in each shire. On the Northern Circuit, courts were held in the summer at York, moving to Durham, Newcastle, Carlisle, Appleby and ending at Lancaster. Very occasionally, a summer court was held at Hull. On the winter circuit however, the judges did not visit Durham, Northumberland, Cumberland or Westmorland, so the English Border counties only experienced one visit each year. The length of each circuit was variable. Oxford was the longest, taking an average of 28 days in summer and 33 in winter. The Northern Circuit was the shortest, with only seven days for the brief winter visit and 16 days for the summer.³⁰

Upon entering a county, the judges were met by the sheriff and the county gentry who then conveyed them to the town in which they were to conduct their courts. The courts began in the morning and the first to be called were those who had been bound by the justices of the peace to prosecute at the assizes. Acting upon these prosecutions, the bills of indictment were then drawn up by the clerk of assize. Prosecutors and witnesses swore on oath that they were telling the truth and their names were written on the back of the indictment together with the information 'jur. in cur.' standing for juratum in curia or sworn in court.³¹

The assize judges were empowered to hear treasons, felonies and misdemeanours. Most of the treasons that the judges had to deal with, however, took the form of drunken ravings and careless gossip. Thomas Allison of Loweswater was brought before the judges for saying in September 1662 'the King is a Rogue and a Bastard and a Traytor And ere itt be long I will make him hopp headlesse as that Traytor his father did.'³²

Felonies then, were the most important cases before the assize judges.³³ During Elizabeth I's reign there had been a concerted effort on behalf of the central government to effect a gradual differentiation between cases heard by the justices of the peace and those heard by the assizes. Ideally, the justices of the peace were supposed to deal with the lesser felonies and misdemeanours. Most of these were statutory and all were non-capital. Grand larceny, that is theft of goods over the value of 12 pence, was supposedly reserved to the assize judges whilst petty larceny could be freely judged by the justices of the peace. In 1590, Chief Justice Wray arranged for the reconsideration and refinement of the old commission of the peace and a new clause was inserted which restricted the justices of the peace to the trial and judgement in difficult cases only when an assize judge was present. In many counties, however, this casus difficultatis clause merely regularised what had probably been the established practice. Lambard writing in 1610, asserted that the justices of the peace 'are not nowadays much occupied' with the trial of felonies and certainly, in Somerset virtually all felonies except larceny were remitted to the assizes. In the Borders, however, the situation would appear to have been rather different, at least in the early part of the seventeenth century. The court profiles of the assizes and the quarter sessions in this period reveal no difference between the two types of courts with regard to the cases tried there. Both were concerned to a great extent with the theft of livestock and as late as 1629 and 1630 all the thefts recorded at the quarter sessions were grand larceny. By the Restoration, when the next series of quarter session documents begins, the large number of thefts valued at 11 pence would seem to indicate that the casus difficultatis clause was now in operation and indeed, there is a visible difference in the type of cases coming before the two courts. Moreover, referrals from the quarter sessions to the assizes became more common.³⁴

In his book, 'The Country Justice', Michael Dalton advised justices of the peace to try 'petty larcenies and small felonies' because it seemed unreasonable to keep prisoners in gaol for a long time until the next assizes. This must

have been a most difficult problem in the north where the judges only visited annually. The situation was further complicated by the continuing trial of petty larcenies and misdemeanours by the assizes. Cockburn found that trial juries in both the quarter sessions and the assizes consistently undervalued stolen goods, with the result that 'any attempt to distribute larcenies on the basis of a pre-trial valuation must have been largely meaningless.' He concluded that the incidence of petty and grand larceny was so erratic as 'to suggest that the justices may have adopted a common sense course by sending many thieves and indeed minor offenders for trial at whichever came first, quarter sessions or assizes.' This was certainly the stated practice of the Border Commissioners in the early years of the century and it seems most likely that the same was true of the assizes and quarter sessions. The court profiles of the assize courts show that misdemeanours after the Restoration were an important part of assize business, so it would not be unreasonable to assume that such offenders were still referred to the most convenient court.³⁵

The court profiles show that there were three main categories of indictments before the assizes. By far the greatest number of criminal indictments were for larceny, both petty and grand. For the three northern counties between 1660 and 1700, this constituted 25 per cent of all surviving indictments. Cockburn found that over England as a whole, approximately 70 per cent of all criminal indictments at assizes were for larceny and allied offences, rising to 90 per cent in heavily populated shires. He found this figure to be more or less consistent throughout the period 1558 to 1714. The early seventeenth-century Border assize records show that the percentage of larceny at the assizes was an average of 73 per cent, but could be as high as 90 per cent (as in 1608). This figure is more in keeping with the traditional view of the Borders as a lawless place and the post-Restoration figure stands in stark contrast, not only to the early part of the century, but also apparently to the rest of England.³⁶

NUMBER OF PERSONS INDICTED BEFORE THE SUMMER ASSIZES AT NEWCASTLE TABLE
1602, 1604, 1605, 1606, 1608, 1616.

crime ↓	1602	1604	1605	1606	1608	1616	total
THEFT	18	26	26	4	24	42	140
LIVESTOCK							
OTHER	2	3	2	3	3	2	15
MURDER/ SLAUGHTER	10	5	5			7	27
ASSAULT	17		9				26
DETAINMENT /RESCUE	1					5	6
ARSON		6			2		8
MISCELLANEOUS					1		1
total	48	40	42	7	30	56	223

COMPILED FROM
 N.R.O. QS I/1
 VETERAN
 JUDICIANEY

INDICTMENTS FROM CUMBERLAND BEFORE THE NORTHERN CIRCUIT ASSIZES 1660-92

	1660	61	62	63	64	65	66	67	68	69	70	71	72	73	74	75	76	77	78	79	80	81	82	83	84	85	86	87	88	89	90	91	92	TOTAL	
THEFT					2	10	9	17	29	9	13	2	26	9	42	23	25		12	2	4			15	3	1	9		1		2	2	11	27	
LIVESTOCK																																			
THEFT OTHER				3	4	6	2	7	20	3	4		8	3	9	16		1	7	4	1	1		7	5	1	1	3	2		3	19	3	14	
MURDER / SLAGHTER				1		1		3	5	1	1		1	4				2	4	1	1						5							31	
ASSAULT					15	3	15	5	17	8	4		16		4	7	7	7	8	1		5	1	11	1		3	12						152	
LITIGATION									1				4	1						8				1										15	
RAPPE																			1															2	
SEDITION																						2													4
REBELLIOUS ASSEMBLY																																			4
REBELLIOUS ASSEMBLY																																			12
CLOSED BANK																																			12
STATUTE OF ARTICLES																																			27
PEACE STATUTES																																			19
DEFAMATION																																			22
PETTY LARCENY																																			30
FORGERY																																			43
DISSEMINATION																																			54
MARRIAGES																																			4
OFFENCES																																			4
OBSTRUCTION																																			24
OBSTRUCTION																																			34
RESCUE																																			9
HIGHWAYS / BRIDGES																																			15
MISCELLANEOUS																																			15
TOTAL																																			903
1660-92																																			370
OVERALL TOTAL																																			127

TABLE 19.

NUMBER OF PRISONERS DELIVERED FROM THE GAOL
AT NEWCASTLE BY THE ASSIZE JUDGES, SUMMER 1628 AND 1629

	1628	1629	TOTAL
THEFT LIVESTOCK	13	24	37
THEFT OTHER	2	4	6
MURDER/ MANSLAUGHTER	9	2	11
RELIGIOUS DISSENT	4	4	8
OTHER	1	1	2
TOTAL	29	35	64

COMPILED FROM
 DURHAM UNIVERSITY LIBRARY, MICKLETON
 AND SPEARMAN MSS., 9/1 SHERIFF
 BOOK OF THOMAS SWINBURNE.

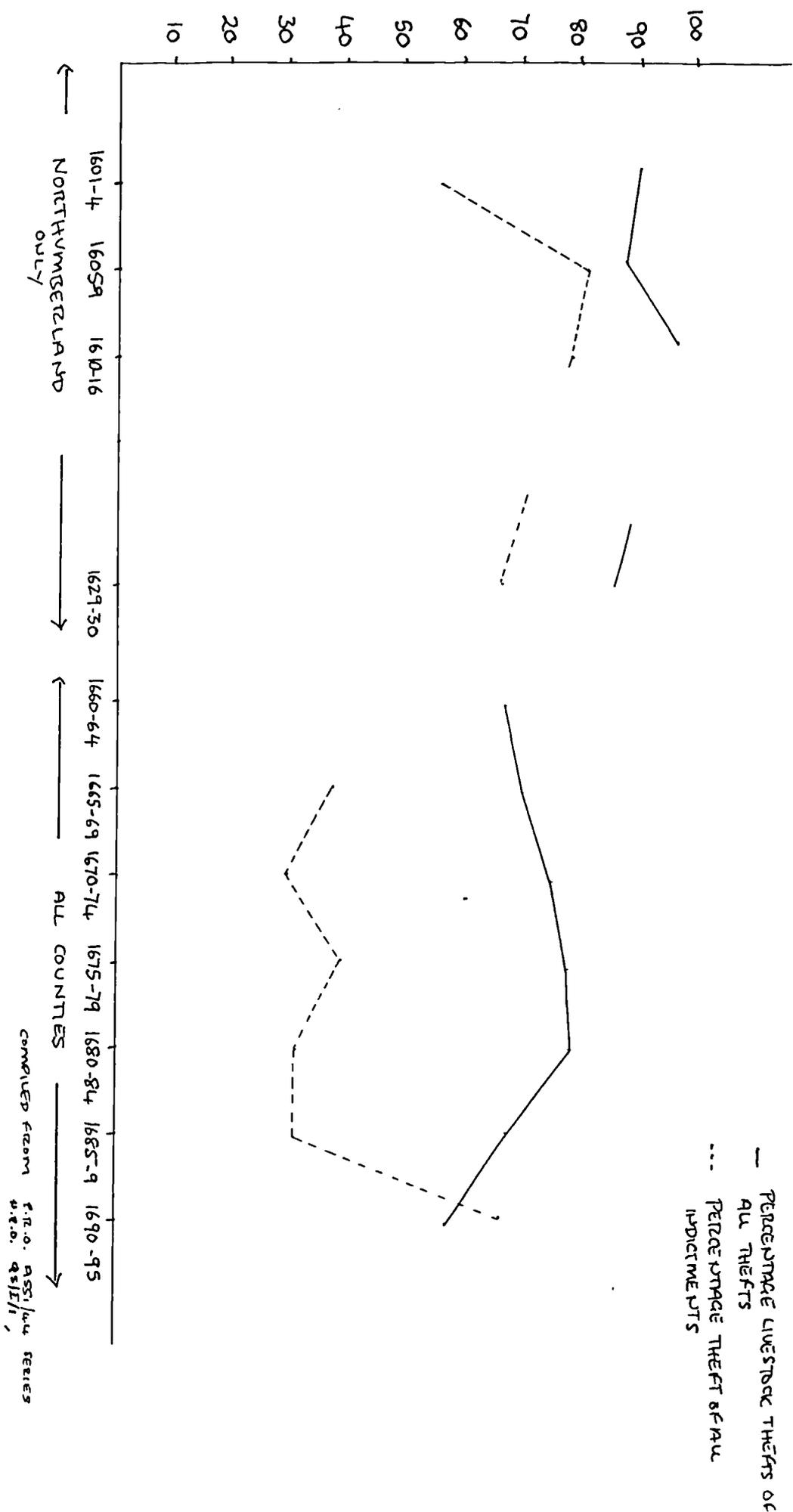
The theft of livestock was most prominent in all three counties. In the early seventeenth century, this constituted over 90 per cent of all thefts in Northumberland, although by the Restoration it had settled down to 60 per cent in Westmorland, 65 per cent in Cumberland and 72 per cent in Northumberland. These figures are supported by the gaol books; for Northumberland in 1628, livestock thieves represented 48 per cent of all the prisoners in the gaol and 87 per cent of all thieves. In 1629, they represented 71 per cent of all prisoners and 89 per cent of all thieves. After the Restoration, they formed a total of 15 per cent of all indictments for the three counties and 69 per cent of all thefts. The graph 1 shows the percentage of thefts among all cases before the assize judges and reveals that the percentage of cattle theft to all thefts was far greater in the period 1603 to 1616 than after the Restoration and that, in fact, the rate of livestock theft remained relatively stable between 1660 and 1700 although the prosecutions of theft in relation to other offences fluctuated, especially in the 1670's.

The predominance of cattle theft may be accounted for by the relative ease with which a beast could be taken undetected and removed to a 'safe' place. It was also quite simple to dispose of a beast at any of the many cattle fairs which were held in the Borders in both England and Scotland and depositions of some cattle thieves reveal a remarkable mobility in this respect.³⁷ The need for mobility is reflected in the type of livestock stolen - most popular were cattle and horses, followed by sheep. Swine or poultry were rarely stolen, being uncommon in the Borders.

Housebreaking and burglary³⁸ were noticeably more *common* in the towns, together with pickpocketing which was especially rife at fairs or markets. Another type of theft tried by the assize judges was the compound felony of highway robbery. This was an 'aggravated' larceny, in which property was not only taken from the person, but taken from him by force.³⁹

GRAPH 1

PERCENTAGE THEFT OF ALL CASES BEFORE THE ASSIZE JUDGES 1601-16, 1629-30
1660-95 IN FIVE YEARLY AVERAGES



After the large number of larceny cases, other felonies seem small by comparison. Homicide comprised a mere one per cent of the indictments for Westmorland, two per cent for Northumberland and Cumberland. The highly stylised indictments reveal little about the homicides committed, but it would seem that they could be put into three categories: murder, manslaughter or infanticide. The word 'murder' originally denoted a secret killing but by the seventeenth century it had been defined as the unlawful killing of a 'reasonable creature' who is 'in being and under the King's peace, with malice aforethought either express or implied'. By this definition, manslaughter was distinguished from murder, a distinction which was of crucial importance when it came to the judgement. During the seventeenth century, inadequate medicine could easily turn a case of petty assault into homicide. Thus, for example, Richard Noble of Knarsdale in Northumberland was accused in 1661 of killing Richard Parker. Noble protested that although he and Parker had brawled in the street, Parker had gone to work the following day, albeit he died one month later. In view of the large number of such cases, it is certain that the rate of homicide would have been much lower if medical aid had been more advanced. In the majority of cases, the offender was accused of only manslaughter, which is perhaps, a reflection of the inability of the law officials to collect and utilise evidence and the unwillingness of the jury to hang an offender, as of the state of the Borders. Most of the homicide cases seem to have occurred during brawls.⁴⁰

In cases of infanticide, in England as elsewhere, nearly all the offenders were women, usually spinsters, and the baby was nearly always newly born. In the eyes of judicial officers, the temptation to be rid of the embarrassing liability of an illegitimate child could be overwhelming. For a murder to have taken place, the child had to die after it had been born - death during the birth, or be still-born could not be murder. Thus, in all cases of infanticide there are the words notha existem, that is, in a separate existence.

Any pregnant woman, particularly if unmarried, who gave birth to a child in private, without the help and therefore evidence of midwives, ran a high risk of being accused of infanticide if the child died, even of natural causes. Such were probably the circumstances in the case of Isobel Barber in May 1664.

Dorathy Bates, giving information to the justices of the peace told how, 'it being knowen there [in Hett in County Durham] that she [Isobel Barber] was with child the people there nor parish would let her stay no longer, upon wich she travalled up and down that County seekinge worke for maintainance'. It was little wonder that in such conditions she gave birth to a dead bastard child.⁴¹

Other felonies found in the assize indictments are witchcraft and arson and both occurred very rarely. Witchcraft prosecutions were spasmodic as can be seen from the court profiles. None appear for Westmorland or for the period 1603 to 1616 in Northumberland. Those from the post-Restoration period occur in the early 1680's in Northumberland and 1679 in Cumberland. These figures would seem to indicate that the outbreaks of witchcraft were essentially localised and on a small scale. In the common law, arson was defined as the 'malicious and wilful burning of the house or outhouse of another man.' In this respect, the burning had to be premediated and if not, it was merely 'negligent burning'. In limiting the crime to the burning of the house of another man, attention was concentrated on the interference with the rights, not of the owner, but of the immediate occupier. Thus, if a man could prove that he had, for example, a tenancy or some right to a property he had burnt, then he could not be charged with arson.⁴²

With the less serious offences,⁴³ known as misdemeanours, the judges shared the jurisdiction with the justices of the peace. The most notable of these were cases of assault, riotous assembly and close-breaking. Together these

amounted to 12 per cent in Northumberland in the period 1603 to 1616, but after the Restoration this had risen to 29 per cent of all indictments for Northumberland, 33 per cent in Cumberland and 16 per cent in Westmorland. It would appear from the documents that most allegations of non-fatal violence were labelled collectively as 'assault' and the formulaic style of the indictment reveals little of the circumstances of the attack. It is for this reason that deforcements and other offences against officers of the law have been categorised separately for in these the motive is reasonably clear. Deforcements and offences against officers of the law accounted for ten per cent of all assaults, riotous assembly and close-break in Cumberland, eight per cent in Northumberland and three per cent in Westmorland in the post-Restoration period. In most cases, the offenders had sought to rescue goods already distrained. A typical case was that of Alexander Ridley.

John Clavering, sheriff of Northumberland, ordered his bailiffs in September 1615 to distrain the goods of Ridley to the value of £20. They took 50 beasts in lieu of the money, whereupon Ridley and several members of his family assaulted the bailiffs and their servants and rescued the beasts. Ridley then aggravated this offence by saying that the bailiffs

and all the rest should kiss his arsse and if the justices should come with a thousand men to drive away their goods if he had but one howres warninge he dyd not care one pine for them all. 44

The high proportion of deforcements was doubtless a reflection that such incidents were much more likely to be brought to court than other general assaults. Most noticeable about the assault cases is that the offence was usually committed by groups. In Cumberland, 130 persons committed assault and allied offences alone, but 285 were in groups. In Northumberland 180 committed the offence alone, whereas 851 were in groups. It is clear that some of the assaults and close-breaks were manifestations of small scale family feuds, whereas others

were disputes over pasturing rights. Some, particularly those against members of the gentry who were not justices, may well have been small enclosure riots. In other cases there was a clear economic motive, where the victim was a tax collector, or, as in Newcastle in 1667, the Smiths Company, whose policies provoked a riot amongst Newcastle blacksmiths.⁴⁵

The most striking feature of the post-Restoration court profiles is the large number of prosecutions for religious non-conformity. These stand in contrast with the early seventeenth-century records, but are consistent with the records of the post-Restoration justices of the peace and with the justice ayre and High Court in Scotland. The central government at this time was increasingly alarmed at the growing number of non-conformists in the country and especially in the Borders. From being a traditionally staunch Roman Catholic area, the Borders had been transformed during the century into a centre of religious radicalism. The Quakers had grown to great significance in Lancashire, Yorkshire and County Durham and had been behind the Northern Rising in 1663. After that rebellion, the government was most anxious to keep the Borders under control. This proved to be most difficult and conventicles (secret religious meetings) continued to be held in the hilly and remote areas, attended by large congregations in both England and Scotland. The Bothwell Bridge rebellion and the Rye House plot in 1679 and 1683 respectively, merely confirmed that the authorities were correct in regarding the religious dissenters in the Borders as a threat.⁴⁶ In Northumberland such prosecutions accounted for 43 per cent of all indictments, in Westmorland 51 per cent, but only 7 per cent in Cumberland. These proportions for each county are mirrored in the quarter session records.⁴⁷

Most of the people indicted at assizes would already have been in custody, having been committed to gaol to await trial. Anyone could arrest a felon, but it was necessary that the prisoner be examined within three days after such an arrest, before a justice of the peace. If the justice strongly suspected the

prisoner of committing a felony, he was required to write down the examination of the prisoner and information of the witnesses or accuser. These depositions were to be presented at the assizes with the prisoner, after the indictment had been drawn up to the grand jury. This was the evidence at the trial. Some prisoners were released upon bail to appear at court; indeed those charged only with misdemeanours were obliged to be granted bail.

Grand juries were the preliminary form of enquiry into the indictments. It was the sheriff's duty to impannell the jury from the freeholders in the county. In 1670, after frequent complaints from the judges that the jurors were 'insufficient' and of poor attendance, the Northern Circuit judges commanded the sheriffs to deliver to their chambers in London before each circuit two panels each listing 38 sufficiently qualified men and ten justices of the peace, from which all jurors at the following assizes would be drawn.⁴⁸ Each jury was supposed to consist of 12 or more substantial freeholders, sworn to prevent all crimes committed in their county. The duty of the grand jury was not to convict, but to decide which bills constituted a true case on which the court could proceed. Thus, if they considered a case justified, the indictment was endorsed billa vera, a true bill. This was not a verdict, rather an assessment that the indictment had passed the preliminary trials. When the grand jury was not satisfied, the bill was endorsed ignoramus, meaning 'not found'. Although ignoramus bills could be presented before another grand jury at a later date, in most cases there seems to have been little reason for preserving these indictments.⁴⁹

For this reason, the survival of ignoramus bills is erratic. Cockburn has written that 'it is impossible to advance a consistent estimate of the number [of accused] freed in this way.' He suggested that the figure could be around 12 per cent. J. H. Baker assessed the rate to be about 14 per cent in 1700, although by that time, as discussed below, the role of the grand jury

had somewhat declined. The survival of ignoramus bills for the Northern Circuit is, for some years, quite reasonable and from these it would appear that the percentage of bills found in this way was rather higher than the figures suggested. From all three counties, it would seem to be about 30 per cent. The percentage of theft indictments pronounced ignoramus was consistent in all three counties - 23 per cent in Northumberland, 25 per cent in Cumberland and 26 per cent in Westmorland. For murder, however, the figures were slightly more disparate. (20 per cent for Northumberland, 23 per cent for Cumberland and 20 per cent for Westmorland).⁵⁰

These figures could suggest that in the case of felonies warranting the death sentence, the grand juries chose to reject a bill outright rather than chance the life of the accused before the trial jury. There is evidence that grand juries could be most independent in their thinking and admonitions sometimes had to be addressed to them from the assize judges who wished them to conform to the current thinking of the central government. Zachary Babington in his 'Advice to Grand Juries in Cases of Blood' certainly believed that they exercised such an independent attitude towards bills carrying the death penalty. Chief Justice Dyer threatened to prolong assizes interminably until the Warwickshire grand jury saw fit to find a controversial bill.⁵¹

Throughout the course of the seventeenth century, the grand juries' role slowly declined. This was largely as a result of regular pre-trial examinations which supplied more reliable information. The process, however, took a further 300 years until it reached its conclusion and until that time, both systems were utilised, although in the nineteenth century the role of the grand jury came to be regarded as merely a matter of form, rather than a vital function.

The indictments drawn up in the morning session of the court had usually been decided by the grand jury by lunchtime, when a break was taken. The afternoon session began with the constables' presentments. These presentments

had been actively encouraged by judges like Coke, who, in 1615 introduced measures by which hundred constables were charged to present infringements of economic and moral regulations. By the post-Restoration period, these had taken the form of 15 articles, listing the offences the constables were supposed to search out: (1) Not attending church, (2) Felonies and robberies, (3) Rogues and vagrants, (4) Inmates of cottages, (5) Unlicensed taverns, alehouses, malsters and brewers, (6) Ingrossers and forestallers, (7) Cursers, swearers, lewd and disordered persons, (8) Bastard bearers, (9) No servants out of service until their time expired, (10) No riots or unlawful assemblies, (11) No false weights and measures, (12) Each parish was to have adequate constables, (13) good roads and (14) bridges and (15) adequate stocks. The overlap with the justices of the peace jurisdiction is very clear here and such presentments would be more in keeping with the quarter sessions than the assizes. In view of this, it is extraordinary that they continued to be presented at the assizes well into the eighteenth century.⁵²

After the constables' presentments, the indicted accused were called to the bar and arraigned - felonies before misdemeanors. They were then required to plead. The indictment, written in Latin, was paraphrased into English for this process. Those who pleaded guilty had their indictments endorsed 'cogn [ovit]': those who pleaded not guilty with 'po[nit] se [super patriam]' (that is, electing to be tried by God and the country). If a prisoner refused to plead on a felony charge, it was considered to be tantamount to a confession and judgement followed accordingly, in the form of the peine forte et dure. This was a barbarous penalty whereby the prisoner was half starved and pressed to death; it was abolished in 1772. When enough prisoners had been arraigned, a trial jury was formed.⁵³

The trial, or petty jury, was drawn from the freeholders of the county and there were supposed to be twelve of them. Again, it was the sheriff's task to assemble the jurors. In the event of an insufficient number of jurors, the

deficiency was filled by drawing from the tales de circumstantibus, a group of men summoned by the court for that purpose. Trial by jury was supposed to ensure an impartial judgement, free from political bias which may have tempted the assize judges. Probably in the major criminal trials, it was not worthwhile packing or bribing a jury. But the reliability of the judgement itself could be suspect. Cockburn has written 'far from being the crowning glory of common law process, [the verdict] merely underscored the many uncertainties of an assize trial.' The accused was at the mercy of what could be a very partisan jury. Although assize jurors who acquitted suspects against the evidence could be summoned to appear before Star Chamber, or later King's Bench, 'the law' as Bacon acknowledged, 'leaveth both supply of testimony and the discerning and credit of the testimony, wholly to the juries consciences and understandings'.⁵⁴

In many ways the seventeenth century legal system was at fault, for the criminal procedure seemed weighted against the accused. Those indicted of felony or treason were not allowed any legal representation. Ironically, those indicted of misdemeanours, although not on trial for their lives, were allowed counsel. Some judges expressed misgivings about this practice and occasionally assigned counsel to advise the accused in some cases.⁵⁵

Evidence to help the jury come to their verdict was supplied by witnesses. Crown witnesses were called first and then the accused could call his witnesses.⁵⁶ Until 1695 in treason cases and 1702 in felonies, defence witnesses were not sworn, merely exhorted to stand in fear of God and tell the truth, but the evidence they gave left a lot to be desired. Most of the depositions had been gathered previously by the justices of the peace and their written depositions could be read in court, even although the deponent was able to give oral testimony. Frequently the justices gave an account of their findings whilst taking the depositions. The depositions reveal that hearsay evidence was admitted

and other evidence of dubious sorts of which the following is a typical example. In a deposition given by Robert Hope, with regard to the murder of Robert Parkin, Hope said that he had seen the ghost of Robert Parkin in the church and it had said that he had been murdered by a woman.⁵⁷ Of the depositions for the three northern counties, from 1646 onwards, 70 per cent were concerned with theft and of these, 62 per cent with cattle theft. Twelve per cent were concerned with murder and ten per cent with treason, mainly from the Northern Rebellion. To ascertain the truth of a murder, theft or witchcraft case, an average of four people had to be interviewed, although in some cases there could be as many as 10 or 11. In a single case of theft, information might need to be drawn from many counties, which must have been very time-consuming for the justices involved. It also seems to reveal a concern to ascertain the truth of the matter in serious crimes which carried the death penalty.⁵⁸

When the prisoners had been charged, the jury could retire to consider its verdict. The judges rarely summed up the evidence, but could occasionally threaten juries to return a verdict in accordance with the judge's opinion. The judges themselves were not above the sway of popular opinion. Roger North, a judge who rode the Northern Circuit in the 1670's, wrote of witchcraft trials: 'it is seldom that a poor old wretch is brought to trial upon that account, but there is, at the heels of her, a popular rage that does little less than demand her to be put to death.' If the judge declared against popular opinion, 'the countrymen cry, this judge hath no religion, for he doth not believe witches; and so to show they have some, hang the poor wretches.'⁵⁹

If the accused was found guilty, the clerk ascertained what property he had that could be seized. Judgements were deferred to the end of the proceedings when all the prisoners, including those who had pleaded guilty, were sentenced or discharged. Following that, misdemeanours and all outstanding business before the court were dealt with.

Before the judgement was given, in cases of felony and treason, there was a process known as allocutus. This was to allow the convict to make any point that could prevent the court from giving judgement. It was at this point that pleas were made for the benefit of clergy, for allowing a pardon, or for respite in the case of a pregnant woman. Benefit of clergy could not be claimed on all offences; murder was exempt, together with cutting purses, housebreak, burglary and robbery (hence the importance of differentiating between, for example, murder and manslaughter). In order to decide who was eligible, the claimants had to read a prescribed passage from a psalter, which came to be known as the 'neck verse'.⁶⁰

Many have assumed that judgement was harsh in the early modern period and that many received the death penalty, but the documents show that this was not the case in the Borders (at least) after the Restoration. There were several ways in which an accused person could escape. The most obvious way was to be pronounced not guilty. There is evidence that those on trial could have had allies in the two juries they came across. The large number of ignoramus bills has already been commented upon. From the gaol calendars and court proceedings from the whole of the century, it would appear that on the Northern Circuit, approximately 44 per cent of the indictments which went to the petty jury were found not guilty. Cockburn found that for England as a whole, the average for between 1558 and 1714 was about 25 per cent. Thus, the northern jurors appear to have been more lenient than their southern counterparts - unless the Borders were not as lawless as has been assumed.⁶¹

Another way in which the jurors could save offenders from the death penalty was by undervaluing stolen goods in order to reduce an offence from grand to petty larceny. It was commonplace to value goods at 10 or 11 pence - just below the crucial point of demarcation. Likewise, felons were frequently found guilty of theft rather than housebreaking or burglary, even when the goods had been

stolen from inside the house. For example, Thomas and Anne Dodd from Northumberland were found guilty of stealing household goods from Alexander Moor in June 1670, but were found not guilty of housebreaking. Housebreaking and burglary were not clergyable offences, whereas simple theft was. Likewise, there are very few cases of murder in the records because most offenders, although charged with murder, were ultimately found guilty only of manslaughter.⁶²

At the gaol delivery in Newcastle in the summer of 1628, three of the nine felons condemned to death escaped through benefit of clergy. The following year, six out of ten escaped in this way. Benefit of clergy then, must have been the salvation of many convicts. Cases have been found elsewhere in England where the judges actually aided the criminals in obtaining the benefit. Thomas Knyvett, a Norfolk magistrate told, in March 1633, of a cut-purse granted benefit of clergy (cut-purses were exempt). Perhaps such was the case of Lancelot Waugh, convicted of stealing purses at the Newcastle court in 1629, or William Leighton at the same court, convicted of breaking open a chest. Both of these offences were technically exempt from benefit of clergy yet both offenders escaped death in this way. Benefit of clergy could only be granted once and this was assured by branding a T for theft or M for manslaughter on the thumb of the offender. Yet even this could be evaded. A book of 1633 called 'Whimsies', tells of a common method. 'If a prisoner, by help of a compassionate prompter, hack out his Neckverse (Psalm 51, verse i) and be admitted to his clergy, the jailors have a cold iron in store if his purse be hot; but if not, a hot iron that his fist may cry Fiz.'⁶³

Women were not allowed benefit of clergy until 1695, although those who claimed they were pregnant could obtain a respite from the death penalty if they could convince a panel of matrons. Reprieves or pardons could also be granted, not only by the Crown, but also by the judge. A judge, however, could only grant a pardon if the convict was insane; and all other pardons had to be

sealed with the Great Seal on the authority of the Privy Council. The most common types of pardon were those which authorised transportation in lieu of the death penalty.⁶⁴

As a result of these merciful measures, few felons convicted of capital offences at the assizes actually received the death penalty. Cockburn estimated that between 1558 and 1714 only about ten per cent of those convicted were actually executed. This figure would appear to be as true for the Borders as for the rest of England.⁶⁵

Why then, did the law remain as it was, if so many offenders were spared? The criminal law was based upon terror. A writer in 1785 told of the atmosphere in the court when the assize judge pronounced the death sentence:-

every heart shakes with terror - the almost fainting criminals are taken from the bar - the crowd retires - each to his several home, and carries the mournful story to his friends and neighbours; - the day of execution arrives - the wretches are led forth to suffer and exhibit a spectacle to the beholders, too awful and solemn for description.

The ceremony and pomp of the assize courts emphasised this attitude. A seventeenth century writer told of the 'lordly judges' riding circuit 'to frighten people with their bloody robes, state and pomp.' In this respect, the judges took upon themselves a kind of divine role - in their hands alone lay the right to decide who should live. The element of choice for the judges was emphasised in the psalm read at the 1628 assizes in Newcastle when the death penalty had been pronounced - 'O lett the sorrowfull sighing of the prisoners come before thee, according to the greatnes of they power, preserve thow those that are appoynted to die.' Those who were chosen for the ultimate penalty were usually the most notorious and heinous offenders, whose execution would serve as an example to others. Some, like Edward Burke, considered that if law and order were to be best served, then there could not be too many hangings or the impact would be diminished. 'It is certain', he wrote, 'that a great havoc among criminals hardens, rather than subdues.'⁶⁶

For those who received it, the capital sentence took mainly two forms. For treason, the penalty was hanging, drawing and quartering. This judgement was prescribed by law and could not be altered by the judge. (Women traitors, however, were to be burnt). There was only one case, in 1699, where this penalty was imposed by the annual northern assize judges, although some of the traitors from the Northern Rising may have died in this way. Those whose treason amounted to alehouse gossip were likely to receive a whipping rather than the death sentence. Those convicted of grand larceny would normally be hanged, although this was not always the case. George Coxon and James Walker who were indicted for sheep stealing at the assizes in 1628 were both sentenced to a whipping. This seems to underline that the death penalty was not the automatic end for all thieves, only the most infamous of them. Whipping was the traditional punishment for those convicted of petty larceny. Imprisonment was rarely used as a punishment, although there are some examples in the records. Francis Howgill, for example, was reported in the gaol calendar for Appleby in 1668, to have been imprisoned for 'praemunire' (religious offences) 'dureinge life or the Kings pleasure.' John Ozmotherley, convicted of perjury at the assizes in Carlisle in 1685 was ordered to spend six months in gaol. Usually however, prisons were regarded as just temporary enclosures for criminals awaiting trial or transportation. Misdemeanours were normally punished by a fine.⁶⁷

In their punishments, it is possible to see the assize judges of the seventeenth century battling against dilemmas which even the twentieth century judicial system has to face. The problem of what to do with convicted offenders was even more pertinent in those days when there was not adequate finance for their subsistence in gaol and where the poverty of the north could not support the imposition of heavy fines. To the judges, as well as the convicts, transportation was a welcome alternative.

In contrast to the tight schedule of criminal business, the packed courts and the miserable manacled prisoners, were the trials of civil cases. The judges were empowered to try such cases by a writ of nisi prius which brought such trials out of the common law benches at Westminster and into the counties. In his speech to Star Chamber in June 1616, James I noted that the trial of nisi prius cases was much more popular amongst the judges, for the courts were altogether more calm and sophisticated. In contrast to the criminal trials, both parties were represented by counsel, and there were richer 'pickings' for the judges themselves. It is difficult to give any description of the proceedings at the nisi prius proceedings because the court records all over England are incomplete or missing for the period under study. An account of a court held in Newcastle in 1667 shows that 15 cases were heard, four of which were trespass, three trespass and ejection, one trespass on the case, and six debt. Although no conclusions can be drawn from one isolated example, fragments of nisi prius proceedings would seem to indicate that the business fell into one of these categories. In this respect they were similar to courts in the rest of England where most cases were concerned with injury to real or personal property - actions on the case forming the largest group.⁶⁸

The proceedings at nisi prius were totally dominated by professionals who seem to have dwelt upon the fine points of law. Such trials were popular in the seventeenth century, saving both litigants and witnesses an expensive and lengthy journey to London.

The assizes and the Scottish justice ayre, then, stand in great contrast to each other, not only in terms of regularity, although that is perhaps the most obvious. The whole aura of the assizes was of the King coming to his people to administer justice through his judges - the Scottish justice ayres had none

of the pomp and majesty that such a visit entailed. Moreover, the assize judges bridged the gap between central and local government, not only judicially, but also in an administrative and political capacity. Yet although both had a draconian code in theory; in practice their juries and judges showed a marked reluctance to execute many offenders, preferring to impose branding and transportation than the death penalty.⁶⁹

CHAPTER III

The Border Commissioners

I. The Commissions and their activities

i. The Commission and the Commissioners

On hearing of the death of Elizabeth I, James VI declared in April 1603 in a sermon at Edinburgh

As my right is united in my person, so my merchies are united by land and not by sea; so that there is no more difference between them. There is no more difference betwixt London and Edinburgh, nea, not so much as betwixt Inverness or Aberdeen and ¹ Edinburgh.

Crucial to James VI and I's concept of the new united Great Britain were the Borders. If Scotland and England were 'to joyne and coalesce togider in a sinceir and perfyte unioun, and, as twa twynnis bred in ane bellie, love ane another as na moir twa, bot ane estate', then the Borders, as they had existed for centuries - a reputed haven of thieves and murderers; a barbarous place where feuds and constant battles prevailed; where the law was so weak it could only tolerate such outrages; and the area where friction between the two nations was most pronounced - must be radically altered. Following logically from the King's concept of a Great Britain, no 'border' or Borders could exist, for, 'be the happie unioun' the Anglo-Scottish Border was now 'the verie hart of the countrey'. ² Thus, declared the King, the very word 'borders' was not to be used, but was to be replaced by the term 'Middle Shires'. It was James' hope that the Borderers themselves would appreciate the principle of the Union of the Crowns and their disorders would naturally cease, rendering unnecessary the warden system and the old Border laws. As Cumberland wrote to Cecil in December 1603, 'I had neither fee for it, nor was it his Majesties pleasure to use wardens longer than the quieting of the Border disorders, which we hoped would not be long'. ³

On hearing of the death of Elizabeth, however, the Borderers reacted in a very different way. Using the excuse that they thought the laws of the nation were in abeyance on the death of a monarch, large numbers of Scottish and English clansmen from the West Marches plundered, attacked, pillaged and wreaked havoc in northern Cumberland, as far south as Penrith. For a week, from the death of Elizabeth on the 24th March, this chaos continued and came to be known as the 'Busy' or 'ill' week. It was reported that 6 men were killed, 14 taken prisoner for ransom, £6750 worth of damage inflicted upon property and over 5000 livestock driven away. The garrison from Berwick of 50 cavalry and 200 infantry, had to be called out to suppress the raid. The Busy Week showed clearly that the Borders were still very much living in the sixteenth century.⁴

But the attitude of other elements on the Borders was gradually changing. Several leading Scottish lairds had, by stages, retired from leading raids and armed incursions and had begun to appreciate the benefits of a peaceful life and court patronage. The most notable example of this transformation in attitude, was Walter Scott of Buccleugh.⁵ In April 1596 Buccleugh, with 80 of his clansmen had raided and stormed Carlisle Castle in order to free William Armstrong (known as Kinmont Willie), a notorious thief, imprisoned there.⁶ So turbulent an influence was Buccleugh, that he was warded in England in 1597.⁷ Yet by 1608 Buccleugh was willing to forfeit the closely integrated society and support of his clansmen in order to become an important figure in the Border Commission. Sir Robert Ker of Cesford had also been a turbulent element in the Borders of the latter years of Elizabeth's reign, who had gradually moved over to the side of the government. Sir Robert Carey marvelled at Cesford's 'sudden alteration from being a protector of thieves, to a suppressor' and noted that the transformation 'causes much wonder in these parts'.⁸

Likewise, on the English side of the border, the gentry had been won over by the Tudor notions of law and order and could foresee good prospects for themselves in a peaceful Borderland. Hence the petition of Nicholas Curwen, Thomas and Lawrence Salkeld, William Hutton and other Cumberland gentry to the Earl of Northumberland in March 1604 requesting 'not onlie to be Rydd of the bad men of the Borders' but 'to be att lybertye to use our landes to their most profytt and Comoditie, as others in other pairts of England being of the like case doe!'.⁹

The change in attitude of the gentry and lairds was first apparent in the Carlisle treaty of 1597, when the gentry were encouraged to play a greater part in enforcing law and order alongside the wardens on special Border Councils.¹⁰ These Councils were to consist of the chief gentry resident in the wardenry and would meet twice a year. They were the idea of Burghley and James VI, who believed that by putting a greater burden of responsibility onto the local gentry, a more stable society would emerge. Contemporaries, however, were sceptical of such a notion 'whereas the greatest murderers are made the chief governors of the frontier' and in fact, the immediate results of the treaty of Carlisle were negligible¹¹. But important seeds had been sown, which were to germinate in the next reign.

It is important that these three differing attitudes to the Borders - the King's, some of the gentry, and the bulk of the Border population - should be borne in mind when the policies and events of the early seventeenth century are being described below. For they help to make more understandable the many contradictions and frustrations apparent on the Borders at this time.

On his accession to the English throne, James allowed the 'days of truce' and much of the old Border Law to lapse.¹² It was obvious, however, after the events of the Busy Week, that the Borders could not yet be governed by the same methods as elsewhere; so, for the time being, the Earl of Cumberland was appointed Lieutenant of the three English Marches in July 1603, and Alexander, Lord Home, his Scottish counterpart.

Together they attempted to prosecute clansmen for crimes committed during the Busy Week. Their main targets were members of the Graham clan. Some writers have viewed this campaign as unfair, arguing that although the Grahams were prominent in the Busy Week raids, other clans, such as the Storeys, Armstrongs and Forsters had played an equally important role.¹³ Others have argued that the Graham clan deserved all they got.¹⁴ Yet although the Grahams had been one of the most numerous raiding clans in the Busy Week, those events had been only one manifestation of the problem. Border inheritance was not governed by primogeniture; thus, lands were divided between sons. The Grahams were the most numerous clan on the Western Marches and, for the second half of the sixteenth century, had been expanding from 107 clansmen in 1561 to well over 200 in 1603. Furthermore, non-Graham sub-tenants had increased from 120 to nearly 300. Of the Graham families in 1603, there were about 15 to 20 surname leaders whose position on the Borders was tantamount to landowning gentry status in Cumberland. Indeed, of the 70 or so identifiable properties in the Debateable Lands,¹⁵ all the large properties were held by the Grahams.

Compared with lands elsewhere in Britain, these areas were not prosperous, but compared with the rest of the Borders they were relatively fertile. The Border Survey carried out in 1604 suggests that some of the Grahams were even able to grow enough corn to feed their families and dependants. An analysis of the economy of William Graham of Rosetrees, for example, 60 percent of whose land was under arable cultivation, shows that in an average year, he would have 600 to 800 bushels of oats for food. At a rough estimate this would be enough for 20 to 33 families. William Graham's establishment encompassed 140 persons in and about Rosetrees, for which 672 bushels of oats would be necessary. Thus, one of the wealthiest leading Grahams had just enough

grain to feed his family and tenants in a good year. As the Introduction shows, however, the average percentage of land in arable cultivation was much lower; 41 percent in Bewcastle, 43 percent east of White Leven, 41 percent between the Black and White Leven and 41 percent at the Bailey. With the population of the Borders rising during the sixteenth century, the pressure on the land must have been considerable.¹⁶ Indeed, as far back as the mid-sixteenth century, Sir Robert Bowes had postulated the theory of the connection between over-population and the under-production of land.¹⁷ Yet had the Graham clan chosen to exploit their lands, they would have found great potential. A writer in 1583 noted that the Eskside Grahams had 'verie much good grounde and faier livings if they used it well.' The Border Survey remarked that in Bewcastle there were 'great store of Coals and verie easie to come by, but the inhabitants esteeme not of them by reason they have such store of Peats ... but if the Countrie were planted with industrious men of trade the mynes would be of great value'.¹⁸ Thus, to remove the Grahams would fulfil certain functions; it would rid the Borders of a most troublesome clan; it would release their lands, which could then be granted to a powerful local influence who, the King would ensure, would be willing to comply with the King's policy of 'pacifying' the Borders; furthermore, the potential wealth of the area would be an attraction in a region which had little to offer generally.

The government decided that to reform the Grahams was out of the question, as 'their evill mynds cannot be changed!'. As an alternative to mass execution, transportation was suggested.¹⁹ After many negotiations and lured by the promise of fertile lands and government financial help, the Grahams were persuaded, in December 1603, to submit to transportation. As the most illustrious courtier connected with the Borders, the 3rd Earl of Cumberland was promised the Grahams' lands of Nicholl Forest, with the manors of Randalinton and Arthurett and the Debateable Lands.

The transportation and banishment of the Grahams, however, was delayed and the leading Grahams rejoined their families. They embarked on a campaign to try to procure a reprieve for themselves, using all the patronage they could find. By the end of 1604, the transportation still had not taken place and the Grahams began to regain confidence and revert back to their old ways. The gentry of Northumberland complained in autumn 1604 that the Union of the Crowns and the abrogation of the Border Laws had encouraged rather than prevented crime and that all the evil persons of both England and Scotland were more free to meet together now, than ever before - 'the dayly and contynuall theft wherewith wee are nightly opprest, contrary to all expectation, being nowe greater than hath bene dyvers yeares heretofore'.²⁰

This rise in crime was also a reflection of the failure of Lord Home and the Earl of Cumberland to prosecute most members of other clans for their part in the Busy Week. In July 1603 William Bowyer attended 'a court of public justice' where 'not only many of such as were bound by recognizance failed to appear', but 'divers others not yet apprehended stand out, whereupon he [the Earl of Cumberland] adjourned the court until a farther day that those which were wanting might advise'. Bowyer added, 'I could not omit my knowledge of a discontented crew who, notwithstanding the just beginning, have most dangerously combined to hinder the free course of justice by advising ways to escape it'. The Earl of Cumberland himself, in May 1603, had admitted that it was proving virtually impossible to apprehend offenders. Another report from Northumberland in January 1604 complained that 'very many suche as had been bayled or were formerly taken bound by recognizance to appeare did not, neither have or can the justices of peace or the sheriff apprehend them.' In November 1604 the Earl of Cumberland confessed to the Privy Council that of 600 indicted at the assizes that year,

only 28 could be brought to trial, of whom a mere 7 were executed. ²¹

The rise in crime on the Borders, the inability of the government to arrange the transportation of the Grahams, the unsuccessful attempts to apprehend and prosecute criminals, together with the new attitude of some of the gentry and the new King's conviction that God had commanded him to pacify the Borders, meant that a transformation in the government of the Borders was likely to take place. James openly declared the inadequacy of the old system in March 1605. 'The lawis and usage of the lait Marches or Borders, instituted and tolerated quhilk they stude seperate and devydit under several kingis, for the peace and tranquillitie thair of, are utterlie frustrated and expyred'. ^{22/}

In February 1605 a new commission was issued to ten men, five from each nation. This Commission of the Middle Shires was intended to

take away all subterfuge and quench all the sparks of any hope of escape from punishment in such as shall offend; to join together in the commission certain of either nation, for the establishment and preservation of our peace in those parts, and for the utter suppressing and preventing of all such exorbitant offences and disorders, or else for the apprehending and sending of such offenders as shall persist in their wickedness, to the country and place where they offended, to receive their condign punishment for their demerits according to law and justice respectively in that behalf. ²³

The intention then, was that the Commissioners of England and Scotland were to work closely together, as part of the same body rather than two separate ones, so that offenders who committed crimes in either country could not escape punishment by 'flying into the other': tactics which, many believed, had been the root cause of all the Border disorders. The Commission as one entity satisfied the King's notion of a united Britain; it utilised the local gentry according to the King's earlier desire and it seemed set to tackle the very heart of the Border problem. Few anticipated that it could be anything other than a means to deliver a short, sharp blow against Border crime. But the Borders proved too difficult and resilient an area for that hope to be realised. The Border Commission was still being renewed in the last quarter of the seventeenth century, as late as 1684.

The Commission was issued in February 1605 under the Great Seal of England and Scotland, and despite the King's desire that only one Commission should be issued, in fact, the Commissions for each country were totally separate. In England special commissions of oyer and terminer could be issued to local justices of the peace, usually afforded by the judges of assize, to deal with a particular and immediate outbreak of crime. T.G. Barnes has defined a special commission as 'a formal instrument issued under the great seal or the Exchequer seal, commissioning specified persons of the locale to carry out certain clearly defined tasks and affording them sufficient power to do so, other than the commissions of the peace and lieutenancy and the sheriff's patent.'²⁴ Special commissions were clearly differentiated from the regular commission of oyer and terminer issued usually twice yearly (or annually in the case of the Border counties) to the judges of assize and a number of other justices from each of the counties in the circuit. Special commissions were not uncommon and were usually issued for short periods against such as piracy or smuggling. Throughout England, leading members of these commissions were, without exception, justices of the peace. As Barnes has written: 'There can be no doubt that in every commission the government expected the justices to lead and if necessary accept full responsibility for the fulfilment of its terms.'²⁵

Throughout the seventeenth century the English Border Commission conformed to this pattern - the justices of the peace selected for service on the special commission acting particularly within the bounds of their own county. Thus in 1605, for example, Sir William Selby, Sir Robert Delaval and Edward Gray acted mainly in Northumberland, whereas Joseph Pennington and Sir Wilfrid Lawson operated in Cumberland. In 1666 William Dalston, Wilfrid Lawson, Thomas Denton and George Fletcher acted in Cumberland and

William, Lord Widdrington, Ralph Delaval, Cuthbert Heron and Richard Stote operated in Northumberland. Each group held courts in its own county, mainly in Carlisle, Morpeth, Newcastle and Hexham; but links between the counties were always maintained and it would appear that usually at least one Commissioner from the opposite county was present at the courts held by his counterparts. The Muncaster and Crawford Manuscripts show clearly that 'mixed' courts were frequently held. After the Restoration this practice continued: George Fletcher for example, attended courts in Morpeth in October 1665, as well as those in Cumberland. Thomas Denton, a Cumberland Commissioner attended Northumberland courts frequently between 1666 and 1676.²⁶

The special commissioners of oyer and terminer were also required to sit with the general commission at the assizes, although able to act independently when the assize judges were not in the area on circuit. The close connections between the justices of the peace, the Border Commissioners and the assizes can be seen in the location of the documents themselves; for example, the post-Restoration documents are found within the assize documents, not only in the form of indictments and gaol deliveries, but also as depositions. These latter were taken by the justices of the peace to be used as evidence at assize trials, but it would also appear that the justices, as Border Commissioners, used the same depositions as evidence at their own courts.²⁷ Evidence on the interaction between the assizes and the Border Commissioners is confusing. In the early seventeenth century there appears to be no difference between the type of crime or criminal tried by each court (or by the justices of the peace for that matter) and the Border Commissioners just seem to be a form of more frequent court than the assizes. Indeed, the Border Commissioners themselves, when taking recognizances, instructed the accused persons to appear at the next assizes or gaol delivery

held by the Commissioners 'whether shall first happen'. The case of William Batie perhaps illustrates one of the reasons for this. The following words appear after his name in the records of a gaol delivery held by the Commissioners in Newcastle in January 1607. 'nomin. eius qui debet. quia pauper et moritur est per defect. cibi si pro Recog. ad Comp. ad prox assisas.'²⁸

In the post-Restoration period too, the type of business before the courts with regard to felonies, is virtually identical, although the Border Commissioners did not try misdemeanours and dwelt heavily upon theft offences. There are a number of offenders in 1676 who were tried by both the Border Commission and the assize judges for the same crime. The assize judges always dealt with the case last and the verdict given by the Commissioners did not seem to affect this pattern.²⁹ This does not appear to happen in any other year or at any other court and therefore cannot be considered as anything but exceptional. No such overlap of cases can be found with the quarter session records of Cumberland and Northumberland; presumably the justices of the peace, as Border Commissioners, sorted out amongst themselves the type of case most suitable to be tried by each particular court. The Border Commissioners could only hear the cases of those indicted before them and not before the justices of the peace or the assize judges. Moreover, according to the Delaval papers, if a justice bailed a prisoner, he had no power to bind him to appear before the Commissioners, only before the assize judges or commissioners of gaol delivery. However, as the Border Commissioners frequently delivered gaols, this technicality rarely hindered the course of law and order.³⁰

The Scottish commission was likewise issued under the Great Seal as a special commission of justiciary. Technically, as the English Commission was to the assizes and then to the central courts, so the Scottish Commission was to the justice ayre and then to the High Court of Justiciary. As

described in the chapter on the assizes, the High Court was in Edinburgh and criminal justice was administered in the provinces either by local deputies appointed by the Lord Justice General who held justice ayres, or by special commissions of justiciary. In the absence of regular justice ayres, special commissions, issued traditionally only for short periods, were the usual method of administering criminal justice in the localities themselves. As with the English Border Commission, then, the Scottish Commission was only intended to last for a brief period. During the Interregnum when the justice ayres were held regularly and the justices of the peace were established in Scotland, the position of the Border Commission in the hierarchy of jurisdictions moved closer to that experienced by the English Commissioners in England.

The Border Commission in Scotland encompassed within its jurisdiction many baron and regality courts and the relationship between these and the Commission in the early years of the century is difficult to determine because of the fragmentary nature of the early records, but the evidence for the post-Restoration period is much more abundant and throws some light on the earlier period. It would appear that many of the Border Commissioners also held official positions in regality and baronial courts. Because of their position, these Commissioners were obliged to swear, as they did at Jedburgh in July 1674, that as Commissioners they would not prejudice the rights of the lord of the regality. For example, James Johnston of Westraw, baillie of the regality of Langholm, Walter Scott of Minto, baillie of the regality of Hawick and James Scott of Bowhill, baillie of the regality of Liddesdale, each 'protested that his sitting as one of the Commissioners shall be nawayes prejudicial' to his respective lord of regality, 'or to any persons living in that bounds who are here pannaed.'³¹ Presumably the baillies of regality were chosen to be Commissioners because they were intimately acquainted with their area;

but there are some indications that a baillie of a regality did not have the same rights outside his regality that other Commissioners had. For example, in January 1675 Christie's Will and James Johnston refused to be delivered up to the Border Commissioners by James Carruthers baillie of Annandale, 'in respect that he dwells not in Annandale.' In April 1679 John Carruthers told the Commissioners that as he was out of his county, he was unable to secure four offenders. It is unclear whether these remarks mean that if a Commissioner was also an official of a regality, he could only operate within that regality. If so, it would certainly be contrary to the aims of the Border Commission, which was established so that regality and barony boundaries might not be a hindrance to law and order. There are no other similar remarks in the documents of the Border Commissioners and it is probable that Annandale may have held a special position in respect that it was a stewartry. The above statements would indicate that in the 1670s at least, this was the case. ³²

Certainly regality courts had the right to repledge from the Border Commissioners' courts. The Commissioners, however, seem to have been reluctant to let offenders be repledged too readily. For example, the Commissioners refused a request for the repledging of James Elliot, an indweller in Jedforest, on the grounds that they were bonafide judges for persons living outside the regality; which indicates that Elliot had committed an offence against someone outwith Jedforest. In February 1665 the Court also refused to repledge James Herd to the regality of Jedforest on the grounds that he had already been judged. These were perfectly legitimate reasons. Some lords of regality, however, objected to the power of the Commissioners to try cases from within their bounds. There was a dispute at Dumfries in August 1623 and when a lord of regality wanted to repledge an indweller from his franchise, his baillie was admitted to sit with the Commissioners at their court. ³⁴

On the whole, however, relations seem to have been quite good between the Commissioners and the franchise courts. In April 1675, for example, the baillie of Jedforest actually requested the Commissioners to try a thief who lived outside the regality, but who had stolen from someone within. In some cases, the Commissioners seem to have been indifferent whether an offender was tried at their courts or not, provided the criminal was brought to justice. In February 1676, for example, William Irving of Kirkconnell was ordered to produce John Beattie in Owl Coatts before either the Border Commissioners or the lord of the regality of Annandale; and in January 1675 the Commissioners ordered the baillie of Eskdale to apprehend John Armstrong of Sorbie. ³⁵

With the baronies, the Commissioners seem to have had a close relationship. In February 1624 the Scottish Commissioners told the Privy Council that in the case of barons with 'priviledge of pitt and gallows' apprehending a thief with the fang, but then neglecting the ordinary time of trial (that is, 24 hours), the Commissioners had decided that it was more expedient to give commission to such a baron for doing justice on the malefactor, rather than send him for trial before the Commissioners courts; because 'beggarlie theivies' had not enough money to entertain themselves in gaol. Whether this was ever practised by barons, however, is not known. In July 1674 all baron officers were given the authority to search for thieves or reseters of stolen goods and report them to the Commissioners. This order was apparently carried out: in the barony of Cockpule, in January 1675, the baillie and 'rypers' searched all the houses in the barony and found stolen goods in the house of John Snawdon, who was charged to appear before the Commissioners. ³⁶

Like their English counter-parts the Scottish Commissioners were men of considerable local standing, who were often undertaking other judicial duties. For example, Walter Scott of Buccleugh, holder of his own jurisdictions, was Lieutenant of the Border Commission in the early

seventeenth century. Sir John Charteris of Amisfield was a Commissioner between 1609 and 1630, but sheriff of Dumfries in 1617, and justice of the peace for Dumfriesshire in 1625. Sir Robert Dalzell of Glenae was a Commissioner between 1676 and 1680 and justice of the peace for Dumfriesshire in 1676. Many of them either held their own jurisdictions or were officials of franchise courts. For example, Robert Ker, baillie depute of the regality of Jedforest, in 1675 and 1676 was also a Commissioner; Sir Alexander Don of Newtown was also baillie of the baillie court of Kelso; John Scott of Rennaldburn was also baillie of the regality of Eskdale. The Commissioners, then, were men of experience in law and order on the Borders. ³⁷

The Commission issued in 1605 was to operate in Northumberland, Cumberland, Westmorland and the shires and parishes of Norham, Holy Island and Bedlington (which were part of County Durham). It encompassed the towns and shires of Berwick, Roxburgh, Selkirk, Peebles, Kirkcudbright and Annandale. The areas in England under the control of the Commissioners never varied throughout the century, but Westmorland was at no time really involved in their activities: all their courts were held either in Northumberland or Cumberland, trying offenders from those counties and the Commissioners rarely, if ever, went into Westmorland. The Scottish situation is more confusing. In 1635 the Commission was issued to cover the same areas as the 1605 Commission. Yet in 1662 the Commission covered just Roxburgh and Selkirkshire. In 1664, five parishes in Dumfriesshire (Westirker, Ewes, Canonbie, Wauchope and Stablegordon) were added, and the inclusion of these parishes was confirmed and continued, according to the Scottish records from 1665. In 1674 the whole of Dumfriesshire and the stewartry of Annandale were added and in 1675, Wigtown, Galloway and Kirkcudbright were included. The records of the Scottish Border Commissioners, however, indicate that the practical working

area in which the Commissioners operated was that designated by the Commissions issued from the Scottish Privy Council. Thus, from 1662, Berwickshire and Peeblesshire were completely omitted. ³⁸

ii. Activity - 1605-1611

At their first meeting in Carlisle, on the 7th of April 1605, The Commissioners of England and Scotland sought to identify their main problems on the Borders and to decide their policy in dealing with these. They considered their greatest challenge to be preventing criminals escaping justice by fleeing from one country to the other. To counteract this, a garrison of horsemen was established in both countries, led in Scotland by Sir William Cranston, and in England by Sir Henry Leigh. These were to assist the Commissioners in rounding up and apprehending criminals at large, and in transporting them to receive trial. The criminals taken were to be sent and delivered to 'such places, within any of our said counties, shires, sheriffdoms and stewartries, towns and parishes in either of our said countries where they may receive justice according to their demerits and our laws and statutes respectively in that behalf.' Later, this statement was to cause problems over the remanding of prisoners. Instead of criminals waiting in gaol until the next quarter sessions or the yearly visit of the assize judges, the Commissioners were authorised to hold justice courts in the Borders wherever and whenever they thought necessary. Regular reports, every two months at least, were to be sent to each Privy Council, by the Commissioners. Initially the Commissioners of both countries were to convene together at these courts, but by November 1605 the impracticalities of this had been realised. That month, the powers of the Commissioners were extended and the privilege of justiciary granted to any three of the Commissioners of each nation. From that time onwards, all semblance of unity between the Commissioners of the Middle Shires evaporated and the two nations operated entirely separately, with occasional consultations. ³⁹

COMPARISON OF THE THREE MAIN SOURCES FOR THE

PROCEEDINGS AT THE BORDETZ COMMISSIONERS' COURTS, 1605-07

PLACE AND DATE OF COURT	CRAWFORD AND MUNCASTER MSS.	SALISBURY MSS.	N.R.O. QS/I/1 'VETERA INDICTAMENTA'
CARLISLE 2ND MAY 1605	5 EXECUTED 8 NAMES LISTED	NUMBER EXECUTED AS IN CRAWFORD AND MUNCASTER MSS.	
NEWCASTLE 10TH MAY 1605	6 EXECUTED 42 NAMES LISTED	" " "	
NEWCASTLE - JUNE 1605		REFERS TO THE COURTS IN MAY 1605 AS THE FIRST COMMISSIONERS COURTS AND THOSE IN NOVEMBER 1605 AS THE SECOND	5 INDICTED
CARLISLE 5TH NOVEMBER 1605	4 EXECUTED 13 NAMES LISTED	NUMBER EXECUTED AS IN CRAWFORD AND MUNCASTER MSS.	
NEWCASTLE 11TH NOVEMBER 1605	10 EXECUTED 42 NAMES LISTED	" " "	11 INDICTED - NONE CORRESPOND WITH MUNCASTER AND CRAWFORD MSS.
CARLISLE 13TH JANUARY 1606	5 EXECUTED 27 NAMES LISTED	" " "	
NEWCASTLE 20TH JANUARY 1606	17 EXECUTED 58 NAMES LISTED	" " "	14 INDICTED - ONE NAME CORRESPONDS WITH MUNCASTER AND CRAWFORD MSS.
CARLISLE 24TH APRIL 1606	0 EXECUTED 13 NAMES LISTED	" " "	
NEWCASTLE 30TH APRIL 1606	1 EXECUTED 15 NAMES LISTED	" " "	19 INDICTED - NONE CORRESPOND WITH MUNCASTER AND CRAWFORD MSS.
CARLISLE 2ND JULY 1606	1 EXECUTED 3 NAMES LISTED	" " "	
CARLISLE 3RD OCTOBER 1606	5 'CONDEMNED' 5 NAMES LISTED		
CARLISLE 11TH DECEMBER 1606	5 'CONVICTED' 3 EXECUTED 5 NAMES LISTED		
CARLISLE 8TH JANUARY 1607	5 EXECUTED 5 NAMES LISTED		
NEWCASTLE 4TH MARCH 1607			
NEWCASTLE 9TH APRIL 1607		10 EXECUTED 14 CONDEMNED 3 CLERGY (NO NAMES) 1 REPRIEVE	15 INDICTED
CARLISLE 16TH APRIL 1607		8 CONVICTED 2 'TO DIE' (NO NAMES) 3 REPRIEVED	
CARLISLE 25TH OCTOBER 1607		7 CONVICTED 4 CONDEMNED (NO NAMES)	16 INDICTED

In order that equal justice might be issued to both Englishmen and Scotsmen, the Commissioners decided upon a scale of terms at their meeting in April 1605. Grand larceny committed by Scotsmen in England and vice versa, was to be punished by death; and a scale of penalties was introduced in the event of an Englishman striking a Scotsman and vice versa. By agreeing to these terms, the Commissioners thought they had exculpated themselves from any charges of biased judgement towards their fellow countrymen. ⁴⁰.

Feuds were also identified as a major problem from the start. In their Commission, the Commissioners were ordered to 'have ane speciall cair and regard for removing of deidlie feidis', and to take all precautions to prevent the same re-occurring. At their first Carlisle meeting they resolved to put old feuds to agreement and arbitration and to bind the parties to keep the peace. New feuds were to be dealt with 'under the law'. ⁴¹

It was acknowledged in April 1605 that previous efforts to pacify the Borders had been thwarted by the warlike defences of the area. The fortified houses with their thick walls, pele towers and strong iron gates had often protected criminals and prevented them coming to justice. Under the Border Commissioners this 'armour' 'quhilk has servit the brokin peiple within these boundis in their lewd actionis' was to be taken from them. No-one, except gentlemen and noblemen was to carry arms, especially in the areas of Tynedale, Redesdale, Bewcastledale, Williavey, Gilsland, East and West Teviotdale, Liddesdale, Eskdale, Ewesdale and Annandale. The inhabitants were only permitted ordinary work horses or 'mean nags' for labouring the ground, none of which were to be worth more than 50 shillings sterling.

The Scottish Commissioners in November 1606 took further steps against the Borderers. Arguing that

ane of the chief and principall caussis quhilkis
 encourageis the thevis and lymmaris of the lait
 Bordouris to continew in thair thevische doings,
 proceidis frome the relief and conforte quhilk they
 haif within thair houssis, quhilkis being made for
 strenth and defence with iron yettis, it is verie
 hard and difficile to his Majesteis commissionairis or
 garison to wyn and recover the saids housis or to
 apprehend the lymmaris thairintill .

The Commissioners resolved that all the iron gates on fortified houses
 belonging to persons of 'brokin and disordourit clannis' were to be
 removed and turned into plough irons.⁴² In order that fugitives
 might not take refuge in their houses, even the most humble dwellings
 seem to have been destroyed or had the thatch removed. In June 1605
 the captains of the garrisons were ordered to search for escaped
 prisoners from Carlisle and demolish their houses. Later that month,
 Sir William Cranston reported to the English Commissioners that he
 had burnt houses belonging to the Armstrongs of Kinmont, Rob of
 Langholm, Jock of the Calfehill and Eckies Ritchie in Staykhue. The
 same month the English Commissioners told the Earl of Salisbury that
 they had demolished the houses of those who had escaped from Carlisle.
 In some cases just the thatch was removed, as in July 1605, 'rather
 to terrifie the rest then hurtful to those that owne theme, for I
 [Sir Wilfrid Lawson] houlds it not reasonable that the houses that of
 right belongeth to uthers should be destroyed, but onely the thatch
 pulled off, that in the meanetyme the offenders there might have no
 harbouringe.'⁴³

For the offenders that were apprehended and brought to justice,
 the Commissioners decided that transportation was the most convenient
 method of removing those who were not executed from the Borders.
 According to the Earl of Cumberland, the Borderers 'beinge even from
 their Cradells bredd and brought up in Theft, spoyle and bloode'
 thought theft was not a shame but a grace and credit to them. He

therefore recommended transportation, 'as their evill myndes cannot be chainged.' The King, however, hoped that by removing the unruly elements elsewhere, 'the change of aire will make in them an exchange of ther manners.' ⁴⁴

The Commissioners also singled out for attack, at their first meeting in Carlisle, one of the major contributors to disorder in the Borders - the practice of partible inheritance. In November 1605 the Scottish Council decided that 'no Bordour man of any broken name shall parte his rouses or steiding amongst his children' without the consent of the Border Commissioners. Instead, everything was 'to goe to the eldest and the rest who have nothing to live upon sufficiently, to be transported whither his Majestie and Counsell shall think fitt.' ⁴⁵

One clan which, as shown above, ⁴⁶ practised partible inheritance, was singled out for special attack and, indeed, the early records of the Border Commissioners are dominated by their activities against the most notorious of the Border clans - the Grahams. The Border Commissioners resolved to pursue the previous Border regime's intention to transport the Graham clan and in March 1605 it was decided that 150 Grahams should be sent for service in the Netherlands. By July that year it was reported that only 72 out of the 150 had reached their destination and the worst Grahams were still at large, including Jock of Peartree, Richard of Netherby and Hutchin of Guards. By November only 14 of the 72 who had reached the Netherlands were still there. In January 1606 it was reported that many of the Grahams had returned to Liddesdale, Ewesdale, Eskdale and Annandale, although rather than stealing, they were in hiding. As most had returned to their wives and families, it was decided that the unmarried Grahams should return to the Netherlands, but the married men, their wives and children, should be removed to Ireland. Sir Ralph Sidley offered to settle 45 to 50

Graham families on his lands at Roscommon in Connaught. These Grahams were to farm the land and were to be subsidised to cover the initial cost of setting up their homes. ⁴⁷

Money for their transportation was to be funded from the gentry of Cumberland and Westmorland, whom everyone expected to subscribe willingly to any scheme to rid the Borders of troublemakers. Contrary to all expectations, however, the gentry were not eager to part with their money, although ultimately £408 19 shillings and 9 pence were collected. On the 13th September 1606, 127 persons were shipped to Dublin from Workington and most of these were the wealthier Grahams. More Grahams were rounded up during the winter of 1606 and in April 1607, 34 more persons were sent to Ireland. An additional group of 20 was despatched in September 1607. As far as the Border Commissioners were concerned, the transportation was a success and by autumn 1606 they were able to report to Salisbury that 'there is not now left between Leven and Sark any Grahams, as we think, of any ability, but three, whereof there be two old men more than fourscore years of age'. This was confirmed in February 1607, when Sir William Cranston wrote to Sir Henry Leigh telling him that there were no Grahams for 24 miles around 'except sum seckly bodies'. Most of the wealthier Grahams had simply been transferred from the Borders to Roscommon, and if, when they reached their destination, they discovered that life in Roscommon was not all they had been promised, it was to other parts of Ireland that they dispersed, rather than back to the Borders. The few that did return, were content to hide and 'lurk in the woods' rather than disturb the peace of the Borders. ⁴⁸

Despite identifying and taking action against what they considered to be the major problems of the Borders, the Commissioners found that although their measures had made a great impact, that area did not

respond as well as they had hoped. Other problems were encountered in addition to those they were trying to solve, many of which plagued not only this, but succeeding Commissions for many years.

From the start, the Commission had not been equally divided between the east and the west of England. The heaviest burden of work was at first in Cumberland, where the Commissioners had to deal with the offenders of the 'Busy Week' and the transportation of the Grahams. Yet only two of the first five Commissioners were resident in Cumberland and both dwelt some distance from Carlisle - Sir Wilfrid Lawson and Sir Joseph Pennington. To help remedy this, Bishop Robinson of Carlisle and Sir Charles Hales, a member of the Council of the North, were added to the Commission in April 1606. But even then, the bulk of the work still lay on Lawson and Pennington. In December 1606 these Cumberland Commissioners complained that they had little assistance from their fellow Northumberland Commissioners; Sir William Selby spent most of his time at his home in Kent and Sir Robert Delaval was ill. (He, in fact died on the 1st of January 1607). 'Mr. Gray', the other Commissioner, they wrote, 'pretended like excuse by multiplicity of his own business and affairs.' These allegations were not altogether true as Sir William Selby can be seen to have attended many courts in both Cumberland and Northumberland; but, in general, however, Lawson and Pennington seem to have been under considerable strain. So much so, that in May 1606, Sir Wilfrid Lawson wrote to Salisbury that 'having now served more than a yeare in this painefull province' he might be relieved of 'this burden' as Border Commissioner. The Council did not permit him to relinquish office and by mid 1606 the emphasis had shifted to Northumberland. ⁴⁹

The English Commissioners' inability to co-operate between counties was matched by an equal inability to work closely with the Scottish

Commissioners. On the other side of the Borders in Scotland, the Commissioners had not shared the English Commission's obsession with the Graham clan. Certainly, the apprehension and rounding up of the Grahams had been important, as letters from the Scottish to the English Commissioners reveal. At their meeting in April 1605, the Scottish Commissioners had been as concerned as the English about the Grahams and a letter of the 18th April 1605 tells of the Scots' activities against Richard Graham of Netherby. In March 1606 Sir William Cranston was reported to have been extremely active, together with the lairds of Johnston, Maxwell, Buccleugh and Sir Gideon Murray, seaching 'all Esk' and the surrounding area for disobedient Grahams.⁵⁰ In general, however, the Scottish Commissioners' activities against the Grahams contrast with those of the English. In a list of 46 names of those banished and executed at their courts in Hawick, Peebles, Jedburgh and Dumfries, there is only one Graham. A list of 15 offenders executed in October 1606 at courts in Dumfries and Jedburgh also includes only one Graham. This could, of course, mean that the Scots were inefficient in apprehending and charging Grahams to appear at their courts. Yet a list of 47 fugitives from the courts at Jedburgh and Dumfries in April 1606 contains only one Graham name and there are only 3 Grahams in a list of 18 fugitives from the Dumfries court in October 1606. At a court held in Hawick on the 26th August 1605 there were 45 fugitives from Liddesdale, Eskdale, Ewesdale and the Debateable Lands, yet there was only one Graham amongst them. There were no Graham fugitives from the same areas at a court in Peebles in December 1605, although there were 31 of other names. At the same court there were 25 fugitives from the Annandale area, but only 4 of these were Grahams.⁵¹

These records indicate that the Graham clan were not considered by the Scots to be the major threat to law and order on the Borders that the English Commissioners thought them to be. Most of those declared fugitive, executed or banished from the areas where the Grahams lived - the Debateable Lands, Wauchopdale, Eskdale and Ewesdale, were of the names of Armstrong, Elliot, Batie or Irving. The English Commissioners could not understand why the Scots did not send Grahams to their courts. In December 1605, Sir Wilfrid Lawson sent an agitated letter to Sir William Cranston demanding that he catch the Grahams and take them to the gaol delivery at Carlisle. In May 1606 the English Commissioners complained that Sir William Cranston had sent no Grahams to their recent gaol delivery and in April 1606 the English had concluded that the Scottish Commissioners did not care to carry out the King's pleasure. In May 1606, they asked the Earl of Dunbar to cause Sir William Cranston to return to Eskdale and search for six English Grahams, as he appeared to disregard the English Commissioners' own commands. The Scottish Commissioners were irritated by their English counterparts' peremptory and, in their view, overstated directions. In March 1606 Sir William Cranston wrote to the English that he considered their obsession with Eskdale to be unfounded and, he continued 'if ye will needs be Comaunders I will desire that your discretion may appeare amid your authoritie and think not my bodie can be everie where to doe all your service on such an instant as yow require.' ⁵²

The court records of the Scottish Commissioners, their communications with the Scottish Privy Council and indeed with the English Commissioners, reveal that they were not negligent, but, in fact, were most zealous in their duty. A letter from the Scottish Council praised

the Commissioners' 'wonderfull goode success in sa fer as the verie memorie and remembrance of oppin ryding and roberies is become odious and detestable in they boundis wherein the Commissioners has omittit nothing that to thair dewtie and chaarge apperteyneth.' Even the English Commissioners commented on the zeal of the Scots, who, they said in September 1605 'made no bones' to kill fugitives or felons who resisted them; and Sir Wilfrid Lawson himself told the Earl of Northumberland 'I cannot but Comend the Scottish Commissioners there honest Care to see his Majesties service advanced'.⁵³

A letter of mid-1606 perhaps explains the Scottish Commissioners' attitude towards the tiresome Grahams. It was here reported that Graham fugitives were concealed in Esk and the adjoining counties of Scotland, but that they desired rather to hide themselves than to cause any trouble. When Sir Henry Leigh and Sir William Cranston, with 30 men, went to the garrison in Esk, the fugitives withdrew themselves and hid amongst the Carlisles and the Johnstons and amongst other families related to them. After Sir William had returned to his own house, they came out of hiding. It would appear that the Scottish Commissioners had enough active offenders to deal with rather than waste time pursuing those who wished to remain in obscurity and out of trouble. The reluctance of the Scottish Commissioners to hound the Grahams, but their zeal in apprehending other offenders, explains the confusing letters in the Muncaster and Crawford Manuscripts, in which the Scots were constantly being criticised for not sharing the English Commissioners' views. This also lends weight to J. Graham's book on the Graham clan at the Union. This book charged the English Commissioners with pressing for the transportation of the Grahams, not in pursuit of law and order, but that their lands might pass to the Earl of Cumberland. At first this book

was dismissed as too biased for consideration, but the conflicting attitudes of the two sets of Commissioners to the same problem in an *area covered by both jurisdictions - the Debateable Lands*, lends considerable weight to his argument. ⁵⁴

The English Commissioners had also become embroiled in factional squabbles on the Borders. A disagreement took place between the Commissioners and Sir Henry Widdrington, deputy Lieutenant of Northumberland, keeper of Redesdale, Member of Parliament and also Salisbury's agent in the area. A particularly bitter power struggle took place between Sir Henry and Sir William Selby, the latter seeking to discredit the former with the King and Salisbury. Henry's brother, Roger Widdrington, a prominent roman catholic, warned him that Selby and Lawson sought to accuse him of hiding recusants and attempted to counteract this accusation by charging the Commissioners with malicious activities in Redesdale. ⁵⁵

These factional squabbles, the inter-county disagreements and the poor relations with Scotland prompted a reconsideration of Border government by the central government. It was decided that one nobleman should have control over the whole Borders and the Earl of Dunbar was the King's choice. ⁵⁶ He had considerable lands and influence in both England and Scotland and it was hoped that he would be able to unite the Commissioners of both countries in a concerted effort and that under his influence, factions would not develop. He was appointed in December 1606. To soothe the English Commissioners (who might have objected at a Scotsman presiding over their sessions) the King justified his choice by saying 'Our meaning is not to give you [Dunbar] any authority to proceed as a judge over commissions, but to reserve that power to them onely where we have enabled in that kind to determine all those things by a commission under the great seal.' So successful was Dunbar's supervision, that in

August 1607 a new Commission was established, dominated by Dunbar, sharing the Lieutenancy with Francis, Earl of Cumberland and for the first time, Dunbar was given the power of life and death over Englishmen. Shortly after, he was appointed Lord Lieutenant of Northumberland, Cumberland, Westmorland and Newcastle. The appointment of the Earl of Cumberland has been condemned as a 'sop to English public opinion' as it was known that he 'would acquiesce to anything which the Earl of Dunbar suggested'. The documents reveal that the Earl of Dunbar's regime on the Borders, from January 1607 until his death in January 1611, was one of great activity by the Border Commissioners. ⁵⁷

Firstly, Dunbar secured the removal of the troublemaker, Roger Widdrington, out of the country. He then set about ridding Northumberland of thieves, for by this time, that county had taken the place of Cumberland as the main source of trouble on the English Borders. Sir William Selby reported to the Earl of Salisbury in February 1607 that the Earl of Dunbar had 'caused a great number of the principal Redesdale and Tindall thieves ... to be apprehended and committed.' The Earl was also very active in Scotland at the same time. Sir Thomas Lake reported to Salisbury in January 1607 that not only on the English, but on the Scottish side, the Earl had apprehended 'the most ancient theves and receivers of theves that were there abiding and many of them such as durst not beforetime be meddled.' In February 1607 Sir William Selby told how the Earl had apprehended the chief ringleaders in Liddesdale and other parts of Scotland. ⁵⁸

Despite reports in March 1607 that all the Middle Shires were in 'good quietnes' and in April that the people of Tynedale and Redesdale showed a greater obedience at the gaol delivery held by the Earl of Dunbar in Newcastle, than at any time since the Border Commission began; the Earl declared to Salisbury in September 1607 'we are now resolving on a course to terrify those that would offend and to punish those that have offended'.

The 'course' referred to was a repeat, in Northumberland, of the treatment of offenders that had been utilised in Cumberland in 1605 and 1606. The Earl advocated that although the 'less harmful sort' of the population of Redesdale, Tynedale and Coquetdale were to remain employed in husbandry, 100 outlaws and their followers were to be enlisted for military service. Whereas the Grahams had been sent for service to the Netherlands, the Northumberland outlaws were to be sent to Ireland. The ringleaders were not to be enlisted (they were to be executed) but those in prison, accused of 'lighter crimes', were to be employed in the King's service. In October 1607, not only were the allotted 100 condemned men sent to Ireland, but a further 40 were ordered to be transported. Despite praise by Sir William Selby and Bishop James of Durham that the Earl had shown such 'justice, equability and clemency that no man have or hath giant cause ... to complain of cruelty in ... pressing any for his Majesty's service', Lord William Howard, several years later, implied that a certain amount of 'private spleen' had directed the Earl's actions. 59

By December 1607, Sir William Selby was able to report to Salisbury that Northumberland was very peaceable and 'well freed from theft since the sending of our men into Ireland'. Unfortunately, no records exist of the Scottish Commissioners' courts during this period, 1607 to 1611; no separate portion of the register of the Scottish Privy Council was given over to the Borders as in previous years and the editor of the register, David Masson took this to indicate that 'the subjugation [of the Borders] had been so complete that comparatively little remained to be done'. Chancellor Dunfermline wrote in 1608 that the Earl of Dunbar 'has purgit the Borders of all the chiefest malefactors robbers and brigands as were wont to reign and triumph there, as clean and by as great wisdom and policy, as Hercules sometime is written to have purged Augeas, the King of Elide, his escuries'. James VI and I told the English Parliament that the Borders

were now

planted and peopled with Civilite and riches: their Churches begin to bee planted, their doors stand now open, they feare neither robbing nor spoiling: and where there was nothing before heard nor seene in these parts but bloodshed, oppressions, complaints, and outcries, they'now live every man peaceably under his owne figgetree and all their former cryes and complaints turned onely into prayers to God for their King, under whome they enjoy much ease and happy quietnesse. 60

Despite these eulogies on the peaceful state of the Borders, there is evidence that that area had not yet moved 'out of their old state of lawlessness and turbulence into that modern state' that they would experience later on. In May 1608 rioters in Dumfries assaulted and mobbed the Captain of the Guard, Sir William Cranston. He reported that the 'haill multitude and body of the toun was standing rankit in battell array'. A spate of prosecutions followed in Edinburgh. In February 1609, Cranston reported that he had been assaulted by the deacons of Dumfries, armed with fire-arms. The Archbishop of Glasgow on visiting the Borders declared the area to be a region of 'barbarity and uncivilitie ... voyd of all trew feir of God and religion'. The appointment of the Earl of Dunbar may have solved the problems of trans-county and cross-Border unity, but it had not been able to resolve many other important issues which troubled the Borders. 61

Throughout the Border region the Commissioners found that their efforts were impeded by an insufficient number of gaols and those which did exist were not capable of holding large numbers of criminals for any length of time. In May 1605 the Scottish Commissioners told the Scottish Privy Council that in the whole of the marches there was no gaol or prison sufficient to detain people, except in Dumfries. The Council took action in this regard and ordered certain burghs to provide sufficient tolbooths. In October 1605 Selkirk reported that it had now a 'verie sufficient 'tolbooth and

Peebles burgh undertook to build one in the town within two years. Yet even in 1612 the provision of sufficient gaols was by no means complete. It was reported, for example, that 'thair is no jayllis nor prisons within the bounds of the stewatrie of Annandaill,' and Jedburgh in May 1614 had to be allowed 1000 marks in order to make its tolbooth suitable for the use of the Border Commissioners' prisoners.⁶² Even where tolbooths existed, problems still arose. In September and November 1608, Sir William Cranston complained to the Privy Council that the baillies of Jedburgh refused to commit to ward a prisoner that he had arrested. Maintaining prisoners was a great source of irritation to the burghs - the burgh of Jedburgh complained in May 1624 of the 'havie and insupportable burdyne' of maintaining the Commissioners' prisoners. They argued that because the burgh 'must outhier entertheyne them or there suffer them sterve of hunger', they had incurred great debts. The burgh was granted 600 marks out of the fines of the Commissioners, for the upkeep of prisoners. This would not appear to have been paid, for in June 1624 the Earl of Buccleugh complained to the Council that the town of Jedburgh had refused to take any prisoners until the Earl paid for them himself.⁶³

The state of affairs was no better in England. Although gaols existed in the major towns of Berwick, Carlisle, and Newcastle, they were frequently full, as in May 1607 and January 1623, when it was reported that Newcastle gaol was greatly overcharged with prisoners and as a consequence, famine and disease were rife. It is little wonder that in April 1623 Lord Clifford told Secretary Calvert that many prisoners had died in Newcastle gaol and others, seeking to evade a similar fate, had taken advantage of the 'weak' condition of the gaol and escaped. In April 1605, 29 out of the 33 prisoners in Carlisle gaol had escaped. In October 1605 it was reported that five notable thieves escaped from

Carlisle gaol when the gaolers' servants left the door open whilst they brought in the prisoners' supper. Two Grahams escaped from Newcastle gaol in May 1606 and in January 1607 the Commissioners spoke of the many breaches of the prison at Carlisle and requested a gaol delivery as soon as possible to reduce the number of prisoners.⁶⁴ The Border Commissioners would appear to have been reasonably efficient in apprehending the criminals, but were unable to bring them to trial sufficiently speedily.

The Scottish Commissioners soon found a solution to that problem. In December 1606, an act of exoneration was granted to William, Lord Cranston and the Scottish Commissioners, which absolved him and them from any future questions or persecution for any of their proceedings. He was commended for his 'forwardness in the execution of our commandments and directions' and for the initiative he had taken in apprehending outlaws. Rounding up outlaws and then transporting them to gaol, could have meant wasting a large part of the season and risking the escape of some of those under his charge.

The consideration of the unsuiritie of himselff and his company to have the chaarge of too many personis disparat of thair lyff or pardoun all at ones, moved the said Sir William often tymes summarilie to mak a quick dispatche of a grite many notable thevis and villanes, by putting thame to present death without preceeding tryall of jurye or assyze or pronounciation of any conviction of dome .

This act of exoneration was repeated five times more before 1613. This would seem to indicate that the summary justice therein described was, indeed, meted out to 'a grite many' and 'often tymes'. We shall never know for certain.⁶⁵

The exoneration acts illustrate one of the other problems which beset the Bordér Commissioners - the question of the degree of severity to be utilised. The King and the Scottish Privy Council, as shown above, commended Cranston's harsh and summary justice. In their eyes, the Commissioners had

'done no manifest injurye, oppressioun or wrong to any of oure guide and obedient subjects'. Cranston was considered as a 'chirurgeon to make incision and to cuy away the rotten and cankered membris and flesche being in those pairtis of oure kingdome'. They continued

whatever actioun, challenge or accusatioun may at any tyme hereafter be leyd againis the said Sir William from his first employment to his present day for quhatsumevir his too summair proceeding, aither in taking, committing, convicting or quicklie putting to death for any persone within those Midle Schyris, we, for us, oure airis and successouris, do frelie renunce and dischairge the same by these presents. 66

Their hard-line attitude can be seen again in January 1606, when the Scottish Commissioners posed several questions to the Council, concerning certain offenders. Andrew Scott (Braidis Andrew) had committed theft before James became King of England, but had since only committed the crime of resetting a stolen nag; Jackie Beattie, also a pre-1603 offender had not committed any serious crime since; Thomas Armstrong could not be proven guilty of any crime and although greatly suspected, protested innocence; Ritchie Elliot had stolen only one sheep. Because of the relatively light nature of these offences, the Commissioners were uncertain as to the penalty which should be meted out to these people. The Privy Council was, however, very certain that harsh justice was the only way to cure the Borders and such justice was ordered to be executed against these offenders. The Scottish Commissioners were accordingly accused of over severity by the English Commissioners. 67

The English Commissioners were caught in a predicament over which course to adopt. On the one hand, the English Privy Council accused them of severity; as in March 1606 when they were charged with using 'more severe and strait proceedings' than the King intended. The Commissioners protested that they had not been too harsh and pointed out that benefit of clergy was nearly always granted for a first offence, if it was not too great. On the other hand, the Council urged the Commissioners to deal

severely with those Grahams who returned from exile. In April 1606, seven gentlemen from Cumberland urged the Commissioners not to use forbearance against any Border malefactor, or else great damage would be done to the country through the insolence that this could create. Like the Earl of Cumberland, these gentry believed that the Borderers were bred to a life of disorder and reform was out of the question. The following month, the Northumberland gentry petitioned to the same effect. Under criticism from all sides, the English Commissioners show great inconsistency in their prosecutions. A letter, in June 1606, from the Council to the English Commissioners, criticised them for acquitting 23 out of the 27 arraigned at Newcastle and Carlisle. Yet at the Newcastle gaol delivery in November 1605, 10 were executed and in January 1606, 17 more.⁶⁸

Many considered the conviction rate to be too low, and blamed this, not on the Commissioners trying to please central government, but on the juries who were unwilling to find offenders guilty and on the lack of witnesses willing to come forward for the prosecution. This problem was as common in England as in Scotland. In May 1605 the Scottish Commissioners reported to their Privy Council that they had great difficulty finding 'sufficient and unsuspect' juries for the trial of offenders within 20 miles of their dwelling, because all jurors seemed to be involved in feuds. This caused them to be biased either in favour or against the accused. The Scottish Council told them to do the best they could to find 'ane assize of the freest men of the cuntrey' and 'to repell and admitt the exeptioun of the feud as they find the parttalking in the feud qualefeit'.⁶⁹ In November 1606 the sheriff of Cumberland was criticised by the English Council for convening mean and ignorant persons to serve as jurors and ordered him to make a list of persons having £4 a year freehold in their own right, in order that trials 'might not be so scandalous as heretofore'. The Earl of Cumberland, in 1603, had seen the problem quite clearly. 'The people',

he wrote to the English Council, 'stands altogether upon clanes and surnames'. Thus, 'their kinridd and Alliance is so greate ... and ther consconce soe small, that hardlie anie prooffe can be gott according to the Rule of the comon lawe'. Moreover, if anyone were to discover a thief, such was 'the feare of Revenge as they will not durst committ that Trust to anie Justice of the Peace [for] feir of secrett burneing their houses or Barnes or other Revenges which hath binn too comon'. In Lord Scrope's time 'such was the power and malice of those Clanes [that] none dared almost to prosecute the lawe agaynst them'. Sir William Selby confirmed in April 1606 that the Commissioners were having to battle against this same problem. He told the Privy Council that the Hall family in Northumberland, were just as troublesome as the Grahams in Cumberland, but hitherto few of them had been punished, 'the people not daring to give information against them'. Thus, fear of revenge was a major hurdle in the path of successful prosecutions by the Commissioners. ⁷⁰

This, however, was but one facet of a larger issue. Protection, given by major landowners to notable offenders and thieves, was also a commonplace occurrence. In 1608 Lord William Howard was accused of overruling the course of the common law in the north and offering protection, particularly to roman catholic offenders. It was alleged that he was conniving to acquire the sheriffship of Westmorland so that he might return biased juries in that area. Sir Henry Widdrington, in June 1607, was described as having a following of the most notorious thieves and broken men in the Borders, of encouraging 'broken men in their insolencies', and of keeping notorious thieves, such as Thomas Hall of Branshawe or Adam Hall of Yardupp, 'as agents for the rest of the thieves of that County'. The issue of aristocratic protection was not confined solely to the years of 1605 to 1611 and was not a matter which could be resolved immediately,

as a cryptic letter from the Northumberland justices in 1618 reveals. They complained to the Council that Northumberland was not as peaceful as it might be 'for want of due execucon (through opposition and private ends) rather to encourage than oppress malefactours'. ⁷¹

There can be little doubt that the Border Commissioners between 1605 and 1611 hit the Borders like a bombshell. The acts of execution for the summary justice, the details of the numbers of those executed (see below p.198) and banished, the practice of destroying outlaws' houses, together with the removal of the Grahams and the 140 unruly Northumbrians, bear witness to this. This period saw major progress towards the pacification of the Borders, but it would be inaccurate to say that that area was now reduced to an acceptable level of law and order. The elements contributing towards disorder could not be eliminated in seven years and the period after 1611 saw a relaxation of the previous constant supervision, which revealed that unless the Borders were under constant pressure, the area would not remain stable.

iii. 1611-1622

The year 1611 was important in the history of the Border Commissioners. In January that year, the Earl of Dunbar died and in August, William, Lord Cranston, the dynamic and determined Captain of the Scottish Border Guard, resigned his post to Robert Ker of Ancrum. Although he still remained on the Commission, his influence was removed from the Commissioners' main means of apprehending and rounding up offenders. ⁷² With their proven leaders now removed, the Commission started to split, not only between England and Scotland, but also between counties.

Disorders were soon apparent in England. In May 1611 the first large scale raid since the Border Commission had started operating took place in Northumberland. Led by Lancelot Armstrong of Whithaugh and his

brother Alexander, with Robert and William Elliot of Reidheugh, 70 men (50 of them on horse) armed with pistols and picks, came from Scotland to Lionel Robson's house in Leeplish, six miles inside England. They demolished the house and killed Lionel Robson and Elizabeth Yarrow. Thirteen Robsons and Charltons were injured.⁷³ More outrages followed and in February 1615 the Privy Council wrote to the Earl of Cumberland and Lord William Howard, asking why, after 'soe many years of peace wherein justice either hath ben or ought to have ben duly administered, there are committed in these pairtis ... more robberies and spoyles than in Tymes precedent? and that these dayly grow and multiply'. In June 1615 the Council again complained to the Earl of Cumberland that 'thefte and stealinge is growne soe generall and to that height in that county of Northumberland that it cannot be suppressed with the ordinary course of proceedinge in justice'. In June 1616 the Earl of Cumberland received a further complaint about the excessive number of robberies committed in the Northern counties and of the outlaws which 'doe dayly increase in an extraordinary number'. Richard Foster spoke to Secretary Winwood in March 1617 of the many thieves that had infested the north since the death of the Earl of Dunbar. Thomas Howard of Cumberland wrote to the Deputy Lieutenant of Northumberland in early 1618 that 'robberyes are verye Ryff in those parts' and the following year the Commissioners wrote to the Council of the 'many and greate disorders' in their area.⁷⁴

In Scotland, too, turbulence began to bubble beneath the surface. In September 1615 a complaint reached the Scottish Council of an illegal convocation and disturbance of the peace in Selkirkshire. It was reported that Pringle of Buckholm and Alexander Stewart of Fawlishope, by taking part in this riotous conflict, had disdained 'to follow oute their actionis be the ordinair course of law and justice and preferring a lawless, insolent and violet forme of proceedinge to his Majesties obedience and peace

of the countrie.' In January 1616, 200 men rioted in Dumfries, most bearing fire-arms. In March 1618 a serious riot broke out on the Borders whereby William Elliot of Prinkenheugh (who had supposedly been banished in 1615 for theft) and William Elliot of Hartsgarth met with

one hundred of all the disordourit clannis of the lait marches, and some of thame being fugitives and outlawis for capitable crimes ... in contempt and disdane of his Majestie to renew the insolencies and disordouris quhilkis of late yeare were to frequent and commoun in these boundis.

Over 50 people rioted in Moffet, armed with pistols, in June 1618 and there are reports of serious disturbances in Dumfries in October 1619, June 1621, and December 1621, involving 'all disordered brokin bordour men'.⁷⁵

Part of the problem seems to have been the return to the Borders of outlaws and fugitives who had fled to Ireland, or further inland, to escape the Earl of Dunbar's rigours, together with the return of those offenders who had been banished abroad. In June 1611 the Earl of Cumberland reported that some of the Grahams who had been sent to Ireland were starting to return. Many of the Northumberland offenders, banished by the Earl of Dunbar, had returned by 1616. Reports from Northumberland in 1617 show that large numbers of thieves and outlaws, many of whom had been sent to Ireland, were again at large in that county, and in the survey of 'lewd and disordered' persons, commissioned in 1618, many can be seen to have returned from banishment. On the death of the Earl of Dunbar, his enemy, Roger Widdrington had returned to Northumberland and in May 1612 the Earl of Salisbury died.⁷⁶

From that time, the Borders and particularly Northumberland, were plunged into factional squabbles. Many of the major Northumbrian land owners were also prominent at court and so the factions at court, which had erupted on the death of Salisbury, were transmitted into the Borders.

The situation worsened in 1614 when Theophilus, Lord Walden received as a grant, all the Earl of Dunbar's former lands in Tynedale, Redesdale and Coquetdale and Roger Widdrington became his steward. The most important quarrel and power struggle was between the roman catholic element (the Howards and Widdringtons) who had been deprived of power prior to 1611 and the protestant Border Commissioners who had, hitherto, ruled the Borders. In the course of this rivalry many accusations and counter-accusations were made - the Commissioners accused the Howards and Widdringtons of giving aid to great thieves and the roman catholic faction in turn accused the Commissioners of debility, old age, neglect and incompetence. Between these accusations the truth is very difficult to determine. Each side alleged that the other was responsible for the increase in crime.

A letter to the Privy Council in 1611 lamented the state of Northumberland and the increase in recusancy since the death of Dunbar, on account of the 'evil government' of Roger Widdrington, Lord Howard of Walden and William, Lord Howard. The Earl of Cumberland in February 1616 attributed the increased number of outlaws on the Borders to protection afforded to them by friends at court. In March 1617 a list was submitted to the Privy Council of 27 thieves and unruly persons in Northumberland, all of whom were allègedly dependants and servants of Sir Henry Widdrington and his brother Roger. William Morton, writing to Sir Ralph Winwood in May 1616, said that judges would not convict offenders because of fear of revenge by the Widdringtons and that many would not even complain of thefts because of the 'heavi hand' of the Widdringtons. The following year, Winwood alleged that the greatest thieves in the county were supported by Lord Howard of Walden and the Widdringtons and that the entire want of justice in that area resulted from the support they gave to each other.⁷⁷

On the other hand, letters were sent to the Privy Council by Sir Henry Widdrington in January 1617 describing his great attempts to rid the area of thieves, by employing harsh methods and 'a desperate remedie and unusuall course to uncover and make inhabitable the howses and dwellings and to cast out the wife and children of such fugitives.' He had, he wrote, committed 20 to gaol recently. He deplored all attempts to slight him behind his back. The Howard faction blamed the incompetence of the English Border Commissioners for the increase in crime in the region. Lord William Howard, for example, in February 1615 suggested that

the principall causes of the late disturbances upon the confines of Cumberland and Northumberland have ben (as I conceive) favourable proceedings against offenders at a gaole delivery holden at Carlisle about two yeares sence, wher (as I nowe remember) about 20 malefactors weare condemned and only one inlands theefe executed, which gave great encouragement to offenders to presume of like future favour .

He concluded that the Commissioners 'either out of pitie or humour of popularitie, shewe extraordinairie mercie in the execution of justice in these partes, one such gaole deliverie will do more harm then will in hast be recovered'. He explained that the Commissioners were no longer efficient .

Sir William Selby that dwelleth in Kent; Sir John Fenwick, a gentillman that more aimes at a private life than publick imploiment; Sir Wilfrid Lawson, dwelling in the inmost parte of Cumberland and aged neere eighty yeres; Sir William Hutton, of greate debilitie of body, both of them learned and sufficient men on the bench, but alltogether unable to serve in the⁷⁸ field.

The Howard faction also blamed the garrison for the increase in thefts and disorder. It was reported that

divers of the garrison have ben theeves and are well known at this daie to favoure theeves and outlaws. Most of them are base idle cowardly fellowes and of badd Conversacon. For these five yeares that they have hadd his Majesties paie they have not brought in five malefactors of any reckoning or done any one daies service worth one weeks paie.

The survey of 1618 commented several times on the 'idle garrison' and lamented that Thomas Nixon, a convicted felon, was still at large, saying 'how can wee hope for truth in our Countrey when such false wretches are suffered to be Tennants and be thus wincked at by our late garrison if not by some of our commissioners'. Lord William Howard spoke in February 1615 of the Provost Marshall of the Border garrison, John Musgrave, as 'a serving man of meane condition, weake in estate and of kinne and alliance to many surnames that have ben heinous offenders and some of them as yett no saints.' ⁷⁹

Using the evidence from 'Vetera Indictamenta', S.J. Watts, in his study of Northumberland, has considered that crime rose in that county during the years 1614 and 1615 but the years 1616 and 1617 saw a decrease in the number of indictable offences. The reliability of these series of documents has been discussed in the notes to this chapter and Table 20 shows that the Border Commissioners' records were defective. The figures for 1614 and 1617, however, are drawn from the justice of the peace records which are considered to be more reliable than those of the Commissioners. ⁸⁰

What is certain, however, is that, firstly, by the time the survey of 'lewd and disordered' persons was issued in 1618, a large number of outlaws and those banished to Ireland had returned. Secondly, the Scottish Commissioners thought little of the English efforts on the other side of the Border. It was reported in October 1612 that

His Majestie never bestowed money worse then on our English quarter, so hath his Majesties cost on Scotland's side ben imploied to exceeding good purpose and great benefitt to the Countrey. The officers there have ben and are so vigilant painefull and industrious as night or daie a theefe cannot stirre but he is presently pursued and their Recetters duely punished.

The letter complained about the debility of the English Commissioners and said that offenders from Scotland fled to England because they knew

they would 'find more rest and better interteanment' there. It is clear that the English Commissioners were not holding as many courts as previously. A letter to Secretary Winwood in May 1617 reported that in the north there was 'no direct course of justice held through the country, but Sessions of peece and court of the county kept, but without any manner of legall proceeding and more in name than substance'. A letter from Theophilus, Lord Walden told, in 1618 of 'often breaches of prisons [which] is imputed to the want of gaole deliveryes'.⁸¹ It is also clear that the factions at court endeavoured to manipulate the Border Commission so that the personnel who served on it would be amenable to their ends. Thus, new commissions were issued in July 1611, August 1615 and February 1616. The Earl of Cumberland, on receiving this last commission, wrote in frustration to the Council, explaining that if law and order were to be brought to the Borders, there needed to be stability in the Border Commission. Yet another commission was issued in January 1618, which consisted of three parts - a large conjunct commission with Scotland; a new, enlarged commission of oyer and terminer and a commission 'for the survey of lewd and disordered persons in the north of England'.⁸²

The survey revealed that in Cumberland and Northumberland, there were large numbers of outlaws from justice, fugitives returned from banishment, offenders who had never been brought to justice, and persons who had escaped from gaol, as far back as the early years of James's reign. Hector Nixon of the Flatt, had been indicted for murder committed on the 31st of March 1603. He had escaped from Carlisle gaol and ever since had lived quietly. Richard Routledge of Todhills, indicted for murder, the survey reported, 'passeth daylie out of Ireland into Bewcastle and is wincked at by all officers'. Pat Storey, called Peele of the Hill, was a thief, 'surpassing all the theeves in Bewcastle', yet he was not brought to justice, 'which causeth poor men to

be silent when they have just cause to complaine and imbowldreth proude theeves to persevere in ther villanie well knowing their own securitie through either the oversight or negligence or Corruption of officers'. John Richardson had been banished to Ireland, but had returned, so had Edward Musgrave of the Trough. Quintin Foster of Crackenthorpe, a convicted murderer who had escaped from prison, was found to be living freely and quietly in Cumberland. In all there were 99 separate names in the Cumberland survey, with a further 22 Grahams who had returned from banishment and there were 152 names in the Northumberland survey. That all these were at large certainly implies some failure on the part of the English Commissioners and their garrison.⁸³

The activities of the Scottish Commissioners remain obscure during this period. Full justiciary courts were held by the Commissioners in July 1611 and again in October, at Jedburgh and Dumfries. Details of these courts survive, but no further records can be found until 1622. There are, however, indications that the Commissioners held several courts between 1611 and 1622. The register of the Scottish Privy Council mentions in June 1615 that two offenders had been convicted and banished by the Border Commissioners: John Scott, called the 'sukler', was reported to have been declared outlaw at a court of the Commissioners held in Jedburgh on the 26th of April 1615 and Walter and William Scott were declared fugitive for not appearing at the Commissioners' courts on the 13th April 1613 and the 5th September 1614. There is evidence that the Scottish Commissioners continued to transport across the Border, English offenders for trial in Scotland. On the other hand, by January 1617 they had apparently not held a court for some time, because the Privy Council was forced to extract a promise from

the Commissioners that they would hold one as soon as possible. It was, perhaps, as a consequence of the lack of courts that the King had received reports, in November 1616, of the disorderly nature of the Middle Shires. He had rebuked the Privy Council in Edinburgh and concluded that the recent disorders were to be attributed to negligence, either on the part of the Council or the Border Commissioners. Steps were taken to remedy the situation in August 1617. Border Commissioners were empowered 'to adopt a more expeditious course of justice than hitherto allowed' in arresting Border malefactors, and were permitted to try criminals they had apprehended 'how soone after thair apprehension as the said Commissionairs sall think fitt', rather than keep them in prison until the next court day. According to the acts of exoneration, however, this practice had been in operation on the Borders since 1605. That it had to be made explicit in 1617 could indicate, either that the Commissioners' current practices were being given royal approval, or that these practices had lapsed during the period after 1611 and without them the Borders were becoming unruly again. The conjunct commission, as established in January 1618, was a response to the recent disorders on the Borders and also to the renewed interest in the area after the King's visit to Scotland.⁸⁴

For a while, the new commission seemed to urge the Commissioners of both England and Scotland to make a greater effort to tighten up their system. A meeting was arranged in Newcastle in November 1619, where both sets of Commissioners discussed the problem of the peace of the Middle Shires. Remanding was one of the main issues discussed and it was decided that all malefactors fleeing out of the country where the offence had been committed and into the opposite country, should be remanded to the place where the offence had been committed. There they would receive trial and punishment according to the laws of that country. A

list, or schedule, of the names of fugitives and outlaws was to be exchanged frequently between the two sets of Commissioners. Furthermore, the English side of the Borders in Northumberland was to be divided into wards and each English Commissioner from that county given charge of a particular ward to rout out offenders. Sheriffs, bailiffs and other judicial officers were charged to help the Commissioners in all ways. ⁸⁵

Such benefits that may have arisen from this meeting were short lived. For a while, pressure had been mounting in the north of England for the abolition of the garrison. It has been shown that the garrison was held as useless, expensive, oppressive and corrupt. In June 1619 Lord William Howard had petitioned the Privy Council in London, saying, 'I do assuredly hope night watches will be needlesse and a garrison in those parts will never be more spoken or thought of'. The Scottish Council and Border Commissioners had a very different opinion of their garrison. 'The diligence and executioun of the garison', they wrote, 'hes broucht the lait Bordouris upoun this syd to greit quyetness, by cutting of mony malefactouris and reduceing uthers to ordour and obedience'. The Guard, according to them, had strengthened and fortified the course of law and order in the Borders, because some of the garrison lived in those parts where the greatest disorders had occurred and were, thus, able to act quickly.

When information was maid to thame of ony stouthis, thay not only maid inquirye of the stouthis and very narrowlie examined the same, bot maid searche for the lymmaris and quhair thair was pregnant presumptiouns of their guyltines they apprehendit thame and committit thame to ward ... when thair justice courts wer appoyntit and sett, the gentlemen of the Gaird brocht the criminalls to thair tryall and had all thingis preparit and in reddines that micht further the tryall quilk was not onlie ane countenance and grandour to ⁸⁶ the courts, but a grite terror to malefactouris.

Under pressure from the Howard faction at court for the abolition of the garrison, the English Privy Council sent out a tentative enquiry about such to the Scottish Council. They received the reply that without the garrison in the Borders, the continued peace of that area could not be guaranteed. The English Council chose to ignore the warning and in November 1621 the Border Guard was discharged. The Scottish Council and Commissioners showed a deeper understanding of the Border problem - realising that although the pacification of the Borders was underway, it was not by any means completed and that the current degree of law and order which had been imposed on the Borders was the result of constant supervision.⁸⁷

iv.1622-1625

The worst fears of the Scottish Council were realised, in both England and Scotland, soon after the abolition of the garrison. The period 1622 to 1625 saw, in both countries, a resurgence of crime. In February 1622 the Scottish Council urgently requested the attendance of Border nobles for talks about 'checking the cryme of thift [which] daylie increassis in Annerdale, Ersdale and Ewisdale'. 'We are informed, 'the Council wrote, 'that the crymes of thift, ressait of thift and pykrie [pilfering] quhilkis of lait yeiris wer happelie supprest in the Myddill Schyris, ar now begun to be renewed and lyk to grow to ane furder hight yf tymous remeid be not provydit'. The same month, Robert Philip sent the Scottish Commissioners a letter describing the increases in crime since the abolition of the Border Guard. The letter is important and worth considering in detail.

Thift increassis nichtlie in Annerdale, Eskdale, Ewisdale and the nether pairtis of Nithisdale, sa that in all pairtis of that cuntreyis thair is nichtlie mony stouthis committit ... lymmaris ar sa insolent and unreullie because thair is not ane gaird nor na uther havand commissioun til apprehend lymmaris, that thai cair not quhat thai do and sa in this caice the cuntrie is wraikit in all pairtis ... Except thair be sum that hes commissioun and power

til tak them, as the gaird had, thai will nocht
 ly lang idyll bot yit steill mair, for thai will agree
 with sik men as ar of power and freyndschip, bot for uther
 trew men that hes not power they respect them nocht.

He then listed all the thefts that had taken place since the abolition
 of the Guard - 15 horses, 56 cattle, 398 sheep and 2 other thefts.

His letter was given added weight by a communication from the
 Committee of Annandale, which reported, in the same month, that
 'within thir twa last yeiris bygane in ane parochie viz. Waughope,
 thair is stolline above 4000 sheip, 200 nolt, 100 horse' .. Furthermore,
 'within the whole parochie of Cannabie thair is verie few that are
 not under the slander of common thieves, at least receptors'.

Even allowing for exaggeration, the letter paints a dismal picture.

The people darr not resorte to churche on the Lord's
 day, for in that tyme, specially, the theeves dryves
 thair goods away. It is nou a commoun pracktack amangst
 these theeves to cum in the night to honest mens
 houssis and fetter [them] with yrons or other bonds ... least
 they sould goe cry for help, and so take all the goods
 within the hous away. The most pairt of Annandale ... is
 filled with insolent theeves who are becum so bold that neir
 the verie ports of Dumfries thay tak away droves of horssis,
 nolt and sheip ... A thousand complaintis will be found
 of this kynd if thair war punishment of theeves and
 innocent people wer protected to compleane. 88

In England there was no similar sudden increase in lawlessness -
 the Guard had never been so efficient in that country as in Scotland.
 But the general deterioration which had been apparent since the death
 of the Earl of Dunbar continued unabated, despite hopes that the abolition
 of the garrison would relieve the area of a corrupt and disorderly
 influence. The English Commissioners seemed to become more and
 more inefficient; so much so that in 1621 a tentative suggestion
 was put forward for the abolition of the present commission and to
 commit the government of the Middle Shires to noblemen and justices
 resident in the Borders. This suggestion was not taken up and
 instead, in March 1622, a new commission for the Borders was established.
 The English Privy Council expressly commanded the new Commissioners to

remand English Borderers, who had committed offences in Scotland, to that kingdom for trial and vice versa for Scottish offenders.⁸⁹

In Scotland a new system was introduced, whereby three Commissioners-in-Chief were appointed - the Earl of Buccleugh, the Earl of Nithsdale and John Murray of Lochmaben. These three were not to supersede the former Commissioners, but were to be conjoined with them in a position of ascendancy. They could only convene courts with the co-operation of the ordinary Commissioners and were to nominate ten gentlemen each as agents in their service, with powers of sword, fire and siege, for the pursuit of criminals in the Middle Shires. It was hoped that this system would help replace the former Guard and by including more local lairds, spread the interest in law and order over a wider proportion of the population.⁹⁰

The first courts were held in May 1622 and from then until April 1623. The overall concern of these courts seems to have been the outbreak of disorder after the abolition of the Guard and harsh justice was meted out. The entries show that 159 cases were heard in eleven months and out of these, 44 percent were banished or executed. There is also evidence that these Commissioners were more efficient at apprehending and bringing the offenders to trial, for whereas 63 percent were fugitives from Border Commission courts in 1611, only 42 percent were declared fugitive in 1622 and 1623. The success of this Scottish commission was reflected in several different ways. In June 1623, the Maxwell-Johnston feud which had troubled the Commissioners since 1605 was finally resolved. By February 1623 the King had been able to ask the Commissioners to apprehend all outlaws fleeing to Ireland and by July that year, a close correspondence had been established between the Commissioners and Lord Clanboye in an attempt to prevent the escape of offenders. Special attention was paid to the poor and unemployed as a possible source

of criminal activity. For example, in July 1622 every minister was ordered to give up the names of all such people in his parish. A report from Selkirkshire in May 1623 shows that measures were being taken against 'strong and ydle beggaris' which were commonly considered to be a major source of thefts. In November 1624 the Scottish Commissioners were able to give a good account to the King of what they had achieved. 'Keeping of good correspondance, executing of justice and causing of reall redres to be maid off all complantis on the English side, sua that now thair is no stouthis, no realtis hard or unredressed on this syde'.⁹¹

By contrast, the English Commissioners were reprimanded for their negligence in failing to remand prisoners and were threatened with prosecution in Star Chamber. Sir Ralph and Sir John Delaval, both Border Commissioners, attributed their inefficiency to the weakness of the whole Border Commission: Commissioners were dead, some had left the area and other were disabled through illness. There was some truth to this excuse: Sir Henry Widdrington died in September 1623; Ralph Gray of Chillingham died the same month; Sir Ralph himself died in 1628 and for a long time before had been so ill that he was unable to leave the house; Sir John Fenwick was reported to be so ill, in December 1623, that he could only act in an advisory capacity; and Sir William Selby had left the north for his house in Kent. The Delavals had not been making idle excuses - the English Commission was, indeed severely undermanned. A complaint by the Scottish Commissioners went so far as to suggest that for all practical purposes, the English Commission had ceased to function. It was reported in November 1624 that Tynedale and Redesdale had

broken lowse and frequent stouthes committed within the same and no redres at all maid, be reason as we [the Scottish Commissioners] conceave, that since the death of umqhile Sir Henry Widdrington, that had charge over these boundis, thair is no persone of qualitie authorised with commission... to tak ordour with the saidis disordouris .⁹²

The period to 1625 was of great importance in the history of the Borders. The Commissioners of both sides, in the early years, employing harsh and sometimes arbitrary justice, had made a great impact on the Borders. By the end of James VI and I's reign, feuds were rare and disorderly clans, like the Grahams, had vanished from the scene. Raiding and reiving no longer took place on the same scale as they had done in the sixteenth century. Yet the Borders were still not as peaceful as the rest of Britain unless constant supervision was maintained. Nevertheless, the complaints of disorders made at the end of James's reign and throughout the rest of the century, must be taken in the context of the period in which they were made. What was from 1625 considered outrageous, could, before the activities of the Commissioners, have been considered commonplace.

v. 1625-1637

On his accession, Charles I retained the Scottish Commission, but not the English, which was allowed to lapse. Charles did not have the same concern for the Borders as his father and there was not the same urgency for him to establish 'Great Britain' that his father had felt. Nor did he have the same concern for Scotland. As his reign progressed, that nation felt increasingly neglected and misunderstood. Despite frequent protests and petitions for the English Commission to be renewed, it was not until 1635 that the new conjunct commission was established. Nor is there any evidence that a justice court was held by the Scottish Commissioners during the first decade of the reign. Certainly in December 1627 the Scottish Commissioners had not yet been given permission to hold a court under the new King.⁹³ Without permission to hold courts and without a mechanism for apprehending fugitives across the frontier, the Commission was virtually impotent. Consequently, the Borders lapsed further into disorder.

In February 1626 the Scottish Council requested the Scottish Commissioner, the laird of Amisfield, to recover the house of Stapleton, seized by Christie Irving and his brothers. They had

fortificat and stuffed the house with men, victualls and armour, intending to keip the same house as ane house of wear aganis his Majestie and his auctoritie and, as appeiris, to use the same as a ressett and refuige to the brokin and fugitive lymmaris in the Middle Shires.

It was reported that without a long, continuous siege, it would be impossible to recover the house, and, indeed, by May 1626, it was still not suppressed. There are conflicting reports of the gradual re-arming of the Borders. Some said that none carried arms in Dumfries and Caerlaverock, although elsewhere in Nithsdale 'thair is many that beiris pistolatis in thair pocattis and behind thair bakis'. Sir Robert Gordon of Lochinvar reported that in the areas adjacent to Nithsdale, 'almost everie man carries pistolettis'. The laird of Galashiels complained 'thair is none that forbeiris to use thame [fire arms] as leist none from beyond Tweed'. There were numerous complaints and reports of disorders made to the Scottish Council. For example, in November 1627 the Commissioners were requested to take measures against the 'great disorders and thefts committit of lait within the boundis of the Middle Schyris' and to apprehend 'the nomber of fugitives who formarlie abandoned and left the countrie and ar now returned and hes ane publict and avowed reset within the same and that the peace and quietnes of these boundis is like to be disturbed.' In December that year they bemoaned the 'uncontrolled libertie these lymmaris hes taine to pas to and fra Ireland at their pleasure and to flee into England without chalse'.⁹⁴

The Commissioners themselves knew exactly what was wrong. Reporting to the Privy Council on the state of the Borders in December 1627, they said 'the cause' of all the disorders

proceeds frome the discontinuance of holding
of courts and keeping of the ordinaire meetings
with the Commissioners on the English side ...
for repressing of these disordouris it were
requisite that Justice Courts sould be haldin at
some certane dyets to be appoynted for that effect.

But in March 1634 a petition was made to the Council from a prisoner who had been in Dumfries gaol for over a year. He declared that, although he had often requested a trial from the Earl of Queensberry, a Border Commissioner, 'the Earl excuses himself by saying that there cannot be a trial unles a full number of the Commissioners be present and that it is uncertain when they will meet, as they have not kept a commission court for some years past'. In July 1629 the Scottish Council again petitioned the King that one of the chief causes of the increase in thieving on the Borders was the hope of impunity and escape by offenders.

After the committing of stealths and other
insolencies on this side they doe flee over the
Border into England quhair they live in a full
securitye without challenge or attachment in
regard the (Scottish) Commissioners ar not warranted with power
for apprehending of them thair ... We humblie beseeke your
Majestie to give warrand for renewing of the joynt 95
Commission for both kingdoms.

As far as it is possible to gauge - from the State Papers and the assize documents of gaol deliveries in 1628 and 1629 - the English side of the Borders does not seem to have suffered as badly as the Scottish. Although without the special commissioners' powers, the justices of the peace, together with the assize judges, seem to have coped quite adequately. At the gaol delivery in Newcastle in August 1628, there was only one case out of 28 involving a Scotsman. In this case, Gerard Coxon, called 'Hint' was charged with the resset of Robert Elliot, a Scotsman and a 'Great Theefe'. At the court in August 1629, there were 2 out of 35 cases involving Scotsmen. Walter Ramsay, a Scotsman was accused of the theft of a purse and John Brewers, of the theft of 28 sheep and escaping from

gaol in August 1627.⁹⁶ Taking into account the Scottish Commissioners' allegations, it is possible to interpret these records as revealing the inefficiency of the English authorities in apprehending and bringing offenders to trial.

Yet evidence from elsewhere would seem to support the suggestion made above, that the ordinary law officers were carrying out their duties efficiently. In May 1630, Thomas Carlton of Carlton, a justice for Cumberland, told the Council of his efforts in apprehending several of the most notorious malefactors that there had been in recent years, whereof 18 were executed at Carlisle. Ellen Charlton, who was prosecuted by the assize judges at the courts in Newcastle in 1628 and 1629, together with her sons John and Thomas, petitioned the King against the 'violence of heavy prosecutors' in Northumberland, by which her sons were sentenced to death. Lord William Howard presented a list of Border malefactors he had brought to justice: eight of these had been brought to trial between 1625 and 1632 and none of them were Scotsmen. In the State Papers, the only reports made to the Council of disorders in the Borders concerned a riot of apprentices in Newcastle in March 1633, although the Privy Council records show that there was concern in January 1631 over the increasing number of disorders occurring throughout England and Wales at that time.⁹⁷

Despite the apparently peaceful state of the English Borders, the King yielded to pressure and reissued a conjunct Commission for the Borders in November 1635, the preamble to which described terrible conditions in the north of England. Malefactors, it claimed, went about armed by day and night, committing robberies and assaults and imprisoning innocent people to the point of starvation. Threats to life, murders and burnings were frequently committed and it was to prevent such dreadful deeds that the Border Commission had been

re-established by the King. ^{It is unlikely that} this was an accurate description of the English, as well as the Scottish side of the Border,

and may ~~not~~ have been included as a preamble expected in such a special commission, as many other Border Commissions contained such. ⁹⁸

This Commission followed the same pattern as previous Commissions and included the requisite complement of powerful local gentry - Lord William Howard, Henry, Lord Clifford, Sir Francis Howard, Sir John Fenwick, Sir Richard Graham, Sir John Lowther (a member of the Council of the North), Sir William Widdrington: and in Scotland, the Marquis of Douglas, Robert, Earl of Nithsdale, Robert, Earl of Roxburgh, John, Earl of Annandale, William, Earl Queensbury, the Earl of Traquair, Lord Drumlanrig, Lord Kirkcudbright, Robert Greirson of Lag, Sir John Charteris of Amisfield and Sir John Murray of Falahill. Little is known of the activities of the English Commissioners in this period as there are no court records. However, in February 1636 there was a renewal of James VI and I's proclamation that the chief landlords adjoining the frontier of the two kingdoms should be answerable to the King's laws for any of their tenants who committed a capital crime and then fled. ⁹⁹ The Scottish Commissioners held court in March 1637. This would appear to have been their first court since 1623.

The delay of several months between the issuing of the proclamation and the holding of a court, was probably due to the dreadful plague which struck the Borders in both England and Scotland in May 1636. Measures were taken to prevent trade between the two countries and in June 1636 the sheriff of Teviotdale prosecuted a man called Ligertwood who had 'maliciously and unchristianlie' brought an infected child over the Borders on his horse. After the child died of plague he still continued to allow several people to ride on the same horse and

saddle. Persons who committed offences like this were liable to the death penalty, so terrified of the plague were the population. Fairs were prohibited in the Borders because English people might attend at Kelso, Melrose, Coldstream, Hawick, Duns, Jedburgh or Selkirk. On account of the numerous prohibitions issued during the time of plague, the Scottish Commissioners would not be able to communicate with their English opposites until the winter of 1636, when the plague had passed. ¹⁰⁰

The first communication that took place after the plague was a disagreement over the remanding of prisoners into each country. As in 1623, the Scottish Commissioners wished to remand but the English did not. The Scottish Commissioners held a court soon afterwards in February 1637 at Jedburgh. At that court several acts were set down by the Commissioners for the better government of the Borders. No persons under the degree of landed men were to go to Ireland without a warrant from the Commissioners. No alehousekeeper in the Borders was to have any mutton or beef in the house without showing the skin, head, ears and hide to two neighbours as proof that it had not been stolen. Landlords having the right to lands occupied by the wives or widows of fugitives and those executed for theft, were to eject the spouses and families and no-one was to resset them elsewhere. All thefts were to be reported and all goods were to be bought on the open market. Each minister was to be issued with a list of fugitives which was to be fixed to the church door ever Sunday. A similar list was to be given to the English Commissioners. All offenders who had been fugitives for a year and a day were to be hanged regardless of crime and without further trial or indictment. These measures were very harsh and reflect the increase of lawlessness in Scotland, which had taken place between the death of James and 1637. ¹⁰¹ The records of the court, too, reveal that harsh justice was meted out in Scotland, compared

with England. At the gaol deliveries in 1628 and 1629, held by the assize judges in England, 10 and 7 percent respectively of the people before those courts were executed. At the Jedburgh court of 1637, however, 42 percent were executed and a further 35 percent banished. ¹⁰²

By 1637 in both England and Scotland, national events had begun to surpass the Border problem in importance. For the next 15 years at least, any organised efforts to impose law and order on the region were to be interrupted and piecemeal. The riots at St. Giles in July 1635 had prompted Charles I to remove the Scottish national law courts to Dalkeith and November 1635 saw the formation of the 'tables' or Committees, which were to organise the revolution in Scotland against the King. By January 1639 the Borders were rife with the rumours of Scots preparing for war and the English Privy Council even went so far as to order the rearming of the Border men that it had, not long before, taken great pains to disarm. The Borderers were even encouraged to resume their practice of raiding and reiving. Sir Jacob Astley wrote of the Borderers at this time, 'They are fit for times of war to burn and spoil and there is good use to be made of them'. In February 1639 Roger Widdrington reported that desperate young Covenanters were preparing for thousands to be sent to Jedburgh and planted along the Scottish Border and in response, the King ordered 600 dragoons to be sent immediately to Northumberland, Cumberland and Westmorland. ¹⁰³

v. 1637-1650

The Bishops' Wars broke out between England and Scotland in April 1639 and from that time, through the Cromwellian conquest of Scotland, troops were a permanent feature on the Anglo-Scottish Borders. The effect of the recurring wars, the spoilation by the troops, and the inevitable breakdown of communications between the two sets of Commissioners, is difficult to judge, but law and order must have

suffered as a result. In November 1642 the Scottish Council complained that

A long time agoe by the force of his Majesties auctoritie and lawes, the peace of the Borders betwixt the Kingdoms of England and Scotland was happelie settled; but now, for want of joynt commission to persons of qualitie in both kingdoms his Majesties peace in the Borders is broken and his good subjectis ther infested in their persons and goods by depredations, thifts, stouthreaffs and other nefarious facts.

They went on to issue a list of 91 names 'who are knowne to be notorious criminals, theeves, ressetters of thifts and the most pairt of them are declared fugitives and outlaws'. Of these, all the persons who had been declared outlaw and fugitive at the court in March 1637 were still at large - none having been brought to justice. It is, then, little wonder that at a justice court held in Dumfries in March 1643, supplications were made by the heritors and ministers of the Borders complaining about the large number of thefts, murders, 'depredations, breaking of ministers houssis, witchcraft, charming and other odious crimes', which had been committed 'be a number of lawlesse and insolent persons who are the more encouraged to goe on and persist in their lawlesse and godlesse practyses ... through the want of executioun of justice in these boundis.' 104

In June 1645 and April 1646 the Earl of Buccleugh was granted a commission for the trial of mosstroopers [freebooters] in the Borders, the courts for which were to be held in Selkirk and Jedburgh. No records survive of these courts and as the register of the Privy Council of Scotland ceased to be kept after 1646, there is no indication of the length of time this commission operated. However, the Scottish Commissioners held a court in July 1649 at Jedburgh, in which 19 persons were pannalled, 9 of whom were found guilty. Their offences were not recorded, but 2 of the pannal can be traced as thieves at a later date. These records, then, cannot give any real indication of the level of law

and order in the Borders at this time, although they do show that law enforcement was still in operation. 105

On the other hand, the English Border Commissioners would appear to have ceased to operate sometime before the outbreak of the Civil War. The invasion of Scotland in 1650, most probably interrupted all law enforcement in the Borders of both nations. The impact of the Cromwellian forces on the south of Scotland were graphically described by John Nicoll in his diary. From Berwick to Ayr, he wrote, 'this kingdom was, for the most part, spoiled and overrun with the enemy'. This left 'the land mourning, languishing and fading and left desolate every part thereof shut up and no safe going out nor coming in'. The English side of the Borders certainly seemed to be in disarray. In October 1649 the regiment in Carlisle was ordered to try to repress the mischief daily committed by mosstroopers. In July 1651 mosstroopers were again reported to have committed many murders and thefts, but little seems to have been done to control them. The English Council was informed that many people, in several counties, who had been put into the commission of the peace, were failing to act in that capacity and as a result, thieving and murders were increasing. To try to combat this, military were called upon to suppress disorder wherever possible. By 1650 - after several years of occupation and abuse by troops, heavy taxation, sieges, and terrible plagues - descriptions abounded of the 'sad and wasted condition' of the north of England and south of Scotland. 106

vii 1650-1660

Cromwell realised that his greatest chance of success lay in the establishment of a law abiding community. The Puritans were eager to effect a godly reformation and bring about the kingdom of God on earth. In order to make this possible they needed absolute control. This was vital, both to keep down 'delinquents' (royalists and papists)

and to suppress the natural inclinations of a 'lewd and disordered' society. Thus, the theory of 'sword and word' was evolved. The sword to conform the outside and the word to reform the inside. The enforcement of law and order, then, was to be a major feature of the Cromwellian period.

The appalling lack of law and order in the Borders was obvious and in 1651 the English commanders in Scotland held justice courts at Leith. The justice ayre was re-established in September 1652 and this went on circuit throughout Scotland on a regular basis until the Restoration. In January 1653 the English Council of State appointed a committee to confer with the Scottish deutes about commissions granted by Queen Elizabeth and James VI and I for suppressing the Borders. In October that year, an act was issued for the better prosecution of thieves, in which anyone discovering felons, known as mosstroopers, residing in the Borders of England and Scotland, who were subsequently convicted of any felony except petty larceny, would receive £10 reward. This act was, initially, to last until October 1656. At the beginning of 1656, however, justices of the peace were appointed in every sheriffdom in Scotland and in June 1657, when the October 1653 act for suppressing the Borders was renewed, the justices of the three northern English and six southern Scottish counties, were ordered to hold private sessions in their shires, to try to bring order to the area. 107

The Interregnum 'Border Commissioners' then, were not initially created by a special commission, as those in the earlier and later periods. In fact, at no time does the Crown Office Entry Book of Commissions record a special commission of oyer and terminer being issued for Northumberland, Cumberland and Westmorland alone, although commissions were issued for those counties with Yorkshire, Durham and Lancashire included. Yet the Riddle of Hayning papers noted that

the courts of July 1658, October 1658 and February 1659 were held by commissioners of oyer and terminer. The evidence in this respect, then, is very contradictory. If these Commissioners were judged by their actions, however, it would be seen that they clearly followed the spirit, at least on the Scottish side of the Borders, of James VI and I's first Border Commission. 108.

Their actions are difficult to trace on the English side. No quarter session records exist for Northumberland and Cumberland and only the depositions from the assizes. For Scotland, however, there are, within the Riddle of Hayning papers, executions of witnesses, assizers and delinquents and also court records. Some of these court records would appear to be of the justice ayre, as in May 1656, April 1658 and April 1659, at which the Border Commissioners gave suit. The court held in October 1657, however, was definitely a Border Commission court. It was held by Andrew Ker of Chatto, Sir William Scott of Harden, Sir Andrew Ker of Greenhead, with other justices of the peace for Roxburghshire, together with Charles, Lord Howard, Henry Widdrington, Esq., Edward Fenwick, Esq., and Sir Wilfrid Lawson, 'keeper'. All this group of justices were described as 'commissioners of oyer and terminer for the borders of England and Scotland'. It would appear, then, that a conjunct commission was in operation, whereby not only did both sides of the commission correspond with each other, but that they all sat and held court together. 109

The preparations for this court were very thorough. Assizers were summoned from each parish in Roxburghshire and large numbers of bands and cautions were taken from offenders in order that they might appear before the Commissioners. Bands were also taken from pursuers to ensure that they presented their indictments. So efficient were these precautions that only three people failed to appear at the court. Close co-operation between the two sides of the commission is apparent in the

list of 13 persons to be remanded from England and sent for trial in Scotland. Most of the offences were not recorded, although George Elliot was indicted for the theft of seven score sheep, Janet Blyth, for the theft of a toop [ram], Margaret Jameson was banished as 'a common raker haveing no constant residence' and James Pirrie was absolved of bestiality. The shortage of information makes such examples unrepresentative, but it would appear that the new Border Commissioners were combining in their courts their powers as justices of the peace as well as commissioners in order to apply the policies of 'sword and word'. No more court records exist for the Interregnum, although a scrap of paper dated July 1658 described Sir Andrew Ker of Greenhead as a Commissioner of oyer and terminer for the Borders and in October 1658, he and Sir William Scott of Harden were similarly described and were reported to have adjourned their court until the 1st February 1659. ¹¹⁰

From these records it seems doubtful that the Border Commission was operating in Dumfriesshire, although the instructions of June 1657 did include that area. Certainly no documents exist to indicate that courts were held in that county. There is also little guidance on the Commissioners' activities between October 1653 and June 1657. Rolls of delinquents, assizors and witnesses exist in the Riddle of Hayning papers dated 1656, referring to a court at Jedburgh in May of that year, but these were, most probably, for a justice ayre. No other documents survive for Scotland. None exist for the English side of the Borders in that period. There is, however, a warrant, dated August 1653, for the Keeper of Morpeth prison to deliver Robert Armstrong of the Side and William Johnston to Henry Widdrington, in order that they might be sent to Jedburgh for trial. There is another warrant issued to the Keeper of Jedburgh prison to accept the two felons. It would appear that a certain amount of cross-Border enforcement of law and order was taking place, even at this early stage, with Henry Widdrington as the

nominee to transport the prisoners. This is curious, because in October 1657 it was this same person who was in charge of remanding. 111

It is unfortunate that so little information is available on the activities of the Border Commissioners in the Interregnum, for the records that do exist would seem to suggest that they were a highly organised body, co-operating closely, each with the other side of the frontier. Their systematic lists of assizers and delinquents from each parish in Scotland indicate that they were utilising the same methods as the newly re-established and efficient justice ayre; this could only be beneficial for the Borders. The experiences during these years were to be of benefit after the Restoration, for several of the Interregnum Commissioners were on the Restoration commissions. One of the most important men in this respect was Charles Howard of Naworth.

In the 1640's, Charles Howard had been Captain of the Protector's own Life Guard and in acknowledgement of his services, was appointed High Sheriff of Cumberland in 1650 and within a year, Governor of Carlisle. From that time, he sought to procure for himself the monopoly of nominations to office in Cumberland and Northumberland - serving as a member of the Council of State in 1653 and as Member of Parliament for Cumberland in 1654 and 1656. Whilst at Naworth in spring 1654, Howard experienced a raid of Scottish mosstroopers and in order to prevent the like occurrence, established patrols over the Border region, which were given the approval of General Monck, who gave Howard two troops of cavalry and ordered that the patrols be extended into the Scottish Borders as far as Galloway. In August 1654 Howard and Monck were named Commissioners to govern the Borders. Using companies of infantry from the garrisons of Berwick and Carlisle, Howard arrested the political opponents of the Protectorate and prevented public assemblies, in addition to seeking out Border malefactors. He was later

to point out that during this time, he had condemned to death 100 criminals in less than three years. In March 1655, together with General Monck and others, he was appointed to 'his Highness Council' in Scotland, with instructions to endeavour to preserve the peace and administration of justice in that country, by having the courts of justice conducted along lines agreeable to English law. The following month he was included in a special commission of oyer and terminer to try the rebels of the insurrection in Northumberland, Yorkshire and County Durham. The same year he was appointed Major General of Cumberland, Westmorland and Northumberland. His inclusion on the Border Commission, then, was natural for one who had had such experience of law and order in both England and Scotland and for one whose ancestors had likewise been intimately involved in such matters. Charles II created Howard Earl of Carlisle and Baron Morpeth and the Earl continued to be a leading member of the Border Commission. His invaluable experience gained during the Protectorate must have made a major contribution towards the success of the later commissions. It certainly served as a valuable apprenticeship for his position as governor-general of Jamaica, 1678-81. ¹¹²

viii. 1660-1684

On the Restoration of Charles II, the Border Commission was not immediately renewed and gradually complaints began to be made about the lawless state of the Borders. In November 1661 the Earls of Home, Haddington and Annandale were ordered by the Scottish Privy Council to speak with the Laird of Stobbs and other Border gentlemen on how thefts in that area might be prevented. In November 1662 the Scottish Council wrote to the King of the 'daylie complaints' made to them, 'of the frequent robberies committed on the borders'. They ventured to suggest that 'if these insolencies be not in tyme prevented, the

peace and security of these bounds cannot long be preserved'. They requested a reissue of the Border Commission. William Delaval wrote to Edward Gray, for Northumberland, about the number of horses stolen by the Scots. ¹¹³ In general, as before the Civil War, most of the reports of numerous thefts came from the Scottish side of the Border, the English were more concerned with religious disaffection.

A letter from William Delaval in January 1661 typified the English attitude. He spoke of the pulpit 'blowing sparks' of common discourse that the government would not last a year; he described groups of disbanded troops lying about Newcastle, waiting to join 'the fanatics' in order to start a new war. Others reported 'dark mutterings' on the English Borders and expressed fears of a Quaker rising. ¹¹⁴ Reports such as these fuelled a great dread of religious disaffection in the Restoration government, which gave rise to a very heavy handed rule in both England and Scotland, with all officers obliged to take oaths of Supremacy and Allegiance. The steps taken against religious dissenters were a reaction against the liberal religious attitudes of the Interregnum, rather than any measure of the level of turbulent 'crime' on the Borders. The reports of theft, as they were made after the Restoration, must be taken in context and not confused with a much earlier and very different period. The Restoration government, however, was extremely sensitive to any disorder, especially in those areas where religious dissent was high. It was probably on account of this, that the Border Commission was renewed in 1662. ¹¹⁵

The Scottish commission was basically the same as those issued by James and Charles I, although it was to operate over the more limited area of Roxburghshire and Selkirkshire only and would appear to have been limited to crimes of 'mosstrooping', theft and robbery. This again is further indication that the Borders were not the same as in

1605. The English commission would not appear to have been limited to theft alone and was issued, as previously, as a special commission of oyer and terminer. It was issued to 47 persons, including the dynamic Earl of Carlisle and a generation of Border Commissioners bearing the same names as their early seventeenth century predecessors - Wilfrid Lawson, Ralph Delaval, George Fletcher, Henry Widdrington, John Lowther and Edward Gray. The Scottish Commission was issued to 38 Scotsmen, but the hereditary element apparent in the English commission was here lacking. ¹¹⁶

Little is known of the Commissioners at this date. According to the Erskine of Dun muniments, the Scottish Commissioners held their first court in January 1663 and a further three courts in that year. There are no court records from the English side, although the Scots reported that they had had a meeting with the English about returning a Scottish prisoner in Carlisle back to his own country. ¹¹⁷

Throughout the summer of 1663, reports were constantly made of the increasing number of religious dissenters in the north of England and south of Scotland - one report put their number at 10,000. At the beginning of August 1663, the high sheriff of Yorkshire, Sir Thomas Gower reported the discoveries of his 'excellent system of espionage' in that county. These revealed that officers of the old Protectorate army aimed to capture York during the assizes later that month. The city was then to serve as headquarters for a chain of insurrections in the north of England and south of Scotland. This scheme was prevented by the immediate posting of the King's Guards to York. But the capture of some of the people involved revealed further insurrections planned for October 1663, in which the key towns of Nottingham, Gloucester and Newcastle were to be taken. Despite thorough government precautions, risings took place in early October in the north of England. The plot was centred on Westmorland, Durham and Yorkshire. A rising was supposed

to take place on 5th October 1663 in Northallerton in Yorkshire and at the same time Captain Robert Atkinson was to lead a simultaneous revolt in Westmorland. Together with the rebels from Durham and Yorkshire, Atkinson was to seize Carlisle garrison, imprison Sir Philip Musgrave, a justice of the peace and requisition the excise money. The rebels seem to have been mostly Quakers, who were opposed to the government's support of the episcopalian church government. Many of them believed they would receive the support of 3000 men led by Sir Thomas Fairfax, with 5000 men from Portugal and a further 800 from Scotland, but in fact the rebellion came to nothing. The rebels were dealt with by a special commission issued for that particular purpose and as a result, no record of the trial and indictments of the rebels can be found amongst the assize indictments. The depositions, however, reveal that feverish activity by the commissioners was taking place in Westmorland and Cumberland, in preparing depositions for the trial of the rebels at a special gaol delivery, which took place in March 1664 at Appleby, expressly for that purpose. 118

The Rising confirmed the government's view of the precarious state of the Borders and it is a strange coincidence that on the 13th of October, a mere eight days after the Northern Rising took place in the old West March, the Scottish Border Commission was extended further west, supposedly to counteract the increased number of thefts in that area. Soon afterwards, on the 1st of December, a warrant was granted to magistrates in the south and west burghs to search for English rebels who had taken refuge in that area of Scotland. The Scottish Border Commission, renewed in February 1664, confirmed the extension westwards.

The pockets of religious discontent in these areas seem to have greatly unsettled the peace of the Borders according to the preamble to the renewed Border Commission of May 1665. 'Robberies, depredations

thefts and slaughters' were committed throughout the day and night upon the inhabitants 'Be the mosstrouper, theves robbers and other wicked and lawlesse persons who convocat themselves together in hostile furnitour'. P. Hume-Brown has taken this preamble to this and the other Restoration commissions to indicate that the Border Commissioners were inefficient and inactive against thieves. In the 1665 to 1669 volume of the register, he states that the Border was in a hopeless state as ever and the Commissioners inefficient. In his edition of the 1669 to 1672 records, he wrote 'in spite of all the past efforts of the Council, the Borders remained as unruly as ever' and spoke of the 'further measures and abortive commissions'. Yet the records of the Border Commissioners themselves, reveal that they were not inactive, but were quite the opposite. 119

In October 1665 the English Commissioners held a two day court and gaol delivery at Morpeth, where they hanged six offenders. The Scottish Commissioners were present at this court on the last day and both sides agreed upon certain articles for the preservation of the peace of the Borders. Witnesses were to be found who were impartial; those who fled to Ireland to escape justice were to be apprehended; and all efforts were to be made to improve communications between the two sets of Commissioners. It was agreed that the articles of the 7th year of the reign of James VI and I were to be put into execution. This meant that the demanding and delivery of felons was to take place as often as possible, at the 'General Quarter Sessions of the Commissioners of Gaole Delivery' and in the interval, upon information given to the neighbouring justices or Commissioners for either kingdom, of anyone who had committed a theft. To cement this agreement, 14 criminals were remanded by the Scottish Commissioners, 5 of whom can be traced in the Scottish Commissioners' records as having received due trial and punishment. 120

There is evidence that throughout 1666 these articles were in operation. For example, a declaration made by Robert Armstrong called Rockes before the gaoler of Carlisle and John Aglionby, a Cumberland justice, was sent to Scotland to be used in the trial of Robert Armstrong, called Hethersgill. In March 1666 another joint meeting was held. 121

The Scottish Commissioners held three courts in 1665 and four in 1666. The English held one in 1665, two in 1666, four in 1667 and one in 1668. It would appear that the Scots did not hold a court between 1666 and 1669, for no record of any can be found. Furthermore, at the court held in Jedburgh in March 1669, the Commissioners were told 'there are several prisoners in javell who have remained for a long time' which seems to indicate that no court had been held for a while. After this court there was another long interval on the part of the Scottish Commissioners, until 1674. During the same period, the English only held one court, in June 1671. Between these dates, there would appear to have been some deterioration in the state of the Borders. In February 1673 the Scottish Council wrote to Lauderdale that in the 'shyres of the kingdoms bordering with England ... robberies, depredations and other outrages are, and have of lait bein more frequent in these parts than formerley.' They requested a joint commission of the Borders, as there had been in the past. A similar letter from an Englishman to the English Council in the same month told how English thieves fled into Scotland and vice versa. He also requested a joint commission to enforce the Border laws, which at that moment were 'a little more lax as to the point of probation than is practised in the ordinary courts of justice'. The joint commission was eventually issued in July 1674 embodying the articles agreed upon at Morpeth in 1665. 122

The response was startlingly different, as a glance at the records of the English and Scottish Commissioners will show. Far from revealing an inefficient and weak executive, which allowed criminals to evade capture and punishment, the majority of the Riddle of Hayning papers are concerned with the years 1673-1680. The gaol delivery book of the English Commissioners confirms this. An examination of these documents reveals a highly organised, dynamic and co-ordinated team. ¹²³

It is not easy to ascertain why this particular commission should have been especially efficient. Many of the Commissioners had been on previous commissions, indeed some of the highest attendances were by those who had served previously. ¹²⁴ However, for the first time since the Restoration, the Scottish Commission was extended to include the whole of Dumfriesshire, whereas previously only certain parishes had been involved. Thus, the Commissioners were able to have control over the whole Border area. Later this was to extend even further into Wigton, Galloway and Kirkcudbright. Yet although this would have facilitated the apprehension of criminals, it need not have instilled new vigour into the Commissioners themselves. Certain new Commissioners came onto the scene with the inclusion of the western counties; most notably, Sir James Johnston of Westraw and Sir Robert Dalzell of Glenae, both of whom were to prove extremely active and zealous. In 1676 Sir Patrick Maxwell of Springkell, James Johnston of Elshields and Thomas Kirkpatrick of Closeburn were added to the Commission. The efficiency of these men in collecting witnesses depositions, rounding up offenders and returning to the Borders those who had fled to Ireland earned them commendation from the King. It is possible that the sudden burst of enthusiasm from the Commissioners came as a result of financial incentives given to certain individuals. The appointment of James Howard as Country Keeper and the financial benefits that post could involve, have been described in the chapter on the justices of the peace.

Moreover, in March 1678 the King granted John Riddle of Hayning, a Scottish Commissioner, the right, for three years, to the fines of all thieves, robbers and delinquents imposed on them by the Border Commissioners since 1666. Both James Howard and John Riddle, then, had a vested financial interest in bringing offenders to trial and conviction before the Commissioners. Whatever the reason for the new found vigour in the Commission, the year 1674 was important in the history of the Borders. ¹²⁵

From the start, relations with the English Commissioners were excellent and they soon agreed that more frequent remanding sessions were to be held in each county. Fifteen days before such a meeting, a list was to be sent to all Commissioners of all those to be remanded and who were to be brought before the next meeting. The Commissioners were kept informed of meetings on both sides of the Border and frequently attended the others' courts. There is also abundant evidence of prisoners moving across the Borders for trial in the county of their crime. In 1676 both sets of Commissioners were pleased to declare 'now at this tyme are seldome any thifts committed but subjectis may leave out freelie thier horse, kye or sheep in the feilds'. ¹²⁶

Moreover, the working methods of the Commissioners seem to have been inspired by new vigour. The English resolved that every constable in each parish was to search thoroughly for any stolen goods. The Scottish Commissioners held several meetings between July 1674 and July 1676 where people were encouraged to tell them of any theft which had taken place since 1649. Confronted with confident Commissioners, the public responded with enthusiasm to this open invitation and long lists of suspects were compiled. As a result of these, criminals could be brought to trial quickly, convicted with ready witnesses and either dispatched out of the King's dominions, or executed. Table 21 shows

the increased number of criminals before the Commissioners in England in 1676 and the high level of execution, which could be attributable to the new zeal of both sets of Commissioners. The efficiency of the Scottish Commissioners can be seen in their documents, where, for the first time since the early seventeenth century, the records were entered into a book, instead of being left as loose papers. ¹²⁷

There are no records of the activities of the English Commissioners after 1678, although as late as 1684 England was included in the Scottish Commissions. It seems likely, then, that the duties of the English Commissioners were gradually taken over by the justices of the peace and the assize judges, who appear to have been able to cope with the Borders, for there was no further demand for an English Commission again.

The Scottish Commission continued for a further period. In June 1679 the Borders could have been once more upset by the rebellion of Bothwell Bridge when rebels hid in the Borders, especially in Roxburgh and Selkirkshire. In July 1683 rebels from the Rye House Plot also hid in that area. But apart from the necessity to apprehend these rebels, which prompted a special visit from the justice ayre, there was no accompanying outbreak of thieving and other disorders, which would have been the result of such an upheaval at an earlier date. A new commission was issued in February 1684 and again in October 1684, but the Commissioner, John Riddle of Hayning, seems to have ceased to keep a record of their proceedings. Certainly, the activities of the Commissioners in the 1680's were not on the same scale as the 1670's. Many of them were also justices of the peace and, during the 1680's, these officials were greatly involved in suppressing religious dissent in the Borders. It would appear, then, that as non-conformity surpassed theft as the major source of trouble on the Scottish Borders,

so the Commissioners began to act more in their capacity as justices of the peace.

A special commission for the Borders was issued in October 1684, but a request, in December 1685 for their renewal indicates that the commission had lapsed. The complaint in May 1691 by Mr. Alexander Hall of Munckraig, of thieves and broken Border men carrying stolen goods in and out of Scotland, was followed by the suggestion that the 'magistrates of burghs and other ministers of the law' should aid the petitioner in executing justice against such malefactors. In earlier years, such a petition would have requested a renewal of the Border Commission, but by 1691 a plea for greater zeal in the ordinary officers of the law must indicate a change had taken place on the Borders. That area may not have been as law abiding as it ought, in 1691, but by that time it was not sufficiently different from the rest of the kingdom to be considered an area requiring a special commission. ¹²⁸

I. The work of the Border Commissioners' courts.

i. Securing the offenders

One of the main reasons for establishing the Commission of the Middle Shires was to prevent criminals being able to escape justice by fleeing from one side of the border to the other. Thus, the working relationship between the two sides of the Commission was of central importance.

Certainly, good relations were necessary, for the extent of the movement of criminals would appear to have been quite astonishing. Very often, these movements were calculated specifically to thwart the law enforcing agencies, by their trans-jurisdictional nature. In the normal course of events, a thief from Westmorland who stole a horse in Cumberland and took it through Northumberland to sell in Scotland; or one for Selkirkshire who stole an animal in Roxburghshire

and took it through Dumfriesshire to sell in Carlisle, would easily evade conviction. In the first case, evidence from three different sets of county justices would have to be collected, in addition to that of a sheriff, at least, in Scotland. In the second case, several Scottish jurisdictions might need to be approached as well as the English authorities. The Border Commission was designed to make such prosecutions easier. It is only where the depositions of witnesses and accused survive that the full extent of such criminal practices can be appreciated and these do not exist in any real quantity until after the Restoration. The extent of trans-jurisdictional movement in the early seventeenth century, therefore, is largely unknown, although the Muncaster and Crawford manuscripts do contain a few hints of such movement.

For example, Lord William Howard in 1606 followed three 'infamous Border offenders' from Cumberland and Westmorland into Yorkshire. The 'Busy Week' raiders came from the Debateable Lands and Scotland down into England in March 1603. In November 1605 the English Commissioners complained that English offenders received resset in Scotland, especially in the west. In a deposition as a witness in July 1610, Thomas Hall of the Hillhouse in Redesdale, told of thefts in Redesdale by Scotsmen. Indeed, the raid in May 1611 against Lionel Robson in Northumberland was carried out by Scotsmen, who then retreated back across the Border. A letter from Theophilus, Lord Walden in 1619, told how criminals committed thefts in England, escaped into Scotland and then took their booty across to Ireland. There are also many indictments which mention that the offender stole from the opposite country. These would all seem to indicate that trans-jurisdictional movement by offenders seeking to evade justice, was very common. 129

By the mid-1650's, depositions survive in large quantities and these reveal the same type of movement as the early documents. Christopher Dodd, for example, stole a mare from County Durham and took it into Northumberland in 1659. Robert Rackett, and two others from Cumberland, stole cattle from Durham, Yorkshire and Cumberland in 1662 and took them to either Alston Moor or Durham to sell. These depositions frequently reveal most complex theft patterns, indicating that the desire to evade capture was the driving force behind the trans-jurisdictional movement. Thus, John Glendinning, and George Trumble from Scotland, joined forces with Mungo Noble and Edward Elliot from Crew in Bewcastle, Cumberland, to steal beasts at Brampton fair in 1661. Some of the beasts were then taken overnight to Haslegillhead in Scotland and then delivered to another Englishman and a Scotsman, who took them to sell either in Durham or Darnton. (old name for Darlington) Others were resset by James Ford of Jedburgh, who took them to Edinburgh to be sold. Another complex case was that of John Milburne, who told in April 1663, of how offenders from Cumberland stole cattle from Northumberland which were then exchanged by Patrick Pyle of Newton for cattle and horses stolen from Cumberland. Margaret Dawson, a widow from Newcastle, told, in October 1663, how she bought a horse from Alexander Scott, a Scotsman, who was later found to belong to the Mayor of Whithorn in Wigtownshire. Robert Elliot in Stobbs, in May 1675, told how 40 toops were stolen from Dornordrig, supposedly by Ninian Elliot of Falanesche, who drove them to Little Arthur Foster, in Peterburne, in Cumberland, who, in turn, drove them to Durham in order to sell them.¹³⁰ Complex patterns like these were obviously very difficult to detect and many more must have gone completely undetected and unknown. The above examples, were, most probably, only the 'tip of the ice-berg'. It needed somebody like the Border Commissioners as a unifying, cross-Border jurisdiction, to be able to bring such offenders to trial. Yet for the Commissioners to convict them, close contacts between each side were crucial.

The relationship between ~~the two~~ sides of the Border was not as close as it might have been and fluctuated throughout the century. One of the basic problems was where the trial should take place of persons who came from one country, but had committed offences in the other. The proclamation establishing the Border Commission had stated vaguely that offenders should be sent 'to the country and place where they offended to receive their condign punishment for their demerits according to law and justice respectively in that behalf'. However, this principle called remanding posed certain problems - trial in Scotland by a Scottish judge, of an English offender, was against the March Law. Although the March law had been abolished by James VI and I, according to the common law of England, men could only be convicted of a capital crime by jurors resident in their own shire. In March 1605 the Scottish Council, in reply to a plea from the Scottish Commissioners to clarify the issue, replied vaguely that the two sets of Commissioners were to agree with each other on form and proceeding. In other words, they could not solve the problem. 131

In August 1605, Sir William Selby, an English Commissioner, attended the Scottish Commissioners' court at Hawick and was astounded at the harsh justice administered there. He resolved from that time to attend all the Scottish courts, although it was against the common law to do so. In November 1606 a Parliamentary committee considering the union with Scotland, suggested that Parliament make provision for the mutual extradition of suspected criminals, so that Englishmen who committed crimes in Scotland could be tried in Scotland. The King greatly favoured this process of remanding because it seemed to fulfil his desires for a united Britain, but it was opposed by northern justices on the grounds that it seemed unfair to allow an Englishman accused of felony to be tried by Scots using roman law instead of the English common law. The bill that was

ultimately passed in July 1607 decreed that Englishmen who committed offences in Scotland, before or after the King's accession, were to be tried in England by English judges. ^{132.}

Yet by October 1607 requests were starting again for the renewal of remanding. A bill of July 1610 enabled commissioners of oyer and terminer, justices of peace and assize judges in the Borders, to examine Englishmen accused of felony in Scotland and if they found 'pregnant proof' according to English law, they could send the offenders for trial in Scotland. The bill was passed with the provision that it was only law if the Scottish Parliament passed reciprocal legislation and anyway, only until the end of the first session of the next Parliament. The Scottish Parliament did not pass the necessary resolution and at the dissolution of the 'next' Parliament in June 1614, legal remanding expired. In November 1617 despite the statute of July 1607 forbidding remanding, the English Parliament passed a resolution in Star Chamber that 'suche as committ felonyes or other heynous offences punishable by the lawe in the kingdome of Scotland and flye into England shall be apprehended and remaunded to the place where the fact was committed and there to receave punishment'. The new Border Commission of 1619 also expressly ordered remanding to take place, again, in the face of the statute of 1607. The confusion this created can be seen in a letter from the English Commissioners to the Privy Council in 1619. They explained that, although in the preamble to the latest commission 'there is mention of the remaunding of the Malefactor fugitive into the place where the offence was committed there to receave his triall according to law', they were very puzzled because 'in the boddy of the said Commission, where the authoritie is given to us, the clause of remaundinge is omitted; therefore wee conceave some doubt how farr we may procede in this point of remaundinge'. They requested the King 'to be pleased to cleere and resolve this doubt'. The issue was not properly clarified and in 1623 the Commissioners

were threatened with prosecution for not practising remanding. By 1637 the issue was still not resolved, when Lord William Howard and other Commissioners were faced with the same ambiguity in interpreting the commission.¹³³

The records mirror the confusing situation outlined above. There are frequent examples of remanding in the 1605 to 1607 period. Examples of Scottish offenders tried before the English Commissioners are found in the Crawford Manuscripts on several occasions.¹³⁴ There are also many examples of Scottish offenders tried before the quarter sessions for crimes in England.¹³⁵ There are also Scottish offenders tried in Scotland for offences committed in England.¹³⁶ In the first few years of the Commissioners, Englishmen were sent for trial in Scotland for crimes they had committed there.¹³⁷ The above examples would seem to indicate that, until the act of 1607, remanding was quite common on both sides of the Borders. By contrast, between 1607 and the Interregnum, there are no details of prisoners to be remanded, although this could be a reflection of the documents themselves (the records of Joseph Pennington finishing in 1607).

During the Interregnum, it is clear that remanding took place on a significant scale. At a court in Jedburgh in October 1657, for example, 13 prisoners were ordered by Charles Howard to be remanded and sent to Scotland and to remain in Jedburgh until they had found surety to appear at the next gaol delivery to be held in that place. After the Restoration, the remanding of prisoners was freely practised. At the meeting of the two sets of Commissioners in October 1665 at Morpeth, they resolved that the act of Parliament of 1610 concerning remanding, be put into execution, in order that the remanding of felons might take place as often as possible. Remanding might take place at the Commissioners' courts and in the interval upon information given to the neighbouring justices or Commissioners of either kingdom, of anyone

anyone who had committed a theft, and to bring them to a convenient place upon the Borders where four Commissioners, or justices, of each kingdom were to be present in order 'to inform themselves of the truth'. The English Commissioners' gaol book contains lists of those to be remanded for trial in Scotland and lists of remandees also appear in the Scottish Commissioners' records for the same period. Especially during the last period of the Commissioners, there would appear to have been considerable movement of prisoners across the Borders, to receive trial in the country of their offence. John Davidson, for example, was ordered at a court in Jedburgh in February 1676 to be sent to Morpeth to a gaol delivery on the 22nd of that month. Adam and Simon Armstrong were to be remanded by the English Commissioners. In May 1676 the laird of Philiphaugh was to transport Richard Graham, a prisoner in Selkirk, to Sir William Douglas, who had undertaken to deliver him at the gaol delivery in Carlisle. Indeed, special joint meetings were held, with both sets of Commissioners, specifically for the purpose of remanding, according to the articles agreed upon at Morpeth. Such meetings took place in May 1663, March 1666, July 1674, September 1674, February 1676, July 1677 and May 1680. They were often held at places close to the actual Border, for convenience; for example, Gammelspath. ¹³⁸

It is from the post-Restoration cases that the method of remanding prisoners can best be ascertained, and some indication of the length of time this involved. Roger Hangingshaw of Hareshaugh in England, for example, was remanded at a court in October 1665, by the Scottish Commissioners for trial 'per legem Scotia' for theft in Scotland. He appeared at a court held in Jedburgh in January 1666. Andrew Bell, called 'chief Bell', was likewise remanded and tried at the same courts, although he was sentenced to be hanged at Jedburgh. These cases were dealt with in a short time; but others were not quite so deftly executed. Such was

the case of Giles Hall of Woodhall, an Englishman. He was remanded at Morpeth in October 1665 by the Scottish Commissioners, but sentenced at the same court to be transported by the English. He appeared again at a gaol delivery in Hexham on the 7th of March 1666, when he was again remanded by the Scots. Later that month, he appeared at the Scottish Commissioners' court where the sentence of the English Commissioners was confirmed. There may have been some confusion as to which country would carry out the sentence, for he was indicted before the assize judges in the summer of 1677 for the theft of three cows in November 1675. Another case was that of Little Arthur Foster of Staingirthside in England. The Scottish Commission requested that he be remanded in December 1674, although in January 1675 he was still in England and appeared at the Commissioners' court at Carlisle. By May he still had not appeared at a Scottish court and the request for his remand was repeated. At last, in February 1676 he was taken to Langholm gaol to await trial, but he broke out and escaped. He was not apprehended again until March 1679.¹³⁹

It was the case of Christopher Jamieson and Robert Brown, however, which caused the most controversy. Both these Englishmen were bailed to appear before the Scottish Commissioners in Jedburgh for theft; but the English Commissioners protested that they ought to be tried in England and petitioned the Scottish Council to that effect. Taking into consideration the articles agreed upon at Morpeth in 1665 and confirmed in 1676, the Council refused to grant the English Commissioners' petition and ordained that the Scottish Commissioners had acted correctly in remanding Jamieson and Brown for trial in Scotland. This case illustrates clearly that the Commissioners were putting into effect the act of 1610 and delivering for trial in the opposite country only those offenders who had already been found guilty under their own law. It also illustrates the problems which arose when the opposite Commissioners disagreed with them.

Difficulties in transporting offenders can also be seen in the above cases - it could be a lengthy process and the gaols in which they were contained were often not secure and allowed them to escape. Confusion also seems to have been encountered when both countries sentenced an offender to death. The remanding system as it existed in the seventeenth century was by no means ideal, but when it was working as best it could, in the period 1605 to 1607 and after the Restoration, it seems to have provided a reasonable means of satisfying the laws of both kingdoms. ¹⁴⁰

Hand in hand with efficient remanding went frequent communications between the Commissioners of both sides. It was only in this way that a feeling of confidence in the actions of the other country's Commissioners could be built up and that confidence was essential if the trans-Border criminals were to be apprehended. These communications were not always as good as they might have been. The Crawford and Muncaster Manuscripts, together with the State papers reveal that each side was constantly suspicious of the other in the early period. These documents, for example, are full of allegations made by one side against the other. This has been partly explained above by the Scottish Commissioners seeing little need for the English obsession with the Grahams. It would also appear, although each side was supposedly equal, that the English wanted to dominate the whole Commission. They frequently ordered Sir William Cranston around in a most peremptory manner, which was obviously resented by the Scottish Commissioners. ¹⁴¹

It is difficult to estimate the relationship between the Commissioners after Joseph Pennington ceased to keep the records in 1607, but it seems unlikely that there would have been a great improvement all of a sudden. Certainly, in 1637 the English and the Scottish Commissioners disagreed over remanding - the Scots wanted to remand, but the English did

not. In general, however, after 1611, it would appear that there was a marked decline in the frequency of correspondence between the two sets of Commissioners and as a result, their effectiveness must have been impaired. During the Interregnum, the close relationship was resumed and it is clear that this brought benefits to the level of law and order in the area.

After the Restoration, this pattern continued and close communications became the norm. Each side regularly informed the other of the times of their courts and frequently attended those held by their opposites. For example, at a court in Jedburgh in May 1676, the English Commissioners informed the Scots of a gaol delivery at Carlisle on the last Wednesday of the month. The Scottish Commissioners were invited to a court in Harbottle in Northumberland in August 1677, and in May 1679 the English were invited to the Scottish Commissioners' next court. Mr. James Howard, the Country Keeper for Northumberland was a frequent visitor at the Scottish courts. It would appear that if no English Commissioner was present at the Scottish courts, a duplicate of the court proceedings was sent to them, as was the case at Kelso in April 1680. There is no evidence that this was done in the case of England to Scotland, although the documents may be misleading in this respect. The successful periods in the Commissioners' history coincide with those times when cross-Border communications were good, which seems to indicate that this relationship was a major key to solving the Border problem. ¹⁴²

In the period 1605 to 1607 the English Commissioners seem to have held courts quite frequently. It would appear that they aimed to hold courts in Carlisle and Newcastle within the same month. Thus, for example, courts were held in both these places in May 1605, November 1605, January 1606, April 1606 and October 1606. But courts could also be held erratically depending upon the necessity of a particular gaol in any area to be delivered. In this early period, courts were held, on average,

about every three months. 1606 would be a typical year, with courts at Newcastle and Carlisle in January and April, at Carlisle in July, at Carlisle and Newcastle in October and at Carlisle only, in December. In August, of course, the Commissioners would be present at the courts of the assize judges. After 1611, the practice of holding Northumberland and Cumberland courts in rapid succession seems to have died out and, in general, courts were held far less frequently. Instead of being held on a regular basis, it would appear that the courts were held according to demand in any area. The Restoration Commissions specified that four courts were to be held each year and there is evidence that this was adhered to in some, although not all, years.

The courts were held in either Northumberland or Cumberland, but never the two in the same month, as was the practice in the early seventeenth century. Although the courts continued to be held at Carlisle, in Northumberland either Morpeth or Hexham was chosen as the location. The Commissioners invariably held a court in January in either Northumberland or Carlisle; in March or April another court was held in the opposite county; summer courts were held between 1671 and 1674; autumn courts could be held in October and winter courts in December. Towards the end of the 1670's the frequency of the courts seems to have declined, although the records could be deficient. In between the actual courts, there are also records of meeting of the Commissioners - either for special remanding courts with the Scottish Commissioners, or simply in order to discuss policy. The documentation for these intermediary courts, which occurred in both the period 1605 to 1607 and after the Restoration, is very insubstantial and more business may have been conducted at them than the documents that remain have indicated.

As a contrast, the Scots held their courts in several different centres. In the early years of the century, courts were held at Peebles,

Hawick, Jedburgh, Dumfries and Selkirk, but by the Interregnum, courts were being held in Jedburgh alone. Jedburgh remained the chief centre after the Restoration, but Dumfries, Kelso and Selkirk were also the sites of courts. The justice courts were held throughout the year, but certain months seem to have been more popular than others. October was an important month for courts, together with April, May, July and January. It is interesting that this pattern corresponds with those of the sheriff and franchise courts, and, as with those courts, September seems to have been a very unpopular month. As with the English Commissioners, but on a far greater scale, inter-court meetings took place. At these meetings, resolutions from previous meetings were discussed, communications from the English Commissioners were declared, petitions could be heard and actions were resolved upon certain cases. Sometimes indictments were drawn up to be heard at the next justice court. ¹⁴³

The 'sederunt' of such a meeting at Jedburgh in May 1676 is typical of these intermediary meetings. At this meeting, four Commissioners from the Jedburgh area were present. Firstly it was resolved that John Olipher, an absent assizor at the last justice court, was to be deleted from the assize roll. It was declared that James Henderson, a thief and prisoner, was to be set at liberty on caution that he appeared at the next court. A notice of a gaol delivery at Carlisle at the end of the month was announced and the laird of Philiphaugh was ordered to deliver a prisoner to that court. It was decided that order was to be taken with the goods of the executed and fugitive and that James Robson, a prisoner in Hawick, was to be sent to Jedburgh, so that evidence might be heard against him. A petition from George Pyll of Harden was also presented to the Commissioners. ¹⁴⁴

Records of meetings such as the one just described, only survive for the post-Restoration period and then, largely for the Jedburgh area.

However, a full court book for 1676 shows that the same types of meetings were also the norm in Dumfriesshire. It is impossible to say, however, whether such meetings were held in the early seventeenth century. These intermediary meetings were usually only attended by the Commissioners from their own area; thus, two meetings could be held on the same day in different areas. In 1677, for example, the Dumfriesshire Commissioners held a meeting on the 15th May in Dalswinton, on the same day as the Roxburghshire Commissioners in Jedburgh. Such meetings were usually held once a month, but the records show that when the Commissioners were preparing for a justice court, the number of meetings increased. For example, in preparation for the justice court at Jedburgh in June 1675, four meetings were held in May. In preparation for the court in Selkirk on the 27th May 1679, between the 15th April and that date, four meetings were held. Likewise, before the courts in May and June 1677, four meetings were held in April, four in May and two in June. These meetings took place all over the Borders and not only in the centres in Jedburgh, Dumfries, Selkirk and Kelso. They were held, for example, in Tarflat, Glencarne, Dalswinton, Lochmaben, Quarrelbuss and Penpont.

In England, offenders were brought to court in the same way as at the assizes. The English Commissioners, as justices of the peace, fulfilled exactly the same function upon complaint to them - taking depositions from accused and witnesses and presenting them at court for trial before the Commissioners as judges. The proclamation which established the Border Commission in 1605 had declared that 'all sheriffs, justices of the peace, baliffs, constables, headboroughs and all other officers, ministers and subjects' were to aid the Commissioners in bringing offenders to trial. But the Commissioners did not just act upon complaints - suspicion was an important factor also. The surveys and lists of 'brokin border men', which were commissioned in 1618 were intended as an aid to the Commissioners

in providing them with a ready directory of suspects. In the proclamation of 1605, all landlords or officers within the bounds of the Borders were to give to the Commissioners of both countries, at their first session, a list of all the tenants or inhabitants and their sons, dwelling under them, together with their trades and any comments on their way of life, carriage and demeanour. These lists indicate that there was always a group of people who could be regarded as potential suspects in the area, and were intended to make them more easily identifiable. In Scotland offenders were brought to the notice of the Commissioners either by a referral from another court, or by complaint from an aggrieved party, in much the same way as in England. ¹⁴⁵.

In the 1670's, however, the Commissioners must have considered this method inadequate and between December 1674 and 1679, they conducted their own enquiries in each area. These enquiries were very far reaching. Large numbers of inhabitants from each of the divisions were invited to tell the Commissioners all they knew about any theft which had taken place since 1640. Some replied that they knew of no thefts; others told of thefts from themselves; some told of thefts from other people. They also aired their opinions as to whom they suspected was responsible. For example, Andrew Haswell in Synside told of the theft of his black mare, 11 years previously, which he deeply suspected had been taken to Ireland by someone called Hall from Liddesdale, who now lived in Ireland. Thomas Porteous in Upperwoodhouslies reported that he had heard that two horses had been stolen out of The Mote in England, which were now believed to be resset by Edward Irving and William Armstrong. ¹⁴⁶.

These 'inquisitions' would appear to have been the seventeenth-century equivalent of modern day 'door-to-door investigations' and they formed the basis of the prosecutions in the courts of the Scottish Commissioners until 1680. Out of a total of 84 suspects named in these investigations,

only 13 do not appear in the Commissioners' records. In 83 percent, then, of these cases, the individuals were interrogated and, if necessary, indicted. Of the 13 whose cases were not followed up, 6 were reported to have come from England, 1 had fled to Ireland and another had gone into hiding in Scotland. Acting on the suspicions of the population, as alleged in these depositions, the Commissioners summoned the suspects before them, as in Jedburgh, in May 1675, where the allegations of theft were put to them. Most seem to have denied all knowledge at this stage. Sometimes the accused was asked to prove that the allegedly stolen goods did, in fact, belong to him. ¹⁴⁷

After these investigations, highly suspect persons were either remanded to England,¹⁴⁸ or put under band to appear at court; others were indicted, secured and imprisoned pending trial at the next justice court.¹⁴⁹

The willingness of the population to offer information against suspected thieves contrasts strongly with the atmosphere that was prevalent at the beginning of the century in both England and Scotland. At that time, the victims were reluctant to report thefts because of the fear of revenge and retribution by those they accused. This, indeed, was a major handicap to the early Commissioners' efforts. It is measure of the greater confidence that the population had as a whole, in the Commissioners' ability to apprehend, try and convict offenders, that they felt able to put their trust in them.

Apprehending suspects had always posed a problem for the Commissioners. The Borders covered a large area of some of the most difficult terrain in Britain. Communications were poor; the population was sparse; the weather frequently appalling, making roads impassable; and the number of places where malefactors could hide were numerous. Unless informed upon by a local, fugitives could remain hidden for years. For example, Hector Nixon of the Flatt had been indicted for murder,

condemned to death at a court in 1604, but had escaped from gaol. In August 1618 he was reported to be living freely in Bewcastle. Quintin Foster of Crackenthorpe was likewise convicted and condemned to death for murder in 1604. He, too, escaped from gaol and in 1618 was living freely in Gilsland. Andrew Armstrong, called Ingreis Andrew had, between 1603 and 1618, been outlawed three times for murder. Even in Scotland where the smaller franchise courts were supposed to have a tighter control over an area, the same conditions prevailed. Andrew Beattie of the Scheill, a fugitive from the court at Hawick in August 1605, was not finally indicted until August 1622. Paton Armstrong of the Hill, also a fugitive from the Hawick court, was likewise not finally indicted until 1622. Thomas Little, called of the Tailerid, another fugitive from Hawick in 1605, was still fugitive from the Dumfries court in October 1611 and when, in May 1622, Matthew and John Little were accused of harbouring him, he was again declared fugitive. ¹⁵⁰

The Border garrison had been established expressly for the purpose of apprehending criminals at large. In Scotland it undoubtedly fulfilled its purpose well - Sir William Cranston was a most assiduous captain, whose constant travelling in pursuit of offenders is well recorded in the Crawford and Muncaster Manuscripts. The English garrison, as described above, was not, latterly, a great success. The abolition of the garrison meant that the task of apprehending criminals fell to other means. In England, these seem to have been the normal methods as used by the justices of the peace. In Scotland, the appointment of Commissioners-in-Chief, with their groups of nominees who were each to patrol their own area, seems to have been trying to achieve in Scotland the same situation in England, whereby local forces and influence were employed. In the post-Restoration period, the Scottish Commissioners seem to have relied upon their own efforts and upon the ability of smaller court officials, a system which would appear to have been successful in that more settled period.

In the early years of the Commissioners, the issue of bailing offenders was much in question. Experience had shown at assizes in the north of England, that frequently 'very many suche as had been bayled or were formerly taken bound by Recognizance to appeare did not, neither have or can the justices of peace or the sheriff apprehend them'. In England and Scotland, serious offenders 'apprehended for robberies much lesse for crymes of a higher nature', were supposed to be imprisoned without bail and the others cautioned, bailed or bound to appear by recognizance before the courts. These recognizances and cautions were taken by the Commissioners as justices out-of-sessions in England and at the intermediary meetings of the Scottish Commissioners. Those who failed to appear forfeited the money laid out by their sureties. 151

Despite these regulations, however, notorious felons continued to be bailed by the Commissioners. In April 1618, it was reported that in England, 'some that have bene comytted for apparent fellony by one Justice, have ben without his Consent bayled by one other justice'. The English Council responded by telling the Commissioners in no uncertain terms that the bailing of felons was expressly against his Majesty's will. The following year, Lord William Howard told the English Council that William Taylor, indicted of horse stealing, had been bailed by Sir William Hutton expressly against the law. As long as offenders indicted of capital crimes were granted bail, they continued to avoid justice. Lord Howard of Walden, in 1619, recounted how prisoners, once bailed, seldom returned for justice and indeed, there are many examples of such fugitives. John Rede of Corsenside, for example, a bailed felon, failed to appear at court. Red Edward Routledge was granted bail for sheep theft, and never came to court. As the survey of 'lewd and disordered' persons dryly commented after listing all the bailed felons at large, 'behold the benefit of bayling theeves'. 152 In Scotland too, there were numerous outlaws and

fugitives from justice who had forfeited their bands and cautions. In May 1606 the Commissioners reported to the Scottish Council that they had declared seven score outlaws and fugitives. Many of these were reputed to seek service in the 'in country' under pseudonyms. To prevent this, lists of names were to be affixed to the market cross of each principal town in the Borders and the garrison was to be ready to apprehend them on intelligence of any baron or gentleman. Despite these precautions, massive numbers of persons continued to fail to appear at courts until the Interregnum. ¹⁵³

The problem of what to do with offenders awaiting trial was indeed troublesome and the Commissioners were in a predicament which the central governments did not appear to appreciate. There were two options open to the Commissioners - either they could commit accused persons to prisons which were frequently overcrowded, with the risk that they might either escape en route, or after experiencing the appalling conditions inside the gaol. Alternatively, the Commissioners could take a chance and bail the accused to appear at a later date. Once the number of prisoners awaiting trial had diminished, there was room for all the serious felons to be committed safely. This situation seems to have been reached around the 1620's to 1630's. The Scottish Commissioners' records show that whereas at their courts in July and October 1611, 63 percent of the persons summoned before them failed to appear; at the 1622-23 courts, this figure had been reduced to 42 percent. But the figure for the 1637 court was as low as 29 percent. From the 1630's onwards in both England and Scotland, the normal methods of bail, recognizance and caution seem to have been sufficient for all but a few cases. For example, Richard Hallywell, a merchant of Selkirk, charged with theft and robbery, refused to find caution to appear before the Commissioners and was therefore committed to prison. Walter Riddle, a great thief, was in 1678 charged to appear before

PUNISHMENTS IMPOSED BY THE SCOTTISH BORDER COMMISSIONERS' COURTS, 1611-1676

PUNISHMENT	PUNISHMENTS		PUNISHMENTS		PUNISHMENTS		PUNISHMENTS		PUNISHMENTS		PUNISHMENTS		PUNISHMENTS		PUNISHMENTS	
	JED. 18TH OCT. 1611	DUMF. 16TH-21ST OCT. 1611	JED. 29TH-31ST OCT. 1611	DUMF. 22ND MAY 1622	JED. 27TH AUG. 1622	JED. 16TH APRIL 1623	JED. 23RD FEB. 1637	JED. 1ST FEB. 1665	JED. 19TH JAN. 1666	JED. 13TH JAN. 1675	JED. 6TH APRIL 1675	SELR. 21ST MARCH 1676	PUMF. 1ST AUG. 1676			
EXECUTED	10	20	8	6	23	20	30	1	2	7	2	10	3			
BANISHED					10	2	19	4	2	1	13	3	2			
BRANDED						8	5									
GUilty BUT PUNISHMENT UNKNOWN			3		1			1								
SCOURGED									1							
FINED								3	1							
REFERRED TO ANOTHER COURT				2												
REPLEDGED																
CONTINUED								1				1				
ACQUITTED	2	38	13	19	25	42	15	1				1				
UNKNOWN						4										
TOTAL	12	58	24	27	59	78	69	10	6	9	15	14	6			

the Commissioners and was bailed on condition that his band was forfeit three miles out of the town of Jedburgh. When he was on his way to court, he heard that the Commissioners were hanging offenders such as himself and he, in collusion with his cautioners, failed to appear on the day his case was to be heard. He appeared a few days later when his case could not be put to trial. According to the Commissioners, this trick was not unusual. ¹⁵⁴

ii. Dealing with offenders ¹⁵⁵

The gaol deliveries held by the English Commissioners were held in the same way as the assize judges held their deliveries. The prisoners in gaol were indicted first, followed by those bound by recognizance to appear. No defence counsel was allowed and the bill, having been found billa vera by the grand jury went on to be tried by the petty jury. The jurors were called in exactly the same manner as those for the assizes and the same problems of biased and unscrupulous juries must have been encountered. ¹⁵⁶ The number of persons brought for trial before the English Commissioners seems to have varied considerably from court to court, as Table 21 shows. There is always the possibility that some of these documents could be incorrect, yet the only contradictory evidence for the whole of the century comes from 'Vetera Indictamenta'. It must therefore be assumed that the number of persons to be tried before the Commissioners did indeed vary considerably from one court to another. With the single exception of the court in October 1665, the Commissioners held their courts on one day only; at least according to their records. This would mean that they might try up to 80 cases a day, although 21 was the average in the early part of the century, rising to 29 in the later part. If the documents are not misleading, it would mean that their courts could be very rushed at times.

It is difficult to judge the percentage of bills returned true or ignoramus. Details of these are not recorded in any of the court records of the early years of the Commissioners and only for a few courts after the Restoration. The gaol calendars after 1660 are usually divided into three categories. Firstly, a list of names with the punishments given if guilty, or else 'not guilty' noted. If any have been committed to gaol, this is written at the side. No crimes or offences are here mentioned. Secondly, a list of the persons who were 'extra in felonia' that is, those who were not in gaol, but who were bound to appear at court to be tried by the judges. Thirdly, for some courts there is a list of those whose bills were found ignoramus. In most court records the verdict is not stated for the 'extra in felonia' cases and it would appear that the ignoramus list is connected with the first category, rather than the second.

Table 21 shows the verdicts and punishments meted out by the Commissioners in both the early and later periods. It can be seen that where the ignoramus bills are recorded, that is, for the courts of October 1665, March 1666, December 1666, December 1674, January 1675, February 1675 and May 1676, these amount to an average of 17 percent of all cases before the courts. In view of the large number of cases where the verdict is unknown, this could, in fact be much higher. But even at 17 percent, it is clear that the Border Commissioners, like the Northern Circuit judges after the Restoration, released more offenders through ignoramus bills than the judges in the south of England.

The kind of evidence used before the Commissioners' courts after the Restoration can be found in the assize depositions for that period. Few depositions survive for the early years of the century and only a few scraps of material from general sources. Initially, evidence seems to have been hard to procure and fear of revenge prevented people from volunteering information. Such fears would appear to have been well founded. Roland Yarrow of Yarrow in Tynedale protested to the Privy Council

in London in 1611 that on his way to court to give evidence against the instigators of the Lionel Robson raid, he was assaulted. In May 1616 William Morton explained that many in Northumberland would complain and give evidence, were it not for intimidation and fear of reprisals. Such lack of evidence was a severe hindrance to the early Commissioners. After the gaol deliveries in April 1606, the Commissioners were particularly disappointed that so few had been convicted, complaining bitterly, 'how small success our service hath had at these Gaol deliveries; many arraigned and few convicted rather through want of dew examination and prosecution then of sufficient matter to convince them'.¹⁵⁷ The post-Restoration depositions reveal that a great deal of effort was being expended on the part of the Commissioners to collect hard evidence to convict felons. Inter-county depositions were taken from as far afield as Yorkshire and other evidence was gathered in conjunction with the Scottish Commissioners. When sufficient evidence was not available, or defective, the offender remained in prison until the proof of his crime was produced.¹⁵⁸

The lack of sufficient evidence could account for the high acquittal rate at some of the early courts. In 1606 the Commissioners bewailed the acquittal of 23 out of the 27 arraigned at their courts in April that year. Yet at other courts, as the table shows, the number of accused found not guilty was perfectly acceptable. Indeed, for the whole period 1605 to 1607 from the courts recorded in the Crawford manuscripts, an average of 32 percent of those arraigned were either found not guilty or discharged. In order to ascertain whether this acquittal rate was too high, the figure was compared with the post-Restoration courts. In order to make the figures meaningful, the ignoramus bills after 1660 were omitted. It then appeared that 12 percent more were acquitted between 1605 and 1607 than after 1660, if both known and unknown cases were included. *Yet of those persons who were tried by the petty*

jury in the earlier period, 25 percent could expect to be executed, whereas only 8 percent would receive that penalty in the later period. Furthermore, although there were very large numbers of persons transported between 1605 and 1607, none of these appear in the court records of the period, whereas all such people seem to have gone through the courts after the Restoration. It would seem, then, that although more people were acquitted in the early seventeenth century, far more received severe penalties. When the *ignoramus* bills are taken into account it would appear that around 30 percent of the people appearing before the post-Restoration Commissioners' courts could expect to walk freely away. In 19 percent of the cases, however, the outcome is not recorded and for some courts the figures are distorted because the records are clearly defective. ¹⁵⁹

For some courts, however, the records appear to be complete, although the figures differ significantly from the averages quoted above. Two such courts are those of February and May 1676. In February, 31 percent of the total cases were found guilty and in May, 28 percent. Sixteen percent were acquitted in February and 22 percent in May. This reversal of the normal trend (also shown in the assize documents for that year) indicates a more harsh attitude on the part of the Commissioners towards offenders. Normally, the number of those found guilty was below those acquitted and the percentage of those reprieved from the death penalty was greater than that of those who died. In 1676, however, not only were there more people before the courts than in any other year, but more people were found guilty than were acquitted. Moreover, 20 percent were hanged and a smaller percentage were reprieved than at any other time since 1665. This situation obtained only in 1676 and in 1677 the normal pattern resumed. 1676, then, was a most notable year in the history of the English Commissioners.

Some felons escaped the death penalty through transportation and those convicted of petty larceny received a whipping as a punishment.¹⁶⁰ A number of convicts escaped death by pleading benefit of clergy. Sir William Selby, a Border Commissioner, explained their policy on 'clergy' in the early seventeenth century, in a letter to the Council. Clergy was granted for a first offence, if it was not too great, which allowed the Commissioners a certain amount of discretion and implied that, in theory at least, offenders could not benefit twice. After the Restoration, convicted felons at several courts benefitted from pleading 'clergy', whereas others received official pardons.¹⁶¹ There is evidence from the whole of the century that the practice used at assizes of reducing a non-clergyable to a clergyable offence was also utilised by the Commissioners. In a report of the courts in November 1605, the Commissioners stated that some escaped death by pleading clergy and others through having their crime reduced to petty larceny. Certainly, in 1677 the court stated clearly that Lancelot Routledge was not guilty of burglary, although guilty of felony, and in 1665 Thomas Young was guilty of manslaughter rather than murder.¹⁶²

The punishments inflicted by the English Commissioners after the Restoration were in line with those imposed by the northern assize judges, in contrast with practice in the south of England. When Roger North visited the Borders in the 1670's he wrote in his diary: The Border Commissioners 'meet in their sessions and hang up at another rate than the assizes: for we are told that, at one session, they hanged eighteen for not reading sicut clerici'. Roger North was entitled to his opinion; but the Commissioners' court records do not bear witness to it.¹⁶³

The penalties imposed by the English Commissioners were a reflection on the type of offences they had to deal with; most of them being serious felonies. The first Border Commission was vague about the exact nature of those offences - stating that the Commissioners were to prevent 'all

such exorbitant offences and disorders' as disturbed the peace of the Borders. From the start, however, the emphasis was upon theft and especially the theft of livestock. The exact nature of the offences committed is often difficult to assess because of the nature of the documents. The early court records, for example, list the offenders and their punishments, but do not give the crimes they committed. The same is true of most of the post-Restoration courts, with the exception of the lists of 'extra in felonia'. At the court in October 1665, 85 percent of these offences were theft, of which 73 percent were livestock theft; four percent were murder cases and there was one assault and five unknown cases. In January 1677 all the cases listed in 'extra in felonia' were theft cases, with 88 percent the theft of livestock. The depositions relating to the Border Commission bear out that most of business was livestock theft. Evidence from the early seventeenth century Commissioners' records would seem to indicate that the Commissioners' work had changed little during the course of the century. Their records, like the assize records, show that cattle and horses were by far the most popular livestock to be stolen. The other types of theft found in the records range from burglary to the theft of small value goods; such as the theft of a bee-hive or iron instrument. 164.

There are few other crimes in the English Commissioners' records. Two cases of murder at the court in October 1665, together with one assault; one murder case in 1666 and one rape case in 1675. This type of case would go before the assize judges when they came to the area, leaving the Commissioners to deal with their main challenge - theft and in particular, livestock theft.

The Scottish Commissioners' courts were rather different from those of their English counterparts. Their courts seem to have been held over a period of around three days, which meant that the number of offenders tried in any one day could range from 8, as at Jedburgh in October 1611, to 19, as at Jedburgh in April 1623. After the Restoration, however,

the practice of holding one big court every four months or so seems to have given way to a new concern to hold smaller meetings more frequently, where fewer prisoners were dealt with. Thus, as described above, the Commissioners could be meeting every week for a month. The pattern of indictments, therefore, is somewhat different from those in England. A single indictment could be heard at one session, although groups of indictments could be reserved to the justice courts. In contrast to the English system where the formal structure of the courts facilitates quantitative analysis, the more informal pattern of the Scottish courts makes this difficult. Although a large number of offenders seems to have passed through the hands of the Scottish Commissioners, the emphasis was more on taking cautions and bands and keeping a constant check on the more suspicious members of the community. The structure of the Riddle of Hayning Papers does not aid the quantitative approach, with most of the documents in bundles of muddled years and legal papers. Only the years 1675 to 1677 are contained in a book. However, if all the indictments in these books are counted, it would appear that the number of offenders before the Scottish Commissioners averaged 33 per year. This compares with 47 a year for the English courts between 1665 and 1677, and 73 a year for the period 1675 to 1677. ¹⁶⁵

The court records for the period between 1605 and 1622 do not show the type of offences committed by the offenders before the Commissioners, but from their letters to the Scottish Privy Council and to the English Commissioners, it is clear that their main pre-occupation was with thieves. The 1622 and 1623 records, however, give full details of the crimes committed. These show that at the Dumfries court in May 1622, 96 percent of all the cases were theft; at the Jedburgh court in August that year, all the cases were theft; at Jedburgh in February the following year, 96 percent were theft, and all were theft cases at the court the following

April. Moreover, 93 percent of those theft cases were concerned with the theft of livestock. It seems improbable that the situation could have changed between 1605 and 1622 and so it may be presumed that the earlier courts were similarly dominated by a concern for livestock theft. The Restoration courts were also concerned with the same. ^{166.}

The need for the Commissioners to concentrate on livestock theft can be seen at several times. A letter from Robert Phillips to the Council in February 1622 listing all the thefts committed in Annandale and Nithsdale since October 1621, told of 405 sheep stolen, 54 cattle, 14 horses, but only 5 bolls of corn. Mass depositions of witnesses, taken between 1674 and 1677 revealed that the inhabitants of the Borders were plagued by this type of theft, more than any other. The thefts of over 940 sheep were reported, together with those of over 76 cattle, 20 horses, but only 5 other thefts. The predominance of livestock theft in Scotland corresponds with similar findings in England. But, whereas in England the emphasis was on cattle and horse theft; in Scotland, sheep were the most popular target for thieves throughout the seventeenth century. ^{167.}

As the English Commissioners were obliged to sit with the assize judges, so the Scottish were obliged to sit with the justice ayre when it was held. During the Interregnum when the justice ayres were held regularly in Scotland, the courts of the Commissioners and the justice ayre are often indistinguishable - some of the documents being kept within the Riddle of Hayning Papers, others within the High Court of Justiciary records. During this period, then, there appear crimes not normally found amongst the cases heard by the Commissioners - such as bestiality, adultery or witchcraft. Yet throughout the first half of the century, the Commissioners could be called upon to act against such offences. In February 1628, for example, the Council issued a warrant

to the Commissioners to apprehend all persons in Annandale who were excommunicated for 'recusancie, adulterie and others nefarious crymes [who] most obdurantlie stands out agains the ordouris of the Church'. In March 1616 a commission of justiciary was granted by the Council to the Commissioners as 'men of upright judgement, sound in duty and good experience' to try persons suspect of adultery 'now become verie frequent and common in the Middle Shires'. No details of such cases, however, can be found in any of the court records. ¹⁶⁸

The Scottish Commissioners prepared for their courts several weeks in advance, by bailing and cautioning offenders, hearing depositions and apprehending and imprisoning those 'vehemently suspect' of crime. The 'sederunts' of the meetings of the Commissioners leading up to the justice courts after the Restoration reveal a most careful attention to detail. ¹⁶⁹

When the day of the court arrived, the first to be called were those accused on bail. The cautions were discharged of those who had been entered to the court and were to be tried at once and new cautions were taken of those who were to appear at a later justice court. Some cautions were continued. Those who failed to appear were then denounced fugitive and their goods escheat. It was very difficult to bring some criminals to court and in the early period especially, there were large numbers of fugitives. ¹⁷⁰ By the Restoration, the Commissioners had managed to secure a reasonable rate of attendance at their courts, although they experienced problems with certain offenders. Two such persons were George McBurnie and Thomas McClamerock. George was accused of theft in a witness deposition in August 1676 and was ordered to appear at the court in Dumfries that month. He failed to appear. In May 1677 he was reported to be at large and living under an 'evil fame' and was ordered to appear at a court in Dumfries that month. He was still at large in December 1680

when he was ordered to appear at a court the following month. He appeared at that court and was banished. Thomas McClamerock, a thief of long standing, was likewise accused of theft in May 1677 and was charged to appear at the Dumfries court. He never appeared and in August the following year was again charged to come to court. He was not ultimately pannalled until January 1681. ¹⁷¹

After the cautions had been taken, the assizors were then called to the court and could be fined £100 for failing to turn up. Then the prisoners selected for trial were put on pannall. Indictments were drawn up against them and a committee of the Commissioners was appointed to hear the depositions of the witnesses summoned. Eleven Commissioners, for example, were appointed at the justice court in Selkirk in March 1676 to hear these depositions, but only five were appointed at the Dumfries court in August 1676. It would appear that the number varied at each court. ¹⁷²

At this stage the prisoners were requested to plead. The indictments to which the offender had pleaded guilty or confessed, or where the witnesses had put forward a clear case, were found 'relevant'. The relevant indictments were then heard before an azzise of men. The summoning of the assize seems to have followed traditional Scottish legal practice. Forty-five men were usually summoned, from whom 15 were chosen to sit. Lists of assizors from the courts in the 1650's show that the assizors could still be chosen for their connection with the area from where the accused had come; for the lists of assizors show that for each parish which sent a 'delinquent' to the courts, there was a set of assizors for that parish, of any number between 2 and 17 depending on the size of the parish. Such details are not available for any courts outside the 1650's. Most of the assizors seem to have been men of substance. At the court held in Dumfries in May 1622, for example, 9 of the 15 assizors had the preposition 'of'; as had 10 at the court held in Jedburgh in August

that year and 14 at the Jedburgh court in April the following year. The assize of 45 at Jedburgh in April 1676 included 4 baillies, 3 merchants, a miller, a maltman, a flesher, and a lorimer in addition to a further 12 who possessed the preposition 'of'.¹⁷³

No lawyer was allowed to plead for the pannall despite protests made against this rule from time to time. In June 1675, for example, Sir Francis Scott of Thirlstane, a Commissioner, protested against the rule that no lawyer should be admitted to plead for the pannall. In March 1681 Thomas Porter, the procurator fiscal, was informed that no advocate was allowed to plead for Symon Elliot 'because it is a forme introduced contrair to the custome of the Borders and prejudicall to his Majestie and his donators interest';¹⁷⁴

The assizors then proceeded to find the accused guilty or not guilty. For the courts between 1605 and 1611, the proportion of each verdict is not possible to ascertain, as the lists of names only indicate those executed or denounced fugitive. The court records of 1611 are more detailed and show that 54 percent were acquitted at the court in Jedburgh in October that year, and 66 percent at the court held in Dumfries the same month. Only 22 percent were acquitted at a court held in Jedburgh in 1637 and by the 1670's between 90 and 100 percent of all the cases before the Commissioners' courts were found guilty.

A high percentage of those found guilty by the courts were sentenced to death. The Commissioners reported to the Scottish Council in May 1606, 'we haif execute be watter and gallous the number of xxxii personis'. Thirty-one offenders were executed at the Commissioners' first courts at Hawick, Peebles, Jedburgh and Dumfries, and ten more executed at the court held in Dumfries in October 1606. The English Commissioners testified to the harsh treatment of offenders at the Hawick court in August 1605. At the court held in Jedburgh in October 1611, 73 percent of those who were found guilty were executed and at Dumfries in the same

month, all those found guilty were executed. And the lists of those executed by the courts at this time were only some of the many offenders who received a capital punishment, as the acts of exoneration for Lord Cranston revealed. The true number will never be known.¹⁷⁵ The rate of executions fell in the 1660's when banishment seems to have been a more popular form of punishment. But the proportions rose again in the 1670's. In 1675 the number of criminals worthy of a reprieve from the death penalty by banishment was considered to be more than those deserving to be executed, but by 1676 the situation had reversed. The harsh attitude of the Scottish Commissioners in those years was noted by Roger North, *an assize judge on the Northern English Circuit*. He described how one malefactor, Mungo Noble, was not condemned to death at the assizes in Newcastle, much to the disappointment of the Border Commissioners. North recounted that 'a Scotch gentleman upon the bench who was a Border Commissioner made a long neck towards the judge and "My laird" said he, "send him to huzz and yees neer see him mere".'¹⁷⁶

The death penalty imposed by the Commissioners was either death by hanging or drowning. The type of penalty does not seem to have been connected with the crime committed. For example, at the court held in May 1622 at Dumfries, John Armstrong, called Bould Jock, was convicted of the theft of five sheep from Richie Wattie and 'wes condampnit and ordanit to be drownet in the Watter of Nith ay quhill he be deid'. Yet Gilbert and George Irving, found guilty of the theft of 12 sheep, were to be hanged. The most common penalty, however, was hanging. The goods of any banished or executed person were immediately escheat to the Crown or to the King's donator (receiver of fines).¹⁷⁷

When an offender had been found guilty by the assize, the Commissioners took a vote on whether he should be banished or hanged. In March 1676,

for example, 15 Commissioners voted that William Miller, a thief, should be hanged, whereas 4 voted that he should be banished. At the same court 17 voted that John Dixon should hang and none considered him to be worthy of banishment. Whether or not an offender could hope to be reprieved from death through banishment, depended upon several factors; the most important of which were the number of crimes he had committed, together with the degree of seriousness of those crimes. The amount of proof available also seems to have affected the decision - the *Johnstone* family of Earshag, for example, would seem to have escaped death through lack of positive proof. In some cases, such as that of John Huggen, a good testimony from a minister could sway the decision of the Commissioners. ¹⁷⁸

The Table 22 shows the importance of banishment as a penalty at the Borders Commissioners' courts. Even the early records illustrate that offenders could be banished in large numbers. In May 1606, for example, when the Commissioners reported to the Scottish Council that they had executed 31 offenders, they also reported that a further 15 had found caution to leave the country. The Commissioners wished to know if the Council knew of any further crimes committed by the 15 in order that they might receive punishment (that is, death) for those crimes before being sent away. In the early seventeenth century, Ireland and the continent were the usual places of banishment and Ireland remained a popular place throughout the century. Mungo Noble, for example, was sent there in 1677. The first British settlement in Virginia, called Jamestown (after the King) was settled in 1607 and by the Restoration, Virginia, Barbados and Jamaica had become regular destinations for banished criminals. ^{179.}

Arranging for the shipment of offenders, keeping them in gaol until transportation was available and ensuring that they remained banished, posed major problems for the early modern state and the Commissioners adopted certain measures to ensure that the punishment was carried out as efficiently

as possible. Cautions were taken that criminals would not return from banishment. As these could be undertaken for considerable sums of money, it was usually men of some property who were asked to stand as cautioners. For example, Henry Riddle, the son of Walter, portioner of Bewlie, Walter Scott of Wauchope and John Curroure fear of Harden, stood as cautioners for Harry Pott in £6000 that he would not return from banishment. Receipts from the skippers of the ships who took the criminals overseas had also to be produced in court. For example, the skipper of the boat which took George Smith to Maryland, produced his receipt at a court in Jedburgh in August 1677. ¹⁸⁰

Despite these precautions, however, criminals, supposedly banished from Scotland, are frequently found to be still in the country. William Elliot of Prinkenheugh, banished from Scotland for theft in June 1615, was still causing trouble in the Borders in March 1618. James Huggen of Caffield, banished in March 1676, was reported to be still in Scotland in October 1680. Some, like Mungo Noble, returned from banishment; but others escaped whilst awaiting their punishment. Keeping the prisoners in gaol until they could be transported posed a major headache for the Commissioners. Petitions were frequently made to them from prisoners awaiting banishment. George Mathieson and George McBurnie were typical examples. They were sentenced to banishment at a court in Dumfries in October 1680 and in March 1681 petitioned the Commissioners that they had no maintenance whilst they were in prison and so had to rely upon charity. They requested that their sentence commence or that they be given supply. Robert Maxwell of Lochbank petitioned in May 1677 that he had been in Dumfries gaol for 'many months' under sentence of banishment and was forced to live off charity. He requested that his sentence start as soon as possible. One William Johnstone was in prison so long awaiting banishment - 153 days in all, that he died. ¹⁸¹

The gaolers' accounts to the Border Commissioners for the year of 1675 show that long imprisonments often resulted in the escape of offenders. In that year 30 prisoners went into the gaol and the length of time they were there varied from 4 to 220 days. On average, the 30 prisoners spent 66 days in prison at, according to the accounts, 3 shillings and 8 pence a day. Seven prisoners awaiting banishment, having spent an average of 44 days in gaol, broke out on the 31st of July 1675. In November that year, a further three broke out, after spending an average of 87 days inside. All 10 prisoners that escaped can be traced in the Commissioners' records as having been sentenced to banishment, some of them several months previously. 182.

Benefit of clergy was not practised in Scotland, but banishment was not the only way in which a convicted criminal might escape the death penalty. Remissions or pardons could also be procured. Ninian Elliot of Falanesche, for example, obtained a remission for theft in 1675. Remissions, or pardons were granted on application to the Privy Council or the King, but do not seem to have been issued upon grounds of merit:- Ninian Elliot was a notorious thief of long standing. The Border Commissioners themselves, were opposed to remissions on just those grounds, for in November 1678 they had actually been prevented from apprehending the infamous Ninian because of the protection afforded to him by his remission. In January 1675, the Commissioners had petitioned the Council that some 'effectual course be tane for preventing remissions for theft in tyme cuming'. They tried to dissuade the King and Council again in May 1678, but this would appear to have been to no avail, for in January 1682 they had to beseech the King again to desist from granting remissions. In 1682 a remission was granted to Robert Elliot of Stobbs. The Commissioners were incensed. This man, they explained, was 'ane notorious theife' and 'one of the ringleaders of that trend'. The Commissioners protested that

'the inhabitants of the Bordering Shires has not enjoyed so much quietnes in no tymes past memorie of man as they have done within these five years bypast' and that now, the only encouragement that thieves had was 'the remissions that are now more frequently procured to such than they [have] beine for many years before'. Although the number of remissions granted each year is unknown, the records of those to whom they were granted indicate that troublemakers were still at large in the Borders in the 1680's. ¹⁸³

The majority of the convicted offenders before the Commissioners suffered banishment or the death penalty, but it was not unknown for other penalties to be inflicted. Janet Blythe in Bedroull, for example, who was convicted of the theft of a 'toop' at the court in Jedburgh in October 1657, was ordered to be taken to the market place with a paper on her head, saying what she had done. This emphasis upon shaming the offender in the 1650's shows the influence of the Cromwellian justice ayre. Fines, however, were imposed in some cases of theft. No reasons are given for the leniency of the punishment, but it may be presumed that the accused was either the receiver of the stolen goods and a first offender, or that he was a first time thief. Two such offenders were George Elliot, guilty of the theft of a sheep, who was fined £300 in 1657 and John Wauch, a butcher, who was fined 1800 marks in January 1666 for receiving four nolt from Cuthbert Home. If this latter failed to pay, he was to be banished to Barbados. James and George Haswell, in February 1665 were found guilty of the resset of a black mare and were fined 200 and 400 marks respectively, which was to be paid within 48 hours. The penalty for failing to pay was banishment. It is, perhaps a mark of the gradual pacification of the Borders that such fines were permissible by the Restorátion period. In the early years of the century, when the Commissioners were first establishing their rule of law and order on the Borders, even first time offenders and those guilty of receiving stolen goods were recommended to be executed alongside the more heinous offenders. ¹⁸⁴

The Commissioners were empowered to poind for the payment of fines if necessary. The money from fines imposed by the Border Commissioners was to go either to the King, or to the King's donator, who, in the Restoration period was John Riddle of Hayning. Out of these fines he was supposed to pay the clerks, the officers of the court and the deutes and provide three stallions for the use of the Commissioners. 185

The relatively small number of offenders who were indicted by the Scottish Commissioners during the post-Restoration period, together with the high rate of conviction in the courts merits some explanation. The contrast with earlier practice would suggest three possibilities. (1) That these numbers do not reflect the true number of criminals who passed through the Commissioners' hands. Certainly there was a precedent for summary justice whereby offenders were convicted and executed outside the courts, as the acts of exoneration for Sir William Cranston in the early seventeenth century reveal. Yet the punctilious recording of the Commissioners' activities and proceedings in the mid-1670's suggest that summary justice was not a feature of post-Restoration practice. The careful record of those years also throws doubt upon whether any documents are missing from the books on a large scale. (2) That the Borders were not as lawless as tradition would have us believe. Yet the investigations undertaken by the Commissioners, between December 1674 and July 1676, in which they invited the population of large areas to come forward with any accounts of thefts, reveal that theft still occurred on a large scale. Most of the thefts reported had occurred in the last three years, that is, at the earliest, 1671 and the witnesses reported that well over 100 livestock had been stolen in that time. (3) That the relatively few people summoned before the Commissioners between 1675 and 1677 - 111 in all, were the perpetrators of all the thefts committed in the Borders. From the depositions of the population, the Commissioners knew, or suspected who

had committed the crimes and between the time the depositions were taken and 1680, most of the accused had been investigated. In their indictments, most were accused of multiple crimes. For example, the Johnstones of Earshag were accused of the theft of a total of over 265 sheep from 13 different people; Adam Hendrie was accused of the theft of 47 sheep and 7 cows from 8 different people and Thomas McClamerock had stolen numerous sheep, cattle and goats from 19 people in Gal'loway and Dumfriesshire. Furthermore, a significant number of the offenders indicted by the Commissioners in the mid to late 1670's had been thieves over a long period. ¹⁸⁶

It is possible, then, that the post-Restoration records reveal two significant facets of the Scottish Borders. Firstly, that a transformation had taken place since 1605 in which the vast majority of the population had become reasonably law abiding. But that, secondly, a nucleus of individuals traditionally living by theft still remained. It was only once these had been eliminated that the Scottish Borders could be pacified. The records of the Scottish Commissioners would seem to indicate that this had been done by 1680.

Bearing the same name and, indeed, conceived as one body, yet it can be seen that the English and Scottish Commissioners, developing in their own particular directions, differed in their methods and attitudes to their common problem. Each had a most important effect on the Borders and, it may be said, contributed more to the pacification and transformation of that area into the Middle Shires of the modern state of Britain, than any other judicial body active in that region during the seventeenth century.

CHAPTER IVThe Sheriff Courts

From the early middle ages, the sheriff had been an important royal official in England. In Saxon times, the land had been divided into shires, each of which had its court of justice, to which all men of any position within the shire were bound to go. They were the suitors of the court and also the judges, for the sheriff, who presided over the court, merely pronounced judgement in accordance with the verdict of the suitors. The shires were sub-divided into smaller units called hundreds, or in some areas of the country, wapentakes, the courts of which were held by the bailiff of the hundred in the name of the sheriff.¹ So effective was the sheriff as a link between Westminster and the shires, that David I of Scotland brought the same system into being in his own country. Norman Scotland was split into sheriffdoms under the control of a royal officer who held a court in the King's name. Like his English counterpart, the Scottish sheriff was responsible for defence, collecting rents and revenues, executing writs and all other orders addressed to him by the central authority and courts. In both countries, therefore, the sheriff was at once a financial, administrative and judicial officer. By 1603, however, the functions and role of the sheriff in England and Scotland, which had begun in so similar a manner, had evolved in very different directions.²

In England, the position of the sheriff as a judicial power in his own right, had drastically declined. Whereas in the early thirteenth century, the county court had been attended by such persons as bishops, abbots, priors, barons, earls, knights and freeholders, as a kind of small government concerned with the administration of government affairs and the execution of civil and criminal justice; by the end of that century, the county court had ceased to have any criminal jurisdiction. Thereafter, it seems to have concerned itself solely with matters of debt, detinue and trespass.³ Holdsworth writes that the sheriff's tourn 'ended in reality [with] the statute of 1461', when all

indictments before the sheriff in his tourn were removed to the quarter sessions. Under Henry II, the sheriff had been responsible for the revenues in the county, but increasingly, taxes and rates were imposed with which he had nothing to do, and his control of the shire's military force declined with the appointment of Lords Lieutenant in Mary's reign.⁴

The decline of the English sheriff was a slow process and elements contributing to his eclipse as an important judicial power are spread over a long period. Under the Norman kings, the sheriffs had been powerful barons and prelates, by whose help the Crown kept potentially over-mighty magnates in order. In the reign of Richard II, great barons who could be trusted to carry on the King's business in the shire in a suitable manner, were scarce. Thus, the office tended to fall to men of lesser social position and wealth. As a result, they tended to be either despised by the gentry or used as puppets by local magnates, thus rendering the sheriffs useless to the central government. In consequence, the powers of the sheriff were gradually delegated to the assize justices and the justices of the peace. Under the Tudors, the Crown placed great confidence in the justices of the peace and their duties were enlarged, mainly at the expense of the sheriffs. T. G. Barnes, in his study of Somerset in the seventeenth century, has written: 'If the office of lord lieutenant was a Tudor creation and that of the justices of the peace a Tudor augmentation, then the office of sheriff was a Tudor demolition.' By a statute of 1553, the sheriff, while he held office, was prevented from acting as a justice of the peace. In the latter half of the fourteenth century, petitions had been made by Parliament that all sheriffs might be removed at the end of every year. The sheriffship was expensive and could prove ruinous to men of small means, especially if burdened with it for several years in succession.⁵

In the seventeenth century, despite the eclipse of the sheriff court and the annual appointment of the sheriff, the office was still subject to enormous expense. For it was the sheriff's duty to organise and prepare for the assizes

and it was he who took the bill for the entertainment of the assize judges. In 1574, after many suspicions about profiteering and corruption in the huge bills sent to Exchequer by the sheriffs, the charge was transferred directly to Exchequer. Despite this reorganisation, however, excessive spending still continued. A Council brief of 1600 expressed the fears of the central government about sheriffs' activities at assize time and the prejudicial effect they could have on the courts' work:-

some for ostentation and some others to make themselves strong amongst the freeholders, to sway causes at their will in the country to the overthrow of justice ... put themselves in the times of assize into excessive and extraordinary expenses, whereby good men are dissuaded from taking office and justices of the peace and grand jurors waste their time in feasting and excess.

The Long Parliament, in 1641, condemned the extravagance of sheriffs and forbade them to indulge in such lavish entertainment. Yet a Wiltshire sheriff in 1685 managed to spend £249 at the assizes, including £38 for a new coach and £8 for music and bells. In Cumberland after the Restoration, sheriffs were still wining and dining 'all the justices of peace, the clerke of assizes and the grand jury with the other gentlemen his friends and acquaintances [and] give entertainment and act the part of the master of ceremonies unto all.' And that was only the first day; on the second it was reported that the sheriff 'usually dines the whole councell.'⁶

On receipt of a precept from the assize judges appointing the place and times of their courts, the sheriff would issue warrants for the holding of assizes to the bailiff and instructions to named persons for jury service. A similar procedure was followed in preparing for the quarter sessions. It was the duty of the sheriff to draw up lists of the grand jury for the assizes and quarter sessions to which were added the names of all justices, mayors, coroners, chief constables and bailiffs in the county, together with details of suspected criminals in gaol or on bail. It was likewise the sheriff's duty to proclaim the meetings of the Commissioners for the Middle Shires, as in November 1619 in Northumberland, and the meeting of the Council of the North, as at York in June 1609. It was also the task

of the sheriff to execute writs addressed to him for persons to appear, not only before the assizes and quarter sessions, but before the central courts. The original writ to commence a civil action before any of the common law courts at Westminster was sent to the sheriff, whose officer then served and returned it. The sheriff impannelled any jury required at either Westminster or the assizes, and once the case was determined, the process upon judgement went to the sheriff for him, or his officers to execute. In most cases, this would be a subordinate. From medieval times, the sheriff had been aided by a deputy, known as the 'undersheriff', but by the seventeenth century, the deputy had, to all intents and purposes, become sheriff in all but name. As in Scotland, the sheriff principal had evolved as a figurehead. Sheriffs were usually drawn from the same ranks as the justices; Ralph Delaval and Sir Thomas Swinhoe being justices and sheriffs for Northumberland.⁷

It can be seen, that from an important government official and the lynch pin of the King's authority in the localities, the sheriff had degenerated into a sort of general factotum for the assizes and quarter sessions. As keeper of the King's peace, however, the sheriff still had powers to maintain that peace, including the rights of arrest and committal. In 1619, the sheriff of Northumberland was ordered to assist the Commissioners of the Middle Shires in apprehending criminals and conveying them to gaol. An order in May 1619 requested the same sheriff to proceed against unlicensed alehouses. In March 1629, the sheriff was commanded to round up and convict the alarming number of popish recusants in Northumberland. During the seventeenth century, therefore, the sheriff had still not ceased to be a functioning officer of the law.⁸

Gaols too, were the special concern of the sheriff. He was responsible, as previously stated, for drawing up the calendar of prisoners within the gaol, for trial by the assize judges, acting as commissioners of gaol delivery. At the end

of his year of office, the sheriff had to pass on to his successor an indenture of the gaol. Sir Thomas Swinburne, sheriff of Northumberland in 1628, shows in his sheriff's book that such an indenture took place between himself and his predecessor, Sir Francis Brandling, in 1627. Brandling had to formally declare that he 'hath delivered and sett over the gaol' to the new sheriff. A list of the prisoners within the gaol was followed by a detailed account of the number of locks, keys, fetters and bolts within the gaol. A similar inventory was compiled when Sir Thomas relinquished office to his successor, Thomas Carr, in 1629. This indenture also contained a list of the writs handed over to him. The sheriff, therefore, was directly responsible for all the prisoners within his gaol and if any escaped, the sheriff was liable to incur a heavy fine. For example, a complaint was made in 1622 against Sir John Fenwick, sheriff of Northumberland, Sir Ralph Delaval, his successor, and the sheriff of Westmorland, for not being fined £500 for allowing prisoners to escape, on the grounds that Sir George Dalston, whilst sheriff of Cumberland, had been fined heavily for the same offence.⁹

The marked decline of the English sheriff in the administration of law and order was matched by a remarkable stability in the position of his Scottish counterpart. From the reign of David I, sheriffs had continued to be appointed in all areas of the country. Such appointments originally lay with the King and there was no definite period of tenure of office. During the course of the fifteenth and sixteenth centuries, the sheriff had, however, tended to cease to be a servant of the state who was appointed annually and instead, the office had been inclined to become the hereditary property of the greatest baron in the sheriffdom. As early as 1305, the sheriffdom of Selkirk was heritable and Roxburghshire soon followed. Thereafter the number of heritable sheriffships steadily increased, until, by 1747, when all heritable jurisdictions were abolished, 22 out of the 33 sheriffs or stewarts held their offices heritably.

Royal influence, however, was not completely lost. Various statutes laid down that poor or negligent sheriffs could be punished at the King's will and removed from office for a year and a day (if held in fee and heritage) or for ever (if held for a term of years). Such control was exercised by the Justiciar or the Lords of the Privy Council. Furthermore, no heritable sheriff was able to exercise laws within his sheriffdom if they were contrary to the laws and customs of the realm.¹⁰ (For notes 11 to 20, see Table 23).

Heritable sheriffships could be sold, or otherwise disposed of by the holder, although royal consent to any transference was required. Most, however, passed from father to son. If there was no male heir, the sheriffship could descend to a woman, as in the case mentioned in the Table 23, of Isabel, Countess of Marr. In the event of the sheriffship passing to a minor and the sheriff was unable to execute his office in the normal manner, a 'sheriff wardour' had to be appointed.²¹

Heritable sheriffships could also revert back to the Crown. Sir John Murray of Philiphaugh surrendered the heritable sheriffship of Selkirk in June 1619 and in September 1630, John, Earl of Annandale resigned his stewardry of Annandale. In such cases, the retiring sheriff received a considerable sum of money as compensation for the value of his office. At the beginning of the seventeenth century, the sheriffship of Jedburgh was considered to be worth £20,000 Scots. When the post was not heritable, or when it had been resigned to the Crown, individuals were nominated for the office. For example, in July 1632, three nominees were accepted by the Privy Council for each appointment. On acceptance of the post, the individual who had been chosen by the King and the Council was summoned before the Council to swear an oath, as Sir Robert Greirson of Lag did in September 1634, as Stewart principal of Annandale, and Sir William Scott of Harden, sheriff principal of Selkirk, who both undertook the 'dewtifull discharge of the said office.' These sheriffs were appointed for one year only

SCOTTISH BORDER SHERIFFDOMS IN THE SEVENTEENTH CENTURY

<u>Berwickshire</u>	Heritably held in the 16th century by the family of Hepburn, Earl Bothwell, but in the 17th century not a heritable sheriffdom until after 1660, when it was granted to the Earl of Home and his descendants. ¹¹
<u>Dumfriesshire</u>	Not a heritable sheriffdom until 1643 when it was granted to the Earl of Dumfries. After the Restoration it passed to the Earl of Queensberry. ¹²
<u>Nithsdale</u> (stewartry)	Heritably held by the Crichtons of Sanquhar ¹³
<u>Galloway</u>	Heritably held in the early 17th century by the McDowells of Garthland and by the Agnews of Lochnaw in the later part of the century. ¹⁴
<u>Selkirkshire</u>	In June 1619 Sir John Murray of Philiphaugh surrendered his heritable sheriffship to the Crown. After the Restoration it passed back into the Murray family until the 1680's when it reverted to the Crown. ¹⁵
<u>Roxburghshire</u> (or Jedburgh or Teviotdale)	On the death of George, Earl of Angus in 1402, the sheriffship passed to Isabel, Countess of Mar and then to the Earl of Douglas. In that family until the 17th century, but was surrendered to the Crown in 1620, when it passed to the Kers of Cavers. In 1665 it passed to the Duke of Buccleugh and Monmouth. Duke of Buccleugh was still in possession in 1673, although by 1684 it was held by the Douglasses of Cavers. ¹⁶
<u>Peeblesshire</u>	Heritably held by the family of Hay of Yester. In 1686 the Earl of Tweeddale sold his lands and the sheriffship to the 2nd Duke of Queensberry, who gave them to his son, the Earl of March. ¹⁷
<u>Wigton</u>	Heritably held by the Agnews of Lochnaw. ¹⁸
<u>Kirkcudbright</u> (stewartry)	Removed from Lord Maxwell's heritable possession on his rebellion in 1608. Then held by the Earls of Nithsdale. ¹⁹
<u>Annandale</u> (stewartry)	Likewise removed from Lord Maxwell in 1608. Held heritably by Earl of Annandale until 1630 when it reverted to the Crown. New stewarts were thereafter annually appointed until 1644 at least. ²⁰

In the 1650's all heritable offices were abolished. There were, therefore, no heritable sheriffdoms in that period.

and the process of selection was repeated each year.²²

The position of sheriff was an important one and the office was usually held by men of high standing and authority. All the early sheriffs were important barons or officials of the King's household. In the seventeenth century, the heritable sheriffs were usually men of considerable status, not only within their sheriffdom, but also nationally: such as the Duke of Buccleugh, the Duke of Monmouth, the Earl of Home or the Earl of Annandale. The annually appointed sheriffs tended to be responsible men of considerable influence within the sheriffdom, although it was unlikely that they were of national importance. Many of them, however, such as the Greirsons of Lag, Sir William Scott of Harden, Sir John Murray of Philiphaugh and John Riddle of Hayning, were also Border Commissioners and as such, men not only of influence, but also with some knowledge of judicial practice and intimately acquainted with the peculiar nature of law and order on the Borders.

In view of the important position of the sheriff and of the demands made on him from his interests outside his sheriffdom, it was natural that the position of sheriff depute should evolve. At an early stage in the history of the sheriffs, it would appear that the sheriff principal had appointed some subordinate officer whom he could depute to act in his stead. Although these deputies were chosen and created solely by the sheriff principal, there were frequent confirmations of appointment by the King. Within heritable sheriffdoms, sons were often appointed deputies under their father so that they might learn the law. The sheriff was always personally responsible for his depute.

Throughout the sixteenth and seventeenth centuries, the office steadily increased in power and responsibility and the sheriff principal tended to become more and more of a figure-head, presiding occasionally at the head courts, but

delegating many duties, including presiding over the lesser courts, to his deutes. From the documents of the Privy Council, it would appear that the more eminent the sheriff principal, the more active his deute was in under-studying for him. In the case of the annually appointed sheriffs, the identity of the deutes rarely emerges, but the opposite is true of the heritable sheriffdoms. Thus, for example, from 1665 to 1669, when the Duke of Buccleugh and Monmouth was sheriff of Roxburghshire, it was to Mr. John Scott of Langshaw, the sheriff deute, that all the commissions were issued, and to and from whom all correspondence with the Privy Council was carried out. The same could be said of the stewartry of Annandale in the 1670's and 1680's, where the identity of the stewart is unknown because all the commissions and correspondence were addressed to his deutes, John Johnston of Elshields and James Carruthers. Conversely, from 1639 to 1644, the annually appointed sheriff of Selkirk, seems to have received all commissions and communications personally, and the identity of his deutes is uncertain. The same could be said of Dumfriesshire from 1615 to 1644 and Berwickshire between 1616 and 1644. An act of 1540 had laid down that all deutes should be yearly sworn in office and the position was considered to be one of dignity and honour.²³

The duties of the seventeenth-century Scottish sheriff were remarkably similar to his medieval English counterpart with the same emphasis on administrative, military and legal duties. The sheriff was the central government's mouthpiece in the localities. It was through him that government acts, proclamations, instructions and intentions reached the ears of most of the population of Scotland, for the sheriff was expected to proclaim all such things at his court and at the market places in his sheriffdom. He was to ensure that copies were given to those responsible for the administration of the law. It was also the sheriff's duty to organise the election of commissioners

to Parliament (as the sheriff of Peebles did on 2nd April 1654) and his obligation to ensure the loyalty of all persons in his sherrifdom to the King. As chief administrative officer in the shire, he was to administer the oaths of Supremacy and Allegiance and other declaratory oaths upon orders from the Privy Council. Such occurred in September 1666 and February 1678, when all persons in public office were required to subscribe. In accordance with this order, oaths of Supremacy and Allegiance were administered by the sheriff in Peebles in December 1674. The heritors of Roxburgh were ordered by the Council to convene at Jedburgh in February 1678 to give their oaths to the sheriff, copies of which were to be sent back to the Council. Similar requirements were made of the sheriff of Dumfriesshire and the stewarts of Annandale and Kirkcudbright at the same time.²⁴

In the absence of a fully developed system of justices of the peace and other 'local government officials', who had authority over the whole of the shire, the sheriffs not only had to deal with routine administrative affairs, but also with unexpected national events. A good example of such occurred when James VI and I announced his intention to come to Scotland in 1617. It fell to the sheriffs to arrange for the King's baggage to be transported from Berwick to Dunglass on the way north, and from Glàsgow through Sanquhar and Annan, back to England. Considerable preparations were necessary for such a journey. The sheriffs were ordered to convene all the barons and landed gentlemen in each shire, together with the justices of the peace, to make the arrangements. New bridges had to be built, such as that by Sir James Murray of Cockpule, between Dumfries and Carlisle, before the King's carriages could be moved through the area; and most of the roads seem to have needed considerable repairs before they were passable.²⁵

One of the most important duties of the sheriff, in his administrative capacity, was the collection of taxation and royal revenues. Royal revenues came, usually, from crown lands, feudal dues, profits of justice, escheats

and occasional compositions, which the sheriff had to collect. From the fourteenth century, sheriffs had been responsible for the collecting of taxes from the lords, barons and freeholders within their sheriffdom. The sheriff was first to draw up a roll of those who were to pay the taxes, as the Stewart of Annandale was ordered to do in September 1608 and as the sheriff of Selkirk did in August 1682. Then he, or one of his officials, had to ensure that the money was brought in. This seems to have been a rather difficult task. In June 1611, the Stewart depute of Annandale petitioned the Council that the inhabitants of his area refused to pay their taxes and in January 1623, the Stewart of Annandale was deforced whilst collecting. In April 1628, the sheriff of Dumfries, Robert Crichton of Ryhill, petitioned the Council to the same effect. The sheriff was empowered to poind goods in lieu of taxation if the inhabitants of his area refused to pay. The money the sheriff collected was to be counted by the sheriff, Stewart, or sheriff clerk, and handed over to the central authorities.²⁶

As in medieval England, the sheriff was responsible for the raising and leading of the shire levies. Every baron was to ensure that his men were fit for war and the sheriff was responsible for the barons of his sheriffdom. The wappenshaw²⁷ met at his summons and the efficiency of its arms was his charge. Burghs and regalities were empowered to hold their own wappenshaws. An act of 1484 ordered the sheriff to keep a roll of weapons and defensible persons in the shire. The sheriff of Selkirk drew up a list of the number of horses that the lairds or landed men in his sheriffdom could furnish in June 1682 and noted that the Duke of Buccleugh would provide 21 horses, whereas Sir William Elliot of Stobbs would provide four, and the lairds of Langshaw, Whitslaid and Newhouse could each furnish one. In the event of an order for the rendezvous of all fencible men in the shire to attend the King's host, there would be ready horsemen present. Such an order came at the time of the

rebellion at Bothwell Bridge in June 1679, when Berwickshire, Roxburghshire and Selkirkshire were to be armed in order to search and seize the rebels.²⁸

The sheriff, of course, had also to raise infantry. If the number of volunteers for service did not constitute a company, as was always the case, the sheriff was authorised to apprehend fugitives, 'backsliders', vagabonds and idle poor, for the service. For example, in March 1626, Sir Donald McKay was ordered to levy 2000 men for service on the continent and all sheriffs were commanded to round up 'suche fugitives and backslyderis' for service. Deserters from McKay's regiment who 'did most unworthilie disband and rune away' were to be apprehended by the sheriffs of Ayr, Galloway and Nithsdale, in April 1628. In the event of a rebellion, the sheriffs' duties did not stop at the levying of an army to suppress the rebels, but also included searching for the rebels after the suppression, prosecuting those heritors who failed to support the King's host and making inventories of the goods of the rebels. Justiciary court records for 1679 contain large rolls with numerous names of persons who took part in the rebellion, persons who resset rebels and those who were absent from the King's host. Such lists were compiled and returned to the Justice Court in Edinburgh by the sheriffs.²⁹

As conservator of the peace, the sheriff had to search and pursue rebels at the horn. On warrant from the Privy Council or the High Court of Justiciary, the sheriff was empowered to pursue and apprehend any fugitive from those courts, compile an inventory of his cattle, corn, goods and debts; arrest the maills, fermes, profits and duties of his lands, if he had any, and hold them under arrest until they could be delivered to the Council for the King's use. He was also able to poind for the amount of money in the event of any fine incurred. Such warrants were frequently issued by the Council. In October 1606, for example, Mr. William Hart of Preston complained against Sir Robert Scott of Thirlstane before the Council in a case of debt. When Sir Robert did not appear at court, a warrant was issued to the sheriff for his apprehension, the

seizure of his goods, and an inventory to be made of them.³⁰ If the rebels at the horn had committed a violent crime, the sheriff was authorised to use methods akin to the Anglo-Saxon 'hue and cry', whereby he could 'convocate the liegis in armes' in order to apprehend the criminals. This was the case in February 1621 when the sheriff of Dumfries was ordered to arrest Sir John Maxwell of Conhaith and his two sons for the murder of the sheriff clerk of Dumfries. Gilbert Brown, a troublesome papist in Kirkcudbright, was to be apprehended in the same manner in 1628. All fugitives or rebels were to be proclaimed at the market cross of the chief towns in the shire by the sheriff, and if they fled out of the bounds of the sheriffdom, the sheriffs of the 'four halves about' were to continue the pursuit. The sheriff was also responsible for safeguarding any prisoners passing through his shire and as with the search for rebels, the prisoners were handed over from sheriff to sheriff. Each sheriff was responsible for the prisoners whilst they were in his particular shire, until they reached Edinburgh, or their final destination.³¹

In addition to carrying out orders from the central courts, the sheriff held courts in his own right, in which he continued his function as a judicial officer of the crown, together with his duties as a local landowner and holder of his own jurisdiction. To enable an analysis of the sheriff courts of the Borders, all the existing court records from that area for the seventeenth century have been studied.

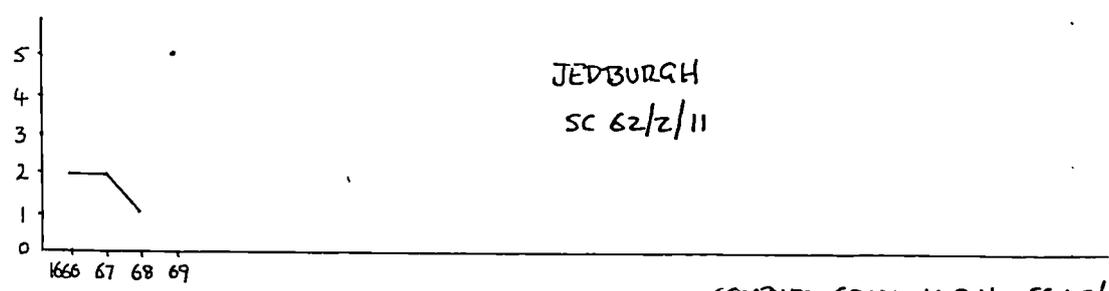
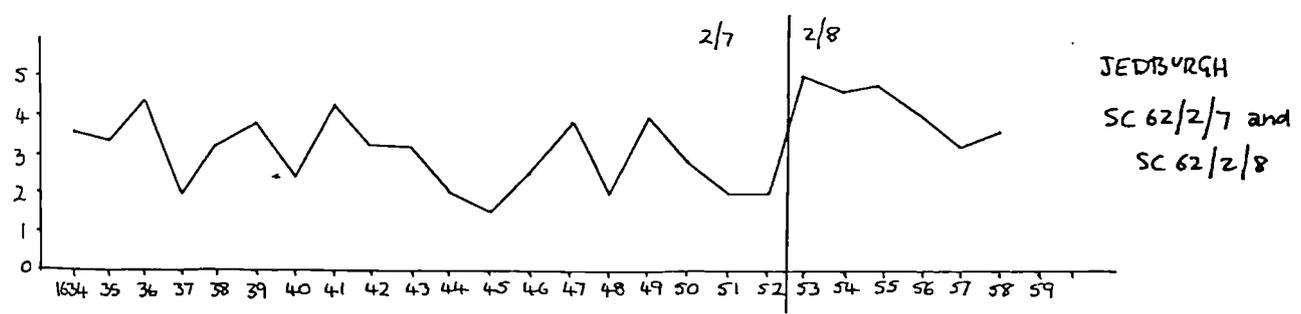
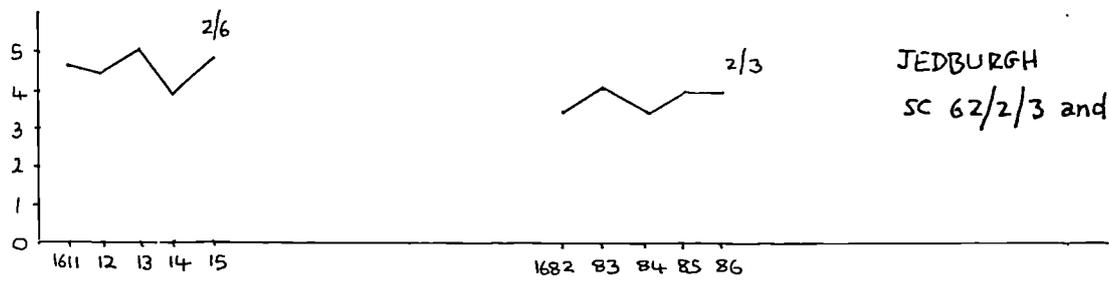
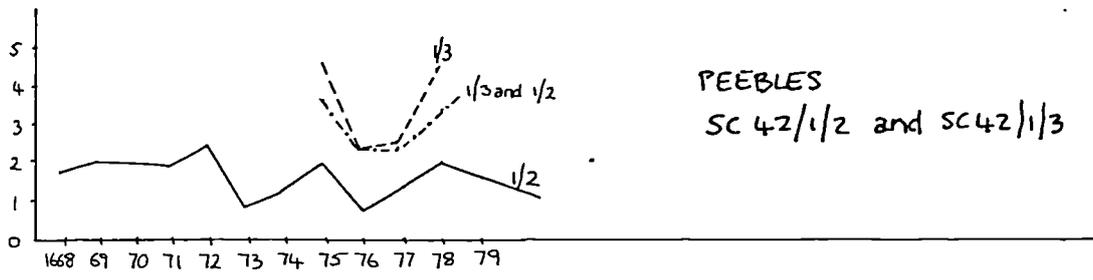
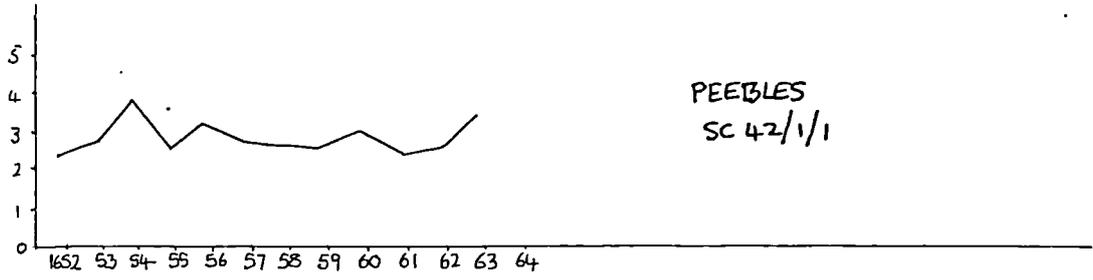
A distinction had emerged early in the history of the sheriff court, between the head courts, held three times a year for the hearing of important cases, and lesser courts, held much more frequently, which dealt with more minor issues. In Stirlingshire the head courts were sometimes held only once or twice a year and have been described as more formal ceremonies than forums for important business. In the charter of David I, it had been laid down that the

King's pleas of each sheriffdom should be held within forty days. By the sixteenth century, although head courts were still held on definite days, no rule had been made for the intermediate courts. Thus, these were arbitrarily fixed and sometimes criminal cases were held ad hoc at additional courts. By the seventeenth century, the court books of the Fife and Aberdeenshire sheriff courts show the court sitting usually every Wednesday and Friday. There were however, certain vacations, during which no sheriff court in the country could be held. For example, during Easter, or during feriate days; that is, during the sitting of the High Court of Parliament and justice ayres. The sheriff and majority of barons and freeholders were required to be present in person at justice ayres and Parliament was a court of appeal where the sheriff was obliged to give suit. Lower courts, therefore, were never allowed to meet during the session of Parliament. During the sixteenth century, no sheriff court could be held on a day of truce in the Border sheriffdoms. Although days of truce were not held after 1605, it is most probable that the same restriction would apply whenever the Border Commissioners held their courts within the sheriffdom. In addition, there was the harvest vacation, which was supposed to last from 1st August until Michaelmas, but which was frequently extended to late September. Dispensations to hold courts during that period however, could be procured from the Lords of Council.³²

Graph 2 shows the number of meetings per month for the courts of Roxburghshire and Peeblesshire. Taking into account the above vacations and feriate days, it has been presumed that if the number of meetings per month exceeds 2.5 on average, the document could be a fairly accurate record. If this is the case, then it could be that the documents reaching such a number give an accurate reflection of the criminal and civil business before the court. A detailed month by month breakdown shows that in some months no meetings were

GRAPH 2.

MONTHLY MEETINGS OF THE SHERIFF COURTS OF JEDBURGH
AND PEEBLES, 1611 - 1686



COMPILED FROM W.R.H. SC 42/1/1-3
SC 62/2/3, 2/6, 2/7, 2/8

held, whereas six or seven could be held the following month. This gives the impression of a court trying to catch up on cases it was unable to hear, for one reason or another. Considering the period that one document covers, it is not surprising that the years 1637, 1640, 1645 and 1651 show exceptionally low figures, for these were years of turmoil on the Borders. The Bishops' Wars, from 1637 to 1642, merged with the English Civil War in 1642; the Battle of Philiphaugh in the heart of the Borders, being fought in 1645; these wars culminated in the conquest of Scotland in 1651 when the Jedburgh court took a vacation from January of that year on account 'of the English being in the county.' In consideration, this document is probably an accurate reflection of the court.³³

As none of the actual court books exist for the Borders, much of the method of working of those courts cannot be ascertained from the above documents. To remedy this, material has been drawn from other shires to supplement the Border court documents, to reveal the practice of a typical sheriff court.³⁴

Traditionally, the castle was the caput vicecomitatis, although in the absence of a suitable public building, courts could be held out in the open air at well known landmarks. This was the case in Aberdeen in 1539, Banff in 1506 and 1615. Head courts were always held in the castle, but the lesser courts were essentially errant in nature and held in different localities in the sheriffdom. Through the middle ages to the seventeenth century, burghs had gradually grown round the walls of the castle, and close links had been forged between the castle and burgh and the rest of the sheriffdom. Dingwall and Dumbarton are good examples of this process. By the time of the period under discussion then, the castle, as the caput, had gradually yielded place to the burgh, so that all courts, whether head or intermediate, were held in the tolbooth of the chief burgh in the shire and the sheriffdom began to take the name of that burgh. Thus the Peeblesshire, Dumfriesshire, and Roxburghshire records all show that all courts were held in Peebles, Dumfries and Jedburgh, respectively.³⁵

As in medieval England, the sheriff court was opened by a ceremony of 'fencing', by which all persons connected with the court were called to attend. Traditionally, all the freeholders in the sheriffdom were supposed to appear at the court. The Jedburgh court record of September 1652 shows such a list of 'portioners', as they were called, consisting of 22 names. The Fife and Stirlingshire records show that the opening of this formal opening of the court, was comprised of an official reading of the suitor rolls, the swearing in of the assize and the reading of the formal charge on all present to obey and support the court. The parties concerned were officially summoned three times. If a party failed to appear he was charged with contumacy, under which he was liable to a fine. Such fines were frequently issued by the courts. Thomas Cowmens and Thomas Rutherford, charged with blood and brawling, failed to appear before the Jedburgh court in August 1667 and were fined for contumacy. In other cases, the defender, by his absence, was then taken to be guilty. In criminal cases, three failures to appear led to the party being declared 'outlaw' and 'put to the horn'.³⁶

Defenders, pursuers and witnesses were all summoned by a writ of execution given out by the sheriff officer. This appears to have been handed personally to those involved and charged them to appear on a specific date at the sheriff court. Assizors, or jurors, were summoned in the same way. No executions are contained in the records of the Peebles and Jedburgh courts, but there are bonds of caution whereby an individual would undertake to pursue another before the sheriff court, or would promise to be in court on a certain date, or whenever summoned. These are similar to the recognizances issued by the English courts.³⁷

Around 1500, the sheriff courts had begun to employ permanent officials and by the seventeenth century an official prosecutor had emerged in the form of the fiscal. From 1665 at the Jedburgh court, it is clearly stated that the prosecutor was the fiscal, and the fiscal is shown to be the prosecutor in

the scanty records of the Selkirk court. For most of the other records, no such details are given. It would appear that a few cases were brought by complaint, as in the case of John Lambert who complained against James and John Ireland for blood and riot in June 1677. In the majority of actions, however, the case would not appear to have been brought to court by complaint and it may be presumed that the fiscal was the prosecutor.³⁸

In early times, all civil proceedings were initiated by the King's briefs, or letters issued from chancery and directed to the sheriff. These charged him to decide the question at issue and could be purchased by the pursuer. The sheriff then issued a precept of summons against the defender either at his house or in court. At the Fife sheriff court either party could be represented either by a procurator or in person, and proof was furnished either in the form of writings or witnesses. In the case of witnesses, they were summoned to appear, according to the method described above. In court, the witnesses had to swear an oath to speak the truth, although before an act of 1686, the parties concerned were not allowed to see the depositions of witnesses. The final decision rested with the body of the court, although in certain actions the jury could be called upon to advise. In some cases, particularly land disputes, the Roxburgh and Peebles sheriff courts submitted the issue to the arbitration of 'neighbours'. This method of deciding a case was frequently used in the baronial and regality courts, where it was considered that the neighbours were more knowledgeable, and therefore more able to judge the truth of the matter, than the court. In submitting their dispute to such a body, both parties bound themselves to abide by the decision made by their neighbours.³⁹

In the documents where both civil and criminal suits are recorded, wide variations are shown in the proportions of civil and criminal cases. For example, the Jedburgh record for 1610 to 1615 contains 95 per cent civil actions, but the record for 1634 to 1651 shows that 47 per cent of all actions were civil and 75 per cent in the period 1652 to 1659. In Peeblesshire

between 1652 and 1653, 70 per cent were civil actions. Overall, despite the differences in actual figures, they all seem to point in the same direction - that the number of civil cases far outnumber criminal ones in the sheriff court documents. In this respect, the Border sheriff courts conform to the same pattern as those of Fife and Stirlingshire. At this period however, as in early English law, the division between civil and criminal actions is rather blurred. W. Croft Dickinson has defined bloodwit, deforcement and spulzie⁴⁰ as quasi-criminal actions, in that the defender is the 'accused' and puts himself upon 'the knowledge and deliverance of an assize'. Also by an act of 1482, spulzie is referred to, together with theft and slaughter, as a criminal action. Because of this, bloodwit, deforcement and spulzie have been classified as criminal actions. In so doing, the tremendous weighting towards civil actions has been somewhat tempered, but nevertheless is considerable.⁴¹

Classified as civil actions are cases of 'removing', whereby tenants were ordered to remove from their lands or house by the landlord, and also 'poinding' and 'apprising'. Poinding was the method of transferring the personal property of the debtor to the creditor. The sheriff was empowered to direct a precept of poinding against any debtor that his debts might be satisfied. If the movable goods of the debtor failed to satisfy the debt, the sale of the heritable right pertaining to the debtor was undertaken in order to make up the deficit; this process was known as apprising. Land disputes have also been accounted as civil cases and also those dealing with 'violent profits'. Violent profits was the term given to damage or loss sustained by a landowner as a result of being deprived of his land, on account of it being 'violently' or illegally occupied. Such was the case when a tenant refused to remove. The profits were those from grass and corn. By far the largest component of the 'civil category', were straight-forward debt cases.⁴²

Cautions or obligations to pay debts also occur frequently in the documents. The Jedburgh record for 1682 to 1687, for example, is full of such cautions. Cautions would also appear to have been taken for pursuing offenders before the court, or to ensure that such offenders appeared at the court. The most common of all cautions, however, was 'lawburrows'. This was a pledge or bond, backed by money, given by one party, whereby he undertook not to harm another or his family. Such a pledge was often given after the two parties had been in court over an issue such as bloodwit and it sought to prevent the like happening again, and curtail any ill-feeling that might manifest itself in further disorder. For example, in July 1615 at the Jedburgh court, George Hunter was fined for a blood against Thomas Shevill, and Archibald Shevill was fined for the same against George Hunter. The same day, they were all charged to give lawburrows not to harm each other. Alternatively, people could request lawburrows from a named party on the grounds that they feared physical hurt from them. When lawburrows were broken, the surety became liable to a fine.⁴³

Featuring prominently in the sheriff court records of Dumfries, Peebles and Jedburgh are actions regarding the servicing of brieves. Originally such brieves were actions initiated from chancery, but by the seventeenth century, the brieves were served in the sheriff court. There were four types of brieve; the brieve of inquest, brieve of tutory, brieve of curatory and brieve of terce. The brieve of inquest was the most important and was rather the equivalent of the English coroner's inquisitio post mortem. When a land holder died, according to feudal law his lands reverted to the superior from whom they were held, until the heir was officially entered to them. If a minor, the heir became a ward of the superior, who enjoyed the revenues from the land until the heir reached his majority. When the heir reached his legal age, he could only receive his lands through a brieve of inquest.

This brieve was served before the sheriff of the shire in which the lands lay and the sheriff was not allowed to serve any lands outside his jurisdiction. A jury decided the points of the service - whether it should be 'general' or 'special'. General meant that the heir was the nearest lawful heir of the deceased who had died 'at the faith and peace of the King.' Special service meant that the above conditions were fulfilled, plus details of the holding and tenure of the lands. For a minor under the age of 14 for males and 13 for females, tutors were necessary. If the father had failed to name a tutor (or guardian) in his will, a tutor had to be appointed by a brieve of tutory. Tutors were supposed to be members of the heir's family. Brieves of tutory were decided by a jury. Once he reached the age of 14, the heir was entitled to choose, from his family, two curators who were appointed by a service brieve, or edict of curatory. On the death of a land holder, his widow was entitled to the life rent of one third of the heritable property left by her husband - known as terce. As in the brieve of inquest, a jury had to ascertain that the widow was the true wife of the deceased who had held his lands according to the points of 'general' service.⁴⁴

The sheriff courts performed a vital function in hearing and deciding civil cases, but their role in the criminal sphere was no less important. Tables 24 and 25 show the criminal cases tried each year before the Peebles and Roxburghshire courts. The sheriff was not empowered to try treason, or the 'four pleas of the crown', which were reserved to the central courts. He was, however, able to try cases of theft and resset of theft, where the thief had been caught red-handed, that is, with the stolen goods in his possession, or at his house, which the courts called 'with the fang'. If the thief was not apprehended in this manner, the sheriff was supposed to refer him for trial by the Justiciar. This accounts for the relatively few cases of theft which appear in the court records.

Within the Jedburgh documents, the court usually stated before it passed judgement that the thief had been caught with the fang. For example, in May 1647, Gavin Little and James Beattie were 'tackin reid hand and fleing with the stouthe' of four cattle. Likewise, George Lye, in April 1649 was 'apprehended with the fang' of ten sheep from Thomas Turnbull. In some cases, investigations were carried out to ascertain whether an individual, having been found with stolen goods in his possession, was actually the stealer of them, or the ressetter. For example, in October 1661, James Brotherstones was found to possess a cow belonging to William Flock. He denied the theft and claimed to have bought the animal from Simon Heckford. Later, in February 1662, Simon Heckford and John Johnstone were accused of the theft of the cow from William Flock. The records of the Jedburgh court do not, however, record only cases of persons caught red-handed or with the goods in their possession. The above example of Simon Heckford and John Johnstone is such a case. The Peeblesshire documents never state that the thieves were caught with the fang and in one particular case, it would appear that the individual, John Dixon in Dodhouse, in October 1674, was definitely not caught with the fang.⁴⁵

It would appear that a suspect was quite often put into gaol, or as the court called it, 'the thieves hole', until the details of the case had been discovered. Such was the fate of Robert Brunton who was accused before the Peebles court in March 1671, of stealing a sheep. After investigations were made, it was discovered that the sheep had been worried by a dog. The failure of the records to state if a thief had been caught with the fang, in all cases, together with the above evidence that the courts dealt with offenders who were clearly not apprehended under the official circumstances, prompts two suggestions. W. Croft Dickinson found similar circumstances in the Fife sheriff court records and suggested that sheriffs may have openly disregarded the distinction between theft with and without the fang.⁴⁶

Certainly, the register of the Privy Council shows that within the period under study, seven commissions for the trial of theft were issued to the sheriff of Berwickshire, one each to the sheriffs of Annandale and Nithsdale, two to the sheriff of Dumfries and four to the sheriff of Roxburghshire. Of those issued to Roxburghshire, none appear in the court records. Twelve other commissions for other offences were issued to the same sheriff, and none of these appears in the documents either. Either the court records are deficient, or, in view of the total absence of any persons named by any commission, it could be that the sheriff dealt with the people alone, without recourse to the court. In the absence of regular justice ayres, such commissions may have been a method of keeping down the number of cases which would have been tried before the High Court of Justiciary. Substantiation is given to this hypothesis by the range of topics covered by the commissions, which are more akin to the business before the High Court than to that of the sheriff courts. Some commissions actually reveal that under normal circumstances, the sheriff would not be hearing the case at all. Such was a commission of the 2nd November 1611, to the Stewart depute of Annandale, for the trial of Thomas Bell, a thief, which stated that he was to be tried by that party because the Commissioners of the Middle Shires did not intend to hold a justice court in Dumfries for quite some time. (In other words, if the Commissioners had been holding courts regularly, the sheriff would not have heard the case). The investigations which took place before a suspect was actually prosecuted in the sheriff court suggest that the sheriff was employing a 'weeding out' process whereby the more complicated and uncertain cases were prepared for presentation by the sheriff to the High Court. Hence the absence of a verdict in several of the actions. However, in view of the special commissions which could be granted to the sheriff for trying persons caught without the fang, the irregularity of justice ayres and the problems of keeping a suspect in gaol until the time for transporting him for

trial in Edinburgh, it is small wonder that the sheriffs took it upon themselves to try the simpler cases of theft and ignore legal niceties.⁴⁷

In general, the sheriffs were concerned to keep down the level of theft in their sheriffdoms. All strange animals were treated with suspicion. Whenever a new animal was bought by someone within the sheriffdom from another without, a caution had to be registered with the sheriff court that the animal had been sold 'free from all fault'. When a beast was found wandering and no owner could be found, the animal was proclaimed 'waif' at the market cross. Occasionally, persons were found concealing such animals and treating them as their own. For this crime, they were liable to prosecution. For example, James Scott in Whitrick was brought before the Jedburgh court in March 1666, having taken possession illegally of waif beasts. In such cases, the beasts were either to be delivered back to their owners, if they could be found, or else declared waif again.⁴⁸

Murder was outside the sheriff's jurisdiction, unless it was committed publicly in 'hot blood', or in self defence. Murder, or slaughter committed on 'forthocht felony' could also be tried by the sheriff, providing the murderer was taken red-handed. A man committing slaughter had at once to find surety with the sheriff to underly the law. If, however, he failed to appear at court and fled and if the sheriff failed to apprehend him, his goods could be put under arrest and he would be charged at the market cross of the head burgh to appear and find surety within six days, under pain of escheat and horning. The sheriff was obliged by law to pursue and apprehend the murderer immediately and to keep him in safe custody until justice could be executed against him. Hope's practicks state that until 1491 the sheriff had to make judgement upon an offender who had

committed a slaughter, 'within forty dayes after the committer was apprehended in cold blood.' If the offender had been apprehended red-handed, justice had to be done 'within three sunnes'. After 1491, however, the sheriff, having apprehended 'ane manslayer', was to take him to the King or Justiciar. Alternatively, he could keep him in ward until he heard from either the King or the Justiciar, 'notwithstanding of the forty dayes and three sunnes contained in the auld lawe.'⁴⁹

There are only two cases of slaughter in the documents studied, and both these occur in the Jedburgh documents of 1639, where James and Adam Brown in Cappock were pannelled and indicted in April of that year for throwing stones at Matthew Tullie, who died as a result. Adam was found guilty, but John was acquitted. There were, however, commissions for the trial of murderers issued to the sheriff of Roxburghshire from the Privy Council, in the same manner as they were issued for the trial of theft and probably for the same reasons (see above p.230). Between 1603 and 1680, four commissions for the trial of murderers were issued to the sheriff of Roxburgh, six to the sheriff of Berwickshire, and one each to the sheriffs of Dumfriesshire and Peebleshire. There were a further ten commissions for the apprehension of murderers, issued to the Border sheriffdoms between 1603 and 1680. Such commissions were, doubtlessly prompted by the infrequency of the justice ayres.⁵⁰

In Stirlingshire, the most common item of business, after the possessory cases, was bloodwit or blood and riot. This referred to public brawling in which blood was shed. It can be seen from the tables for Peebleshire and Roxburghshire, that bloodwit, or brawling to the effusion of blood, was indeed a popular item before the Border sheriff courts. Frequently the term 'riot' alone could also refer to an assault or brawl, in which blood was not shed.

In some cases, however, 'riot' represents a very different type of crime. For example, in June 1668, William Porteous and an accomplice came before the sheriff court of Jedburgh for casting down Francis Scott of Whitlaw's dyke, for which they were found guilty of 'riot'. In October 1670, Thomas Nicoll in Castellhill was accused by the Peebles court of 'riot' against the house of John Noble. In view of the varied use of the word 'riot', all riots have been classified separately, although it should be borne in mind that many of them may refer to a brawl in which no blood was shed. It is unfortunate that the documents frequently do not elaborate on the type of riot committed and so it is impossible to categorise them further. Bloodwit has been called a 'quasi-criminal' action, in that criminal actions proceed, not upon a summons, but upon an indictment; furthermore for a criminal action, the penalty was not pecuniary, but of 'life and limb'. The prosecution of bloodwit cases was by the fiscal and both parties could appear in court to be prosecuted if the brawling was mutual. In this respect, bloodwit conforms to the criminal definition. Yet the penalty was pecuniary only. Deforcement, too, falls into this category. By an act of 1587, deforcement could be punished either civilly or criminally according to the option of the pursuer. Deforcement was an assault upon, or resistance to, an officer of the law in the execution of his office. It had to be proved in law by two witnesses in addition to the officer.⁵¹

Another important 'quasi-criminal' action was spulzie. This corresponds roughly to the English 'taking and detaining', or borrowing without the owner's consent. As in the English records, it is often very difficult to distinguish between spulzie and theft, and it is possible that as the sheriff's jurisdiction in cases of theft was limited, the line between the two was frequently blurred. The sheriff would naturally be concerned to bring all border-line cases of theft which were outside his competence, within the broad scope of an action over which

there was no limit to his jurisdiction. As W. Croft Dickinson has written 'spulzie was probably a happy term extending, under cover of its ambiguity, the criminal jurisdiction of the sheriff.' Compared with other sheriff courts, actions of spulzie are relatively sparse in the Jedburgh and Peebles records, although many more occurred in the Dumfriesshire documents. The same situation has been found in the Stirlingshire documents, and it has been suggested that the number of spulzie cases was not as high in that sheriffdom because such actions could have been treated as debt - the guilty party paying the price of the property 'borrowed'. Perhaps this, too, was the case in Jedburgh and Peebles.⁵²

Most noticeable in Tables 24 and 25, are the extremely high number of persons prosecuted for violating the so-called penal statutes. These were acts of Parliament which forbade certain activities. In medieval times, the sheriff had traditionally been responsible for local issues such as the destruction of illegal weirs, inspection of weights and measures, the punishment of regraters and forestallers and the regulation of inn and tavern prices. During the seventeenth century, however, with the progress of legislation, new duties were imposed on the sheriff. By the mid-seventeenth century, the sheriffs of Roxburgh and Peeblesshire, therefore, are found executing regulations forbidding activities such as the cutting of green wood, or broom, fishing at the wrong time of year for salmon fry or smolts, breaking parks, shooting hares in the snow time, shooting fowl or game, using gun dogs, or burning heather. Later, attending conventicles, or not attending the kirk were added to the ever expanding list of penal statutes. Penal statute prosecution seems to have reached a height after the Restoration, when religious non-conformity threatened the peace of the Borders. The Riddle of Hayning documents, show that Selkirkshire was particularly acutely affected. Even the fragmentary records of that sheriffdom show that between 1681 and 1687, a staggering 783 persons appeared in the sheriff court on charges of violating the penal statutes.⁵³

A traditional duty of the sheriff was the apprehension of 'sornars', or idle men, who were to be arrested until surety was found for them, upon which they were given forty days to find masters or enter a craft under pain of imprisonment. Accordingly, in January 1624, the Privy Council had charged the sheriffs of Berwickshire, Roxburghshire, Selkirkshire and Dumfriesshire to hunt out and apprehend 'counterfeit Egyptians'. As the economic pressures of the seventeenth century grew and burghs and parishes became increasingly resentful of supporting 'idle Beggars' who were not natives of those places; and as the central authority became increasingly aware of the need for the firm establishment of law and order, the sheriffs were required more and more frequently, to search for more and more 'masterless men'. Thus, in February 1664, the sheriff banished three 'egyptians' from Peeblesshire and in 1665 and 1683, prosecutions were brought against those who harboured, or gave support to vagabonds.⁵⁴

It is interesting that there are four cases of witchcraft - all from the Peebles court, in 1678. Witchcraft was not one of the common actions to be brought before the sheriff court, as this serious crime was usually reserved for the Justiciar. There is, in the Peebles court record, no account of the punishment, or even the verdict of the trial of the witches, merely the statement that the four persons had been accused of 'consulting with familiar spirits against the laws of God'. This indicates that the sheriff court was acting as a court of first inquiry, before referring the case to a higher court. Although no record of this case has been found among the documents studied of the High Court of Justiciary, it was most probably to that court that they would be referred. Between 1603 and 1680, 26 commissions were issued to sheriffs for the trial of witchcraft; fifteen to Berwickshire, four to Roxburghshire, two to Selkirkshire, one to Peebles, three to Dumfries and one to the Stewart of Kirkcudbright.⁵⁵

The categories of cases which have been discussed above reveal that the sheriff's essential function was to deal with minor disputes over debt and brawls and to execute the government's wishes in his sheriffdom. The rest of the business before the courts, as shown in figures 24 and 25, can be seen to be of minor significance compared to the cases discussed above. But they too, serve to illustrate the concern of the sheriff for the smooth running of the shire and for the maintenance of law and order. Petty local disputes, such as closebreaking, or cattle eating another's crops, or slander, were all brought before the sheriff court at some time.⁵⁶

Until 1540, the Scottish sheriff courts adhered to the medieval English system, whereby the freeholders or 'suitors' of the court were both judge and jury. An act of the Scots Parliament of 1540, however, instructed the sheriff to act as judge, and no longer be merely the president of the court. The sheriff was to use a jury to assist him in difficult criminal matters and in the service of brieves. Witnesses were summoned to the court in some cases, and in actions, such as theft, quite thorough investigations took place to ascertain whether the criminal was guilty. In August 1686, the sheriff of Selkirkshire held Robert Graham prisoner in the tolbooth of Selkirk whilst he made detailed investigations into the alleged slaughter of Dr. William Sympson by Graham. Six witnesses were summoned to give full depositions and also the surgeon who had dressed the wounds of Dr. Sympson. Robert Graham later confessed to the crime. Witnesses were summoned, like the jurors (or assizors) by an execution issued by the sheriff's officer, which charged them to appear at court on a certain day. They were usually given 15 days notice, although shorter warnings could be given. Absent assizors could be fined for not appearing in court, unless they produced a testimony from a 'famous' person (usually the minister) that they were sick or out of Scotland.⁵⁷

Few details are given of the jurors in the sheriff court records studied, and in the majority of cases the method of trial is not stated. However, it

is clear that an assize was used in some cases. For example, the sheriff of Berwickshire, in March 1628, was instructed by the Privy Council to try William Whitelaw in Duns and Jean Murdo, with the aid of assizors, for the crime of infanticide. John Atcheson was reported to have been tried by an assize in the stewart court of Annandale, for an assault upon one Johnstone of Foulshields, in February 1636. By law, in such criminal actions as came before the sheriff court, the assize could be chosen by the party pursuer in conjunction with the officers of the court. Generally, however, the assize in sheriff courts such as Fife and Aberdeen, and probably also in the Borders, was composed of men from the neighbourhood of the crime. At the Aberdeen sheriff court, the number of assizors seems to have been 15 in criminal actions. W. Croft Dickinson reports that the number was always uneven and seemed to vary at the Fife sheriff court, from 13 upwards and that 'the larger numbers generally prevailed in the more important cases.' The jury always elected a chancellor whose duty it was, in the event of an equal division of opinion, to give the casting vote and also to announce the decision of the jury.⁵⁸

It is apparent, however, that not all important actions were tried by an assize, as shown by a letter in August 1654, from the sheriff depute of Roxburghshire to the High Court of Justiciary. The letter told of a prisoner in Kelso who had been accused of bestiality. 'The mater', the sheriff wrote, 'remains verie dark and difficult, being most confidently affirmed by the informer and als confidentlie denyed be the defender.' He therefore requested that he might maik the mater knowin unto your honoures and understand your pleasour.' This issue never appeared in the court records for Jedburgh, but it is clear that a trial by assize was not considered applicable, and that judgement was to remain either solely with the sheriff, or with the Justiciar.⁵⁹

The verdict of the assizors was not always recorded in the documents, although in many cases there is a judgement and sentence. These permit a general picture to be constructed of typical sentences. The most severe penalty was death, and rarely appears within the documents studied. It was issued by the sheriff of Peebles against William Hoy, who was sentenced to be hanged in August 1672 for shooting deer. Adam Brown of Cappock was sentenced to be drowned in the water of Jedburgh for the slaughter of Matthew Tullie in April 1639. In May 1647, Gavin Little and James Beattie were found guilty of theft and were to be put to death. In July 1653, the court at Jedburgh meted out a strange punishment, and it is unfortunate that the crime of which the offenders were accused is not recorded. Ten persons were found guilty of the unspecified crime and they were ordered:

to draw lottis whiche of them sould be sufferer. The lott falling upon William Porteous the uther nyne are to be dismist. And they have hereby enactit themselffis under the paine of deathe not to be fund within the schyre of Roxburgh efter Thursday nixt at night. Except thay find sufficient caution for thair behaviour. ⁶⁰

W. Croft Dickinson says of the Fife records that usually in the case of theft, justice took the form of hanging or drowning, although for simple theft the penalty could be scourging, banishment, or in some cases, fining. The situation seems to have been very similar on the Borders. Banishment was often used as an alternative to the death penalty where the culprit was not a notorious criminal, or was a first offender who had committed a less heinous crime, such as petty theft or resset of theft. For example, John Porteous in Haystone was found guilty of ressetting a sack of oats in January 1699; John Laing was found guilty of the theft of a mare and Robert White, of the theft of a horse, in June 1699: - all three were ordered to be scourged through the town of Peebles, to be burnt on the cheek with a P and to be banished from Peeblesshire with their wives and children. Criminals of greater stature, such as Richard Douglas, son to the laird of Bonjedburgh, were banished from the realm of Scotland. ⁶¹

By far the most common form of punishment recorded in the sheriff court documents was the infliction of a fine. Pecuniary punishment was the penalty for a wide range of misbehaviours. According to contemporary legal practicks, the fine in the sheriff court for bloodwit could not exceed £50 Scots and certainly this seems to have been a most popular figure, although the amount could range from £5 to £100 Scots. Deforcement too, seems to have been punishable by a fine, which was, without exception £10 Scots, although in more serious cases, the goods and gear of the offender might be escheated and his person put in ward. £10 Scots, too, would appear to have been the standard fine for riots. Without exception, violations of the penal statutes were punished by fines, which varied in severity according to the number of offences committed and how frequently the offender had been in court. Most seem to have been between £8 and £50 Scots, although a persistent culprit, for example a regular attender at several conventicles, could find himself with a far more considerable fine running into hundreds of pounds.⁶²

It can be seen that although the sheriff's jurisdiction was wide in theory, he was, in effect, limited in the number of cases he could try in his court. Likewise, his jurisdiction did not extend to everyone living within the sheriffdom. No sheriff was considered judge competent to any ecclesiastical person and burgesses of royal burghs claimed the right to be tried only before their own courts. Exemption from the jurisdiction of the sheriff could be granted to individuals on the grounds of 'deadly enmity and feud', although these exemptions rarely extended to relatives or servants and ceased when the sheriff in question terminated his office. This could not, however, apply in the case of heritable sheriffs, when arrangements could be made where the action was brought before the Lords of Council or before another nominated judge. James Neilson, for example, petitioned the Council in July 1630, requesting that his trial before the Stewart of Kirkcudbright, with whom he was at feud, be transferred to the provost and baillies of Dumfries.⁶³

Furthermore, the complex judicial structure of Scotland meant that other jurisdictions within the sheriffdom greatly circumscribed the sheriff's authority, for he had no authority over anyone dwelling within a stewartry, regality or burgh. Lords of regality had equal justice to, and in some cases, greater than the sheriff. All cases involving an indweller of a burgh, stewartry, or regality were 'repledged' to the court of that place. Repledging was the process whereby the lord of a jurisdiction could call into his own court any action in which his tenants or men were cited as defenders before another court, provided that he was competent by his charter to judge that action. Such repledgings were quite often initiated in the sheriff court by lords of regality and royal burghs. In August 1643, the Marquis of Douglas requested the repledging of John Martine, herd in Lyntallie, to the regality court of Jedforest. If a defender had proponed defences, or had accepted the competence of the judge of the other court, he could not be repledged; but at any time prior to that, the baillie of the lord could appear before the sheriff and desire the case to be removed. The pursuer had the right to raise exceptions or protest, but if it was proved that the defender came from within the jurisdiction of the named lord, then the sheriff could not refuse the application.⁶⁴

Who, then, did come before the sheriff court? As shown above, they were people from the royalty of the sheriffdom, not belonging to any regality, stewartry or royal burgh. Indwellers of baronies could be subject to the sheriff's jurisdiction, as long as they did not also live within a regality. A wide range of people used the sheriff courts. Men of some standing and status are involved in many court cases, although in Dumfriesshire, Roxburghshire and Peeblesshire, the majority of persons involved with the courts were of lower social status. These can be identified by the preposition 'in', rather than 'of'. Powerful landowners, such as the Earl of Buccleugh, Robert, Earl of Somerset, or William Elliot of Stobbs are mentioned in some cases, although these are,

without exception, actions against those who had stolen trees from their lands, or where their parks had been broken, or where they were owed money. Whether they ever appeared in person at the courts is unknown. It is in the debt actions that the range of status is the greatest and the numbers of 'of' and 'in' are about equal. In cases of bloodwit, or riot, only about ten per cent of the offenders have the preposition 'of'. Landed men, therefore, were largely using the sheriff court for debt cases, the service of heirs and ensuring that their rights and lands were protected by the sheriff; or when the offenders came from outwith their jurisdictions.⁶⁵

Within the sheriff court records, there are a surprising number of Englishmen to receive justice at the hands of the sheriff in apparently the same manner as Scotsmen: for example, Gavin Little and James Beattie from Tynedale, in England who were ordered to be put to death for theft. Simon Scott, Edward Robson and Edward Dodd, all from Tynedale, were warded by the Jedburgh court for theft in October 1650, and were ordered to be tried, although no verdict is recorded. In the case of Thomas Bell, in Phillop, in Northumberland who was apprehended for theft in October 1652 and Anthony Wright, from Newbrough in South Tynedale, who was before the court of Jedburgh in May 1649, both these entries are scored out. Such scorings out, although rare, do occur across purely Scottish cases, but are most often found across English ones. It could, perhaps, be that these criminals were sent back to England for trial and punishment.⁶⁶

Although no relationship between the English courts and the Scottish sheriff courts can be proved, the sheriffs had quite close connections with other Scottish courts and the working partnership with the Privy Council and the High Court of Justiciary has already been discussed in Chapter I. The repledging system has also been discussed. Yet on other occasions there was

co-operation between sheriff and regality. Such occurred, for example, in the case of George Milne in Halmyre, in August 1682. He had been summoned before the regality court of Linton for bloodwit, but had fled out of the shire of Peebles instead of appearing at the court. He would, naturally, have been unlawed for contumacy by the Linton court, but only the sheriff of Peebles could, as that sheriff then did, banish him from the shire of Peebles and order that none resset him. In January 1688, the sheriff of Peebles upheld a fine against George Baillie of Mennerhall and four of his tenants, for contravening the penal statutes. The fine had previously been imposed by an unnamed regality court. Similar co-operation has been found in the sheriff records of Stirlingshire, where not only were the rulings of the regalities upheld by the sheriff, but the sheriff even referred cases from his court to some franchise courts, without repledging. The sheriff courts also had links with the church courts. In December 1679, Janet Thompson and Marion White were both fined for a mutual riot before the Peeblesshire court. In addition to the fine, they were charged to keep the peace and also to 'satisfie the kirk according to the injunctions thereof.' In Stirlingshire, the church courts referred obstreperous cases to the sheriff courts. The sheriff court of Peebles also seems to have had links with the burgh courts, for in the case of 14 offenders the sheriff confirmed a fine previously imposed by the burgh court of Peebles before whom the offenders had already been called.⁶⁷

As the English sheriff convened and arranged the meetings of the courts of the assizes and the justices of the peace and Border Commissioners, so the Scottish sheriff carried out this duty. For example, in February 1635, all the sheriffs and stewarts on the Borders were commanded by the Council to aid and assist the Border Commissioners in any way possible; to convene and to announce their courts and to bring before the Commissioners any witnesses they may require. Again, in February 1643, the sheriff of Jedburgh was commanded,

with others to search for delinquents to present them at the courts of the Border Commissioners. In June 1649, the sheriff court at Jedburgh proclaimed the meetings of the Commissioners and requested 'all his Majesteis leidges within the saids midle schyres to attend the said court att Jedburgh.'⁶⁸

As each commission of justices of the peace was issued, the sheriff of the county was included as convener. For example, in August 1623, Hume of Blacader was appointed sheriff of Berwickshire; later the same day, when the new justices of the peace were appointed, Blacader was included in the commission and named as convener. Similarly, Sir John Murray of Philiphaugh as sheriff of Selkirkshire, was also named as justice of the peace. A list of justices issued in July 1625 also included the 'yeiris wherein suche of them has been shireffs served.' This list included Hume of Blacader, for Berwick, Murray of Philiphaugh for Selkirkshire, and Archibald Maxwell of Cowhill for Dumfriesshire, each of which had the words 'presentlie in office' after his name. It would appear, therefore, that not only was the sheriff convener of the justices, but was, in effect, an acting justice of the peace himself. This is in direct contrast to English practice, where no sheriff was permitted to be a justice. Of the eight new justices for Berwickshire, six had been, or were, presently sheriffs; of the seven for Selkirkshire, four had been sheriffs; and of the fourteen for Dumfriesshire, seven had been sheriffs.⁶⁹

It is surprising in view of this, that the relationship between the sheriffs and the justices seems to have been, at least in the case of Selkirkshire, decidedly fiery. The sheriff and justices duties did overlap in some areas: for example, both were supposed to monitor the prices of meal at the markets and both were able to hold courts to deal with breaches of the peace. The sheriff was empowered to sit on any courts with the justices, and they were expressly ordered not to try any case where the sheriff had already proceeded, or where they might prejudge the ordinary jurisdiction of the sheriff. All

finer of persons below the degree of heritor were supposed to be disposed to the sheriff and his deutes. However, in October 1680, James Murray of Philiphaugh, sheriff of Selkirkshire, accused Adam Urquhart of Meldrum, justice of the peace, for holding a justice court in that shire and citing persons before it on charges of frequenting conventicles. Proceedings against 'persons guilty of conventicles', protested the sheriff, 'did sollie appertain to his duty and office as sheriff principall' and that Meldrum did, therefore, 'usurpe and incroach and invade the jurisdiction of his Majesteis shireff'. Meldrum was pronounced by the Council to be not guilty of the charge.⁷⁰

The defences of Meldrum, recorded in detail in the register of the Privy Council and in the Riddle of Hayning papers, illustrate clearly the problems posed by sheriffdoms which were either hereditary, or held by one family over a long number of years. The counter defences in the Meldrum/Philiphaugh quarrel are worth a close inspection in this respect. Meldrum first alleged that Philiphaugh and his depute, William Murray, had been in office 'these many years past' without taking the declaration of Allegiance, which was obligatory for anyone in public office. By not taking this, Meldrum alleged, the sheriff and his depute were 'unfit persons to act in any judicatorie.' This charge clearly shows that if the sheriff, who was supposed to enforce the oaths and declarations of Allegiance, chose to avoid taking such oaths himself, he was not obliged to promptly cease acting as sheriff. Meldrum further alleged that the sheriff had not taken the oaths because he had actually supported the rebels at Bothwell Bridge, in June 1679 and did, himself with his tenants, even now still shelter the rebels. He persisted in attending conventicles in person and, indeed, actively encouraged them; nor had he or his depute, ever prosecuted conventicles in Selkirkshire. As a result of this policy, Selkirkshire was one of the worst areas of Scotland to be affected by religious dissent. Meldrum

protested that Philiphaugh openly pleaded for any conventiclers

proponed excuses and frivolous defences on their behalfs and disorderly persones and meetings are so fare encouraged therby that the most frequent and considerable Conventicles Keaped in that shire are in the paroch where the said sheriff dwells and near his house. 71

However, not only had the sheriff refrained from prosecuting non-conformists, he had actually tried to prevent the justices of the peace from so doing, when they had a commission from the Privy Council to that effect. He had dismissed the offenders summoned to the justices' courts, tried to debar the justices from sitting as judges and released vagrant preachers from gaol where they had been imprisoned by Meldrum. It is clear that not only had the sheriff of Selkirkshire been drastically failing to carry out his duties as sheriff for many years, but he had, in fact, been guilty of severe malpractice in that office. It had taken someone like the evidently dynamic Meldrum to expose these failings. It is interesting that the Council upheld Meldrum's defences. William Murray, sheriff depute, was imprisoned in Edinburgh and Philiphaugh was put on trial and replaced as sheriff by Riddle of Hayning.

Abuses arising from heritable sheriffships had long been known to the central government. James VI and I had written in Basilicon Doron that 'the greatest hinderance to the execution of our lawes in this country are these heritable Sheriffdoms and Regalities, which being in the hands of the great men, do wrack the whole country.' In 1617 he had appointed commissioners to consider the heritable offices and report on them, but little or nothing ever came of such. Nevertheless sheriffs were, from time to time, rebuked by the Council for insufficiency in their office. For example, Sir John Maxwell of Conhaith, sheriff of Dumfries, was reprimanded in September 1626 for not apprehending a non-conformist minister; the stewart deputes of Kirkcudbright

were chastised for reticence in July 1627, as was the sheriff of Berwickshire in January 1628. It will be noticed, however, that these sheriffs were annually appointed, not heritable.⁷²

How far, then, did the sheriff administer true justice, and how efficient were his courts? In September 1633, the Council themselves had doubts about the efficiency of the sheriffs in bringing criminals to justice. They urged the people to support the sheriffs and their deputies in the discharge of their office with a view to the more efficient administration of the law. 'One of the cheefe causes' they complained,

quhilks procure the contempt of the law and executione of justice to his Majesteis distrest subjects through all the shires of this kingdome, proceeds frome the undewtifull refusall of his Majesteis subjects to concurr with his Majesteis shireffs and other officers in the executioun of his Majesteis lawesquharthrow the nomber of rebellis universallie increassis, stouths, thifts and other insolencies hes a dailie course and progresse.

From the court records themselves, the question of efficiency is difficult to answer, as the documents reveal few pleas or protests (if there were any) against the judgement of the courts. W. Croft Dickinson considers that through the sixteenth century the number of complaints of lack of justice before the sheriff court of Fife, gradually diminished in both number and degree. He attributes this to the effects of the 1496 'Education Act', whereby the King and Parliament ordered that all heritable officers must put their eldest son to the schools of art and law, so that eventually, as the judges themselves, they would have a knowledge of the law and justice would reign universally throughout the realm. As seen in the case of Selkirkshire, however, even in the late seventeenth century, this vision was not yet fulfilled. This probably remained the case until the abolition of the heritable jurisdictions in 1747. For annually appointed sheriffs the case was probably different. As shown above, on page 213

these were often experienced judicial officers, with a close working knowledge of the area, its special problems and the current central government policies towards it.⁷³

The sheriff courts were the heart of the sheriffdom, giving it a territorial homogeneity which, with only the multitudinous, scattered, private jurisdictions, would have otherwise been denied. Thus the sheriff was a most important link in the chain of law and order. The heritors and freeholders who attended his court were sometimes the holders of private jurisdictions and were therefore linked through the sheriff court. Furthermore, the sheriff, as a 'local government official', was the vital means of communication between the Crown, its important subjects and the population of the Borders at large.

CHAPTER V

The Justices of the Peace

It is in the Commissions of the peace that some of the greatest differences between the legal systems of the English and Scottish nation are visible. The origins of the English justices lie as far back as the twelfth and thirteenth centuries, when small commissions of knights were appointed to complement the efforts of the inadequate number of royal judges. These 'keepers of the peace' proved their usefulness throughout the thirteenth century and in 1327 were given statutory sanction. In 1380 there was the first mention of a clerk of the peace for each county and round about the same time, general quarter sessions were instituted to establish gentry judicial control over the shires. By the mid-fifteenth century, the justices of the peace had gradually taken over the sheriff's power to hear and determine cases. During the course of the sixteenth century, the justices' authority was considerably enlarged and consolidated, and between 1485 and the end of the sixteenth century, 176 statutes had been passed, conferring additional duties and promoting the justices to become the main government instruments in both administrative and judicial matters in the counties. The importance of the justices of the peace and the esteem in which they were held, was reflected in the eagerness shown by the county gentry to serve on the commissions of the peace.

In Scotland, by contrast, it was not until 1587 that a system of justices of the peace for that nation was even conceived. Even then, it was not as an evolution from any existing system, but rather a whim of the King, who, having heard of the success of the justices

of the peace in England, wished to impose the complete English system on Scotland, regardless of whether there was room in the complex Scottish legal organisation. James's motives in seeking to develop commissions of the peace in Scotland, seem to have been three-fold: to draw Scotland closer to England; to provide officials in the localities who were responsible to the Crown alone, and who would report on the King's pet hate - the heritable jurisdictions. The prompt punishment of evil doers seems to have come third. Nothing, however, came of the 1587 act and it was not until 1609 that the issue was again raised. Thus, in any study of the justices of the peace in the seventeenth century, it should be borne in mind that one system, developed over centuries and at the height of its power and influence, is being compared with one which had only just been instigated and was struggling to find a niche for itself in the already close-packed Scottish judicial structure.

I. The Scottish Justices

The 1609 act, then, saw the birth of the justices of the peace in Scotland. The commission was issued to members of notable families who were charged to bind evil doers, below the status of gentry, to keep the peace. In 1611 their somewhat nebulous position was clarified by another act which gave them the jurisdiction to try breaches of the peace and enabled them to keep quarter and petty sessions when necessary. They were permitted to summon everyone except nobles and to punish all under the rank of gentry for contumacy from their courts. They were also empowered to decide whether a case in another court (especially a heritable sheriff or baron court) had been decided fairly. In most shires, however, they failed to become permanent and were dogged by competition from other courts. The acts were reissued in 1617, 1630 and 1633, but there was little enthusiasm from the right sort of people

to accept office. In September 1641 the office lapsed and from that time until 1655 justices of the peace occupied no place in the administration of Scotland.¹

In November 1655 the Cromwellian administration issued 'Instructions for the Justices of the peace in Scotland' which bore a close resemblance to the acts of 1609 and 1617, but with several important additions. The justices were now given new moral responsibilities which were to be enforced with fines over all the population, regardless of status. At the Restoration, an act of 1661 relegated the justices to their pre-Cromwellian role as agents of the Privy Council's economic and social policies. Throughout the 1670's, during the period of religious persecutions, the problem of finding suitable men became more acute. In 1677 the Council appointed special commissions to deal with those who attended conventicles and special justices of the peace, with the powers of sheriff-depute, were appointed to deal with the religious situation. These were to hold court once a week. This was obviously an unpopular task, for in 1683 those who refused office were threatened with punishment by the Privy Council. A further act was passed in 1685, urging the justices to enforce more stringently the acts against irregular religious practices, but was repealed in 1690. In 1707, the Act of Union elevated the Scottish justices of the peace to the same powers and privileges as their English counterparts, yet despite this, there is evidence that even then, the system was not fully operational everywhere. Sir John Clerk of Penicuik in 1730 wrote 'Tho' the countrey be in the hands of certain justices of the peace, as in England, yet there are some shires in this countrey where they doe not meet at all either as Justices of the Peace or as Commissioners of Supply'. It is generally understood, then, that with the exception of the Cromwellian period, the justices of the peace were of little

importance in Scotland in the seventeenth century.²

Who were the justices of the peace in Scotland? According to the act of 1611, they were 'godlie wyse and verteous gentilmen, of goode quality moyen and repute, making thair residence within the same schyre.' Indeed, *most illustrious persons* were included in the first commission of the peace. The Roxburghshire commission in 1611, for example, included John, Archbishop of Glasgow, Robert, Lord Roxburgh, Walter, Lord Buccleugh, William, Lord Cranston. The Commission for Dumfriesshire included John, Earl of Wigton, Robert, Lord Crichton of Sanquhar, Alexander, Lord Garlies, Sir James Douglas of Drumlanrig, Sir John Charteris of Amisfield, William Greir of Lag, Sir Robert Dalziel and Sir Thomas Kirkpatrick of Closeburn. The commission also included the provosts and baillies of royal burghs and towns, each within the bounds of his own jurisdiction. In each shire one justice was appointed to keep the rolls and named as custos rotulorum, in the same way as in England. Four justices constituted a quorum. Throughout the century the same type of person was to appear on the commission of the peace.³

Some of these names appear again and again in this study of the Borders, and it would appear that many of them were fulfilling several different judicial roles at the same time. Most of these people were highly active in one or other of their judicial positions and in view of their multiple duties, it was perhaps a little hard on Harry Ker of Graden to complain in 1680 that many of the justices 'pretended they have not freedom to engage in that service'. The Scottish justice was confined to dealing with minor issues and he may well have chosen to put these second to the more urgent issues of violent crime on the Borders. Throughout the history of the justices of the peace in the seventeenth century, complaints were made about negligence and reluctance to take up their duties. In 1611, Home of

Wedderburn and the Berwickshire justices were reprimanded for neglect. The Privy Council in January 1636 complained that justices 'throughout the severall sheriffdomes of this kingdome slights and neglects their service and hes not accepted the charge upon thame, nor keeps thair quarter sessions nor other ordinance days of meiting'.⁴ Yet in view of the noble performance of some justices in executing their other judicial duties, it should be borne in mind that the individuals were usually not lazy or negligent, but rather did not consider the office of justice of the peace worthy of similar effort, and relegated these duties to a lowly position in their list of priorities (but had to accept office for fear of offending the King). To try to instill more vigour into the commission of the peace, after 1634, the Privy Council began to appoint ministers. This practice, however, faded with the commission of 1641 and seems to have had little success.⁵

After the conquest of Scotland in the 1650's, General Monck believed that to re-establish the justices of the peace would solve Scotland's problem of widespread disorder and 'would much conduce to the settling of the Country'. His idea was to appoint, especially in the Highlands, the clan chief as justice of the peace, 'which would probably keep them in order or divide them'. In the end, however, many army officers became justices although it was reported that people of some social standing had taken the oath.⁶

The work of the courts: Scotland.

The duties of the justices in Scotland covered a wide ranging area, but from the start, they were supposed to act as agents of the Council in reporting on the sloth of heritable officers and their failure to suppress disorders. As the Privy Council expressed it in 1610, 'nothing gaif so grite grouthe and strenthe to the monyfould insolencis and enormities whilkis were so frequent and common in this

kingdome as the sleuthe of magistrates in not suppressing the first seidis of these dissensiones'. It was hoped that the justices, through prompt action, could prevent these 'dissensiones' from escalating into more serious offences as they used to do in the past. ⁷

The justices were also supposed to be the prime agents of the Council in imposing its economic and social policies. The Commission of 1609 had instructed the justices to bind evil doers to keep the peace and to charge them to appear before either the Council or the King's justiciar. By 1611, however, the inadequacy of this had been realised and the justices were then given power to proceed in trial against all those under the rank of gentry, who committed riot. Those found guilty could be fined and punished, the fine going either to the King's use, or to the lord of regality. All those who were 'delinquents of any penal crime' were to be tried by an assize of 13 or 14 people. Under these instructions the justices were to regulate for example the price of malt and other commodities, weights and measures and the wages of workmen, labourers and servants. They were to enforce the laws against disorderly alehouses, the carrying of arms, poachers and those who cut green wood. Additional instructions were issued to the justices from time to time, as in March 1616, when they were asked to act with the Border Commissioners in suppressing adultery in the Middle Shires. How far the justices were actually making progress in their duties and how effective their courts were, is difficult to judge prior to 1655, because of the almost total lack of court records; but communications with the Council give some insight into this. ⁸

The justices for Selkirkshire, Roxburghshire, Berwickshire and Dumfriesshire sent reports of their court proceedings to the Council in September and October 1623. These reveal that the justices were

concerning themselves with suppressing idle and sturdy beggars, providing money for the relief of the poor and dealing with fore-stallers of victual. In August 1626, the justices for the same counties reported to the Council the current prices of wool and livestock in their areas and on the number of persons carrying firearms. They made similar reports the following year. As for breaches of the peace, there is little information about the progress of the justices, save a reference to a dispute between some tenants of Lord Gray of Chillingworth and of the Earl of Home's men, which was dealt with mainly by the sheriff of Berwickshire, although with some assistance from the justices of the peace in that area. Kirkcudbright town council records for April 1624 reveal that Edward Forrester, commissar of Kirkcudbright, became cautioner for James Gordon to keep the peace to Marion Corsane and agreed to present James to the justices of the peace on the 6th May 'for taking ordour with him anent the allegit rioat and wrang done be him to the said Marioun'. Nine years previously in 1615, the Berwickshire justices had reported to the Council that thefts and disorders were on the increase in that area, but did not indicate that they had taken any measures against them. There is no information from the rest of the Borders regarding breaches of the peace.⁹

From the start, the justices had been required to keep an eye on disorderly alehouses and on those who spent too long there, but in July 1625 their moral duties were enlarged and they were required to put into operation in the landward parishes, acts of Parliament against fornicators, drunkards, swearers, Sabbath breakers and other moral offenders. There is no indication that these measures were enforced until 1655 when the new Cromwellian regime was instigated.¹⁰

Although 1655 is held as a crucial year in the history of the Scottish justices of the peace, in fact the court profiles from that period show that the justices were largely continuing the duties which they had been carrying out between 1609 and 1641, although some extra duties had been imposed by the Cromwellian regime.

The work of the justices can be seen in Tables 26 and 27, which show the type of business before their courts. It can be seen that these cases fall into three main categories; moral offences; offences against the government's economic and social policies; and lastly, what might be called 'criminal offences'. This last category covers such cases as theft, blood and riot, the resset of criminals, slander, contempt of court and negligent officers of the court. In the absence of the heritable jurisdictions, abolished by Cromwell, the justices of the peace seem to have gained some ground with cases in this last category, because as shown above, there seemed to be little activity before 1655. Between 1655 and 1659 at the Peebles court, such cases amounted to 23 percent of the cases, and at the Roxburgh court, 8 percent of the cases. There were only four cases of theft *before the Roxburgh court and only one before the Peebles court* and they were very minor cases such as the theft of hay and corn. The Scottish justices in the Interregnum were obviously not dealing with the significant criminal business of their English contemporaries. Actions of riot, or blood and riot were the most important cases in this category, revealing that the justices¹¹ were fulfilling their role at this time, of guardians of the peace.

The amount of time given over to the prosecution of those who contravened the penal statutes, however, reveals that in the period 1656-59, the keeping of the peace was of secondary importance, for the majority of cases fall into this category at both the Peebles and

TABLE 26

CASES BEFORE PEERLESSHIRE JUSTICES OF THE PEACE,

1656-60, 1664-66, 1670-77: SHOWING ABSOLUTE FIGURES AND PERCENTAGES.

	1656	57	58	59	60	64	65	66	70	77	% 1656-59	% 1660-66	% 1670-77
THEFT	1										23%	14%	0.7%
SLANDER	1	1	1										
BLOOD AND BIT / BLOOD	29	32		5	8	1	2						
NEGLIGENT OFFICER	1	1		1		1	1	1					
CONTEMPT OF COURT	2	1		2		2			1				
FORNICATION	28	22	16	11	2	1					31%	3%	0.7%
DRUNKENNESS	1			1						1			
SWEARING	10												
SABBATH BREAK	4	10			1								
SHEARING UNLAWFULLY	1						1				44%	84%	99%
SERVICE REGULATION	27	89	8	6	1	53	14	10	53	92			
ILLEGAL FISHING / WOOD CUTTING	14				2		15						
RESETTING GYPSIES	2	1					2				1%	0	0
'GOOD NEIGHBOURHOOD'	1	2	2										
TOTAL	122	159	27	26	14	60	33	11	54	93			

COMPILED FROM W.R.H. JP 3/2/1-3

CASES BEFORE ROXBURGHSHIRE JUSTICES OF THE
PEACE, 1656-59: SHOWING ABSOLUTE FIGURES
AND PERCENTAGES

	1656	1657	1658	1659	TOTAL	% 1656	% 1657-9
THEFT	1	3			4	5%	12%
RESET OF THIEVES	2				2		
BLOOD AND RIOT	1	5	4	2	12		
SLANDER	4		2		6		
NEGLIGENT CONSTABLE	2				2		
CONTEMPT OF COURT	1		1		2		
FORNICATION	15	11	29	10	65	18%	43%
DRUNKENNESS	6	2	5		13		
SWEARING	12	3	1		16		
SABBATH BREAK	6	2	1		9		
SHEARING UNLAWFULLY	31	24	7		62	53%	29%
SERVICE REGULATION	79	8	1	2	90		
ILLEGAL FISHING/ WOODCUTTING	5	1			6		
MISCELLANEOUS	9	3	2		14	4%	3%
UNKNOWN	45	2	12	4	63	5%	12%
TOTAL	219	64	63	20	366		

Roxburgh courts, taking 44 percent and 43 percent of the cases respectively.¹² As in the pre-1655 period the justices were concerned to execute the central government's socio-economic policies, so the Interregnum justices seem to have followed in their footsteps. Not only did the penal acts cover such offences as cutting green wood, or fishing in a forbidden time, but also the regulation of servants' wages or fees and ensuring that all persons who ought, entered service. Indeed, in the documents of the Interregnum justices, a great deal of space is given to matters concerning service. Not only could masters be prosecuted for paying their servants too much, but servants could be fined for accepting too much. There were many masters fined for paying under the prescribed fee. Those who absented themselves from service were charged to explain their absence to the justices, or face a fine and a charge to re-enter service. Prosecutions against those who failed to go out and shear were common, together with fines imposed upon those who hired themselves for shearing outside the shire.¹³

The justices had been granted the power to deal with such matters in 1609, but the necessity to enforce them had been given new impetus by the poor economic situation between 1655 and 1659. Nicoll reported in 1655 that the poor harvest that year had caused the price of victual to triple and quadruple in some areas, and in spring 1656, reported famine conditions in Scotland. Despite a good harvest in September 1656 and 1657, Nicoll wrote that the new cess tax in 1657 had caused great poverty. 'The condition of this nation of Scotland', he wrote in December 1658, 'it yit remaynes sad'. He attributed this to 'povertie and havy burdinges' lying on the nation, and also that 'this yeir, 1658, the crop wes verie pure ... the price of this yeire did double the pryce of the yeire preceding'.¹⁴

To reduce the strain on the community and the poor rates, it was especially urgent at such times that as many people as possible should be employed in service. It was also important that mobility be minimised in times of hardship. People who left their area would be unable to obtain relief from another region, and would therefore be forced to leave and be compelled to roam the country in search of food and employment. Hence, the prosecutions against those who left the county to shear elsewhere.

The same concern of the justices is reflected in their attitude towards vagabonds and beggars. In March 1656, the Peebles court noted the 'great burden lying on this County by reason that Many louse and Idle persons haveing no certain trade nor calling, under coulour of living in cotehouses in some part of the yeir, lye Idle and go abegging'. They decreed that from that time onwards, all wood-gatherers and seed-setters were to be considered as 'vagabonds' and 'begging persons not known as proper objects of charity'. Indeed, Peeblesshire seems to have been especially troubled with such people. In July 1657 it was reported to be suffering greatly from 'a swarming multitude of vagabonds, beggars and wool-gatherers, haunting and going up and down' Peeblesshire. To relieve the county, the justices decreed that all suspected vagabonds were to be immediately banished from the shire. ¹⁵

The justices had a particular interest in reducing the financial burden of the county, for, like their English counterparts, they were responsible for local poor relief. Although charged with this duty since their inception, evidence of activity in this sphere is confined to the Interregnum years. Two overseers of the poor were nominated in each parish in 1656 who were to compile a list of poor people. This was submitted to the justices who then assessed the sum necessary for their maintenance, which was to be levied from the inhabitants.

This book or list was supposed to be examined and, if necessary, reviewed, each six months. ¹⁶

By far the greatest difference between the pre-Interregnum justices and those after 1655, was their attitude to moral matters. As in England, the Puritan conquerers of Scotland were concerned to bring about a reformation of morals. Their desire for reform seems to have been echoed by contemporary Scots who believed that the plagues, famines and conquest of Scotland were the result of the nation's sinful ways. ¹⁷ Justices of the peace were exhorted to 'take special care in searching after guilty persons and fornicators, swearers and breakers of the Lord's day'. The justices were so assiduous in this duty that between the years 1656 and 1659 moral cases comprised 31 percent of the cases before the Peebleshire court and 43 percent of those at the Roxburgh court.

The commonest prosecution was for fornication, which formed 63 percent of the moral cases at the Roxburgh court and 72 percent at the Peebles court. The moral offences were punished by fines which varied according to the number of times the offence had been committed and according to the comparative wealth of the parties involved. George Pringle, son of Robert Pringle of Blindlie, was fined £100 Scots for his fornication with Janet Boustone, whereas she was only fined £10 Scots. Swearers and slanderers were likewise punished through fines. ¹⁸ The percentages showing the type of business before the Roxburgh courts (Table 27) reveal distinct differences between the courts in 1656 and those between 1657 and 1659. Far more people came before the courts in 1656, but the business was much more limited. Over half the cases were actions against those who had violated penal statutes, most of which were service regulations or those concerning shearing. It was not until 1657 that moral cases started to become important. The Peebles records do not show a similar phenomena for the 1650's although a comparison could be drawn between

the Peebles records after the Restoration and the Roxburgh courts of 1656. It can only be conjecture, but the Roxburgh records seem to suggest that the justices gained confidence as the 1650's progressed and were gradually able to break away from their pre-1650's mould, and branch out into dealing with moral matters. Moreover, the population and the church must have had more confidence in them as time went on, hence the increase in moral cases.

One of the main aims of the Cromwellian government in encouraging the justices of the peace to try moral cases, had been to break the power of the church courts in Scotland. But the justice of the peace records for Roxburgh and Peeblesshire show that rather than setting up in opposition to each other, the two courts tried to complement each others' activities. In most areas of Scotland, some of the justices were also elders, so there were naturally close connections between the courts, each having an intimate knowledge of the influence and affairs of each other. From the start, the Peeblesshire justices seem to have acknowledged that the kirk had a greater influence over the community. In March 1656, the justices agreed to ask the ministers at their presbytery meeting

that if any acts flowing from the justices dissatisfy any of ther number they would not immediately fall on reproveing the same publickly in sermons or exhortations, but first acquaint the Justices at this meeting of the evill contained in the same and the just grounds for ther not being satisfied.

In other words, they recognised that the kirk had the power to discredit their actions and undermine their power in the community, and so it seemed sensible to invite the kirk to work with them, rather than against them, in their mutual battle against immorality.

And so the justices requested that the Presbytery

would countenance the acts flowing from the Justices ther bench and cause them be read in the body of the respective churches befor dissolving of the congregations that all persons may with more conveniency tak notice of them.

The same process of co-operation between the kirk and the justices can be identified in the Roxburgh records. When, in July 1656, the justices requested a list 'of all fornicators in Melrose parish that have been before the [kirk] session since december last', they weræ not only offering to give the kirk session decrees the authority of the state, but also acknowledging the kirk's superior methods of detection and interrogation. Thus, those who had satisfied the kirk session were accepted as also having satisfied the justices. ¹⁹

Initially, the justices took all the fines from those who had committed moral offences, but it is a measure of the co-operation between the kirk and the justices that an amicable agreement was reached whereby the fines were shared between the two. Some of the punishments inflicted by the justices reflect the influence of the kirk. Mungo Eccles and Christian Dixon were to stand two hours at Jedburgh cross, as a public penance for fornication, in October 1657. Most other offenders were fined, but occasionally, the justices imposed harsher punishments. Vagabonds and beggars were usually banished out of the county and some were burnt on the hand before leaving. Some penalties seem particularly unusual for the type of offence committed and one can only assume that the offender had either repeatedly committed the act, or was recalcitrant. Such a case was that of Robert Thompson who was threatened with a whipping if he continued to grind corn on Sundays. Some offenders had obviously committed acts which were deemed more socially unacceptable than others within the same category, such as Alison Fowler, who was found guilty of assault; but because she had assaulted the mistress of her son, she was given the unusual penalty

of being 'put in the jogs upon the Sabbath day next from the second bell to the ministers ingoing'. In general, corporal punishments were rare and fining was the usual result of an action. 20

The distinctive nature of the Interregnum justices' records, is somewhat concealed by the paucity of post-Restoration records. The Peebles records, alone, continue after 1660 for 1664, 1665, 1666, 1670 and 1677, but these enable a reasonable comparison to be made with the earlier period. Table 26 shows that after 1660, the emphasis of the courts changed. Whereas between 1656 and 1659, 31 percent of the cases had been moral, this had declined to a mere 3 percent in the period 1664 to 1666, and below one percent in 1670 and 1677. 'Law and order' cases declined drastically, but the number of actions enforcing government regulations rocketed to 70 percent, 1664 to 1666 and to 99 percent in the 1670's. Yet these figures hide the restricted nature of the justices' work, for the overwhelming majority, 93 percent of the government regulations that they enforced, were concerned with servants and service. It would appear that until 1666, at least, the justices of the peace courts attracted more varied cases than by the 1670's, although far fewer than in the 1650's. By the 1670's, the justices' role in the legal system of Scotland had been reduced to the mere regulation of servants. The court records from that time reveal that the community as a whole had scant regard for their courts, for the number of contumacious persons at court steadily increased after the Restoration.

One of the basic reasons why the justices of the peace failed to flourish in Scotland, was that they faced too much competition from other long established jurisdictions. From their inception, the justices had been charged to 'spy' on the heritable jurisdictions and to set up courts in opposition, so the climate was never conducive to

good relations between the courts. An early dispute between the justices and the burghs occurred in Selkirk in July 1611. The Selkirk justices reported to the Council that 'our greatest and onlie impediment is the toune of Selkirk thair obstinat refusall to concurre' and that they 'wald nother accept nor acknowledge our commission'. Nor were the justices accepted by the franchise jurisdictions. They had no jurisdiction over the holders of the franchises, or, indeed over any landed gentlemen, until the 1650's; yet franchise holders naturally felt that their courts were being threatened. In 1609, the justices had asked the Council where they stood in relation to privileged barons in cases which they had cited before the barons had done so. The Council replied that the barons might reclaim all such cases within 15 days of the justices' citation. The justices, then, clearly understood their inferior position, claiming that this made them 'but sergeants and officers to the other judges in the kingdom'. The Archbishop of St. Andrews summarised the attitude of most heritable jurisdiction holders in June 1611, when he said

the institution of the Commissionars of the peace wes verie recent, without any warrand of law, it wer na reason that that Commissioun as ane sone sould overshaddow and obscure all the uther jurisdictions of the Kingdome, and that the realme had many hundreth yeires bene weil governed without Justices of Peace.

During the Interregnum, all men came under the jurisdiction of the justices. Even Michael Naismith of Posso was prosecuted by the justices for Peeblesshire in August 1658, for not paying his servant's due to Thomas Henderson. Yet the community as a whole could not accept the superior position of the justices, and throughout the Interregnum friction was apparent between the justices and rival jurisdictions. 21.

In August 1656, the provost of Peebles was accused of 'undervaluing

the authority' of the justices by abusing the town gaoler for committing to gaol offenders ordered there by the justices.²² In August 1656, Thomas Sanderson and John Veitch, accused of a riot before the Peeblesshire court, complained that they had already been fined by the baillie of the regality of Linton. The justices replied haughtily that the baillie 'had no power by vertue of that office neither are any regality courts of that nature now allowed'. After the Restoration, the justices were once again relegated to their inferior, pre-1655 position, and, from the records, it would appear that holders of the rival jurisdictions made sure that they stayed there. This is made clear in the Peebles records, where, on attempting to try cases of muirburning, the justices were sharply rebuked by the laird of Horsburgh, on the grounds that 'the cognisance thereof did properley belong to the Shirreff Court and that therfor this Court would not to medle therein especially seing the Shirreff Court had entered upon that bussines already'. The most well documented dispute which arose between the Border justices of the peace and other jurisdictions, was that between Adam Urquhart of Meldrum, justice of the peace for Roxburgh, Selkirk and Berwickshire, and Sir James Murray of Philiphaugh, sheriff of Selkirkshire.²³

Another reason for the justices' failure to establish themselves in Scotland, was the shortcomings of their constables. According to their instructions in 1609, the justices were to choose at least two constables for each parish, although in the burghs, the constables were to be chosen by the burgh magistrates. Their appointment was to last six months, at the beginning of which they were to take an oath to administer the office dutifully and not to conceal offenders. At least one of the constables from each parish was to attend the quarter

sessions and give information about offenders to the justices. Constables were given the right to arrest vagabonds, beggars, idle persons, slaughterers and committers of capital crimes, all of whom they must take immediately to the justices. Constables were also to suppress riots and affrays and execute the writs of the justices. The records of Peeblesshire and Roxburghshire show that constables were appointed as required by law, and according to the Peeblesshire record, made presentments to the court as in England. There were, however, frequent allegations of negligence against the constables. In February 1657 it was reported that 'the justices [were] suspecting the Constables [of] unfaithfulness and ther connivance at faults'.²⁴

The constables, too, were prey to the same temptations as the rest of the population - the Skirling constable, for example, in May 1657, was ordered to appear before the Peebles court for fornication. As a result of such misbehaviour, and as a consequence of having to carry out the unenviable task of reporting on other members of the community, the constables were despised men. The action of Margaret Law who threw dirt in the fact of Andrew Law, the constable of Peebles shows this clearly. It is not remarkable, then, that the office of constable was not a popular job and that some refused to take up office, or to perform their duties dilligently.²⁵

There is evidence, however, that the activities of the justices of the peace outside the Interregnum period, did not result in total failure, for it would appear that in the Borders, at least, the justices were making a not inconsiderable contribution to law and order.

Firstly, the records of Peeblesshire show that justices of the peace were at least operating, albeit in a limited manner, in that

county. Secondly, commissions of the peace were issued from the Privy Council to several areas, and the Border justices of the peace were commissioned to proceed against all disaffected persons who attended conventicles, and to generally regulate the Border region after the 1679 rebellion.²⁶ Thirdly, the Meldrum/Philiphaugh struggle shows that in Roxburgh and Selkirkshire, justices were sufficiently active to arouse the alarm of the sheriff. The allegations of the sheriff of Selkirkshire in 1680 and 1681 show that the justices were holding regular courts for the prosecution of religious dissidents and that a large number of people were appearing before them.

The sheriff alleged that at one court, from the 12th to the 15th October 1680, Urquhart of Meldrum 'caused cite a great many persons befor him alleged guilty of conventicles and other delinquencies'. Those that were found to be at fault were fined heavily and imprisoned until they could pay. At another court in Selkirk in May 1680, many persons guilty of conventicles, resetting of rebels, and 'other disorderis', were ordered to appear before the justices. Meldrum and the other justices of the peace for Roxburgh, Selkirkshire and Berwickshire were supported by the Privy Council and ordered to continue their good work in compiling lists of rebels who had not yet submitted themselves, seizing vagrant persons and persons who failed to attend church, and acting in co-operation with the gentlemen of those shires to achieve those ends. In December 1684 the justices were once again called upon by the Privy Council, this time to prosecute those who 'are daylie committing bloodie and execrable murders [and] are sheltered, supported, resett and communed in several of our shires'. Judging from their performance in 1680, the justices would carry out this command efficiently.²⁷

It has been noted above that many of the justices of the peace performed other judicial duties and that many were also Border Commissioners. There is evidence from the post-Restoration period that those justices who were also Border Commissioners were openly combining their duties to bring about an improvement in law and order on the Borders. One document lists several persons on pannel who were to appear before the justices of the peace at Quarrelwood on the 6th July 1676, in order to answer indictments. Yet that same meeting at Quarrelwood is well documented elsewhere in the Riddle of Hayning papers to have been held by the Border Commissioners, and indeed, the names of those impannelled are virtually identical. That justices of the peace should be Commissioners is not surprising, but this instance could indicate that the justices were using their positions as Border Commissioners as a natural process of selection for the more serious offences. In other words, if the justices as justices of the peace were dealing with the less serious and administrative matters, and as Border Commissioners dealing with serious crime, then the one is an extension of the other, and it cannot be said that the justices of the peace on the Borders were inactive in the post-Restoration period. ²⁸.

These factors outlined above, together with a host of letters, commissions and vague references in the register of the Privy Council, combine to cast serious doubt on the previously held opinion that, outside the period 1655-1659, the Scottish justices of the peace contributed little to law and order in seventeenth century Scotland. Their role may have been far more subtle than has hitherto been appreciated, relying more on their position as prominent local gentlemen holding the magistracy to augment additional jurisdictions, than any formal methods, for which there was no place in the Scottish judicial system. It

could be as a result of this that few records remain.

II. The English Justices

In contrast, the English justices of the peace, had, by 1603, consolidated into 'the principal executors of royal justice and administrators of royal policy in the counties'. From 1580 and throughout the seventeenth century, there is a strong element of continuity in the office of justice of the peace. Most of the major changes took place during the Tudor period, when, out of 309 statutes imposing duties on the justices by 1600, no fewer than 176 had been passed since 1485. Not all were of great significance - some were merely temporary measures and many simply obliged the justices to punish offenders by ordinary judicial means - but others laid upon them more positive administrative tasks. By 1600, the justices were responsible for the regulation of religion, industry, poor relief, relations between servants and masters, marketing, roads and bridges, in addition to their judicial function. Numerous new misdemeanours were created by Tudor statute, to come specifically under the regulation of the justices of the peace.²⁹ The sudden increased complexity of the justices' task was marked by the emergence of a series of justices' manuals, such as Lambard's Eirenarcha, which intended to guide and instruct the justices in their new duties. By 1600, also, the desire of the most important men in the county to be on the commission of the peace, had emerged as a trend which was to last (with the exception of the Interregnum) beyond the seventeenth century.

Yet some developments were still to take place that century, the most significant of which was the subtle shift in the balance of local power, which Hurstfield has called 'a revolution in the structure of local government'. The first initiative in that direction had

been made in 1590, when a clause was inserted into the commission of the peace empowering justices to render judgement in difficult cases (casus difficultatis) only when a judge of one of the benches or of assize was present; otherwise to refer the case to the assizes. This clause has been heralded on the one hand as a revolution, and on the other as merely a regularisation of what was already the case. In the case of the Borders, the court profiles of the Northumberland quarter sessions of the early years of the century, when compared with those of the post-Restoration era, show that in the Borders the casus difficultatis clause took effect gradually, but that at some time between 1630 and 1660 became fully operational. Once this clause had taken effect, the justices, unhampered by the more serious and time consuming cases, were left to concentrate on misdemeanours, including the new statutory offences, and on the enforcement of local government. ³⁰.

Hand in hand with the development of local government, was the rise of the parish as a unit of secular administration. Under the Tudors' statutes, the petty constables and church wardens had become the parish officials, surveyors of the highways and overseers of the poor. As the justices of the peace's own organisation was best suited to judicial and administrative work carried out under judicial forms, they needed a body of officials to carry out the routine business of local government. This gradually became the role of the parish officials, who, acting under the supervision of the justices, made possible the development of county government and made the parish the principal unit of local government.

By the end of the seventeenth century, the gradual separation of the administrative and judicial functions of the justices is visible - but they had needed the whole of the century to adapt their traditional

judicial methods to non-judicial business. Until then, local government had been carried out without the distinction between the enforcement of obligation by judicial means, and the performance of administrative functions. For most of the seventeenth century the justices' main method of enforcing administrative statutes was by punishing breaches of them.

The position of the justices of the peace in the northern hierarchy of jurisdictions is rather more complex than in the rest of England. In other English counties, such as Somerset, the justices carried out the day to day administration of the county, holding courts every quarter, occasionally meeting between those sessions, taking informations, apprehending and bailing offenders and after 1630, reserving the more difficult cases for the assize justices when they came into the county. In the north, the Border Commissioners from 1605, dealt with the difficult cases between assize visits; but, in any case this special commission was comprised of justices of the peace, who were, in addition to their own duties, supposed to carry out the time consuming duties of special commissioners for the suppression of theft and murder.³¹

The court profile of the Northumberland quarter sessions for 1605-1618, when compared with the assize courts and the Border Commission courts of the same period, reveals little, if any difference between them, indicating (as shown in Chapter II) that the casus difficultatis clause was not applied there in those years. Offenders seem to have been sent to the earliest possible court, regardless of the crime they had committed.³² Yet referrals to the assize judges did occasionally occur at this time. That many of these offenders were gentlemen may have had more influence on their being referred to the assizes by the justices, than the type of crime they had committed; the justices, as gentry themselves, finding it difficult to prosecute

other local gentry. ³³

Later in the century, the court profiles show that the character of the cases before the courts had changed, with the justices of Westmorland, Cumberland and Northumberland restricting their judgement to petty thefts. Whereas between 1604 and 1618, 65 percent of all the persons before the courts had been indicted for theft, and 57 percent of all these for the theft of livestock; between 1675 and 1705 in Northumberland, less than one percent were indicted for felonious theft, and 11 percent for non-felonious theft. The post-Restoration Cumberland quarter sessions show that only 2 percent of the people before the courts were indicted for felonious theft and 2 percent for non-felonious theft, making 4 percent in all. ³⁴ The Westmorland records show that this pattern had been established there by the 1650's, with only 9 percent of the cases between 1655 and 1667 for felonious and non-felonious theft. Whereas there were 29 persons indicted for murder in the 15 years between 1604 and 1618 in Northumberland, there were none at all between 1675 and 1705. There were none in the Westmorland records between 1655 and 1667 and only two at the Cumberland post-Restoration courts.

Yet individuals continued to be referred to the assizes even for offences which could have been tried by the justices. Some, like John Taylor of Croosedale, may have been referred because they were particularly stubborn offenders. He had been prosecuted by the Cumberland justices in 1668 for illegally practising the craft of a dyer, and in July 1675 was tried by the assize judges for the same offence. Certainly, the justices at quarter sessions were always ready to bind refractory persons to appear at the assizes, presumably in the hope that the awe-inspiring presence of the judges would make a greater impression. In contrast with the earlier period, however, when there

were numerous examples of offenders tried at both quarter sessions and Border Commission courts, after the Restoration, such offenders were reserved to the assize or Border Commission courts alone. ^{35.}

All justices of the peace in England and Wales, with the exception of Lancashire, were appointed by letters patent under the great seal of England and enforced by the Crown Office in Chancery upon authorisation of the Lord Chancellor, upon a warrant directed to the clerk of the Crown in Chancery. Each commission of the peace issued included the Lord Keeper and other principal officers of state, royal judges, clerks of assize, and, until 1641, legal members of the Council of the North; nobles with territorial influence in the county were included together with county gentlemen. Not all of these sat at the quarter sessions in the county. The officers of state and privy councillors were on the commission in a purely honorary role and they never performed any duties in the county. The assize judges came on circuit in the north once a year and heard the cases referred to them. Occasionally members of the Council of the North would sit with their fellow justices at quarter sessions, but this was very rare. Likewise the noblemen could sit on the commission, but seldom, if ever did, although they provided useful links with court. The working justices, then, were the esquires, gentlemen, knights and baronets, drawn from the county gentry. The addition, or withdrawal of a justice voided the whole commission which then had to be reissued. Once issued, the commission was transmitted to the clerk of the peace and at the next assizes the new justices took their oaths of Supremacy and Alliegance. They were authorised to remain in office until the King willed that they be removed from the commission. One of the justices was appointed custos rotulorum, or keeper of the rolls, and he was usually a senior justice with experience on the bench, acting as

unofficial chairman of the quarter sessions. He was also a member of the quorum which was appointed to ensure that a certain number of experienced men were always present at the sessions. ³⁶

It is difficult to know how certain individuals came to be on a commission, although it is clear that the initial nomination of a new justice always came from a magnate within the county. Thus, it would be natural to assume that the county's political leaders advanced their adherents to magisterial office. The position of a justice was sought after, offering prestige in the county and increased contacts with the nobility and central government. It was appealing both to the new gentry, who were anxious to establish themselves in the county, and to the older families who were equally determined to maintain their position. On any commission of the peace, there were, in addition, the central government's own choice of several clergymen. Henry, Bishop of Carlisle, for example, was very active on the commission of the peace in the early seventeenth century. Also included were several barristers, most of whom, although not active out of sessions, were of great importance in court, being the only professionals there, with regard to the law. ³⁷

It was the 'working justices', however, who had the greatest influence over law and order in the counties. The normal qualifications for appointment were not difficult to meet for most county gentry: they had to have property worth £20 a year, be resident in the county, and be willing to take the oaths of Allegiance and Supremacy. Once selected, a man remained a justice of the peace until his name was omitted from the commission. Generation after generation, the same families frequently served on the commissions of the peace. The only time when the inclusion of these families on the commission of the peace was interrupted and their control of the counties threatened, was during the Interregnum. ³⁸

In 1640, most of the Border counties were under the control of royalists. Sir Richard Graham controlled large parts of north Cumberland with the Howards of Naworth; the Huddlestons of Millom controlled south-west Cumberland and Sir Philip Musgrave, north Westmorland. The only exception was in south Westmorland where the Bellinghams were initially Parliamentary. In all, 77 of the 98 county gentry of Cumberland and Westmorland were for the King in the first Civil War. During the Interregnum, a change in the type of person serving on the commissions of the peace has been noticed in several counties in England. In Lancashire during the Civil War, the old established gentry families, as in Cumberland and Westmorland, had supported the King, and so during the Interregnum were omitted from the commission of the peace. The commission, thus, became dominated by lesser, newer gentry who would not normally have been found as justices of the peace. This same trend can be identified in Cumberland and Westmorland, revealing, perhaps only limited support for the Interregnum government within those counties, and a major symptom of its long term weakness. The commission of the peace for 1657 comprised a total of one knight, two esquires, two gentlemen, three merchants and four or five yeomen. As in Lancashire, when the Restoration came, few of these men remained in local government and most faded into obscurity. A few, like Charles Howard, who later became Earl of Carlisle, Sir Wilfrid Lawson and Richard Tolson, who had been of the older gentry families serving on the Interregnum commissions, survived the Restoration re-shuffle and continued on the commission. ³⁹

The 20 years after the Restoration were years of stability in the commissions of the peace, during which time the traditional magisterial families were able to re-establish their time-honoured places in local public life. Purges of justices of the peace, however,

took place in the 1680's, for political and religious ends, culminating in the notorious 'Three Questions' of 1686. These were designed to procure pledges of support from local administrators for James II's policies, especially with regard to the penal laws. In Northumberland, for example, the 'working justices', who were the most frequent attenders at quarter sessions from 1680-1686 (John Blakiston, Ralph Jennison, Ralph Delaval, Richard Stote, Richard Neile, and Patrick Crow) had ceased to appear in court when the register resumed after a hiatus between October 1686 and July 1687. By July 1687 the justices who appeared in court were entirely new, and had never attended quarter sessions before 1687. By 1689, however, the traditional justices had returned to the commission. In Cumberland, however, there was a strong element of continuity through the three reigns of the 1680's, indicating either a greater degree of acquiescence on the part of the justices, or else more flexibility. ⁴⁰

Many of the justices were involved in judicial duties other than the commission of the peace. As shown in Chapters III and IV many were Border Commissioners, and it was from the ranks of the justices that the sheriffs of the counties were drawn. Some were also lords of manorial courts, like the Fenwicks and the Howards. Charles Howard was not only a national (Scotland and England) figure, but also so esteemed for his capabilities as a law enforcer that he served as governor-general of Jamaica, 1678-81. In many ways, it was their multiplicity of interests, in addition to their possession of land, that made such men attractive to the Privy Council as justices of the peace. They possessed a recognised claim to social leadership, reinforced over generations, not only by the economic dependence of their tenants and servants, but in their established connections with the forces of law and order throughout the whole county. ⁴¹

There were, nevertheless, limits to the power of the justices within each county. From the middle of the sixteenth century it had become common for borough charters to make the mayor and aldermen justices also. Some of these charters even gave the right to some boroughs to hold their own courts of quarter session. Without a special quarter session commission the borough court was necessarily subject to the exclusive jurisdiction of the county quarter sessions. But it did not follow that because a borough had the right to hold a separate court of quarter session the jurisdiction of the county quarter session was excluded, only where the session of the county was expressly excluded in a certain area of jurisdiction which was duplicated in the borough quarter session.⁴² The towns of Berwick and Newcastle were the only territorial limit on the jurisdiction of the northern justices. The courts leet, the hundred courts and the manorial courts could not bar justices of the peace from their bounds. As shown above, some justices were also lords of the manor and so conflict was, anyway, unlikely. The relationship between the justices and the ecclesiastical courts is hazy. In some areas the jurisdiction of the two courts overlapped, for example, in cases of defamation, drunkenness or profanation of the Sabbath; but there is no reference in any of the quarter session records studied of a referral to the church courts, or of co-operation with them, as in Scotland. Perhaps the presence of clergy justices on the bench made such formal communications unnecessary.⁴³

The justices were required by statute to hold four general sessions each year - in midwinter, earlyspring, midsummer and in the autumn. The Cumberland sessions were usually held at Cockermouth in the winter, Carlisle in the spring and summer, and at Penrith in the autumn.⁴⁴ In Westmorland two sets of courts were held for the county: one permanently in Kendal and the other permanently in Appleby. In the

early seventeenth century the Northumberland courts were all held at Morpeth, although they occasionally sat at Alnwick or Hexham. By 1630, however, a distinct pattern had started to emerge, whereby the winter and spring sessions were held in Morpeth, the summer sessions in Hexham and the winter courts in Alnwick. This continued to be the established routine after the Restoration. There are indications that in unsettled periods courts were not held. The commissions of the peace were disrupted in all counties during the Civil Wars. In Yorkshire, for example, the first commission to be issued after the war was in 1648. No courts were held in Westmorland in the summer of 1660 because the Restoration interrupted the previous commission. Courts were also disrupted in the 1680's. A petition from Mr. Ralph Clavering and Mr. Thomas Riddle to the quarter sessions of Northumberland in January 1692 mentioned the 'obstruccon in the execusson of the lawes and noe new Commission comed down' in the year of the Revolution, 1688.⁴⁵

As described above, not all the justices on a commission attended the quarter session courts, and indeed, even 'working justices' failed to attend all of them. Attendance must have been affected by distance and weather, especially during the hard Border winters, and by the other duties of some justices. In all counties there seem to have been a knot of particularly active justices, who attended more frequently at the quarter session courts than their colleagues. The number of justices at any one quarter session could vary up to about eight, although usually around five were present. Thus the work of the quarter sessions throughout any one county, fell on a small number of active justices, who, through their conscientious attendance, probably became more familiar with the law enforcement process and more respected throughout the county. Certainly, they were likely to have a good deal of power concentrated in their hands.⁴⁶

Also present at the courts were a number of court officials. The clerk of the peace would be present to make a record of the proceedings of the court and to draft the indictments and processes. He was usually an efficient professional who acted as the co-ordinator between the justices' out-of-sessions processes and the work of quarter sessions. The post of clerk of the peace was sought after in the counties and so frequently some of the most able men were in attendance at the sessions. Other officials present were the constables, tithing men and parish officials, such as churchwardens and overseers of the poor. These, in contrast to the clerk, were unpaid and most unprofessional. Most of them were unwilling to undertake the office, were ; illiterate, and thus incapable of producing the careful accounts and presentments which the law expected them to make. In many ways the constables were in an unfortunate position - if they were negligent in arresting or reporting an offender, they were prosecuted in the courts, yet if they did their duty efficiently, they might find themselves maliciously assaulted by revengeful parishioners. *The large number of deforcements in the court profiles show that this was a very real predicament.* The constables, then, were often lazy and disobedient and so not respected by the population. The parish officers were likewise subject to either derision by the population, or *prosecution by the courts.* Yet these constables and parish officers were the sole executors that the justices possessed to presecute lawlessness and administer the poor law. ⁴⁷

The work of the courts: England.

After the justices had taken their places on the bench, the crier proclaimed the sessions and the clerk of peace read the commission. A roll call was made of those officers required to attend and any documents relating to the court business were collected

together by the clerk. Those summoned for jury service were then called and the jurors sworn in. Once this had been done, the court was ready to proceed with its business and the articles of the charge were then usually read by the custos rotulorum or the chairman of the justices. This usually consisted of an introductory exhortation followed by a definition and summary of the laws and offences which the grand jurors were to inquire into and present. The grand jurors' presentments covered a wide range of topics, which aimed to alert the law enforcing officers to the problems of local government prevalent at any one time and to instruct them in the types of offences they ought to be trying to prevent. ⁴⁸

The bills of indictment were then considered by the grand jury, and the procedure then followed the same pattern as at the assizes. The jury decided whether the bills were to be found true (billa vera) or ignoramus. As in the assize documents, few ignoramus bills survive for Northumberland, with the exception of the years 1700 to 1705, although there seems to be a complete series for the Cumberland courts between 1668 and 1672. On average in Cumberland 26 percent of all the people before the court were released through ignoramus indictments, and 19 percent of those at the Northumberland courts. This compares with 30 percent at the assizes and is consistent with the higher rate of such acquittals in the north of England in the post-Restoration period. Those whose bills were found true, were then arraigned before the petty jury and their cases heard. ⁴⁹

At least one grand jury was summoned to appear at every quarter sessions for the purpose of finding indictments. There were usually 12 substantial freeholders on the grand jury although more could be present. All of them were gentlemen at least. ⁵⁰ There were usually 12 petty, or trial jurors, who were obliged to be freeholders to the value of 40 shillings. The evidence at the trials is not recorded in

the quarter session documents, but it would have been collected by the justices themselves from the persons who appeared before them at preliminary enquiries, as described in the chapter on the assizes. At these examinations, the accused and witnesses would appear before some justices, or even a single justice, and the evidence of witnesses would be taken down in writing and the defendant, also, could make a statement. The accused could then either be bailed to appear at the next quarter sessions or sent to prison to await trial by the assize judges. In the case of misdemeanours, the justices were bound to release the accused upon him finding adequate bail.

Witnesses and prosecutors could be bound over by recognizance to appear at court against the accused. Those who failed to appear forfeited the money laid down as a bond.⁵¹

Not all prosecutions were made by indictment at the quarter sessions and an alternative could be allowed in the form of a mere 'information' of an individual against one who had committed a misdemeanour. The use of informations dispensed with the presentment of the record to the grand jury. Thus, whereas an indictment began 'the jurors present [name]', an information began, 'be it remembered that [name] gives the court here to understand and be informed that [offence]'. Anyone could inform either for himself, or for the Crown and this method of prosecution was designed to encourage law enforcement (and make up for the deficiencies in law enforcement agencies) by giving informers a share of the penalty. Moreover, by bypassing the grand jury, it was a useful means of dealing with unpopular prosecutions. The use of informations was not very prevalent in the Border quarter sessions, although several appear in the records. For example, Michael Walton, at the court in Carlisle in April 1668, informed against Oswald Archer, an illegal grocer and John Featherstonehaugh, for having an illegal alehouse. M. Beresford has found that informations were

frequently made against those who offended against the penal statutes, and in particular against those who violated the economic regulations. He found that they were more prevalent in years when prices were high, when informations against forestallers and regraters reached a peak, as in 1613. ⁵²

It is difficult to estimate the percentage rate of acquittals and convictions by the petty jurors. Sometimes the records state at the side of a name 'non cul' (not guilty), sometimes 'exonerat' (exonerated) and sometimes no verdict or judgement at all is recorded. Those that definitely record a verdict of guilty, or a judgement that implies guilt, have been calculated for the years 1668-1672 for Cumberland and it can be said, with a fair degree of certainty, that between the years 1668 and 1672, 50 percent of the people who came before the quarter sessions in Cumberland could expect to be convicted by the petty jury. ⁵³

The court of quarter sessions has been called the 'clearing house' of all the civil and criminal affairs of the county. Many cases were dealt with in the court, but others were sent down to be dealt with by the justices in their divisions and others were referred to the assizes. The court profiles show the type of cases found before the sessions for Cumberland, Westmorland and Northumberland. Frequently, the Cumberland court did not give details of the offence committed, but merely noted that a felony or a trespass had been committed. These have, therefore, been noted separately. From the court profile it is most probable that these felonies were theft, most likely petty larceny. 'Trespases' could refer either to trespases against goods, persons, or lands and it is impossible to ascertain which from the documents. ⁵⁴

The court profiles show that murder cases very rarely came to the quarter sessions after the 1650's, but were quite common at the beginning of the century in Northumberland, where three percent of all

INDICTMENTS BEFORE NORTHUMBERLAND QUARTER SESSIONS, 1604-30

TABLE 28.

	YEAR →												TOTAL						
	1604	05	06	07	08	09	10	11	12	13	14	15		16	17	18	29	30	
THEFT	58	98	33	24	14	14	20	34	29	24	10	48	67	30	10		15	24	552
LIVESTOCK																			
THEFT	7	4	1		4	1	7	1	1	4		6	22	6			5	8	77
OTHER																			
MURDER / SLAUGHTER	5	4	2	1	2	2		4	1	3		5							29
RAPE						1					1								2
ARSON	6											2							8
ASSAULT	3	7		1		7	7			2		12	24	19			3	20	105
DEPORTMENT / RESCUE				1		1		3	1	1	2	3	8	3	5		7	9	44
CLOSERIEAM									9		7			1				4	21
DISSEIZIN								4		5			2	14	7		15	1	48
OBSTRUCTION	1			4	1			2	2	1	1			1	1		2	2	20
GAME LAWS			15	3				10		7		12			6		1		65
WITCHHUNT				1															1
RELIGIOUS NON-COMPLIANCE											20				1			1	25
UNLICENSED ALIENHUSES														1				8	9
MISCELLANEOUS								9											9
TOTAL	80	113	51	35	21	37	56	70	43	47	21	88	123	75	30		48	77	1015

COMPILED FROM
N.R.O. Q5/I/1
VETERAN INDICTA-
-MENTS

INDICTMENTS BEFORE NORTHUMBERLAND QUARTER SESSIONS, 1675-1705

COMPILED FROM N.R.O. Q5/1/2/1-65

TABLE 29.

	1675	76	77	78	79	80	81	82	83	84	85	86	87	88	89	90	91	92	93	94	95	96	97	98	99	1700	01	02	03	04	05	TOTAL
FELONIOUS THEFT						1	1			1	1	1								2		3	1	9	5	2	2	3	4	1	37	
THEFT	8		8	3	1	13	53	6	7	16	18	24	17							6	3	30	17	36	57	56	8	35	29		451	
RARE											1																					1
ASSAULT	9		21	16		18	37	16	16	15	26	28	23	3	2					5	3	35	13	22	56	42	20	37	25	3	491	
DEBASCHEMENT			4	3		22	13	1	1		3	2	5	1									21	22	1		14	12	3	128		
MESSPASS	9		23	9	1	25	23	30	23	9	17	39	14	2						5	3	23	30	55	46	16	17	41	46	4	512	
DISSEMIN						5							4							2	1				3	4	10	8	7		444	
DAMAGE	9			1		3		11	1	1		2	5							13	1	5	7	10	11		3	4	1	4	91	
OBSTRUCTION			3			5	12	2	7	1	5	1	1		1					4	1	4	2	9	21	7	3	2	2		93	
UNLICENSED WALEHOUSES	2					16				6			91										92	110	68	73	1	93			552	
SUGARING			9			6	2			1	3	4	1	1								9	4	4	10	3	1	1		2	56	
NEGATIVE WPT-COUPON			7			214	26	319	642	5	2		40																		1253	
GOOD DEBASCHEMENT					2							7	5												1						15	
GAME LAWS				1		3	4	3	3	10	1		7								5	4	7	53	32	17	34	15	5		204	
STATUTE OF MULTIFIDELS								3	7	38	14	7	21	2	1						3	3	7	4		1		1	6	3	121	
EXTORTION						1							4									2	1	11			3	1			23	
NEGLECT OFFICERS				1				1			4												2		2		1				9	
MANAGEMENT OFFICERS						7	1	1		3	34	5										9	1	2			18				80	
PERJURY						1		1																21			1				24	
VAGRANCY								3	10	23	5														1		1	1			444	
UNLICENSED BREWING										12	4												22								43	
UNLAWFUL			3			2	1			1	1			3								2									12	
TOTAL	35		77	26	2	334	180	396	718	441	131	115	243	12	11					37	20		120	208	372	334	223	103	214	138	21	4288

INDICTMENTS BEFORE WESTMORLAND QUARTER SESSIONS 1655-67

	1655	56	57	58	59	60	61	62	63	64	65	66	67	TOTAL C.J.	TOTAL OVERALL TOTAL
FEDEROUS THEFT										7	3	1		11	11
THEFT	4	12	6	2	1		1	4	6	4		4	1	45	45
ASSAULT	21	2	20	28	14		13	10	17	6	4	2	8	145	145
RELIOUS ASSEMBLY					13				15					28	28
AFFRAY			7								3	5		15	15
OBSTRUCTION				3	1	1		2	3	2	2	1		18	18
COUNTERFEIT	15	6			1			8	4	13	12	8	2	71	71
DAMAGE	6	5	2	4	3						1			21	21
SWANDER	7	6	2	3		2	3	2	3	5	2	3	3	41	41
RELIGIOUS NON-COMFORTUM									4	61				65	65
UNLICENCED MEATHUSES	[2]	[5]		[2]	[1]	2	3	1	7	3		16	25	57	20
TIPPLING		[9]		1										1	9
UNLICENCED MALSTENS/SHOPS											4			4	4
FORNICATION		1	2		[1]									3	1
SARISBATH ISLEHM		[1]		1										1	1
DISURBING CHURCH SERVICE		2				1								3	3
VAGRANCY							2		[1]					2	1
PEWAL STATUES	5	2	1						1			3	4	16	16
DISSEID		8			3				1			2	3	20	20
DEALIGENT OFFICERS			2						1				5	9	1
MISCELLANEOUS	[3]			4	[1]			1						8	2
HIGHWAYS/ROADS									3					3	10
TOTAL	64	69	45	49	43	6	32	26	75	101	26	52	51	20	20

COMPILED FROM
 U.R.O. QUARTERSESSIONS
 NATIONAL DIVISION INDICTMENT
 BOOK, 1655-67.

THE FIGURES IN BRACKETS [] REFER TO CASES APPENDING TO THE ORDERS OF THE COURT WHICH ALTHOUGH NOT FORMAL INDICTMENTS, WERE JUDGED AND PUNISHED AS IF THEY HAD BEEN INDICTMENTS.

persons before the courts were tried for murder, although no cases are recorded in the years 1629 and 1630.⁵⁵ There was only one case of rape in the post-Restoration records, but two rape cases in the period 1604 to 1618.⁵⁶ Arson, too, would appear to have been dealt with by the early seventeenth century justices, but by the Restoration had become confined to the assize judges.

Larceny, then, was the largest category of felony left to the justices after 1655. Even then, there is some doubt as to whether it was treated as a felony in all cases. The documents seem to differentiate between felonious theft and taking and detaining, but would appear to be rather confused as to ^{the category to} which certain cases belonged. For example, Jane Harrison of Tynemouth was indicted before the Northumberland justices at Morpeth in April 1681 for feloniously 'taking and carrying' goods belonging to an unknown person. Certainly in any legal definition of theft, the element of taking and carrying away goods is crucial. However, when Thomas Revely of East Lilburne took and carried away goods belonging to Roger Hewett, this was not classified as a felony by the Northumberland justices. Likewise the court did not record as a felony the case of William Armstrong who took and 'abducted' lead from William Blackett worth 40 pence. Taking and detaining could also be classified as a felony, but could also be considered rather like the Scottish spulzie. As the documents do not give many details of these cases, they therefore appear to be very confusing on this issue. Thus, thefts which have been specifically called 'felonious' in the documents, have been classified in one category, and apparently non-felonious thefts, taking and detaining, taking and carrying, and taking and abducting (all terms used by the quarter session courts which may, or may not have been interchangeable) have been placed in another category.⁵⁷

The records of the early seventeenth century reveal that theft cases dominated the business before the courts. Indeed, 65 percent of all the people who came before the courts were indicted for theft - the vast majority of them for the theft of livestock. This was invariably grand larceny, the goods being above the value of 12 pence, and so punishable by death or banishment. Yet after 1655 only 9 percent of those in Westmorland and after the Restoration only 4 percent of the people indicted before the Cumberland courts and 11 percent of those before the Northumberland courts, were indicted for larceny. This is, indeed, in stark contrast with the earlier records, and also would appear to be in contrast with other parts of England. G.C.F. Forster writes of the East Riding of Yorkshire quarter sessions, 'larceny was the most common, totalling a half of all the criminal cases heard at any sessions'. In further contrast with the early seventeenth century, most of the offenders were indicted for petty larceny, usually of household goods or trees. In many cases, the value of the goods stolen is not given, but the penalty incurred is so small that they must have been petty larceny. On the other hand, indictments for the theft of goods which were valued at, or would appear to be worth more than 12 pence, seem to have fallen into one of three categories. Either there is a missing verdict or judgement, indicating that the case was probably passed to the assize judges; or the offender was given a very small penalty in view of the value of the goods.⁵⁸ Alternately, especially at the Northumberland courts, the indictment went to 'travers'. For example, William and Giles Hall of Woodhall who stole goods to the value of £8 from George Dunsire, were recorded as 'ad travers' at the Morpeth court in January 1682.⁵⁹

It is important to remember, however, that in the last half of the seventeenth century, the justices of the peace were also acting as Border Commissioners, hearing many cases of grand larceny and imposing

capital sentences on offenders at those courts. Although the Border Commission had been in operation at the beginning of the century, without apparently affecting the number of grand larceny cases before the quarter sessions, it would seem that after 1655, the Border justices fell into line with practice in the rest of England, and reserved difficult cases to the higher courts. Yet for this to be a practical measure, the number of thieves and the amount of crime in the Borders would have to have been severely reduced, and the low percentage of larceny cases on record is evidence that this had been achieved by 1655.

The worst penalty for larceny imposed in the post-Restoration period courts was whipping. Adam Merriman, found guilty of the theft of 10 yards of cloth from Thomas Walker was to be whipped at market towns in Cumberland, namely Carlisle, Egremont and Whitehaven, 'till the blood come'. One Pattinson, from Morpeth, who stole a kettle, was ordered by the Northumberland justices to be whipped in the stocks on market day. Fines, too, however, could be imposed as a penalty.⁶⁰

As the business of the early courts was dominated by felonies, so the courts after 1660 are dominated by misdemeanours. Twenty five percent of all the persons before the Cumberland courts were indicted for assaults and 23 percent of those assaults were against officers, either in the form of deforcements, or the rescue of distrained goods. Twenty three percent were indicted for the same at the Westmorland courts. The percentage of persons indicted before the Northumberland courts for assaults, is only 14 percent, although this percentage is distorted by the large number of religious cases before the courts of that county. If the religious cases from Northumberland are omitted, then it would appear that the county experienced a similar number of assaults to Cumberland and Westmorland. In a similar proportion to Cumberland, 20 percent of those assaults were against officers. The number of persons indicted for general assaults is fairly consistent

throughout the period 1655-1707 in all courts, but the assaults against law officers tend to be concentrated in certain years; for example, in Cumberland in 1668, 1677 and 1706 and in Northumberland in 1680, 1699 and 1703. Many of these assaults were against either excise men or salt tax collectors. Assaults against the latter were especially prominent in the 1690's and 1700's. The penalty for assault or deforcement was invariably a fine, usually 6 shillings for simple assault and 20 shillings for the assault of an officer. ⁶¹

Poundbreaking and close breaking were important business for the quarter sessions, constituting 11 percent in Westmorland, 12 percent in Northumberland and 15 percent in Cumberland. These terms seem to have covered a wide range of offences, from straying cattle to riotous trespass. Many of the indictments for trespass were in association with assault or other types of prosecution, and frequently a closebreak offence by one party would be returned by a closebreak on that party by the previously offended party. Indeed, petty breaches of the peace, such as disseizin, nuisance, obstruction and defamation, must have taken up a fair amount of the justices' time. Some indictments were similar to those prosecuted by the English and Scottish franchise courts under the category of good neighbourhood. For example, Richard Uriel and John Scott with three others from Cockermouth were fined by the Cumberland justices in October 1668 for keeping dunghills in the street. ⁶²

There are also several cases of perjury in the quarter session records, especially in Cumberland, where such cases constituted three percent of the court business, illustrating how difficult it must have been in the seventeenth century to carry out normal legal proceedings. It is interesting that there are 16 persons indicted for forgery at the Cumberland court, but none at the Westmorland or

Northumberland courts. A Star Chamber ruling of 1603 had limited the consideration of forgery cases to the assize judges, so it is extraordinary that the Cumberland quarter sessions should be found dealing with such cases. Nor were all these cases passed to the assize judges. ⁶³

It has been stated that during the Tudor period the administrative function of the justices as local government officers was increased. Indeed, numerous statutes were passed which enforced economic and social controls designed to create social stability and public order. The early seventeenth-century court records do not reveal this element, but show that the courts would appear to have been more concerned with the reduction of serious crime in the area, rather than carrying out the enforcement of regulative statutes and local administration. The Delaval papers, from the same period, reveal that the justices for Northumberland were taking some action against unlicensed alehouses and vagrants between the years 1618 and 1623, although in 1623 they were rebuked by the Privy Council for negligence in this regard; who wrote, requesting that

The Statute against Rogues and Vagabondes As also those concerning Osteries, Aylehouses and drunkerds and the abuses in the Assises of bread and beare might be strictlie looked to, for that the slacknes of Justices of the peace in the execuccion of theis Lawes haith bred and suffered greate disorder.

64

That many justices elsewhere in England were failing also to enforce these statutes can be seen in the Book of Orders issued in January 1631. ⁶⁵ Here it was acknowledged that there was some 'defect of the execution' of the statutes passed proceeding from the 'neglect of duty in some of our justices and other officers'. Examinations and informations had not been taken of abuses and this had shown itself in an outbreak of public disorders all over England.

The Book of Orders stated that the justices who 'now of late in most parts of this kingdome are grown secure in their said negligence and the said politic and necessary laws and statutes laid aside or little regarded', were to be strictly supervised by the judges of assize. Moreover, a more vigorous rule was to be enforced by the justices. Eight basic orders required the justices to meet singly in each hundred once a month to receive the reports of the constables. To encourage people to inform against offenders, a reward was to be offered out of the money levied upon the presentment. The justices, constables and all law officers were ordered to take particular note of unlicensed malters, brewers, forestallers and regraters, alehouse haunters, inmates and those who had offended the articles against labourers and artificers and marketing regulations. Particular attention was to be paid to the administration of poor relief, but harsh measures were to be taken against those who sought to obtain relief without due cause. Thus, idle persons, those not in service and alehouse haunters were to be prosecuted and, together with vagabonds, were to be conveyed to the house of correction.⁶⁶

One of the most important administrative functions of the justices was the organisation of poor relief. Elizabethan statutes had established poor relief on a parish basis, to be administered by churchwardens and overseers of the poor under the supervision of two justices of the peace. The aims of the Poor Law acts of 1598 and 1601 had been to try to minimise disorders resulting from hunger, poverty and unemployment, and so had divided the poor into two categories - the deserving (or impotent poor) and the undeserving (ablebodied and idle). An assessment of poor rate was levied on parishioners to finance these schemes and the money received went towards providing relief, meeting the expense of chastising and removing

vagrants, binding paupers as apprentices and providing fuel and shelter for paupers. Details of the poor rate assessment are not revealed in the quarter session documents. Cases are recorded of paupers petitioning the justices and complaining of the reluctance of the overseers of the poor in paying out relief. For example, the overseers of the parish of Hexham were ordered to pay Elizabeth Lee, called Tyson, 2 shillings poor relief and all the arrears due to her. The Northumberland Order Books reveal that the relief of the poor was a most important feature in the affairs of the justices, which seems to indicate that relief must have been issued frequently. Relief for the deserving poor seems to always have taken the form of money in Northumberland, although other counties' records indicate that relief could have several forms.⁶⁷

The records show clearly the drawbacks of having relief organised on a parish basis. Parishes were usually reluctant to pay out their money to any but the most deserving and those who had lived in the parish for a considerable time. The overseers of the poor frequently quibbled over whether these two factors were applicable. For example, Hugh Makepeace petitioned the Northumberland quarter sessions in July 1691 for relief from the parish of Whitfield. This was granted by the justices, but at the following session a protest was received from the minister of Whitfield that the said Hugh was not poor and did not need maintenance. Thus the money was withdrawn - the judgement of whether he was poor (that is, deserving poor) or not, obviously resting with the parish authorities who held the purse strings. By far the most common quibble was over whether a pauper belonged to the parish or not.⁶⁸

John Selby and others of Bywell St. Peter petitioned the Northumberland justices in July 1695 that John Harrison and his wife Jane, had lived for two years as householders in Haltwistle parish, but

that John had now left his wife, and she and their two children, who had gone to live in the parish of Bywell St. Peter, were now likely to fall upon the poor rates of that parish. Bywell St. Peter refused to pay them maintenance on the grounds that they were not long-standing residents of the parish, and so, after much debate, the justices ordered Jane and her children to return to the parish of Haltwhistle, which was to maintain them. The same year, the Northumberland court ordered that the bastard child laid at the door of Robert Walker in Wooller and now called Charity Wooller, was to be carried to the parish of Eglington in order to be maintained there. One wonders if they changed her name. ⁶⁹

As a result of these attitudes of the overseers of the poor, a pregnant, unmarried woman, who was thus liable to fall on the parish rates, could be moved from parish to parish; each parish hoping that they could escape paying for her and her child. In February 1690, the justices heard a petition from the parish of Newburne, that Dorothy Buicke, who had been born in the parish of Heddon-on-the-wall was 'now with a Bastard childe and likely to bother ye parish of Newburne'. Thus, Newburne was ordered to send Dorothy back to Heddon 'there to be kept from wandering abroad in the Country'. One of the obvious ways to reduce the number of payments to illegitimate paupers was to ascertain who was the father of the child and then coerce him into either marrying the mother or undertaking to provide maintenance for the child. The parish officials and the justices went to tremendous lengths to ascertain the paternity of children. ⁷⁰

In some counties interrogations of midwives took place to find out if the mother revealed the father's identity in childbirth. There were even cases where the midwife's help was withheld until this was revealed. Those accused of being the fathers of illegitimate children often hotly denied the charge, which gave rise to lengthy

inquiries by the justices. One such case occurred in February 1690, when the parish of Long Benton was ordered to pay 2 shillings to Mary Bell for the maintenance of her bastard child of whom the father was unknown. Under pressure from the parish authorities, Mary Bell later alleged that the father was Mr. Richard Hyndmarsh. The case was then referred to a single justice, Ralph Millburne, to investigate, and if found to be true, Hyndmarsh was to pay the child 15 shillings a quarter. Millburne's inquiry showed that Hyndmarsh was not the father, although later evidence proved that he was and Hyndmarsh was ordered to pay the money due. Often, although the father was named, he was found to have 'gone out of the county'. The quarter session records for Northumberland and Cumberland do not show any prosecutions of bastard bearers, although those fathers who refused to pay their maintenance could be fined by the courts, as in the case of the above Richard Hyndmarsh in Northumberland. The fathers were expected to maintain their children until the age of seven or eight when, at additional expense to the father, they were to be bound apprentice to local employers. ⁷¹

Evidence from Westmorland and other counties during the Interregnum has revealed that the quarter sessions during that period were concerned with the prosecution of bastard bearers, and indeed, with any form of moral misbehaviour. The Puritans were anxious to effect a reformation of morals and manners and to this end a certain re-defining of 'deviant behaviour' took place during the years 1649 to 1660. That period, then, saw an intensification of demand for religious and moral changes to be imposed by the church and the state. ⁷² An act of 1650 made fornication punishable by a three month sentence for the first offence, and by death for the second offence. Adultery was likewise made a capital offence. There is no evidence, however,

that these punishments were ever carried out. Traditionally, before the Interregnum, most bastard bearers had only reached the notice of the justices if they were either 'repeaters', or were about to fall on the parish poor rates. Evidence from Lancashire shows that the justices heard no cases of fornication or adultery between 1626 and 1640, but 23 cases between 1646 and 1659. The Westmorland court did not seem to have been so keen to prosecute fornicators or other moral offenders, although there were four cases between 1655 and 1659. The Border justices after the Restoration seem singularly unconcerned with the moral aspect of such issues, but rather on the effect illegitimacy could have on law and order and on the finances of the county. ⁷³

The inability of persons moving around the country to obtain relief, if necessary, from any parish other than the one in which they were born, could pose a serious threat to law and order. Starving desperate people were more likely to steal and commit other offences, than any others. The poor harvests of the 1590's and 1620's had underlined the correlation between starvation and theft, and the latter had given rise to the Book of Orders of January 1631, which specified particularly harsh treatment for vagrants, or 'sturdy beggars'. Northumberland after the Restoration seems to have been particularly affected by vagrants. ⁷⁴ Westmorland vagrants could receive the same punishment as John Johnston, who, in January 1663 was to be burnt in the shoulder with the letter R and to be sent from constable to constable until he came to the place where he had last lived for the space of a year. The penalties for the Northumberland vagabonds were not recorded in the documents - 18 were removed by writ of certiorari to King's Bench, but for the others, it is only noted that they 'submitted'. The Order Books reveal what such a submission could entail. Gilbert Gray, for example, was ordered to be sent from

constable to constable until he arrived at Newstead where he was born. From studies in other counties, it seems that this was a common penalty. The records do show, however, that other vagabond offenders might be sent to the 'house of correction'. 75.

An act authorising counties to raise money for a house of correction was passed in 1576 and gradually throughout the late sixteenth and early seventeenth centuries, such houses began to be established in most counties. Some counties, however, were extremely slow to set up such foundations. Northumberland was such a county, having not built a house of correction as late as October 1637, despite an act of 1610 which obliged each county to provide a house of correction in which to 'set rogues or other such idle persons on work'. The documents for the Border counties, however, show that by the Restoration such houses were firmly established and that money was regularly collected for maintaining the house of correction and for paying its Master. And it would seem that until April 1686 the Northumberland house of correction was situated at Alnwick, but in that year it was deemed to be 'verie uselesse' at that place and so removed to Morpeth. The Master of the house was appointed by the justices in session and was responsible to them for the safe custody and good conduct of those committed to him. He was also responsible for the tools and raw materials with which the inmates were to be employed. In the Borders, the houses of correction seem to have been used in various ways. They were useful methods of punishment for some offenders, particularly those who could not afford to pay a fine: in most cases they were utilised as a means of short term imprisonment where mothers of illegitimate children were usually sent for three months. It could also be used as a place of detention for vagrants (as shown above) and it provided compulsory employment for the less deserving unemployed. The

house of correction, then, played an important part in the justices' treatment of crime and poverty, acting as prison, workhouse and reformatory institution. ⁷⁶

The fear of vagrants falling on the parish poor rates was also responsible for the various acts against 'inmates'. Inmates could be either lodgers or squatters who had moved into the area. Genuine migrants were distinguished from 'undersettlers' in the 1662 Settlement Act, which legalised the removal of newcomers within 40 days of their arrival in a parish, if they occupied a tenement valued at less than £10 per annum and if they were likely to be chargeable to the parish. They could be removed by the parish official to wherever they had last resided for 40 days. Those who encouraged such people into the parish by offering them accommodation were also liable to prosecution. ⁷⁷

The justices of the peace also had a duty to provide pensions, or relief for poor soldiers. Richard Lawson, a poor officer in Charles I's army, was granted a pension of £3 by the Northumberland justices in 1691 and William Levin was granted 40 shillings as a former soldier of Charles II's army. Poor prisoners could also receive relief from the justices. This was an important service at a time when all prisoners had to maintain themselves whilst in gaol and when most of the prisoners were poor people. Early modern gaols must have been wretched places. They were frequently overcrowded, especially in the early seventeenth century, with all prisoners, regardless of sex or offence, crowded into one room. Prisoners were expected to pay for their own food and those who were unable to afford this were dependant on charity. Diseases flourished in the dark, damp, foul atmosphere of the gaols and those without an adequate supply of food were the most likely to contract a fatal infection. Even by the standards of the time, the Northumberland gaol was considered to be one of the worst. The

Privy Council in October 1637 described it as 'soe exceeding straight, ruinous and ill that there is noe conveniency of roome to secure fellons from other prisoners, nor men from woemen, a thing most Uncivill and barbarous'. 78

Like poor relief, there were numerous economic controls prompted by the desire for social stability and public order, which were to be enforced by the justices. One of the most important of these was the control of alehouses. Alehouses were viewed by some contemporaries as 'nurseries of naughtiness' (Lambard), where prolonged drinking could lead to gambling, idleness, vice, crime and poverty. To control them, therefore, seemed eminently desirable, especially to the Puritans, who sought not only the proscription of drunkenness, but also the elimination of the alehouses. Legislation in 1604, 1606 and 1610 had enabled the justices to restrict alehouses through licences and to suppress those without such licences. Such attempts at suppression reached a peak during the *Interregnum period* in some counties such as Lancashire, when the laws against alehouses were strengthened and reinforced by the Humble Petition and Advice, which proposed the disfranchisement of drunkards, alehouse haunters and profaners of the Sabbath. The Puritans saw alehouses as great obstacles in the way of the reformation of manners. John Angier, a notable puritan minister wrote

doth not experience tell that men are forced to ly in thir beds or keep their houses on the Lord's Day because they have drunk so hard in the week, or on Saturday, that their bodies are weak and tired sometimes fogueing recreations and businesses of mens calling, do so spend the body that it hath no strength left for God's service .

Alehouses were, then, considered as an alternative to God, and thus an intolerable affront to puritan justice. 79.

Both puritan and non-puritan justices alike, however, condemned the alehouses in times of dearth, for the alebrewers used the barley

which was badly needed for bread. Alehouse suppression, therefore, became an invariable feature of times of grain shortage and conservation, and the ensuing dearth conditions. Because it was only in such times when a united campaign was launched against alehouses, their suppression tended to be very spasmodic. The Delaval papers reveal great concern with alehouses in 1618 and 1623. The court profiles reveal concentrations of alehouse prosecutions in Northumberland in 1630, 1680-1, 1687, 1698-1703; and in Cumberland in 1672-3 and 1697-98.

These years can be shown, in most cases, to be years of food and grain shortages. The famine year 1623, for example, is notorious in demographic history. 1630 was another year of famine conditions, in which the north of England was particularly badly affected and it set the scene for a decade of poor harvests. Poor harvests and grain shortages were experienced in the 1640's and then from the 1680's until the end of the century. The 1690's in particular were notorious and became known as the 'seven ill years'. Nor had the 1670's been noted for the abundance of food. A famine occurred in Staffordshire in 1674 and these conditions have caused Peter Laslett to write 'food prices were very high in the area at about that time and the mid-1670's resembled the early 1620's in many respects'. The sudden bursts of alehouse prosecutions, then, can almost certainly be connected with bad harvests, high prices and grain shortages in those years. ⁸⁰

In between these periods of suppression, unlicensed alehouses multiplied, for they undeniably played an important part in the welfare of the poor. Not only did they provide bread and beer for them, but they also provided employment. Those members of the community who were unable to do hard manual labour, frequently set up as alehousekeepers, and, in times of relative prosperity, were permitted to do so, because they then cost the parish nothing. A list of those prosecuted before the Cumberland quarter session at Cockermouth

in January 1673 is most revealing in this respect. This list, of 157 offenders, contains four people who were 'paupers' and ten widows. These would most probably have set up alehouses as a means of income. Sometimes craftsmen appear on these lists of unlicensed alehousekeepers, some of whom may have sought to augment their incomes by selling a little ale. In most counties, however, much of the business of alehouse licensing was done by the justices out of sessions, and this was probably also the case in the northern counties; in which case the quarter session records can only reflect 'the tip of the ice-berg'.⁸¹

The Northumberland quarter session records show a strong correlation between the years when unlicensed alehouse prosecutions were high and when the prosecution of marketing offences was most intense. This is a typical pattern which has been found in other English counties, and like that of the alehouse prosecutions, was prompted by a poor economic climate. Unlicensed badging, regrating and forestalling fall into this category. The justices also had statutory powers against those who used faulty weights, sold bad food, or indulged in unlicensed droving and were charged to ensure that the food supply remained as good as possible by attempting to keep the markets well stocked.⁸²

A steady stream of prosecutions occur throughout the post-Restoration period, of those who violated the Statute of Artificers (1563). This statute sought to enforce a seven year apprenticeship for crafts and trades, which, it was hoped, would not only encourage good craftsmanship, but would also reduce unemployment and prevent changes of occupation which could lead to social instability. Those who violated the Game Laws were also prosecuted with increasing ferocity in the early years of the eighteenth century. These laws

went back to the Middle Ages, when, in 1389, hunting was classified as a gentleman's game and the qualification for participation was set at 40 shillings per annum. At the beginning of the seventeenth century this was raised to £10, but the Game Act of 1671 raised the level of exception to exclude all who had not freehold worth at least £100, or leasehold valued at £150 a year. Also included in this category are those who killed salmon fry in forbidden times, caught hares in the snow time, or used guns to kill their prey.⁸³

Most striking in the court profiles are the number of persons prosecuted for religious offences, such as not attending church, or attending conventicles. In the post-Restoration period in Northumberland, 29 percent of all the people indicted at quarter sessions were accused of religious offences. This large percentage compares with 43 percent before the assize judges for the same county. Ten percent were prosecuted for such cases at the Westmorland sessions. Both the quarter session records and the assize records, however, reveal a much smaller percentage for Cumberland - 7 percent and 8 percent respectively. This disparity between Cumberland and Northumberland suggests two different possibilities. Firstly, that Cumberland could have been less troubled with religious dissenters than Northumberland. Or, secondly, that such cases were not reaching the courts as they were in Northumberland. It has been shown how Selkirkshire appeared free from religious dissent until a sympathetic sheriff was removed, and then that county was found to be the worst troubled on the Borders. The English state papers reveal that this may well have been the case in Cumberland.

Letters to the Privy Council show that although the magistrates of Cumberland and Westmorland may well have been 'very hot' against papists, they were less enthusiastic about protestant dissenters. Daniel Fleming reported in February 1670 that a great conventicle of

200 was held near Rydal, but that several justices refused to issue warrants against them. Thomas Carr, in November 1676 reported that although the non-conformists were causing great trouble in the Cumberland area, the justices of the peace executed their orders 'coldly' or 'remissley'. Sir Philip Musgrave had bemoaned in 1667 the disloyalty of Cumberland, and attributed it to the fact that many justices were of the 'opposing party'. Furthermore, Daniel Fleming, in February 1676, revealed that many of the present justices were dead and that many of those that were left failed to attend meetings. This is not to say that the level of religious dissent was higher in Cumberland than Northumberland, for the state papers show that Northumberland was indeed extremely badly affected, but such accounts of the defective Cumberland justices, do cast doubt on the figures shown in the court profile and indicate that the true figures could be much higher. ⁸⁴

Under Tudor acts of 1555 and 1563, parishioners were to choose two surveyors of highways whose task it was to repair and maintain all roads within their unit. Some members of the community were to contribute money towards the upkeep of these highways, and others were to provide their free labour. It was the duty of the justices to punish those who reneged on these obligations, whether they be whole parishes or individuals. References to these offences occur frequently in the Order Books for Northumberland and Westmorland, where the grand jurors made frequent presentments about highways. Also, in addition, the justices had responsibility for the repair of bridges. In 1531 an act had charged counties with the upkeep of all bridges for which no liability could be found and proved to lie elsewhere, either with parishes, towns, or individuals. When bridges in need of repair were presented at the quarter sessions, the justices were able to levy rates and to appoint surveyors to organise the work.

Bridges which did not fall to the obligation of the county might also be supervised by the justices and they could punish those who failed to undertake the repair of any bridges under their care. The repair of bridges could be an expensive matter and if they spanned a boundary river, could cause problems - such issues could be referred to the judges of assize. By the end of the seventeenth century, the justices in Northumberland, at least, seem to have taken to raising a general levy for the repair of bridges in the county, rather than special rates for a specific bridge. In April 1688, for example, this levy was assessed at 20 shillings in the pound.⁸⁵

Since 1563, justices of the peace had been involved in deciding relationships between masters and servants. The Scottish justices' records are dominated by such issues, but none appear in any of the Border quarter sessions records. G. Forster found a paucity of master/servant issues in the East Riding court records also, with the justices issuing wage settlements only in times of abnormal labour conditions rather than annually. Barnes found that in Somerset, such issues tended to be dealt with by the justices out of sessions, as they were permitted to do by Elizabethan and Jacobean statutes. Perhaps this was also the case in the Borders.⁸⁶

It is in the quarter session Order Books that the justices' policies for the county can be most clearly seen, for it was in quarter sessions that the Privy Council's directives were debated and the best means of executing its proposals were decided upon. It was then the justices' duty to enforce these policies out of sessions. Because the quarter sessions was the meeting place for all the justices' in the county, with clerks and officials all present, documents tend to have survived for the sessions but not for the justices out-of-sessions activities. Yet their out-of-session activities were just as essential as those in quarter sessions. Out-of-session or petty

session documents survive for very few counties in the seventeenth century, but because the quarter sessions were the co-ordinating point between the central government and the activities of the justices amongst the grass roots of the county itself, the Order Books can offer insight into out-of-session activities. This is certainly the case in Northumberland and Westmorland.

The Book of Orders, 1631, had defined the out-of-sessions administrative areas and ordained that there be two active justices in each division. The justices were to meet singly in each hundred once a month, to receive the reports of the constables on the administration of the poor laws. The Delaval papers, however, reveal that the justices in Northumberland may have been acting in divisions, such as those laid down by the Book of Orders, since at least 1605. In August 1605, assize judges, George Snigg and Sir John Sayle had declared that justices of the peace in all parts of the country were to be separated into divisions to deal more effectively with out-of-session administrative matters. In September 1605, Sir William Selby, a justice for Northumberland, informed Salisbury that he had recently convened the first 'six week meeting' or petty session to be held in Northumberland. High and petty constables had been appointed by the justices, together with other lesser officials hitherto unknown, at least to Northumberland, and the justices reported that they had not only reduced the number of alehouses in the division from 105 to 15, but had ordered all vagabonds to leave the area. There is no further mention of 'divisions' until around 1618 and they may have lapsed during the interval. In, or around 1618 (the document is not dated), it was suggested by Sir William Selby and Henry Widdrington, that Tynedale and Redesdale 'etc.' should be divided and assigned to certain justices. These justices were to take charge and live in their divisions, in order that felons might be more rapidly discovered and apprehended. It was hoped that with a resident

justices of the peace in the area

noe fugitive can have so quietly either
 maintenance ayde or recite, noe theefe have
 meatinge with his fellowe theeves, noe fellony .
 so soone committed, noe trespass or misdemeanours soe
 soone done, but presently the justices of that
 quarter ... is ready to punish it while it is
 greene and before it grow .

87

T. Barnes, in his study of Somerset, has written, 'divisions were the prerequisite of the growth of petty sessions,' although he points out that 'the establishment of divisions did not in itself produce petty sessions'. For, although the justices may have met together at definite places to transact business referred to them by the quarter sessions, such meetings could not constitute petty sessions. Petty, or private sessions were regular meetings, fixed in time and place, whereby regularly appointed business was transacted. Thus a separate entity and function, distinct from quarter sessions must exist to constitute petty sessions. Barnes does not consider referral from quarter sessions, or occasional meetings to bind a few apprentices, or license a few alehouses, could constitute petty sessions. The 1631 Book of Orders was, he writes, an essential catalyst to the development of petty sessions; and he designates 1631 'the birth year of the petty sessions'.⁸⁸

Yet although the justices had been ordered to hold private sessions by the Book of Orders, the Northumberland justices had failed by 1637 to carry out its orders in that respect. A letter from the Privy Council to the Northumberland justices complained 'wee have received information that you ... doe not hold any monethly meetings for the punishment of Rogues and Vagabonds, binding over of apprentices and ye like publique services direct by his Majesties Booke of Order'. No information is available between 1637 and the 1670's, so it is impossible to say whether the Privy Council's directive was obeyed. 'Private Sessions' as they were called, were clearly in use in Westmorland during the 1650's and

1660's. It would seem that they dealt with mainly the assessment rates and the poor rates and the licensing of alehouses, malsters, badgers and drovers; although they could also take recognizances. From the orders issued in court, it would appear that the Interregnum justices used their private sessions for unlicensed alehouse, tipping and other moral prosecutions, but after the Restoration these were pursued in the court of quarter sessions itself. By the 1670's the Cumberland and Northumberland justices were holding regular meetings outside their quarter sessions, often as many as three a month. The Northumberland court called them simply 'sessions' or 'sessions of adjournment' and they could be held in a number of places throughout the county. The minutes of these meetings are often recorded in the quarter sessions Order Book.⁸⁹

The Northumberland records show that frequently the justices seem to have come together at these courts to find that 'no business' was required. This indicates that these were regularly appointed meetings, rather than special incidents to deal with material left over from the quarter sessions. There is, however, no regular pattern to them, which could indicate that they were supposedly monthly meetings which sometimes were delayed or postponed; or else that the Order Book has not recorded every meeting which took place. Where the business of the meetings has been recorded, however, the records show that the affairs dealt with by the justices were no different from those before the quarter sessions. For example, at the meeting at Moothall in Castlegarth, in February 1690, the justices decided issues over poor relief, constables, levied rates for road repair, organised preachers for the gaols and arranged the collection of 'Rogue Money'. At a meeting at the same place in April 1691, they took recognizances and heard a complaint against the highway in Cramlington. This type of business is such as would appear before the quarter sessions, rather than petty sessions, according to Barnes's

definition. Yet in the documents there is evidence that separate, specifically named 'petty sessions' were being held, of which there appears to be no record. The minutes of the meeting at Moothall in February 1690, reported that the times of 'private sessions' for alehouse licensing had been set. The documents preserved do not contain any record of these alehouse licences and so it would appear that the true petty sessions were in operation at this time and that in the adjournment sessions, one is witnessing something other than petty sessions.⁹⁰

The justices out of session had other important duties to perform in addition to licensing alehouses, and served, in the absence of a police force, as the detectives of the county. Taking examinations and informations was a crucial function, without which the assizes or the *Border Commission* could not have operated successfully. It was during these interrogations before the justices that evidence collected from various witnesses was compiled to produce a ready case against the accused.⁹¹

The English Border Justices: special features

Border justices of the peace had an extra administrative burden placed upon them - the maintenance of a Country Keeper. An act 'for the preventing of Theft and Rapine upon the Northern Borders of England' in 1662-3 (13 and 14 Charles II, cap. xxii), had ordered the justices of the counties of Northumberland and Cumberland to appoint at their sessions of the peace a Country Keeper. This Country Keeper was to employ not more than 30 men in Northumberland and 12 in Cumberland, 'whereby malefactors may be searched out, discovered, pursued and apprehended and brought to trial of the law.' A sum of money, not exceeding £500 a year for Northumberland, and £200 for Cumberland, was to be levied by the justices for those counties, which was to go to the Country Keepers for their safeguard and security.

From time to time at their quarter sessions, the justices were authorised to 'take good and sufficient Security of the Person or Persons by them employed in the said service', to ascertain that they were not negligent or defaulting in their duties. The duties of the Country Keeper would appear to be, primarily, to pay out damages for goods stolen within four months of the complainer proving on oath, before one or more witnesses, in front of two justices, that the goods had been stolen. Special books were to be kept for this purpose in every market town in Cumberland and Northumberland, and an official 'Booker' was appointed in charge of these records. In Cumberland, for example, there were 16 books under a 'general Booker'. It would seem that none of these books now survive; but an entry in the Cumberland quarter sessions records illustrates how these entries would probably have been made.

Whereas it appears upon oath that James Bell of Carby upon ye 11th of May last had two oxen stolne from Snawdon Close price 8 li and ye same was lawfully booked by Matthew Whitfield, Bookeeper there; It is ordered that Thomas Warwick Esq. treasurer of the Money Collected for ye Border Service doe pay ye said James Bell ye sum of six pounds for ye said oxen.

The original act established Country Keepers for five years only, but such was their popularity that the act was repeatedly renewed over the next hundred years. ⁹²

The Country Keeper was to be appointed, ideally, every year, but every two years would suffice; and upon taking up the appointment, he was to take the oaths of Allegiance and Supremacy. The Country Keepers were usually men of considerable standing in the county. ⁹³ Moreover, they were often justices of the peace in addition. Upon receipt of the money from the county 'for his sallary', the Country Keeper had to swear 'that he give God security' to be taken in the names of three justices' on the behalf of the whole County to answee and pay into every Inhabitant within the said County for all such Horses, Mares, Oxen, Kine, Sheepe and Cattle wharsoever which shall

be stolen as well out of houses, stables or Byres as out of the open fields'. Anybody who claimed money from the Country Keeper and then discovered their stolen cattle, was to pay all the money back. For example, Robert Waugh of Scotswood, in July 1692, was reported to have had a gelding stolen, for which he had been reimbursed with £15 by the Country Keeper. It was now reported that the gelding had been found and Waugh was to pay back the £15. One wonders how many people were tempted to claim money illegally through this scheme. Certainly, Joseph Taylor, Thomas Newton and Thomas Stobbert fell into such temptation, for they were ordered to appear before the quarter sessions for presenting false certificates to the Country Keeper in April 1696.⁹⁴

It would appear that the Country Keeper also had a judicial function although it is difficult to ascertain exactly what this was, as the statutes and instructions mention only his compensatory function. It seems clear, however, that the Country Keeper worked closely with the Border Commissioners. Mr. James Howard of Redesdale, Country Keeper for Northumberland, frequently attended the Scottish Border Commissioners' meetings and was often corresponding with them about stolen livestock. Furthermore, he was very keen to arrange remanding meetings whereby offenders were exchanged, and it was through him that most of the negotiations between the Scottish and the English Commissioners were carried out. The Country Keeper played an important part in the conviction of offenders before the assizes. In April 1693, the Northumberland justices threatened Thomas Blenkinsopp, Country Keeper, that if he 'do not Convict the persons att the next Assizes and General Gaole Delivery of the felonious stealing and takeinge away a bay mare of the goods and chattells of one Roger Haddock of Newcastle upon Tyne', he would be compelled to pay for the goods himself. This statement sheds an important light on the

role of the Country Keeper in establishing law and order on the Borders.⁹⁵

The task of the Country Keepers would, at first, seem unenviable; for if money was paid out by them in advance, it could be very difficult to obtain reimbursement from the justices of the peace. Yet despite this, the position was sought after. Mr. James Howard served as Country Keeper for 'several years' and created tremendous resistance when the post was offered to Edmund Craister in 1683. Indeed, there seems to have been quite stiff competition for the post, although James Howard was eventually successful in retaining the position. The reasons for the popularity of the post can only be guessed, but it would appear that the Country Keeper levy was paid as a 'salary' to the Keeper and out of that he was to pay for all the cattle stolen and not returned. If the thief was captured, either the goods themselves or the value of the goods would be returned to the wronged party by the thief, and not by the Country Keeper. Thus, it was in the interests of the Keeper to detect and apprehend as many of the thieves as possible; hence the close co-operation with the Border Commissioners. It was only when the thief remained undetected and his restitution thus unpaid, that the Country Keeper parted with his own money. An efficient Country Keeper, then, could well end up with a good financial profit at the end of the year, which was, doubtless, a tremendous incentive to law and order!⁹⁶

The theory behind the justice of the peace system was perfect; in practice, however, the system had its faults. Most justices, as unpaid amateurs, were not conversant with the finer points of law, although there may have been legally trained justices present at the quarter sessions. Their attendance, however, was not compulsory and as shown above, much work was devolved on individuals or small groups of justices acting outside quarter sessions. Nor, it seems, would

the amateur justices always listen to their professional colleagues. At the 1663 assizes in Hereford, Hyde told the justices of the peace to abide by the legal rulings of the lawyer justices 'and not (as is commonly practised) put to the vote of many ignorant justices on the bench according to their fancy and opinion'. Examples such as this within the county of Wiltshire, have led Hurstfield to conclude that the justices of the peace may have meted out a harsh 'rough justice'. Yet it was not unknown for the assize judges to take upon themselves the education of justices in legal matters. Cockburn has discovered 'a wealth of information to suggest the immense influence exercised by the judges on the thinking of rural justices and on the conduct of their routine duties'. Indeed, as shown in the above chapter, the assize judges shared much of the administrative burden of the county with the magistrates and, in this respect, could be viewed as senior partners, to whom legally delicate cases could be referred. Yet the fact remains, that so long as the record was properly compiled, there was no appeal and in the absence of such, it is impossible to tell whether the business transacted was as perfect as legal theory required. The system of appeals in the seventeenth century was very crude and rather vague. Appeals were only possible in bastardy cases and where the finding and order of the justices out-of-session was a referral from quarter sessions.⁴ When the justices out-of-session were granted by statute, the right to hear and determine cases, the court was unable to overturn their findings.⁹⁷

The type of person who came before the justices' courts, seems to have come from all except the top levels of the social scale - from paupers and vagabonds to gentlemen. By far the largest social category, however, was that of 'yeoman'. As shown in the chapter on the assizes, the term 'yeoman' could indicate a multitude of possible

occupations, but it does serve to show that most offenders brought before the justices of the peace were of a social status of less than gentlemen. . . . There would always be fewer gentlemen in the records because there were fewer of them in society, but the relative paucity of number of gentlemen could also help to explain why the justices were reluctant, or indeed unable, to prosecute a person of their own social status. In March 1623, for example, Attorney General Coventry advised that the investigations by justices against Roger Widdrington be referred to the assizes, because Widdrington was too powerful to be dealt with by the justices alone. ⁹⁸

A petition from Sir John Ballentyne, Anne his wife and Dorothy, widow of William Musgrave, of Cumberland, revealed that this sort of predicament was still prevalent after the Restoration. Dorothy had been legally left William Musgrave's land, but William's uncles, George and William, persisted in making forcible entries against her and threatening Sir John, demanding that they be given the land. The petitioners had requested that the magistrates of Cumberland protect them from such bullying, but reported that William and George Musgrave were 'so potent in the county' that the justices dared not interfere. It must have been particularly difficult for the justices to prosecute recusants, many of them being of old established, aristocratic families. ⁹⁹

Being part of the community of the county, then, the justices were naturally often entangled in the factions which existed in most regions. King James I considered that justices 'go seldom to the King's service but when it is . . . to help their friends or hurt their enemies, making justice to serve for a shadow to faction and tumultuating the county'. The 'high feud' between the Musgraves and the Lowthers and Fletchers, in Cumberland in the 1670's, was probably

typical of the type of factional squabble which could detract from the justices' effectiveness against law and order. In February 1676 Sir Philip Musgrave reported to Sir Charles Musgrave that Lord Carlisle and Sir George Fletcher sought to make him 'insignificant' in Cumberland, by undermining his authority. As all three were justices of the peace, their impartiality must have suffered in their attempts to get the better of each other. Indeed, Sir Philip Musgrave reported that 'I know the greater part of the justices in both counties [Cumberland and Westmorland] dislike their [Carlisle and Fletcher] arbitrary magisterial proceedings'. The dispute was so deep that it had to be referred to the assize judges in order to be resolved. In the early part of the seventeenth century especially, factions had led to the protection of certain criminals, which severely hindered the path of the justices of the peace. A letter of April 1618 from the Privy Council asserted that 'malyfactors and Theeves are both countenanced and mayntayned by Justices of peace' and that 'some that have bene Comytted for apparent fellony by one Justice, have ben without his consent bayled by another Justice'.¹⁰⁰

Throughout the seventeenth century, justices of the peace from all counties were repeatedly harangued by the Privy Council for negligence or laziness. James I called the justices 'idle low bellies that abide always at home', and it was certainly true that some justices, having attained a position of eminence in the county were content to sit back and let others do the work. Others were old or sick and often unequal to the demands that were made of them; so they went into voluntary retirement. Thus, as shown above, the active policing of the county was left to a small handful of zealous justices. Some charges of negligence, then, arose because the few active justices were so hard pressed that there were simply not enough of them or

enough time to carry out assiduously all the demands made of them. This situation had probably led to the criticism of the justices for Northumberland in 1637. In 1667 Sir Philip Musgrave wrote that he wished the older justices would attend the sessions more frequently in order that the younger ones could benefit from their experience. ¹⁰¹

In some cases, the small number of active justices seem to have been consciously negligent with regard to certain specific matters. This attitude was especially noticeable in the realm of religious prosecutions. As Sir Philip Musgrave wrote to the Privy Council in February 1676, 'if a strict account be given of justices whose zeal for the Church has made them proceed to put in execution the laws against the enemies of it, the number in this county [Cumberland] would be small, and fewer in the barony of Kendal'. Isaac Basine, a Northumberland justice, reported instances of disaffection in the magistracy of that county in 1683. He claimed that when some of the justices who met at Morpeth in January 1681, made several proposals for suppressing 'fanatics' and preserving the peace, they were given small encouragement by John Blakiston, J.P. and others. Furthermore, when information was given to the bench by the grand jury at Christmas 1682, of a dangerous conventicle of 500 armed dissidents, John Blakiston had laid aside any proposals of action against them. It has been shown that John Blakiston was one of the most active justices in Northumberland in the post-Restoration period, which illustrates clearly, just how reliant the central government was on possibly biased officials to carry out its policies in the provinces. It also illustrates how the prosecution figures in matters of conscience, particularly, can bear little relation to the actual incidence of the offences. ¹⁰²

The central government, however, was well aware of the shortcomings in its local government officials and sought to try to regulate and supervise them as much as possible. Their directives were issued in minute detail and left little room for the exercise

of magisterial 'discretion'. This allowed the Council to demand strict accounting by the justices of their execution of the law. The assize judges were the traditional supervisors of the justices of the peace and their role as such was confirmed by the Book of Orders. Indeed, the Book of Orders itself reflected the central government's concern with frequent reports of negligent justices. It authorised that the assize judges were to

give unto us a particular and true information of the case and industry of our justices of the peace ...as upon the said inquiry you shall find diligent in putting the said laws, statutes, orders and directions in execution; ... and if contrariwise you shall find any of our said justices of peace negligent and remiss in their... performance and execution of the said laws and statutes committed to their charge, or the orders and directions given by you; ... then our pleasure is that you do likewise certify the names of such as you shall find so remiss and negligent that accordingly order may be taken of their removing and displacing out of the Commission of the Peace, as men unworthy of their said trust and places, as also deserving such further punishment in our court of Star Chamber or otherwise as may by law be inflicted upon them.

In practice, removal from office, as described in the Book of Orders, was rare, with the formal machinery of discipline lightly used. Nevertheless, the assize judges maintained a considerable informal influence over the justices in the provinces. Justices could be fined for not attending the assizes, or for procedural errors in their work out of sessions, and the judges were officially appointed to hear appeals against quarter session administrative orders. T. Barnes found that there were few of these appeals in Somerset and the records for Northumberland and Cumberland would conform with his findings. Nevertheless, 'the appeals served as a constant reminder to the justices that they were strictly accountable at law for the exercise of their authority'. 103.

The assizes have been called the 'mirror of the State', but it was the justices of the peace who gave the assize judges the image

to be reflected back to London. For, in addition to their crucial judicial and administrative functions, the justices were the permanent eyes and ears of the central government in the counties. The State Papers are full of reports from local justices to the Privy Council, containing details of the political and economic state of their respective counties, disputes between powerful private persons, personal judgements on other justices' actions, in addition to asking advice or referring cases to the Council's judgement. Thus, first hand knowledge of the provinces was conveyed to central government. Sometimes, however, one receives the impression that the justices reported what they wanted the central government to know. For example, in 1604 the King wished Northumberland, for the first time ever, to contribute towards a loan. The justices for that shire promptly reported that Northumberland was in a terrible state, greatly impoverished by a recent wave of crime; the sheriff was unable to locate suspects the justices had ordered him to capture, and an outbreak of plague had severely upset law and order in that area. This convenient reply secured Northumberland's exemption from the loan. ¹⁰⁴

In general, however, in terms of routine administration, the Council was probably quite well informed on the state of affairs in the Border counties. In terms of political reports and any assessment of the counties' reactions to recent central government policies, the government could only receive the personal opinions of the justices, which it had to assess for reliability. Sir Philip Musgrave, for example, was a most assiduous reporter on post-Restoration Cumberland and Westmorland; but he was not an impartial observer with regard to his feud with Sir George Fletcher. Such reports, however, would be compared with those of the assize judges and from the two, the government

would form its opinion of the county in question. Yet the central government itself was not an impartial receiver of information, and the true state of affairs in any one county is likely to have eluded the Privy Council, who heard only what it wanted to hear and acted accordingly. 105.

In all then, the English justices of the peace were a most valuable instrument for the central government. Virtually upon them alone relied the policing of the counties, the detection, apprehending and presentment of criminals, to their own courts of quarter sessions, or to the higher courts of assizes. In the Borders especially, the justices were of central importance - acting as Country Keepers, and on the vital special commission for the Borders. They were the local government officers of their day - administering the welfare system of the time and regulating the economic and market forces within their respective shires. Not only were they in charge of a county's communications system, its roads and bridges, but they also determined the nature of the county's morals. In many ways, the central government must have been forced to overlook all but the most heinous defects in the justices, for without their support, the development of the centralised, modern state would not have been possible.

In Scotland, where the justices of the peace were not introduced until 1609, the process of centralisation was much slower. Whereas the English justices reigned supreme as local government officers, the Scottish justices were undermined by the franchise courts and sheriffs, and the Interregnum interlude was too brief for them to establish any authority in that sphere of their work. Documentary evidence is sparse, but it would appear that by the last quarter of the seventeenth century, the Scottish Border justices were consolidating their position as local government officials. By that time, certain factors were operating in their favour which had not

been present in 1609. The Union of the Crowns had been in operation for over 70 years, and it is highly unlikely that there were any people alive who could remember the pre-Union days. This must have made for acceptance of England and English ways. These ways had been brought especially close to the Borders, where the English justices of the peace, acting as Border Commissioners, were in close communication with the Scottish Commissioners. The excellent work of the Border Commission in pacifying the Borders must have gained them some respect from the population as a whole and certainly seems to have won the support of the Crown. They may, then, have prepared the way for the re-establishment of the justice ayre, which started to travel the country more regularly from the 1670's onwards. Yet despite these improvements, the contrast with England was still very marked.

CHAPTER VIThe Franchise Courts

In 1603, an English writer, pondering on the Scottish legal system, wrote with incredulity of the Scottish franchise courts, 'whereof the Principall are not of the princes gift and disposing, but hereditary.' He marvelled that the holders of these jurisdictions were not only to execute justice, 'but themselves to sitt and determine within their precincts in Civill and criminall causes of Justice.' Moreover, 'divers of the nobility have hereditary power to execute and pardon within their precepts and jurisdictions absolutely as the King hath, which cannot be taken from them, nor superseded by the Prince.' Certainly, from the English point of view, the franchise courts of barony and regality were the most striking feature of Scotland's legal system.¹

It was not the fact that jurisdictions were held by heredity that was so remarkable, for England too, had feudal manorial and leet courts, which, although of declining importance in the seventeenth century, still had the power to deal with minor civil actions and petty breaches of the peace. It was rather that royal officials, and indeed, the King, in Scotland, had no control over some of the more important courts. This was in stark contrast to English practice where the justices of the peace and the assize judges were able to override the boundaries of the feudal jurisdictions, and all central courts had superior authority over the whole realm. Furthermore, within some of the Scottish franchises, all justice could be carried out 'absolutely without appeal to the prince.' This was again in contrast to the situation in England, where the feudal courts had no power to try felonies and certainly could not impose a corporal punishment, let alone a capital sentence. In short, some of the franchise courts of Scotland were 'kingdoms' within the kingdom of Scotland, a situation which had long since vanished in England.²

I. The Scottish Franchise Courts

(i) Competence

Not all franchise jurisdictions had the same powers. Although there were two main categories of franchise courts - regality and baron - even the authority of those courts within the same category could differ according to the type of charter they had been granted.

The most important and complete form of private jurisdiction was that conferred by a grant in regality. By 1747, there were about 160 such regalities in Scotland. In theory, a regality (sometimes called a bailiery, or justiciary court) was a 'sub-kingdom' and the lord of regality had exclusive rights of justice over all persons dwelling within the area over which he had authority. These people were frequently called 'indwellers'. The civil jurisdiction of a regality court was equal to that of the sheriff but the criminal jurisdiction varied according to the grant of the charter. However comprehensive their charter, no regality court could ever try treason cases, although the right to hear the 'four pleas of the crown' might be granted.³ Such a situation could arise, then, as in Argyll; where in 1718, the justiciary court of Argyll and the Isles claimed that it had a 'co-ordinate jurisdiction' with the King's High Court in Edinburgh. Indeed, this large regality had also developed an administrative organisation modelled on the central government system and, like several of the larger regalities, had a central secretarial office from which the lord's brieves were issued to his justiciar, baillies, sergeants and other officials, who were to execute them. If the regality was extensive, a system of itinerant jurisdiction, along the lines of a justice ayre could be established. Such was the case in Stirlingshire, where the regality of Montrose held a justiciary court which went on ayre. The regality court of Jedforest also held justice ayres. Regalities which escheated to the Crown, retained their separate administration under the jurisdiction of a steward appointed by the Crown. Within these stewartries (as they were known), smaller jurisdictions were likewise

separate and were known as baileries because they were administered by a royal baillie.⁴

In the case of all regalities, the sheriff was excluded from their bounds. (Some even excluded the justiciar). In the case of newly granted regalities, the inhabitants immediately became exempt from the jurisdiction of the sheriff or steward, 'albeit heritably infest in the office and [in] possession of the jurisdiction long before the granting of the regality.' Furthermore, the lord of a regality could claim competence over any indweller within his jurisdiction who might be summoned before another court, whether it be that of another lord, a sheriff, or even a royal justiciary. This process, known as repledging, has been described in Chapters I and IV. The right of appeal from a regality court was to Parliament only, but it was the regality courts themselves which were the courts of appeal, in criminal cases, for the lesser franchise jurisdictions - the baron courts.⁵

The baron courts, the basic unit of the franchise courts, were not as important as the regalities and were subordinate to them, or to the sheriff. Baronies varied in size from very large ones in the Highlands, to small ones, such as the barony of Halydene near Kelso. The baron courts' competence in criminal and civil matters was equivalent to that of the sheriff and the sheriff, if the barony was not under a regality, had to be present at the court if any matter of 'life or limb' was being tried. Unlike the regalities, the baron courts, unless within the jurisdiction of a regality, were unable to exclude royal officers.

Grants of judicial power to private individuals had been a feature since feudal times in Scotland and by 1603 were of the utmost importance in the administration of law and order. T. I. Rae has calculated that at the end of the sixteenth century, within the three sheriffdoms nearest to the English border

(Roxburgh, Dumfries and Berwickshire), there were at least 104 franchise units in existence. Nine of these were regalities and 95 were baronies. Franchise jurisdictions had not evolved as a result of irresponsible behaviour by the crown, but rather because the medieval Kings of Scotland were unable to exercise their regalian power and rights on their own behalf. Consequently, powerful local lairds and magnates were given regalian rights to exercise within certain bounds. This practice rapidly created a complex situation. An ambitious family could acquire additional lands with the accompanying judicial authority. Not only could this mean that a large number of baronies could be held by one individual, but that, on the acquisition of additional power from the King, such baronies could be incorporated within a regality. All lands comprising a barony or regality formed a single unit of administration or jurisdiction even when they were not contiguous. Thus, lands scattered throughout several shires could be subject to one franchise court. Conversely, the holder of several lordships would always have a separate court for each group of vassals. An example of such can be seen in the documents of the Berwickshire baron courts of Godscroft, Horndean, Wedderburn and Coldingham which were all held by the Homes of Wedderburn. The records of the regality court of Jedforest show that the jurisdiction of the court covered places not only in the Jedburgh area but also in Lanarkshire and Haddingtonshire.⁶

The holders of these franchises were men of considerable importance in the Borders and often in the realm of Scotland. They were frequently leaders of local politics and their actions and opinions were of great significance to the central government. In many cases, they were also holders of other jurisdictional offices.⁷

From the records of the Border courts, there would appear to be a distinct difference in this respect between the regality and baron courts. Powerful national figures, such as the Earls of Haddington, could hardly appear at all

their baron courts in person. On the other hand, the Pringles of Stitchill and the Nicholsons of Cockburnspath usually did preside over their own baron courts. The lords of the baronies held their courts in conjunction with their baillies, but in the case of regalities, the lord of a large complex, such as that of the regality of Jedforest, would be unable to preside at the courts of his more distant baronies, even if free from national duties, and would therefore, have to depend on the efforts and competence of his baillies. Where the baillie's role was more important, the men who filled this position were of more substantial status than the baillies of independent baronies who were of more humble stature.⁸

T. I. Rae has calculated for the sixteenth century that of the 95 Border baronies in Berwickshire, Roxburgh and Dumfriesshire, almost half were administered from a distance through baillies. He concludes that 'such units could not have been so effective in helping to maintain order in this troubled area as were locally controlled franchises.' Whatever local importance men such as Pringle of Blindlie or Don of Newton may have had, as baillies, they were always subordinates and responsible to the central administration of the private individual who held the franchise. Yet although they could not equal the position of such as Lord Bynning and Byre or Lord Roxburgh, the fact that some of these were Border Commissioners and justices of the peace could mean that they were more respected than has been suggested.⁹

The special judicial position enjoyed by some magnates was a source of constant irritation to James VI and I, who viewed the regalities as a challenge to his power. In Basilicon Doron he wrote: 'The greatest hindrance to the execution of our lawes in this countrie are these heritable sheriffdomes and Regalities, which being in the hands of the great men, doe wracke the whole countrey.' In 1617, he appointed commissioners to consider the heritable offices and report on them, but little was ever done to reduce their power and

authority. Further appeals to Parliament for their abolition in 1633 and 1662 were likewise ineffectual.¹⁰

The vast areas of Scotland which led separate existences from the central government were as intolerable to the Cromwellian regime as to James VI. To ensure the loyalty and thus the political stability of Scotland, these areas had to come within the control of the central government. Thus, in 1652 the heritable jurisdictions were abolished in Scotland. An act of Parliament in 1654 ruled that in every parish each baron should resume his former jurisdiction and hold a court of justice, along similar lines to those of the English courts leet - taking cognizance of petty debts and trespasses. Yet the records of Melrose, Stitchill, Kelso, Cockburnspath and Elshieshields reveal little difference in the type of business before those courts in the 1650's and at other times. Like the earlier attempts to squash the heritable jurisdictions, the Cromwellian regime failed because it was unable to fill the gap which would have been left if the multitude of franchise courts had ceased to exist. In the absence of a sufficiently large number of loyal and capable officials, the government could only tolerate the franchise courts in acknowledgement of their crucial position in the judicial structure of Scotland. It was not until 1747 (when the Hanoverian government had a suitable replacement and sufficient funds to pay out the vast sums of money demanded as compensation by the franchise holders) that the regality courts were finally abolished and the jurisdiction of baron courts limited to fines of a maximum of £2 in civil and £1 in criminal suits.¹¹

As in the sheriff courts, the barony and regality courts were officially opened by the ceremony of fencing, whereby all tenants and freeholders within the franchise were charged to appear. From the lists of absentees drawn up by the Melrose court, it is apparent that many of these failed to attend. The court at Stitchill was held at the Kirk and the Elshieshields court at the

'mansion house' of Elshieshields; but the records of the other courts do not state the actual location. The frequency of the courts seems to have been variable. The most complete baron court record, that of Stitchill, shows that the court met anything up to four times a year, although in some years, such as 1687, 1689, 1690 and 1701, it never met at all.¹²

Occasionally, the records of Stitchill state that a 'heid court' took place. All except one of these head courts took place in the last three months of the year. Furthermore, the most popular months for courts were November, December and January, followed by May. It could be suggested, therefore, that barons aimed at holding one court in the summer and one in the winter. The records of the regality of Melrose, however, show that many more courts were held in a year, in fact, up to three a month. Again, as with the Stitchill records there is a seasonal variation in the number held. Very noticeable are the few courts held in the month of September; which indicates that the regality of Melrose like the sheriff courts, had a vacation for harvest during that period. The Melrose records also show that 'head courts' were held at certain times of the year. In 1664 for example, there were three head courts, in February, June and October, indicating that courts should have been held at regular intervals. Lists of freeholders and tenants appear in the records for October 1606 and June 1607, which also indicates a special occasion, although those courts were not specifically named 'head courts'. As in the Stitchill records, there is no apparent difference in the type of business before the head courts and the ordinary courts.¹³

The method of prosecution seems to have been the same in both baron and regality courts. It would appear that this could be either by complaint by the pursuer or by a procurator fiscal. In cases of bloodwit, riot, assault, theft, or similar more serious issues, the fiscal was always the prosecutor.

He also prosecuted in some cases of woodcutting, linen steeping and abstracted miltures.¹⁴ In all these cases the fiscal could adopt a supportive role to the pursuer's complaint. From the early 1680's onwards, the Melrose court records show that nearly all the cases before that court were prosecuted by the fiscal. As in the sheriff courts, it would appear that the fiscal gradually became a permanent official of the court towards the end of the seventeenth century. The records of the regality of Jedforest however, show that even in the early seventeenth century, the serious actions were always drawn up as official indictments, in the same manner as the High Court of Justiciary. These show the highly organised nature of that important regality, in comparison with the smaller regality of Melrose, and underline how the powerful regalities sought to establish themselves as sub-kingdoms.¹⁵

The court profiles show that the type of cases before the franchise courts studied were very similar to those before the sheriff courts. Within the Stitchill records, the debt cases far outnumber the rest and the Elshields court mirrors Stitchill in this respect. The number of debt cases before the Melrose court is also striking. Between 1657 and 1675 there were 2190 actions for debt, compared with 831 of all other cases. A great deal of the franchise courts' time, therefore, must have been taken up with settling petty monetary disputes between the indwellers.¹⁶

The regality court of Melrose also bears a close resemblance to the sheriff courts in the proportion of time given over to land disputes. Actions of removing, pasturing disputes, ejection and 'violent profits' were frequently decided in that court. This was a common feature of regality courts and a similar pattern has been found in Stirlingshire. These courts would be the natural courts of first instance for land actions involving the holder of the jurisdiction. In May 1668, for example, John, Earl of Haddington ordered 53 portioners and indwellers of Gattonside, Bridgend, Westhouses and Darnick to remove from their lands so that he might enter and dispose of them. In June 1673

CASES BEFORE MELROSE REGALTY COURT 1605-09, 1657-76, 1682-4

TABLE 32

	1605	06	07	08	09	57	58	59	60	61	62	63	64	65	66	67	68	69	70	71	72	73	74	75	76	P2	P3	84	TOTAL	
DEBT	7	22	19	31	2	91	101	124	165	91	155	149	133	93	121	63	112	75	69	124	129	113	180	102	26	6	16	8	2326	
THEFT			1				2			1	5	1	1	4						1		1		3					20	
MURDER																						1							1	
UNAD DISPUTES	2	17	12	3	3	3	5	1	4	6	4	6	11	2	13	8	57	9		7	15	43	1	2		2		2	238	
GOOD NEIGHBORHOOD		1		1		1	7	11	4	2	20	22	2	1		3	5	2			9	1	2	12	1				107	
MARKETING-OFFENCES					1	1							25										1	1					29	
RUBO AND RIOT		2	21	23		8	2	2		2	23	12	12	3		1	3	10		2	6	1		3	1		1		138	
FEMALE DUES		1	21	72		6	3	6	8	8	17	2	2	9		10	10	1	6	15								1	6	194
GRIEVES		4	4									1	2	2		1	1		1	1	4								22	
TRIPASS								1	1	5	1			1	1	7			5		1				2		2		35	
SLANDER		1	1			1	1				1		1				1												7	
BROKEN CONTRACT			1	1			3	1	2	1	2	2	3	3	1	4	4		5		1					2			38	
SPUIZIE/DETAINING						8	3	3		3	7	3	1	3	2	4	6	1	1		7	2	4	1				1	60	
SERVICE REGULATION		1				4	8	2	1	1	2	2	3		2		5	2	1	2	5	4	4	9					58	
DEKULMENT			1	1		3			1		2	2	5									4							19	
CONVENTIONS																													144	
NOARRIV OF LEGAL OR RESUL STRIS		1					2	19	6	4	1	2	2	1		63		2	3		3		24						133	
MISDEMEANORS			2	1		1			1			3							1		1								11	
TOTAL	9	50	82	133	6	127	137	170	193	124	240	207	203	117	144	154	204	102	92	153	181	169	226	136	30		187		3577	

CASES BEFORE KILSO DISTRICT COURT, 1623-6, 1641-51, 1659-74

TABLE 34

	1623	24	25	26	41	42	43	44	45	46	47	48	49	50	51	59	60	61	62	63	64	65	66	67	68	69	70	71	72	73	74	TOTAL
DEBT																1	3	1						1	1						1	8
THEFT	1	16	2								1											1	7	2	1		1				33	
MURDER																									1						1	
ADULTERY				1																											1	
WITCHCRAFT		1																													1	
LAND DISPUTES	1																														1	
GOOD NEIGHBORHOOD						1	4	2		2	1	1	1		1		2														15	
GLOBAL AND RIOT	10	32	64		2											1	1					2	2	1	1	1				116		
ARSON																								1							1	
MURKETTIDG OFFENCES	3															1									1						5	
LEGAL / MEDICAL AOS																26	1							#							131	
MISCELLANEOUS		1																								1					2	
UPPERHOUSE		2	7	1																											10	
TOTAL	15	52	74	1	3	4	2		2	2	1	1	1		1	28	7	2				3	9	109	3	2	2	1		1	325	

COMPILED FROM S.R.O. R/11/1/2/1
 # ALL THESE ARE CHIMNEY TRANSACTORS
 # OF

a further 43 were ordered to remove for the same reason. The baron court records do not show the same concern for land disputes - there are only two 'intrusion' cases in the whole of the Stitchill records and none in any of the other records. This was probably because such actions were automatically sent to the regality court within which the barony was situated.¹⁷

The traditional sheriff court actions of spulzie and detaining feature in all the franchise records, together with cases of 'intromitting' or 'intromission'.¹⁸ Such actions are important in the Melrose documents, although not so prominent in the baron court records. The penalty for spulzie or intromission was usually a fine, together with an undertaking that the goods taken would be restored. In addition, the offender was required to pay certain expenses to the court. John Taylor in Stitchill was ordered to pay three shillings expenses on top of his £5 Scots fine, for the spulzie of a nag in November 1691. From the debt cases, it appears that there could be little difference between spulzie and debt, and between spulzie and theft. A case in the Stitchill records is actually given as 'spulzie and theft' in November 1691.¹⁹

Actions of riot, bloodwit, brawling, blood and deforcement were clearly an important part of all the franchise courts' business. All barons were allowed to try anybody who had committed riot, blood, or oppression on any of their tenants, before the delinquent left the barony, and within four days of the crime being committed. In practice, the four day rule seems to have been considerably stretched. Balfour considered that the baron had power to

sit and cognose upon all actions of blude, gif the committar
or doar of the blude did the same within the baronie or
within the bounds of any pertinent or pendickle thereof, and
was takin reid hand with the blude.

A baron was the lowest degree at which anyone could sit upon an issue of blood. If, however, one of the parties belonged to a regality, the case was automatically

heard in the regality court. In the baron courts of Stirlingshire, cases of riot and bloodwit are very few: the barony of Cambuskenneth, for example, dealt with only eight cases of riot between 1709 and 1747. There are far more cases than that at the Border baron courts, indicating that either a more unruly society existed in the Borders, or that, by the early years of the eighteenth century, society in the rest of Scotland in general had calmed down. Certainly, the records of the baron court of Stitchill show a decline in the number of such cases heard, although this could be part of the general decline in all cases which is exhibited from 1700 onwards. The Melrose regality records show that such actions were very common in the early part of the seventeenth century and also just after the Restoration, but tended to decline towards the latter half of the century. The Kelso records show the same pattern. Bloodwit was treated as a quasi-criminal action in the franchise courts, as in the sheriff courts, with indictments drawn up and prosecuted by the fiscal. Deforcement too, was treated in this way.²⁰

With the exception of the Kelso court record, there are few criminal actions in the documents. In Stirlingshire, it was found that 'criminal actions were almost unknown in Baron courts' and in the regality courts 'theft cases were even rarer than in the sheriff court.' The competence of a baron in criminal matters was equivalent to that of the sheriff, which meant that he was unable to cognose upon the 'four pleas of the crown.' Like the sheriff, a baron was only competent to judge cases of theft where the offender had been caught 'in manifest thift sic as hand-havand and back-beirand.' If the thief was not apprehended in this way, then theoretically, the baron had no power to sit upon the case, even if it was obvious that the individual accused was guilty. Scottish law in the seventeenth century had pronounced that there were two types of theft - one committed by an indweller in the barony upon another within that barony, known as 'infang theft'; and the other committed by a person living

outside the barony upon one living within, known as 'outfang' theft. Barons could be granted the liberty to try both, or either. Thus, those with the grant of outfang, as well as infang theft were able to cognose upon all theft committed within the barony, provided the thief had been caught 'with the fang'. If however, the thief escaped out of the bounds of the barony, the baron lost that privilege. 'It is not leasum' wrote Balfour, 'to the Baron of the same baronie, to reduce and bring him agane and judge him be reassoun of his privillidge and libertie, quidder he be his awin proper man or not.' As capital crimes, theft cases could only be tried by a baron if the sheriff or his depute was present. By the eighteenth century, most baronies belonged to a regality and so the more serious charges were normally evoked to the higher court, which might account for only a single case of theft to be found within the baron court records studied.²¹

In theory, the baron also had the same right as the sheriff to try cases of slaughter, although not of murder, providing that the sheriff or his depute were present at the trial. It was required by Scottish law that the baron *should arrest the 'manslayer' within his barony and then present him to the sheriff; or, if he had the liberty, to do justice upon him himself.* After recording this act of 1426, Hope added 'Nota de practica barrons doe not punische slaughter.'²²

Over the 28 years covered by the records, Melrose dealt with 20 cases of theft and all but a handful of these were thefts so petty that they are indistinguishable from spulzie. The penalties for these crimes were accordingly small and eight of them were absolved because there was no proof.²³ There are only six 'serious' cases in the whole of the Melrose records and three of those were absolved because there was no proof. Of the three that remain, the most

serious case seems to be that of George Pringle in Westhouses and two accomplices who were accused in November 1662 of carrying off 28 lambs, five ewes, and one cow, in June 1662; of stealing a cow later that same month; of house-break and theft in July of that year, and of the theft of a bull stirk in October. Yet the decree of the court was that all the goods were to be refunded and £10 Scots expenses to be paid. This was not the kind of penalty for a really serious case of theft.²⁴

The cases of theft before the Kelso court are in contrast to those at Melrose, although certainly there are cases of petty theft. In the 30 years covered by the record, there are 33 cases of theft, 29 of which were sufficiently serious to deserve the punishment of banishment, and one of which merited corporal punishment. Even the fragmentary records of the regality of Jedforest show that the types of theft before that court were of a far more serious nature than those before the court of Melrose. All the 17 cases of theft which survive from the Jedforest documents for the early seventeenth century, would not have seemed out of place among the records of the Border Commissioners. All were indicted for widespread livestock theft. For example, James Langton was indicted for the theft of 28 sheep and one cow in 1610 and John Carruthall in Redmyre was found guilty of the theft of 25 cows and 4 horses in January 1620.²⁵

None of the records contain enough slaughter or murder cases to permit any comparison between the attitudes of different courts. Regalities in general were supposed to have the equivalent jurisdiction to that of the High Court of Justiciary, except as shown above, murder was one of the 'four pleas of the crown' which was not covered by the charter to Melrose regality. That regality then, would be confined to the trial of slaughter, as were the sheriff courts. There is only one slaughter case in the Melrose records and it is difficult to ascertain if the above conditions applied: John Halliwell, a weaver in Gattonside

had been imprisoned for 'most unnaturalie' striking his wife with his hands, in July 1673, 'by which strokes she immediatelie deid.' He had escaped from prison whereupon the court declared that he had 'taken the guilt upone him'. There is only one murder tried before the Kelso court.²⁶

Arson was one of the 'four pleas of the crown', but barons were able to try and punish those who 'ryses fyres reclieslie' within their baronies, as distinct from arson and wilful burning. The regality of Melrose records contain a complaint against the inhabitants of Ridpath who had 'Brunt Craighouse' in 1606. However, an inhabitant of Ridpath protested that no action should be taken until the complainer had produced certain documents. The court conceded the request. It is difficult to determine the exact meaning of this, as no further mention of the action is contained in the records. On production of the documents, either the property was found not to belong to the complainer; but rather to one of the accused, in which case no arson action could be brought; or else the case moved to the High Court as one of arson. No such cases appear in the baron court records.²⁷

One further difference is evident between the baron and regality court records. As the sheriffs were empowered to issue brieves of service of inheritance, so the regality courts appear to have done the same. In July 1664, an edict of curatory was issued at the instance of George Blaikie, who having reached the age of 14, chose his new curators. Unfortunately, as all three refused to take up the office, the baillies had to choose two other portioners of Melrose to replace them. Baron courts were unable to act as courts of record in which contracts and writs might be registered, but, like the sheriff courts, the regality courts were able to do so. Not only were bonds of debt registered with the court. In September 1648, letters of lawburrows between John Peter and Mr. Alexander Home of St. Leonards and eighteen others were registered with the court at Melrose. A baron could, however, take lawburrows from persons within his barony.²⁸

Similarities between the barony and regality courts appear in their eagerness to enforce feudal obligations. Most prominent of these were for payment of rents, maills, fermes and dues to the laird.²⁹ Fermes and maills were the rents due on a farm and like the other dues were paid annually either in kind or money. Where former ecclesiastical lands had been alienated from the church, tiends or tithes were also payable to the holder. If they were still held by the church, then the baron or regality court could enforce the payment of them to the church. Payment of the stipend to the schoolmaster seems also to have come under this category. According to the Melrose court, a roll was first drawn up of all the feuars of the area and of the money they were to pay towards the maintenance of the schoolmaster. The annual payment in 1666 varied from 11 shillings to be paid by James Patterson, to £5 10 shillings payable by Mr. William Wallace of Heyburne. In the small baron courts, however, such as Elshields and Cockburnspath, the records show that the court seemed to exist primarily for the economic benefit of the holders of these jurisdictions, Sir James Johnston and Sir James Nicholson. The majority of the cases in those records are concerned with the feudal dues owed from the tenants to the laird. The baron court of Wamphray too, seems to have placed great emphasis on rentals and feudal dues owed to the laird.³⁰

The feudal obligation to grind corn at the mill of the barony, known as 'multures', was vigorously protected by the miller and the laird. Tenants who renege on the duty were prosecuted for abstracting multures and the franchise court documents are full of such cases. The Melrose regality records for October 1666 give a good account of how such multures were supposed to operate. Mr. John Scott of Langshaw stated that, according to his condition of multures, as granted in January 1586,

no tenants, subtenants, coatters, inhabitants, nor indwellers within the said Lordshippe and lands [may] without licence asked and obtained of them that give it, passe withe any of ther cornes ather of his owne cornes growand, or that he buys, that come once within the freedom of the mylne that he is thirled to ... but allernalie to the mylne that he is deput, ordeaned and thirled to passe to.

Indwellers in the barony were also required to support their own brewers and bakers. An act of Stithill barony declared, in December 1666, that nobody in the barony who 'shall make Brydell Bread hereafter shall buy their Brydell Aille and Drinke furth of the Barony but that they buy their haill Aille for the use of the Brydell fra the Brewers within the barony.' John Wood and two others, who contravened this act were each fined £10 Scots at the court in July 1667. This commercial aspect of the franchise jurisdiction is also reflected in the Kelso records, where James Bell, taylor in Faircrose, was accused by two Kelso taylors of taking work out of the lordship.³¹

It was expected of indwellers that they would contribute towards the well-being of the barony and in some cases, towards the well-being of the laird. The Stithill court ordered, in September 1667, that each possessor of a husbandland was to furnish an able workman to help build a ditch on behalf of the barony. In September 1692, the Stithill procurator fiscal complained that some indwellers refused to repair the kirk 'conform to use and wont' and ordered that they be compelled to carry out the repairs and do other work for the laird. Robert Fairbairn, a tenant in Stithill, was fined £5 Scots in November 1704 for disobeying the baillies order and refusing to go to the barony of Hirsell with the other tenants on 'great affairs of the laird.' Perhaps the most extreme example occurred in June 1656 at the Cockburnspath court, when the court, or rather Sir James Nicholson, decreed that all fishermen 'both small and lynemen' were to bring their daily catches to Sir James's house for the use of himself and his family. The penalty for failure was a fine of 6 shillings 8 pence. A study of the Stirlingshire baron courts showed that the enforcement of feudal obligations gradually took up more and more of the courts' time until by the 1740's 'this had become more or less the sole function off the baron courts.' The Border baron courts, at least as far as 1707, do not exhibit any such trend.³²

The franchise courts also sought to preserve the food supply of their indwellers, by punishing regraters and forestallers. Forestalling was the equivalent of the English 'engrossing', which was the obtaining or buying up in gross or wholesale, large quantities of corn, or other grain, with the intent to sell them again, usually at times when the prices were high, thereby making an unreasonable profit out of others' hardship. As high prices usually occurred in times of crisis, such as grain shortages due to famine or bad weather, forestalling was considered a threat to society and to law and order. As forestallers who bought in bulk often obtained their goods from special sources, it was specified by Scots law that goods should be sold openly in the market place; those who failed to do this were known as regraters. John Haistie was found guilty before the Melrose court in June 1609 'for breaching the act maid be my lord of Bukcleuch anent selling of victual out of Melrose and nocht presentand the mercat with the samin.' In October 1660, the regality of Melrose passed an act to restore the weekly market in that town, as it had almost 'decayed' during 'the great trubles that hes been upon this kingdome.' All the inhabitants were ordered to present whatever commodities they had to sell at the market in Melrose every Saturday upon the penalty of 20 marks for each time they were apprehended at other markets.³³

The commercial sphere of the franchise courts also extended to the control of prices of goods within its bounds, in a similar way as the sheriff regulated them within his shire. Failure to comply with these regulations could lead to prosecution in the courts. The Melrose court ruled in October 1606 that the baillie 'ordaneit the aile to be sauld within the regalitie of Melrose fra this nicht bak for xvjd the pint.' Those who sold bad produce were also liable to penalties. In November 1657, Patrick Burnley in Birkenhead who sold William Ker a mare for £27 Scots, which was later found to be blind, was ordered to refund the money.³⁴

Finally, the regulation of servants also fell within the sphere of the franchise courts. Those who abandoned their service before their contract had expired were fined, and those who hired servants and then maltreated them, or failed to pay them were equally punished by the courts. For example, John Thin, portioner of Blainslie was pursued by James Ormeston for putting him out of service in the middle of his term without refunding his 'fee and bounty'.³⁵ Employees, particularly herds, who were negligent in carrying out their work so that sheep or cattle were lost or killed, were punished by the court and made to repay the cost of the beasts lost. James Smith in Mosshouses, for example, lost 13 ewes and one wedder whilst herding for James Brunton. He was fined 40 shillings for each ewe and £4 for the wedder. Similarly, George Mitchell in Darnick was, in January 1658, prosecuted by the court for placing cut trees in a foolish place so that the flood water carried them away.³⁶

As the sheriffs were required to enforce Acts of Parliament in their shires, so the lords of regality seem to have enforced them within their franchises. At the end of the Melrose records, there is a section of 'enrolments of the regality court of Melrose' which consists of 'ane particular list of the haill irregular persons and delinquents ... [who have] transgressed the Acts of Parliament forbidding field and house conventicles and keeping disorderley baptisms' as well as those who had failed to attend church regularly. From the court profile, it can be seen that many people were pursued for contravening Acts of Parliament which indicates that in this respect at least, the inhabitants of the franchises could be under as close a scrutiny as if they had been within the sheriff's jurisdiction.³⁷

Before the actual litigation began in the franchise courts, the documents show that each court, baronial or regality, passed 'Acts' concerning matters of local importance. Thus the baron court of Stitchill in September 1667 passed five acts; one ordering the planting of new trees, one ordering that each

tenant keep his hedge in good condition; destroyers of plants were to be fined £10 Scots, those who trespassed were to be fined and each possessor of a husbandland was ordered to furnish an able bodied workman to help build a ditch. These were local acts as distinct from national, and were intended to deal with immediate and particular problems. An act against drunkenness, passed by the Melrose regality court, was phrased in a manner very similar to the Acts of Parliament, with a statement at great length on the evils of drink, and imposing heavy pecuniary penalties. It urged the inhabitants of the regality to 'detest the cumpanie of theise rannayatis to the effect that gude ordour may be keipit in all tymes cumeing, to the honor of God, to the contentment of the magistratis, weill and honestie of the cuntrie of Melrosland.' The whole tenor of this act emphasises that the inhabitants of the regality belonged to the 'cuntrie of Melroseland' as much as the kingdom of Scotland.³⁸

Yet it would appear that the aims of the central government and the franchises were the same, in many respects. The franchise courts sought to keep 'good neighbourhood' within their bounds, understanding clearly that out of petty issues greater disorders could evolve. It seems to have been well established that if a nuisance was being caused by some persons within the regality, who were not actually breaking the law, the person against whom the nuisance was being committed could appeal to the court for an act to be created which gave the support of the law of the regality to his complaint, and allowed an authorised fine to be levied if a breach of that law was committed. Such was the case in February 1660, when Robert Mein and Robert Trotter, feuars of Newsteid, complained against the inhabitants of Newtown, Eildon, Danzeltoun, and Melrose who 'cuttis houckis, away leids, carries and takes the Newsteid quhines* aff and from the hill ground and lands of Newsteid.' James Lythgow of Drygrange complained in June 1660, that people from Melrose trespassed on his ground and cut his broom, and he was granted an act of the court and a penalty

* broom

of 13 shillings and 4 pence was to be imposed on each offence, of which half would go to the baillie and half to the complainer. It is this type of concern for 'good neighbourhood' which distinguishes the franchise courts from the sheriff courts.³⁹

Those who lived within franchises were constantly being exhorted, as the Elshields tenants were in December 1662, to 'keep guid neighbourheid ane to another.' Offences against good neighbourhood covered a very wide area, but anything anti-social which could give rise to disorder might fall within this category. Obviously some of the acts of court and the commercial interests of the courts which have been discussed above were intended to keep good neighbourhood within the franchise. Slander and scolding are also examples of such anti-social behaviour which might be punished by the courts. Also within this category are prosecutions against persons whose cattle had strayed into a neighbour's field and eaten his crops. The baillie of Melrose, for example in May 1657, charged the inhabitants to restrain their cattle and ordered that none 'shall suffer or permitt their horsses or utheris their bestiall to goe upon their nichtbouris cornes either grein or rype naither by nicht or by day.' Offenders could find themselves liable to a fine. Indwellers who failed to maintain sufficient hedges or dykes were also fined for this reason. Cutting green wood seems to have been a common offence against good neighbourhood in Stirlingshire, and the same would appear to have been the case in the Borders, together with cutting broom and casting divots. Frequent squabbles broke out between neighbours over the placing of march stones, or boundary marks.⁴⁰

Many of the neighbourhood disputes were referred to a Birlaw or Bourlaw court. This seems to have been rather like a court within a court, which has left no record of its activities other than glimpses in the main court record. Such Birlaw courts were not peculiar to the Borders and have been found all over Scotland.⁴¹ Each Border franchise court studied had its group of Birlaw men who

seem to have held courts of their own to deal with decisions of neighbourhood, or, as the Stitchill record put it,

to desyde all matters questionable and debaitable among neybons and to impose stent and publick impositions and to desyde the samyn equally and proportionably without partiality conforme ilke anes severall possessions, with power any tua of them with the said William Nizbet, factor, forsaid to convein, stent, decyde and decerne efter mature deliberation. 42

The Birlaw men were elected annually in each barony or regality. It is difficult to assess how many were required in each franchise, but the number seems to have been a steady three for Elshieshields, and varied from three to seven for the Stitchill court. No numbers can be ascertained for Cockburnspath, Horndean, Wedderburn or Godscroft. There seem to have been several groups of Birlawmen for each section of the regality of Melrose; four for Gattonside, three for Melrose town, and an unknown number, but obviously separate group, for Darnick. There could easily have been other groups about which we know nothing. In Elshieshields barony, the Birlawmen were rewarded for their efforts with one tenth part of every peck that they took as fines, but there is no evidence of remuneration in any of the other records although the Stitchill court recorded that persons fined for 'eaten corn' were to contribute towards the 'Bourlawe Drinke'.⁴³

Perhaps these rewards were necessary to keep the Birlawmen active, for it does not appear to have been a particularly pleasant task. Several deforcements of Birlawmen are recorded in all the courts studied, so much so that the Melrose court in June 1668 had to order the inhabitants 'to obey the burlaymen thair of under the payne of 5 lib ilk persone whoe shall refuse or deforce the saids burlaymen present and to come.' At the Cockburnspath court in December 1649, the Birlawmen gave in a bill desiring to be liberated from the office 'because they complained they wer upbraided in execution of thair office be some persones.' Nor were the Stitchill Birlawmen revered by the community. In 1662, the court

ordered all the indwellers to 'obey the Sentences and Decreits to be pronounced be the Bourlawmen in tym cumeing and that non oppose them neither be word nor deid nor scold, raille, nor outcry against ther proceedings.'⁴⁴

Many neighbourhood disputes must have been settled by the Birlawmen before reaching the official court records, and it is possible that those recorded are only the most difficult disputes. It is impossible to estimate this, but it should be borne in mind when those in the official record are being studied. From the official court records, however, it is possible to construct a reasonable picture of the type of business dealt with by the Birlawmen. Pasturing disputes seem to have taken up a great deal of their time, and from the Stitchill record, it would appear that they were responsible for approving the baronies herds who were nominated by each tenant. The nominations were presented at the Birlaw court, so that only those who were 'sufficiently able' might be hired. A specific number of cattle were to be pastured in each barony or regality and if any tenant tried to pasture more than his allocation, he could be fined for 'over-sowmes' or overpasturing. It was the duty of the Birlawmen to watch out for this. They were also to inspect hedges, dykes and gates, so that none of the beasts damaged any corn. If corn was damaged, then the Birlawmen were to act as appraisors for the sum of money due in compensation and they could poind if necessary. Other aspects of good neighbourhood, such as preventing the cutting of broom, regulating divots, or enforcing the payment of some petty debts, were also dealt with by the Birlawmen.⁴⁵

In the case of misbehaviour at their actual court, the Birlawmen were empowered to punish all disorders committed there, either by the members, or others, with the exception of blood crimes. This punishment could take the form of a fine or corporal punishment. There is, however, no evidence that corporal punishment was ever inflicted and fines seem to have been the norm. Birlawmen

could also be called upon to resolve any boundary disputes, as in January 1664, when the baron officer of Stitchill was ordered to take the Birlawmen to 'clear the boundary' at the ditch in dispute between George French and James Campbell. Likewise a march stone disagreement was referred to the Birlawmen of Hutton in July 1699. In most cases, however, such disputes seem to have been referred to an assize of neighbours. There is no mention of an inquest, jury, or assize in the records of Elshields, Cockburnspath, Godscroft, Horndean or Wedderburn. At Kelso, an assize of neighbours was used to decide 'questions of neighbourhood'.⁴⁶

(ii) Procedure

When an action had been presented at the court of Melrose, it seems to have been common practice to allow 15 days to elapse to give the offender time to answer the summons and prepare his defences. John Cairncroce, for example, in the action between himself and John Rogear before the Melrose court in July 1606, was given 15 days to appear. No similar practice can be identified in any of the other court records although an unwritten code could have been in operation. In cases where the defendant could provide adequate defences, he was absolved; but if his defences were inadequate, yet the pursuer could not provide sufficient evidence for conviction, the defendant was likewise acquitted. If a case was clear cut, then no jury would have been summoned. If however, the issue was debateable, then a jury could be asked to consider the case, as it appears to have done in a wide range of actions.⁴⁷

The Stitchill record describes how, at the beginning of the court in January 1655, the

Judge, in compliance with the Act for Holding of Barroun courts in Scotland has elected and chosen fyfteen famous honest men of whom fidelity and Qualification he hes assurance, to pass voyce upon Inquest as Jury in all matters questionable within the said Barrony.

The jury were required to give their 'aiths of veritie of faithful and lawful administration of their office in all matters questionable and debateable to the best of their knowledge ... without fear or hatred.' Sometimes more than 15

members were employed; an assize of 17 was used in the trial of John Carruthall in Reidmyre, who was charged with theft before the regality court of Jedforest in January 1620.⁴⁸

As mentioned above, perhaps the most common form of assize was the 'inquest of neighbours.' The neighbours, or local people, were considered to be the most knowledgeable jury, whose opinion could be relied upon in matters concerning possession. For example, in April 1658, William Fisher, portioner of Easter Langlie complained against Jean Hunter for cutting broom. The court decreed that neither of them should cut any broom until an inquest of neighbours had decided to whom the broom belonged. Similarly in November 1707, John Dixon, taylor in Kelso and his wife, complained against George Hamilton for removing two headstones belonging to the complainers' deceased father and brother. The court ordered that a group of persons be sent to 'take due triall of the matter'. They reported back to the court that the petitioner had, indeed, been wronged and the baillie authorised their decision. That such an assize of neighbours was specified, rather than the Birlawmen, indicates that the two were not synonymous, but that the neighbours probably acted independently of the Birlawmen. An inquest was always used in the service of briefes before the regality courts.⁴⁹

In disputes of neighbourhood, the assize of neighbours acted as both jury and witnesses, but in some cases, where neither pursuer nor defendant had produced convincing evidence, witnesses could be summoned before the court. In cases of bloodwit or riot, witnesses were often called to help to ascertain who was the aggressor. At Melrose in December 1607, witnesses were called to testify to quarrels between Charles Steinson and William Lythgow, which were subsequently judged by an inquest of 15 men.⁵⁰

It was the baillie or lord of the court who passed the final judgement and who authorised the penalty. In the vast majority of cases, the penalty was

pecuniary. The fines seem to follow a similar pattern in all the courts and there would appear to be, in each court, a system whereby the penalty was increased according to the number of times the guilty party had offended, or according to the degree of heinousness of the crime. Thus, in January 1667, the Kelso court ordered that the penalty for those 'who uses combustible things near the fire' should be fined £20 Scots for the first offence, be imprisoned for the second and banished for the third. There seems to have been a maximum fine of £50 Scots for blood in all the courts, although this could be as low as £10 Scots as shown in the Stitchill, Melrose and Kelso records. Tree cutting was punished with a fine of £10 Scots in all the courts, although the Godscroft court imposed a fine of £20 Scots. Steeping linen and keeping swine merited a fine of £5 Scots. The fine for abstracting multures or over-pasturing was calculated on the amount of meal abstracted, or on the number of cattle pastured. Slander merited a fine ranging from 10 shillings in the Stitchill court, to £10 Scots at the Melrose court, and imprisonment at Kelso. James Neilson and his wife, who confessed to 'speaking rashlie of the stent maister' (tax collector), were ordered by Kelso court, in July 1667, to swear that they would 'carry themselvis more christianlie and sobberlie in tyme cuming' upon a penalty of £100 Scots and imprisonment. Even for theft the punishment could be a fine.⁵¹

Fines were to be paid to the court, or in the case of specially requested acts of court, half to the pursuer and half to the court. In certain cases it was specified that the money be put 'ad pios usos'. Persons who had blasphemed and cursed in Stitchill in 1655 were to be fined 10 shillings 'the quhilk fine and amerciaments and penalties is to be employed for their Table uses be the advyce of the Minister and Members of the Kirke-Session', and Isobell Turnbull was fined 40 shillings later in the same court which was to be put 'ad pios usos'. The fines of William Merton in Melrose Gattonside and Nicholas Wood in Stitchill were both to be used for the poor. Fines were an important source of income to

the holder of a jurisdiction and could be enforced by poinding or extracted under a caution, such as when Margaret Black and her husband were fined £5 Scots for a riot against Margaret Dixon, which was to be paid 'under the payne of Corporall punishment'. This does, however, seem to have been an unusual caution and most were ordered to remain in prison until the fine was paid and caution received for their future good behaviour. It was, presumably, the financial benefits which made the holders of the jurisdictions so keen to repledge cases from other courts if possible.⁵²

The procedure for repledging from the High Court, the justice ayres and the sheriff courts have all been described elsewhere, together with the conditions required by each court before this could take place. A regality court could always claim cases from an inferior baron court within its jurisdiction and from another regality court if the conditions which obtained in the High Court, ayre and sheriff court were fulfilled. In July 1610 at the justice court for the regality of Jedforest, held in Douglas, an offender was repledged. James Young, an indweller of the regality of Dunsyre and Bothwell, was indicted before the Jedforest court for theft committed within Jedforest regality. The baillie of Dunsyre and Bothwell, James Inglis of Braidlie, repledged him back for trial before that court.⁵³

Even the baron courts were keen to preserve their jurisdiction, as the case of John Haggard and Magdalene Hamilton shows. They were fined £10 Scots each at the Stitchill court in September 1692 for summoning Adam Hogeart, wright in Stitchill, and insisting against him before the Commissary court. The Stitchill court decreed that all 'the inhabitants within ther baronie [must] insist in tyme comeing before the Baron Court of Stitchill anent any actiouns of neighbourhood' under the penalty of £5 Scots. Protection of the jurisdiction of the baron courts was common throughout Scotland; a study of Stirlingshire has shown that

James Tenant of Easter Dykehead was fined £10 in 1641 before the Falkirk court, for contravening an act of that court 'that none of his lordis vastellis or tenantis should pursew any other vastell or tenant before any other judicatorie, but onlie before My Lord and his baillie.'⁵⁴

Corporal punishment was a rare occurrence in the baron court records, and indeed only appears to have been used once at Stitchill, as the penalty for an improper accusation in June 1655, for which Agnes Black was ordered 'to stand in the Stockes'. Baronies could have the power to banish offenders from their bounds, but again this was used only once in the Stitchill court, and then only as an ultimate punishment if the offender, a scold, failed to abide by her caution. Regality courts had the right to punish offenders with corporal and (if the charter granted) capital punishment. Thus, the regality of Jedforest condemned John Carruthall, a thief, to be hanged in January 1620. The regality of Melrose, although it never used the death penalty, did inflict corporal punishment; for example John Bald was ordered to 'instantlie be takine and put in the jogs for halfe ane houres space' for assault.⁵⁵

Banishment from the bounds of the jurisdiction could also be inflicted. In more serious cases, the regality had the right to banish an offender from the whole of Scotland, as in the case of George Brown, a thief, who was sentenced by the regality of Jedforest in July 1610. In the main, however, it can be seen that capital and corporal punishments and banishing were rarely, if ever, handed out. The same reluctance can be found elsewhere in the country and the Justiciary Court of Argyll, out of 85 cases between 1705 and 1742, only condemned 14 to death. The baillie court of Kelso would appear to be a major exception. Of the 325 cases recorded in those records, 35 ended in banishment or scourging. If it is considered that, out of those 325 cases, 128 were actions against persons without adequate chimneys, the percentage of those receiving severe sentences is even more remarkable, compared with Melrose. Most of the banishments were meted out

for theft, although some were for adultery, arson, murder and witchcraft. Some were banishments just from Kelso burgh, some from all the lands of the Lord Roxburgh, and a few were from the whole of Scotland. The penalty for returning was nearly always death, although in the case of banishment from Kelso, it could be scourging. There is, however, no record of a capital punishment in the records.⁵⁶

All the franchise courts seem to have been keen that justice should be done, and any malfunction of the court, or negligence, or abuse of office by a court official was dealt with promptly. In January 1669, the fiscal of Melrose complained against 'the haill officers for refusing to put the decreits to execution' and one of the officers was imprisoned and the rest reprimanded. John Bunzie, officer, was discharged from his office and ordered to be put in the stocks during the baillies pleasure because he 'committit ane manifest breach of his trust for suffering and permitting John Halliwell Fair, delinquent, to goe up and down the streitts.' Bunzie had entrusted Halliwell, a murderer, with the keys of the prison door and Halliwell had escaped.⁵⁷

(iii) Relations with other courts

Both the regality and the baron courts had good relations with the church courts.⁵⁸ Within the franchises the policy of 'sword and word' seems to have been put into action. Thomas Ford, the presbyterian Englishman summarised this theory in the early 1640's: 'when in times of reformation and purities, men will not leave their vanities and supersititons; what the Word cannot take away, the Sword of the magistrate must.' The Stitchill court expressed it in a more typically Scottish way.

For the advanceing the glory of God, the cherishing and nourisheing of piety and vertew within ther parochin and for punisheing of vice for incouragement to weill doers and for terror to all those who inclyne to doe evill within this parochin, that the minister, Elders and Kirke Sessioun have the concurrence and assistance of the Civil Magistrat for corroborating of ther Acts to be made be the said Kirke Sessioun and his auctority interposed therto that sicke persons as shall be convict be them may heirafter stand in aw to doe evill.

To the franchise courts, the kirk session could act as a local police force in each parish; and to the kirk session, the civil magistrates could reinforce their acts and give greater weight to the punishment they could inflict. The court records clearly show this arrangement. In August 1629, the baron court of Godscroft ordered all the tenants in the barony to 'keep the preaching and hail ordours of the kirk.' The records of the baron court of Cockburnspath show that agreement with the kirk could be reciprocal, for it decreed in December 1645, that the ecclesiastical judges should also enforce the acts against penny bridals.⁵⁹

As a result of these arrangements, a fine in the civil courts could be imposed for moral offences and often the offender had to endure not only the pecuniary penalty, but also the censure of the kirk. Thus, John Maxwell in Melrose was fined £10 for slander by the regality court and was, furthermore, ordered to appear 'the nixt Sabbath in Melrose Kirk and in faice of the congregations' *crave the pardon of the person he had slandered.* Thomas Wood was fined £3 by the Stitchill court in October 1670 for slander and had also to suffer the censure of the kirk session. The civil courts, however, are also found extracting fines on behalf of the kirk session, perhaps from recalcitrant offenders who refused to be compelled to pay by the kirk. For example, the Melrose court decreed in November 1608 that if anyone refused to appear before the minister and kirk elders, he was to be fined 11 shillings. William Hoggarth was ordered by the Stitchill court to conform to an act of the kirk session and pay £3 Scots fine.⁶⁰

The relations with other courts were not as close. From the baron court records, there would appear to have been no liaison or communication with other jurisdictions, although appeals from baron courts went to the regality within which they were situated. From the regalities' point of view, the court of Melrose, at least, does not seem to have accepted punishment by a baron court as an adequate penalty for an offender. In March 1682, for example, James Robson,

a weaver in Ridpath, asserted that he had already been summoned by 'baillie Faa's officer' and tried before 'his' baron court. The baillie of Melrose, however, rejected these excuses and fined him again for 'his delinquencies' (probably attending conventicles). John Hoy in Gattonside confessed his delinquencies before the Melrose court in April 1682 and likewise protested that he had already been fined by a baron court. Like Robson, he was fined again by the regality court.⁶¹

By comparison, verdicts and fines imposed by another regality court were upheld. For example, in November 1682, James Hislop showed that he had already been discharged by the clerk of the regality of Stow and he was also discharged by Melrose. Likewise, David Mein, a weaver in Newstead, protested that he had already been fined by Adam Urquhart of Meldrum, a justice of the peace, and he was absolved by the Melrose court. In the unusual circumstances which necessitated the urgent prosecution of people who attended conventicles in the early 1680's, the Melrose court allowed the procurator fiscal to the justices of the peace for Roxburghshire, to lead a prosecution against four people from the Melrose area in the court of that regality.⁶²

There are many examples of the regality court enforcing a decret, usually for debt, of the sheriff of Roxburgh. For example, Andrew Hieton was prosecuted by William Edgar, portioner of Melrose, in October 1657, for not obeying a decret of the sheriff of Roxburgh of March 1655 for debt. The Melrose court orderd Hieton to pay. In October 1658, Margaret Brown in Melrose was ordered to pay a debt to Robert Mein, as the sheriff had decerned two years before. Decreets from other courts were also enforced by Melrose regality. For example, a decree for abstracted multures issued by 'Charles Havard of Navand Esq.' from November 1653 was enforced in the court in July 1661. It is most probable that this means Charles Howard of Naworth, one of the most active Border Commissioners during the 1650's and post-Restoration period. In November 1657,

Isobel Wishart, a widow, was pursued for £5 by Andrew Holme, but was absolved by the Melrose court 'in respect of the order of the justices of peace for the schire.' It can be seen that these examples of co-operation with other courts all occurred during the Interregnum period. This is the only difference that can be perceived between the Interregnum years and those before or after, and it is suggested that whilst the Melrose regality court was permitted to continue in the face of abolition of such courts in 1654, it was on the understanding that it should support and encourage the other 'official' judicial bodies. To sweep away all the traditional heritable jurisdictions and try to govern the country with the insufficiently developed system of justices of the peace, was a utopian, but impracticable scheme. The records of Melrose show that, in reality, the regalities, like the kirk session courts, were allowed to operate whilst the Cromwellian authorities turned a blind eye in the name of law and order.⁶³

Historians have written of the decline of the franchise courts at the end of the seventeenth century as a result of an increasing awareness and efficiency of the central courts. The Melrose records do not continue to the end of the century, but in the last few years of the court records, it can be seen that there was a decline in the amount of business before the court. The only exception to this was the number of conventicle cases which were dealt with by Melrose, and which, from 1682-1684 constituted over 75 per cent of the court business. The Kelso bailiery records show a similar decline towards the end of the century, with the number of cases from the Restoration held at an artificial level through the high number of prosecutions for insufficient chimney stacks. The Stitchill records show that whereas the court heard an average of 24 cases a year in the period 1660-1669, and 18 cases a year in the period 1670-79, in the period 1700-1709 only an average of 6 cases a year were being heard. By 1747, most of the franchise courts in Scotland had suffered a severe decline in business and importance, so that when they were finally abolished in that year, they appear to have vanished without a murmur.

II. The English Franchise Courts

In contrast, the decline of the English franchise courts was a much slower and longer process, which never experienced a decisive termination such as the Scottish courts did in 1747.⁶⁴ By the seventeenth century, the courts were of little significance compared with their Scottish counterparts, but still managed to struggle on in some places until the mid-nineteenth century.

When Henry VII came to the throne of England in 1485, that country was a myriad of franchises, liberties and feudal courts. The biggest franchise was that of the church, with its own system of courts and rights of benefit of clergy, powers of granting sanctuary and staying the King's writ. Large areas of the country were in the hands of the church - the whole county of Durham and the liberties of Ripon and Beverley, for example. In these places, as in every church or churchyard, criminals could find sanctuary for life, providing they never left their refuge. Under Henry VIII, acts passed between 1530 and 1540 steadily destroyed sanctuary and the franchise status of the Palatinate of Durham. The Palatinate was gradually absorbed into the Northern Circuit of the assizes, and in 1646, its Palatinate status was eventually abolished. Benefit of clergy, which meant that an offender could virtually have his first crime discounted on reading the 'neck-verse', was still in operation throughout the seventeenth century.⁶⁵

The nobles too, in the reign of Henry VII had held special franchises and liberties, although the large Palatinate of Lancaster had been united with the Crown in 1399 when Henry of Lancaster became King. In the middle ages, it had been acknowledged that no franchise was valid except by grant of the Crown. However, once in possession of such a grant or charter, the Crown was virtually powerless to deal with an obstreperous franchise holder.⁶⁶ During the fifteenth century, there had been a vast increase in the independence and obstinacy of the franchise holders, and under weak kings, petty kingdoms had been established in

England. The Tudors were determined to stamp out such abuses once and for all. The large liberty of Tynedale was abolished in 1504, but it was under Thomas Cromwell that the most radical changes took place. The act of 1536 'for recontaining certain liberties and franchises heretofore taken from the crown' stated in its preamble that

divers of the most ancient prerogatives and authorities of justice appertaining to the imperial crown of this realm have been severed and taken away from the same by sundry gifts of the king's most noble progenitors ... to the great detriment of the royal estate of the same and to the hindrance and great delay of justice.

The act continued to reserve all pardons for treasons and felonies to the Crown; all appointments of judges and justices everywhere in the realm were to be made only by the King and all writs in the Palatinates were to run in the King's name. With the establishment of the Council in the North, in 1537, which could remove any case from the Palatinate courts, all franchisal rights of any consequence were destroyed. Thus the Border Commissioners were able to say, in June 1617, 'the liberties of Tynedale, Redesdale, and Hexhamshire are liable to all laws as well in other places as in Northumberland' and that all ministers and officers had the power to enter those places to execute justice.⁶⁷

Despite the radical changes of the 1530's, and the increase in power and competence of the assize justices and the justices of the peace, small franchise jurisdictions managed to survive in the form of manorial courts and courts leet.⁶⁸ Manors were also called baronies, and each baron or lord was empowered to hold a domestic court called the court baron, for redressing misdemeanours and nuisances within the manor and for settling disputes of property among the tenants. Landowners were keen to maintain these courts because it could give them a firm hold over their tenants and through the court the running of the manor could be facilitated. In most manors there were copyhold tenants whose lands were largely their own property, although nominally part of the lord's

demesne. Manors also included freehold tenants who held their lands of the manor in perpetuity. A court baron, then, was traditionally of two natures. The one a customary court, appertaining entirely to the copyholders, in which matters of land tenure relating to them (only) were transacted. The other was a court of common law, held before the freehold tenants who owed suit and service to the lord of the manor. This court was held by ancient custom once every three weeks and dealt mainly with all controversies relating to lands within the manor and with small personal actions where the debt or damages did not exceed £2.

Lords of the manor could in addition, have the right to hold courts leet. These have been described as 'a species of [sheriff's] tourn in private hands' and were courts of record.⁶⁹ Courts leet were to be held once a year, and not more often, within a particular hundred, lordship or manor, and it was their duty to view the frankpledge, or the freemen within the liberty. During the twelfth century, by virtue of tithing customs, a system of compulsory collective bail had evolved, which operated, not after the arrest of an individual for a crime, but in anticipation and so acted as a kind of safeguard for the community. By the end of the century, this system, known as frankpledge, had been fully incorporated into the system of manorial courts and all persons over the age of 12 were to appear in the feudal court once a year for the conservation of the peace and for making presentment of articles which could be reported to the ayre. It was after the reign of Edward I that the word 'leet' began to be used to denote the police control and jurisdictional powers which were associated with the sheriff's tourn, but held in private hands and which embraced the system of frankpledge. The jurisdiction of a court leet was frequently exercised by lords of manors and boroughs.⁷⁰

By the Constitutions of Clarendon (1164), leets and manorial courts had been forbidden to try felonies or to impose any punishment greater than a fine. But courts leet were allowed to inquire into felonies and present them to the

assize judges or to the grand jury so that they could be found as an indictment. J. H. Baker has argued that this power to present felonies was almost obsolete by 1550, but the Hexham court can be found exercising this right. In October 1628, the jury of Hexham was ordered to inquire if William Heron of Acombe was responsible for the theft of five sheep from Matthew Addison four years previously. The jury found that there was a case to be answered. Later at that court, it was ordered to inquire into the theft of cloth by John Wigham of Hexham from James Magee's wife. This too was found. In October 1630, the jury inquired into the theft by John Orde of Stotfould, known as Jock the Lawyer, of a mare from William Armstrong of Langlee, which they found proven. None of these cases were tried or judged further than this stage at the Hexham court, but all were sent for further trial at the quarter sessions. The Gilsland court records also show that felonies were investigated before the court. For example, in April 1612, John Thompson was accused of felonious theft and Patrick Atkinson was accused of feloniously taking a black heifer. The case of John Thompson was not judged *by the court, and was probably referred to the quarter sessions.* Patrick Atkinson, however, was fined 20 shillings for his offence. Holm Cultram too, investigated felonies. The court records of January 1631 reported that 'we of the Jury do say that John Bell ... committed a felonious crime But suffered punishment by standing up in the church.'⁷¹

It would appear, then, that in the early seventeenth century, the Gilsland court was, in some cases, ignoring the rules forbidding franchise courts to impose penalties for felonies. An examination of the post-Restoration court documents, however, showed the court conforming to the standard practice of franchise courts. The chapter on the Border Commissioners shows Lord William Howard to have been perhaps the most powerful man on the English Borders in the early years of the century. As the holder of Gilsland barony - an area of crucial importance on the Borders, notoriously independent and strategically vital - he may well have taken it upon himself to run his barony according to

his own convenience. In general, however, the franchise court records are full of petty debt, minor squabbles and local misdemeanours.

By the seventeenth century, justices of the peace and assize justices had authority in the bounds of the English franchises and as a result of this, the franchise courts are generally considered to be in decline in this period. They were rigidly limited in powers and could only take cognizance of the newer statutory offences if they had specifically been given the power to do so by the statute which created the office. The franchise courts, concerned with minutiae and operating in a very limited area, may seem unimportant at first glance, yet their decline was a very slow process and during the seventeenth century at least, the Border franchises formed a vital link in the chain of institutions involved with law and order on the Borders. As shown above, some, like Gilsland were not averse to dealing with the occasional felony, which would indicate that the Border franchises were more powerful than those elsewhere in England at the same time. The holders of these jurisdictions were usually men who occupied prominent positions in other law enforcement bodies, thereby forming a link between the franchise courts and the important criminal courts in the area.⁷²

Although the courts leet were to be held once a year, there appears to have been no set rule for the number of general courts held in a year. The Hexham records, for example, show that the number of meetings a year could vary from none to fifteen. The fullest years show that the court held meetings once or twice a month, but in general, the regality had to be content with far fewer. At Gilsland too, the court meetings could vary considerably, although they seem to have tried to hold at least one a month, and succeeded sometimes in holding as many as four. From the roll of jury presentments and inquiries for Hexham, a clear pattern emerges from the courts when such presentments took place. There seems always to have been such a meeting in October; and indeed at a court

in January 1672, the jurors refer to 'an order of ye last Head Court halden ye eleventh of October 1671.' Other meetings of the jurors for presentments took place in either May or June, suggesting that a head court was always held in October or Michaelmas, with another summer head court; a pattern similar to that of the franchise courts in Scotland. The Gilsland court records show a like pattern. At most of the court sessions, only debt cases were heard but at others, only non-debt actions were dealt with. As such actions occur in large numbers at these courts, it would suggest that they were saved specially for a particular type of court. Such courts occur mainly in April of each year and at Michaelmas.⁷³

The equivalent of the baillie in the Scottish franchise courts was the English steward, who was expected to carry out the business of the court and seems to have been, in all cases, a person of some standing in the county.⁷⁴

The court was opened by calling all the tithing men or tenants to the court. The better class tenants were the jurors of the court. The number of jurors at a court seems to have varied from barony to barony and, indeed, from court to court - the Gilsland barony seems to have liked 15 jurors from within the Geltland area of the barony and 15 from without. Although the number varied from meeting to meeting, there were rarely more than 17 or less than 13 from each area. There usually seem to have been 15 jurors attending the meetings of Hexham regality, Simonburn and Morpeth. Presentments at the courts were made traditionally by the jurors.

The best surviving records, those of Gilsland and Hexham, show how the courts worked. It would appear that civil cases were normally brought to the court by complaint and that misdemeanours could be brought in the same way, but were mainly brought by presentment. The jurors from each parish in the lordship made their own presentments for their own particular area. These were usually for petty offences, such as keeping swine, illegal ploughing or broken hedges. No witnesses would appear to have been called and the offenders

were usually ordered to pay a small fine. The sworn men, or jurors could also request an investigation or inquiry into an offence. For example, in 1606, the jury of Hexham were ordered to enquire on behalf of John Hopper of Tosbrige regarding a horse bought by Thomas Errington of Wallicke Grange (for whom John Hopper was surety) from Thomas Hopper of the Burnemylne. The horse had been challenged as stolen and John Hopper wished to know the truth of the matter.⁷⁶ According to these investigations, the jurors could declare that they had 'found' that the case 'ought to be tried' or that it was 'proven', or else that there was 'no proof'. A complaint of John Robson's against Matthew Addison for slander was 'found', whereas an inquiry into the trampling down of a lamb by George Orde was dismissed because there was 'no proof'.⁷⁷

Depending on the outcome of the inquiry, the jury could present the offender to a higher court if found to be highly suspect of a felony or serious misdemeanour, or to the court of the manor. Hence the frequent occurrence in the court records of the words 'wee present' followed by details of the offence. As shown above, however, courts like Gilsland may have taken it upon themselves to deal with some felonies. In some cases, the action was dismissed because the court had no jurisdiction over the case. For example, the Hexham jury in October 1619 found that an action of trespass between George Gibson and John Robinson belonged to the manor of Anick Grange and therefore should not be tried at the Hexham court. In some cases, the franchise courts may have decided to present an offender to a higher court because he or she was unwilling to accept the judgement of the franchise court. This was probably so in the case of William Hunter, who had refused to comply with the pasturing regulations in Simonburn. He was presented to the assize judges in Newcastle in July 1684.⁷⁸

Most of the courts show only the offence committed and the punishment imposed. They do not give details of the court proceedings. The Hexham court, however, perhaps because of its two types of court rolls, provides some information on this matter within its bounds. Once formally presented, the offender was not automatically convicted. Defenders had to declare before the steward of the court whether they pleaded guilty or not guilty. As in the Scottish courts, some offenders were given one month to plead. If the offender took an oath on his plea of not guilty, he could be acquitted. The records show that frequently, cases were not pursued; for example, the case between Thomas Rowly and William Kirsopp in September 1647 was declared void for lack of proof. In October 1704 the jury declared that they could not pursue a case 'without evidence from the other side.'⁷⁹

The cases before the franchise courts illustrate the dual function of these courts - to supervise and maintain the lands within their respective bounds, and to supervise the tenants by policing the neighbourhood.

By far the largest item of business before the courts was debt. Both Gilsland and Hexham show that 72 per cent of the courts' business was matters of debt. Also prominent in the Hexham records are actions of 'trespass on the case' (trespass super casum) which was a form of action for some unlawful act whereby indirect or consequential damage had resulted to the plaintiff. In many cases no details are given, but it would appear to have stood in contrast to simple trespass where direct damage was sustained by the plaintiff. This is however, difficult to ascertain from the records. Originally, the ancient action of 'trover' (from the French trouver, to find) was a kind of trespass on the case, based on the finding by a defendant of the plaintiff's goods and converting them to his own use. By the seventeenth century this action had become largely a matter of form, and seems to have been classified by the courts as detaining. In legal theory, however, trover was slightly different from

CASES BEFORE HEXHAM MAJORITY COURT, 1606, 1616, 1619, 1622, 1624-30

	1606	1616	1619	1622	24	25	26	27	28	29	30	TOTAL
DEBT	96		30	166	71			308	62	381	261	1375
DETAINING	4		2	6	1			3	9	36	23	84
ABSTRACTED MULTURES									8			8
THEFT	1							3	11		3	18
DEGRADATION			11		7		1	13	8		3	43
RESCUE									1	1	1	3
RAFFRAY				7			1	4	20	1	21	54
OBSTRUCTION				1							2	3
GOOD WIGHTBOROUGH				5	1	18	2	38	40	19		123
ILLEGAL SWING				6					10	10		26
'FOURDORUST'					2	1	1	8	4			16
TRSPASS			2				1	4		1	1	9
TRSPASS ON THE CASE	6		1	3				9	4	2	26	51
LAND DISPUTES	2	1	3	5	2	2	2	2	10		8	36
ILLEGAL WOODCUTTING			1					1	2			4
RESTRICTION VANDAPTS				1								1
LEND LIVING								1				1
TOTAL	109	1	50	200	84	24	351	191	476	368	1855	

COMPILED FROM
H.R.O. AVAILABLE MSS.
HEXHAM MAJORITY COURT ROLLS
HEXHAM MAJORITY, JULY PRESENTMENTS
AND INQUIRIES

TABLE 36.

CASES BEFORE GILSLAND MANORIAL COURT, 1611-13

	1611	1612	1613	TOTAL
FELONIOUS THEFT		2	3	5
DEBT	209	381	540	1130
AFFRAY		6	17	23
BLOOD AND AFFRAY		15	18	33
DEFAMATION		45	42	87
RESWE		13	6	19
CLOSEBREAK		2		2
ILLEGAL SWIPE		8	24	32
ENCROACHING ON COMMON LAND		19	3	22
OBSTRUCTION		2	8	10
REFUSING TO OBEY THE COURT		1		1
ILLEGAL BURNING		3		3
GOOD NEIGHBOURHOOD		53	55	108
UNLICENSED MALTING		6	6	12
UNLICENSED GAMING			3	3
INMATES		1	1	2
MISCELLANEOUS			1	1
TOTAL	209	557	727	1493

COMPILED FROM DUR. UNIV. DEPT. PAL. AND DIP.,
HOWARD OF NORTH DOCS., c/178 a, BKS. I AND II

detaining, in that the object of the action was to obtain only damages for the wrongful conversion of the property to the defendant's use; whereas in detaining the object was to recover the actual belonging itself, or, failing that, its value or damages. Detaining, therefore, could be considered to be the equivalent of the Scottish 'spulzie'. As with spulzie, problems seem to have arisen over the fine lines between spulzie, theft and debt, so much so that in the Gilsland records actions of trespass on the case seem to have been classified as debt. If then, actions of trespass on the case are added to the debt cases before the Hexham court, the predominance of civil matters is even more pronounced.

The lords of the manor seem to have been concerned to keep a close check on the lands in the area. An act of the Netherwitton court in October 1662 decreed that no tenant was to dispose of his tenements without the liberty of the lord and in August 1645 a list of rigs and farms within the manor of Goswick was submitted to that court. Land disputes, however, do not dominate the franchise court records, although they do form an important element of business.⁸⁰

Of greater significance is the evidence of the enforcement of the feudal rights of the manor. Prosecutions for not grinding corn at the lord's mill occur frequently. As in Scotland, the offender was required to pay to the owner of the mill, the sum of money lost to him whilst the 'multures' were being 'abstracted'.- For example, John Dixon of Sunding-sheills, who ground his corn away from the lord's mill for a whole year was fined 39 shillings 11 pence at the Simonburn court in 1672, whereas George Dodd, who committed the offence over a shorter period of time, was fined 3 shillings and 4 pence, in 1689. At the Netherwitton court in October 1662, all tenants were ordered to buy the Lord's malt, and in 1660 the barony of Morpeth's feudal obligations were enforced against those who baked bread away from the Lord's bakehouse.⁸¹

Although officially forbidden to try felonies, the common law jurisdiction of the manorial courts enable them to deal with all misdemeanours of a public nature such as affrays, or bloodshed.⁸² From the court records, it can be seen that frays or blood and frays were a common occurrence. Most of the offenders were bound over in the King's will and a fine of varying degrees imposed. It is difficult to ascertain the exact meaning of the term 'fouldbrust', an offence which figured frequently at the Hexham court. One Wilkinson was presented for a 'foulde bruste by cuttinge of a roppe and takeing the beaste away'; and Edward and Gerard Kell committed a 'foulde bruste' by taking their father's cattle. It would appear then, that the offence involved removing another's cattle from a fold, but was somewhat different from either theft or detaining. 'Fouldbruste' always incurred the fine of 3 shillings and 4 pence for each offence, and was probably the equivalent of the Scottish 'riot' in one of its other meanings, as described on page 233. Frequent prosecutions were made for slander or defamation, which were investigated by the court until either they 'found a slander' or found 'no slander', or discovered that there was no proof either way. There is no indication of the penalties incurred for such an offence in the Hexham record, although offenders before the Simonburn court were fined 6 shillings and 8 pence in 1672, and the sum seems to have been the standard fine at Gilsland and Holm Cultram.⁸³

One of the most distinctive features of the manorial courts, is their concern with what would be called in Scotland, 'guid nichtbourheid' and the courts were able to pass acts to be enforced in their bounds for the preservation of good neighbourhood relations. It is obvious from the records that tenants were required to keep their dykes, hedges and gates in good condition and could be fined if they failed to do so. By keeping such boundaries in good order, it was hoped to avoid claims for crops damaged by cattle, and to avert any possible land

disputes. Disputes, however, could and did, still arise, as at the Netherwitton court in October 1618 and at the Hexham court in October 1629, where persons who ploughed and mowed other peoples' fields were prosecuted. Those who allowed their cattle to wander and spoil corn were also penalised.⁸⁴

Pasturing seems to have been rigorously controlled. Cattle were not to be tethered in the common field at Simonburn or Netherwitton, or left out at night in Goswick. A similar system to the Scottish 'sowmes' seems to have been in operation in Hexham, whereby each household was allowed to pasture a certain number of their animals on the common land and those who exceeded this number were fined for 'overstinting'. To keep track of the swine within the manor of Netherwitton, the court ordered that they should all be ringed, as in October 1662. In most manors, however, tenants were forbidden to keep swine during the summer and could be fined by the court if they disobeyed this ruling. Dung or manure was to be disposed of sensibly and considerately without offence to neighbours and those who piled their middens in the street, or threw them into the river, found themselves facing a fine in court. Tenants who cut down trees within the manor without licence were also fined by the court, as were those who fished or cut turves illegally. The courts could also adopt a moral tone. Vagrants and beggars were banned from the bounds of Hexham and Netherwitton; tippling and drunkenness were censored by Hexham and Morpeth and in October 1627, a 'lewd list' was published by the Hexham court.⁸⁵

In general, the whole tenor of the manorial court records shows that they regulated the day-to-day life of the tenants at a much more intimate level than was attempted by the higher courts of assize and quarter sessions. In this respect the manorial courts were excellent 'constables' for the larger courts. As shown above, the holders of these jurisdictions were, in most cases, justices of the peace themselves, and it must often have been a matter of using the manorial court as an investigative body for presentment to the higher court.

Thus, apart from the formal links of inquiry and presentment, the crucial link of personnel must have meant that the manorial courts were, in effect, an extension of the quarter sessions in the realm of misdemeanours. An entry in Holm Cultram records illustrates this clearly. In August 1616, Sir Edward Bromley, assize justice, ordered a list of certain by-laws to be sent down to Sir Wilfrid Lawson, Sir William Hutton and Sir Richard Musgrave, justices of the peace, presumably in order that they might be passed on to the manorial courts for implementation at the lowest level. The by-laws concerned Sabbath breakers, alehouses and negligent constables. Some courts, like Hexham, seem to have willingly enforced fines and debts for the higher courts. In October 1642, for example, Richard Swindon was prosecuted before the court in an action of trespass upon the case, 'upon a writt of ye Justices of ye County Court of Northumberland.'⁸⁶

The manorial courts were able to enforce their judgements by fine alone and were not entitled to imprison offenders. If offenders refused to pay their fines, the court was able to 'pound' or distrain their goods, until payment was made, during which time the goods, usually animals, were kept in the pinfold. *The fines were paid to the lord of the manor and must have constituted a not inconsiderable source of income.* This, perhaps, accounts for the jealous guarding of actions liable to be tried in the manorial courts. This attitude can be seen at Hexham in October 1627, where John Somerson pursued James Dryden for wrongfully detaining 15 beasts. The court ordered that the action be 'rested' or postponed until the next court, but not before it had exacted a promise from the pursuer that 'this action shall not be removed to any other Courte, but to be tryed here at the next Courte'. A similar attitude was displayed at Gilsland where in 1613, Henry Robson was fined 6 shillings and 8 pence for suing an action outside the baron court of Gilsland.⁸⁷ Although the manorial courts were not allowed to imprison, the Hexham court records contain a reference to a gaol within its bounds.⁸⁸

In addition to fines, the manorial courts could banish offenders from their bounds. For example, in October 1627, John Nicholson 'for his lewd life and conversation' was banished 'forth of the Towne and shire' of Hexham; and in October 1633, William Craig, who 'stowed and cutt corn' was ordered to leave the liberty of Hexham. None of the other manorial court records contain references to banishment, and it may be that Hexham retained this right as an exceptional case, from the time when it had been one of the great liberties of England. The records of Morpeth, however, do record the use of stocks, pillory and ducking stool, in 1654 and 1668.⁸⁹

The documents of the English and Scottish franchise courts reveal many similarities between the two judicial systems. Although the power and authority of the English franchises was much diminished by the seventeenth century, in respect that those courts were not able by law to hear felonies, or mete out severe punishment, they were not strikingly different from their Scottish counterparts in the same period, who, although able to deal with such matters, in reality rarely did so. Furthermore, the aims of the two types of court were virtually identical - to maintain law and order at a local level by controlling petty misdemeanours, settling debts and upholding good neighbourhood between the tenants; and at the same time, to administer the lands of the lord of the manor as a profitable concern, with the prompt payment of feudal dues and the efficient execution of feudal obligations by the tenants. The two systems shared further similarities, in particular the personnel link between holders of the franchise courts and the more superior law courts dealing with the more serious cases. In this respect, in the absence of a police network in both countries, the franchise courts served a vital function. Like the English courts, the Scottish baron courts dealt exclusively with offenders in the lower orders of society, in comparison with the Scottish regality courts who frequently heard cases against persons entitled to use the preposition 'of'.

To liken the English manorial courts to powerful regalities such as Jedforest however, would be most misleading. The English manor could exhibit nothing comparable to the independence, omnicompetence and dominance of such regalities, and the absence of good documents from such a Border regality has, perhaps, meant that insufficient emphasis has been placed upon those qualities. Good Jedforest documents could well have provided evidence of a Border regality acting as a major influence in the gradual pacification of the area or co-operating closely with the Border Commissioners. In the absence of such evidence, however, one can only draw on information from other lesser franchise courts and conclude that their role in the pacification of the Borders throughout the seventeenth century was apparently not as great as might be expected. Their operation in a limited geographical area, their concern for feudal rights and profitable civil actions, to the apparent exclusion of the larger issue of law and order over the whole Border region, meant that the unifying and centralising forces of the Border Commission and the High Court of Justiciary were able to gradually drain the power of the Scottish franchise courts and leave them so enfeebled, as to offer no resistance to the act of 1747.

CHAPTER VII

Town Courts

The existence of communities in towns and cities endowed with special privileges for their own good government, is of very ancient origin. Borough government is thought to date back to pre-conquest days in England and the first recorded reference to a burgh in Scotland (Roxburgh) occurred in 1120. Boroughs and burghs (as they were known in Scotland) were created by charter from either the King or the lord of the franchise jurisdiction in which they were situated. In the seventeenth century, just as there were different types of franchise courts, so these had given rise to various kinds of burgh and borough courts. As each town grew to develop its own peculiar identity with regard to trade, industry and geographical position, so the seventeenth century courts appear in different stages of development. Scottish burghs can be divided into two basic categories - burghs of barony and royal burghs, the latter being distinguished by more extensive rights. The English boroughs were basically either manorial boroughs or municipal corporations.¹

Like its Scottish counterpart, the English borough grew out of the manorial courts and because of this, certain problems have arisen about documentation. The growth of a borough within a manor could mean the existence of several courts, as in the case of Bamburgh. Here the manor belonged to the Forsters, and two courts were held regularly in the castle; firstly, the courts baron of the manor of the castle, with jurisdiction over all the manors of Bamburgh, about 50 square miles in all, which incorporated the view of frankpledge. Secondly, were the courts of the manor of the borough of Bamburgh, which governed the little village clustered round the castle itself. Both municipal corporations and manorial boroughs would have incorporated a court leet of the manor in addition to their own borough courts; this was the case in Carlisle and

Kendal. Moreover, municipal corporations usually had an array of courts, each dealing with a specific matter, such as civil or criminal jurisdiction and a multitude of administrative courts. In many cases, not all of these different court records have survived. Thus, in order to give each type of court record its correct significance in its own particular borough, the hierarchy of courts has been examined.²

After studying most of the manorial and borough courts in England, the Webbs concluded that there were two main types - the manorial borough and the municipal corporation. This first group they called 'a heterogenous crowd of authorities exhibiting in 1689 every variety of constitutional structure, but all alike falling short of autonomous corporate magistracy and all connected in some way with the Manorial jurisdiction from which they may probably have sprung.' Within this group, they identified four types of manorial borough.³

At the lowest level was the 'lordless court'. This was, indeed, nothing but a manorial court where the lord no longer demanded his rights; instead, the community had stepped in to govern itself, but had not developed any municipal structure. Such a borough was that of Newbiggin-on-Sea, in Northumberland. This was a small fishing village for which Lord Widdrington had been the lord of the manor, but who had, by 1689, let slip his rights. At the next level, the 'lord's borough' differed from the 'lordless court' in that a constitutional municipal structure was present. In Holy Island, for example, off the coast of Northumberland, the borough of Holy Island was run by two bailiffs, 24 burgesses and an unlimited number of 'stallingers'.⁴ The burgesses were the owners of the 24 freehold tenements of the island and by virtue of this, they were the Freemen of the borough, who alone had the right to elect one of the bailiffs. The other bailiff was a nominee of the lord of the manor. The stallingers did not have the right to elect a bailiff, but had to attend the lord's court and serve on the jury.⁵

Some 'lord's boroughs' attained such a degree of power and independence of action, that the connection with the lord of the manor became merely formal and he played no part in the constitution of the borough. If the borough managed to obtain a royal charter, it could be known as an 'enfranchised borough'. In some of the larger towns, where industry, trade and commerce were well established, the government of the borough often came to be shared between the manorial court and one or more of the trade guilds. The borough of Alnwick, for example, was - a place where the government of the town was shared between two distinct, but closely interwoven authorities:

(1) The court leet and court baron of the borough and manor of Alnwick held by the Earl of Northumberland, and (2) the guild authorities (chamberlain, the 'Four and Twenty'⁶ and the 'Common Guild of Freemen'). The first of these was, nominally, the superior of the court. The lord of the manor appointed the bailiff who became the head of the town and who joined with the chamberlains and the Four and Twenty in the administration of the affairs of the borough. The chamberlains and borough officers were present and appointed at this court and it was the jury of this court that enacted the by-laws for the government of the borough and gave instructions to the Four and Twenty and the chamberlains. In April 1654, for example, the court leet and court baron made regulations with regard to the customary annual horse races, clearing the streets and arranging the common pasture. Civil actions and nuisances were decided before this court.⁷

The guild authorities were extra-manorial and their constitution was not governed by statute, merely by usage. Yet, in reality, it was the guild authorities who were the ruling force in the borough; for most of the jury in the court baron were members of the Four and Twenty. The Four and Twenty were the burgesses or freemen of the borough and each year they selected four chamberlains from amongst their own members, who then became the executive

officers of the borough. It was the chamberlains, together with the Four and Twenty, who actually enacted the by-laws of the borough, who appointed the minister, clerk and sexton of the parish church, chose the surveyors of the highways and raised the money for the trained bands.⁸

In Morpeth, the lords of the barony - the Howard family - had, at some time, conceded to the inhabitants of Morpeth, the manor which directly encompassed the town. Within this manor, they were entitled to hold markets and establish a trading centre and the lord had granted them a measure of autonomy - the right to call Morpeth a borough and to elect bailiffs and burgesses. Yet the lord's courts still formed the centre around which municipal life evolved. These courts reveal the subservience of the borough of Morpeth to the lord of the manor. For example, the inhabitants could be presented for grinding corn away from the lord's mill and those who abused the bailiff of the town were presented at this court. It was from this court that the bailiffs were ordered to suppress unlicensed alehouses in Morpeth. At a court in 1654, William Ellis was prosecuted for 'taking and carrying away woollen yarne out of the town and Borough being a forrayner', and at the same court, Gavin Smith was prosecuted for 'taking a fee of a freeman contrary to the Custome of the Corporation.'⁹

In 1662, a royal charter confirmed all the rights of the borough of Morpeth:- the right to hold markets and fairs and the right to govern the borough through a corporate body. Yet even still, the lord did not relinquish complete control of the borough and there can be seen in the records a mixture of the authority of the lord, existing side by side with that of the bailiffs, aldermen and juries of the borough. It was the lord of the manor who built the town hall in which the bailiffs sat and without the steward of the lord's consent, no burgess could be admitted and no appointments to office

made. Moreover, it was the lord who had the final choice in the selection of bailiffs and the influence over their nomination.¹⁰

The burgh authorities in Morpeth were formed primarily from the seven trade companies or guilds, who chose the freemen or burgesses, the bailiffs, the constables and the serjeants. These companies of master craftsmen and traders met each in their own assemblies and each elected an alderman every year, levied fees, fines and monthly dues upon their members and made the by-laws for the regulation of their respective trades. All this was done independently of the lord of the manor. The brothers of the trade companies were not full citizens of Morpeth and they were not entitled to take part in the making of by-laws for the borough as a whole, or to participate in corporation business. Yet they were summoned, together with the burgesses, to take part and vote on all matters concerning the common lands.¹¹

According to an order of the lords of Morpeth of 1513, the seven aldermen were permitted to sit upon the bench at the several courts of the lord of the manor and audit the accounts of the bailiff. It was, however, the duty of the burgesses alone to make by-laws and it was from the burgesses alone that members of the juries were chosen at the courts.¹²

After 1662, the bailiffs of Morpeth secured for themselves, without either charter or grant, an unusual authority - the privilege of acting as if they were justices of the peace within the borough. Their names were never included in the commission of the peace for the county and it is difficult to explain how they came to exercise this authority. The Webbs concluded that when the royal charter of 1662 specifically required oaths to be taken and the new bailiffs of Morpeth presented themselves at the next quarter sessions for the county to take their oaths of office, they somehow assumed they had

'qualified as justices'. Thus, from that time until the end of the eighteenth century, they acted fully as justices of the peace in the borough, although they never held quarter session courts. So, except at the three sessions of the lord's court, the bailiffs were the unquestioned heads of the borough. All complaints, requests, appeals came to them. It was their duty to regulate, license and suppress alehouses within the borough and all the parish and borough officers came under their orders. The bailiffs could impose fines (by far their most usual form of punishment), whipping or imprisonment in the 'Clockhouses'. Serious offenders were referred by them to the assizes or *quarter sessions*, but the bailiffs obviously preferred to deal with offenders themselves. In 1702, for example, a man was presented for 'fetching a warrant from a justice of Peace' against another, 'before either the Bailiffs or the court had a hearing of it, contrary to order.'¹³

The borough of Morpeth stands half way between a municipal corporation and a manorial borough, because of the peculiar position of the bailiffs as justices of the peace; for, according to the Webbs' classification, the key identifying feature shared by all municipal corporations, was that of a corporate magistracy. This was a most prized privilege which allowed one or more members of a municipal corporation to exercise the powers and authority elsewhere conferred by a *commission of the peace*, together with the right to hold petty or quarter sessions. There are, however, several problems associated with identifying municipal corporations.

Sometimes the bailiff of just a manor might take upon himself the title of 'mayor' and claim the right to act as conservator of the peace. Other boroughs who were not permitted to create their own justices of the peace, acquired the privilege of having the current mayor or members of the corporation invariably included in the county's commission of the peace. Sometimes a separate

commission of the peace, issued initially for a short time for a borough might, if continued decade after decade, make a manorial borough indistinguishable from a municipal corporation. On the other hand, a genuine municipal corporation might allow its corporate magistracy to lapse and thus it would appear, to all intents and purposes, to be a manorial borough. Moreover, the privilege of corporate magistracy took several different forms.

Some corporations were not permitted to hold quarter sessions and had only the power to try and punish offences that would normally have been dealt with at petty sessions - such as minor assaults or drunkenness. This type of corporation had to refer persons accused of graver offences to trial at the county quarter sessions or assizes. The justices of another type of corporation were empowered to try and punish all misdemeanours, but were forbidden to deal with felonies. Others were allowed to punish all felonies not affecting 'life or limb' or all felonies except murder or manslaughter. The most powerful type of privilege empowered the corporate magistracy to deal with all felonies whatsoever, which, in the case of Chester, included high treason. In some cases, the borough justices were granted only concurrent jurisdiction in the town alongside the county justices and could only hold special or petty sessions. In others, the justices exercised exclusive jurisdiction within the borough for a borough court of quarter sessions, whether in respect of misdemeanours or felonies. The most powerful were those corporations (40 in all, in 1689) who excluded the county justices from intermeddling of cases - even the gravest of felonies.

The three main towns of the English Borders - Carlisle, Newcastle and Berwick upon Tweed - were all municipal corporations and each possessed different powers. They each represent different levels of borough organisation and development.

The most powerful was Berwick, which existed as a jurisdiction entirely separate from Northumberland; by virtue of its position as the last relic of Edward I's conquest of Scotland. The mayor and bailiffs were empowered to hold, not only quarter sessions but also general sessions or assizes, from which the judges and justices in Northumberland were excluded. Moreover, the bailiffs and mayor acted as sheriff in the execution of all writs and mandates from the King's courts at Westminster. The King's authority was not excluded from the burgh and cases could be removed a certiorari to his courts. But with regard to Northumberland as a whole, Berwick was a separate entity. At first the Border Commission expressly included the town of Berwick and in 1609 the Earl of Dunbar held a Border Commission court there, while the gaol there was often used for the Commissioners' prisoners in the early seventeenth century. But after about 1610, the Commissioners never visited Berwick and there is no record of a prisoner from Berwick being tried by them.¹⁴

Newcastle upon Tyne was empowered to elect its own corporate magistracy, to hold quarter sessions for the trial of felonies and misdemeanours and to exclude the county justices from dealing with any of its cases. Unlike Berwick, however, it was always inextricably tied up with Northumberland, for the assize judges held their courts there and in the early seventeenth century so did the Border Commissioners.¹⁵ Carlisle differed from Newcastle in that it was not able to exclude the county justices who held their quarter sessions in the town itself. In 1684, its aldermen were granted the right to be justices but they do not appear to have held any of their own sessions at all. There was, however, what was termed the 'court leet' of Carlisle. Unlike the usual kind of court leet,¹⁶ this court stated before each sitting that it was empowered to deal with treason, petty treason, murder, manslaughter, rape, robbery, burglary, as well as trespasses and misdemeanours. The cases tried by this court leet however, were similar to those found in all court leets and it is most likely that the

justices for the town of Carlisle were required to present any other cases to the county justices or judges of assize. Certainly the documents from those two bodies show no lack of cases from Carlisle.¹⁷

The documents from these towns illustrate clearly the confusing nature and multiplicity of borough courts, of which the justices of the peace and their quarter sessions were just one amongst many. For this particular study, however, they must be considered the most appropriate and relevant and therefore the most important. They shall, nevertheless, take their place amongst the following descriptions of the functions and jurisdictions of the courts that comprised a municipal corporation, and especially those of Berwick, Carlisle and Newcastle.

Most municipal corporations held special courts for settling civil actions. These courts closely resembled the baron courts and usually had been granted by the lord or the King to the municipal corporation. In the large corporations, there were several civil courts dealing with different classes of actions - such as petty debt or real estate. In Newcastle, there was even a civil court for freemen and a separate one for non-freemen. The main civil court of Newcastle however, was the 'Mayor's court' and the mayor and bailiffs usually acted as the judges. This court met frequently at regular intervals of about four weeks and its jurisdiction was limited to suits in which the cause of the action had arisen within the borough itself. In many boroughs it was limited to personal actions, but in a number of others, all sorts of actions could be tried. In Berwick, for example, the mayor and bailiffs held their own 'Land Court' or 'Court of Pleas' in which all kinds of civil actions were heard.¹⁸

The Table 37 shows the type of case heard before the Newcastle civil court. It shows that this court was concerned not only with personal debt, but other civil actions. Although personal debt was the largest category, it was closely

TABLE 37

CASES BEFORE NEWCASTLE-UPON-TYNE CIVIL COURTOCTOBER 1656 - MARCH 1657

	OCT. 1656	NOV. 1656	DEC. 1656	JAN. 1657	FEB. 1657	MAR. 1657	TOTAL
DEBT	50	40	21	65	56	51	283
ASSAULT	8	2	1	9	6	6	32
ACTION ON THE CASE	34	29	22	40	48	39	212
TRESPASS	1	1		2		5	9
BREACH OF COVENANT		1					1
DETAINING				1		1	2
EJECTION				1	2		3
TOTAL	93	73	44	118	112	102	542

COMPILED FROM N.C.A. 540/49

followed by claims for damages or action on the case. By all accounts, however, this was an important court hearing 542 cases in the six months between October 1656 and March 1657.

In the majority of municipal corporations, the court most in use besides that for civil actions, was the court leet. As a town became a municipal corporation, it did not cease to be a manor, neither did its municipal court cease to be held in and for such a town. Usually the ownership of the manor passed to the municipal corporation and it continued to hold the usual courts; but in some cases, the court was still held by the lord's steward, or by a municipal officer on behalf of the lord. In the case of Carlisle, the court leet was held by a specific grant from the King, as in Kendal. Because of the way it had evolved, the court leet was held by a municipal corporation in exactly the same manner and with the same content, as if it had been held by a manorial borough.

The court leet records of Carlisle reveal this clearly in the type of cases heard before the court. A typical court was that of 21st April 1619. At this court, the court leet dealt with 22 marketing offences, 8 cases of breach of good neighbourhood, 8 cases of unlicensed brewing, 6 swearing, 1 trespass, 1 keeping unlawful company and 1 case of an unlicensed craftsman. In the middle of the Puritan revolution, in 1651, the number of those charged with unlicensed brewing had jumped to 34 prosecutions. The type of case before Carlisle court leet reveals that although the court claimed to be able to deal with serious felonies, in fact all such cases must have been referred to the county quarter sessions held in the borough. The cases reveal the borough's concern for preserving its reputation as a marketing and trading centre: Richard Dacre was prosecuted for over-pricing his malt and Katherine Sympson and Elizabeth Mulcaster for forestalling the market in 1619. The prosecutions of those who

swore or those who brewed ale illegally reveal a concern for a law-abiding borough, as do those prosecutions for breach of good neighbourhood. The cases also reveal a similarity with justices' petty sessions. The court leet continued to make by-laws for the borough - ordering, as it did in 1619, that all walls within the town be kept in good repair and that no beggars be found within. As with the manorial court leets, the penalty was usually a fine, but there are cases of persons banished from the borough. Agnes Clarke, Agnes Sleyte and Marion Bell were ordered to be 'excluded from the city' in 1619.¹⁹

The Webbs found that during the course of the seventeenth century, the courts leet of boroughs declined in power. This decline can largely be attributed to the transference of power from the court leet to the borough administrative court or to the quarter sessions. This process had begun in Edward VI's reign when a statute ordered that all indictments found at the leet court were to be transferred to the justices of the peace. Under threat of losing some of their judicial powers, municipal corporations began earnestly to procure for themselves, or maintain their own corporate magistracy, which could render them immune from the jurisdiction of the county justices. The similarity between the business of the Carlisle court leet and the petty sessions of the justices of the peace has been noted, and indeed, in those municipal corporations where a magistracy existed separate from the county justices, the two courts gradually became absorbed into one. The justices of the peace gradually assumed the ordinary criminal jurisdiction of the court leet - the petty thefts and assaults and took over suppressing unlicensed alehouses, regraters and forestallers and bawdy houses. Indeed, this seventeenth century process has been called a 'curious intermingling of the structures of the two Courts.'²⁰

The jurisdictional area of a municipal corporation was often not compact. Its marketing jurisdiction might extend over counties; its admiralty jurisdiction up creeks, along estuaries and coastlines. The most comprehensive area of jurisdiction, however, was that exercised by the justices of the peace of the municipal corporation, for their 'area' was usually that of the original manor and parish within which the city or town was situated and which was usually regarded as 'the borough'. By tradition this area was divided into wards.²¹

The chief officers of the borough - the mayor, aldermen and bailiffs, were nearly always the justices of the peace who presided at the borough quarter sessions. The mayor often sat alone as judge and could act as coroner also, during his year in office. The bailiffs, as the chief officers subordinate to the mayor, of whom there were usually two (four in Berwick), were responsible for the selection and summoning of juries. The high steward of the borough was also frequently a justice of the peace and he was also usually a lawyer. In this respect, the borough justices could contrast with the county justices, *for whereas in the latter there were dozens of county gentlemen and clergy from all over the county, there were rarely more than six borough justices, all of whom held specific office in the borough.* Moreover, the borough bench was usually occupied by the same handful of people, one of whom was a salaried professional lawyer. As shown in the chapter on the county justices, this constant professional management of the court could contrast with the handful of 'working justices' who were essentially amateurs on the county bench.²²

The documents of the Newcastle justices reveal little of the frequency or the form of their meetings, but the Webbs were confident that their sessions would not be confined to quarterly meetings and that they would meet more frequently than the county justices. The records do reveal, however, that the quarter session court was held in the Guildhall in Newcastle, at the usual

times of year - in January, April, July and October. They also show that recognizances could be taken up to five times a month, with three or four times the average number. This would seem to indicate that the borough justices met outside their quarter sessions. The Berwick-upon-Tweed justices certainly met out of their quarter sessions, whether in sessions of adjournment or in 'private' or petty sessions. At a court on 11th October 1695, for example, Elinor Selkirke, a slanderer, was ordered to appear at the private sessions the next Saturday to receive her punishment.²³

The form of the corporate justices' courts almost always followed that of the county justices, with indictments framed, traverse offered, bills found true or ignoramus²⁴ and juries summoned from the burgesses and freemen of the borough. The Newcastle recognizances give some indication of the type of case before that borough's justices in the 1650's. (See Table 38). Apart from the unknown cases, where the accused was commanded just 'to appear' before the court, the largest number of cases would appear to have been assaults. In 1650 there were ten people charged to appear for assault, and a further nine were charged to 'keep the peace' to another, indicating that they too had committed a similar offence. The term 'misdemeanour' is also likely to have referred to a similar offence. If that is so, then in 1651 also, assault was the most common kind of disorder in Newcastle borough. In 1650, two people took an assault too far. Peter Dreyden and John Bainbridge on 22nd February were charged to appear before the justices for the 'dangerous hurting' of William Simson; by 4th March, they were to appear with regard to the death of Simson. Thefts too, seem to have been common in Newcastle at this time; but unlike those in the county as a whole, were not dominated by livestock theft. There is only one case of livestock theft and, perhaps significantly, it was committed by Thomas Rutherford, who lived outside Newcastle in West Lilburne. No particular category of theft predominated - they were a mixture of thefts of money, foodstuffs and household goods.²⁵

TABLE 38

RECOGNIZANCES TAKEN BEFORE NEWCASTLE-UPON-TYNEJUSTICES OF THE PEACE 1650-51

	1650	1651	TOTAL
PELONIOUS THEFT	5	8	13
MURDER	4		4
WITCHCRAFT	7		7
ASSAULT	10	2	12
DEFOULMENT/ /RESUE	2	3	5
DRUNKENNESS	2	3	5
DEFAMATION	1		1
PERJURY	1		1
UNLICENCED ALEHOUSES	2		2
DISORDERLEY ALEHOUSES	2	1	3
'TRANSGRESSION' (TRESPASS)	2		2
'MISDEMEANOUR'	4	10	14
MARKETING OFFENCES	6	3	9
DISOBEYING THE MAYOR	1	3	4
ILLEGAL SWIFE	3	5	8
'TO KEEP THE PEACE TO ...'	9		9
'GOOD BEHAVIOUR'	5		5
UNKNOWN	25	5	30
TOTAL	91	43	134

COMPILED FROM N.C.A. 540/39

There were seven cases of witchcraft in 1650. These conform to the standard witchcraft pattern, whereby all were women and four of them were widows. The 1650's were notable in England for their witchcraft prosecutions. They were also noted for their attitude to moral offences and in this respect, the Newcastle records are typical, with prosecutions against drunkards, swearers, unlicensed and disorderly alehouses. Like the court leet of Carlisle, the Newcastle records reflect the borough's concern with marketing offences in the prosecutions of regraters and forestallers and those who used incorrect weights and measures. John Smith, for example, who sold rotten food, was charged to appear before the justices in May 1650. The recognizances also reflect the basic manorial concern to keep good neighbourhood within the borough.²⁶

The Berwick-upon-Tweed justices in the 1690's were concerned with similar matters. Table 39 shows that between April 1695 and March 1696, most cases before the quarter sessions concerned those who had committed marketing offences. The Berwick records, however, contrast with those of Newcastle in two ways. Firstly, there were no serious offences recorded in the quarter sessions. Undoubtedly, the theft and murder cases would go before the mayor and aldermen at their assize courts (for which there are no records). Secondly, the Berwick magistrates show a remarkable concern for the morals of their inhabitants, with a large number of prosecutions for bastardy and unlicensed aleselling. In this respect, Berwick bears more resemblance to some Interregnum courts at the height of the Puritan reformation of manners. It certainly contrasts with the county justices' courts in the 1690's.

Boroughs in general were anxious to keep down the number of unlicensed alesellers - both Newcastle and Carlisle reveal this concern. But the records of Berwick suggest that that town was more troubled with immorality than the others on account of the garrison stationed there. In four of the ten bastardy

TABLE 39.

CASES BEFORE BERWICK-UPON-TWEED JUSTICES OF THE PEACEIN QUARTER SESSIONS, PRIVATE SESSIONS AND SESSIONS OFADJOURNMENT MARCH 1695 - MARCH 1696

ASSAULT	3
AFFRAY	6
DEFORCEMENT/ RESCUE	5
INMATES	5
NUISANCE	2
FORESTALLING	22
KEEPING A HOUSE OF ILL FAME	1
BIASTARDY	10
UNLICENSED RESELLING	11
SABBATH BREAK	1
DEFAMATION	1
TOTAL	67

COMPILED FROM B.R.O. C/8/1

cases, for example, the father was a soldier and in eight of the eleven cases of unlicensed aleselling, the offenders were soldiers. At a time when towns had to support fatherless children from the poor rates, it must have been an expensive business for those towns which, like Berwick, had an essentially transient male population.

Recognizances, by their very nature, do not usually record the penalties imposed by a court - but some idea is given by the Newcastle recognizances. There is, for example, mention of one Cuthbert Harle, described as the 'Town poinder'. This would seem to indicate that fines or confiscations were a popular penalty. But harsher penalties are also indicated. In April 1650, Elizabeth Watson was ordered to be whipped on the back until she bled and in May that year, Margaret Armstrong was to be banished from the town 'she being very troublesome and chargeable'.²⁷

The recognizances do not show the cases actually tried by the justices themselves and it is therefore, impossible to ascertain whether the casus difficultatis clause (see page 75 above) was in operation in the borough of Newcastle. It is clear, however, that by the Restoration, the most serious cases from Newcastle were being referred to the assize judges. Since the 1630's at least, the justices of Newcastle can be found seeking help in dealing with difficult cases. In March 1633, for example, the mayor wrote to the Privy Council complaining of a riot of apprentices which seemed to have got out of control. The mayor and borough justices were *unable to deal with the situation* alone and neighbouring sheriffs were charged to assist them and the Council of the North was called in to arrest the delinquents.²⁸

In Berwick too, there is mention of a town 'pinder' or poinder and fining was the punishment invariably inflicted, although some offenders were committed to gaol until they paid the fine required of them. But it should be borne in mind that the serious offences did not come before the quarter sessions and therefore, the most serious punishments would not be inflicted in that court.²⁹

Important as the civil and criminal jurisdictions were, however, the administrative courts of the borough were regarded by contemporaries as equally vital and the key institutions in the running of the municipal corporation. The seventeenth century saw, in many municipal corporations, the gradual combining of the administrative functions of the borough into the 'Common Council'. This was certainly the case in Newcastle, although in Berwick, instead of the Common Council, another administrative court called 'Common Guilds' governed the borough. In Newcastle, the Common Council consisted of 38 members in the period 1639 to 1656, including the incoming and retiring mayors and the sheriff of the borough of Newcastle. The rest were burgesses and aldermen. The records of their proceedings during those years show that they dealt with almost every aspect of the running of the borough.³⁰

It was the Common Council who appointed persons to the major positions in the town - the sheriff, coroner, town clerk, burgesses, aldermen, the water bailiffs and 'key masters'. It was that same body who could remove those officials from office if they proved unsuitable. (The mayor, of course, was elected annually) The schoolmasters and ministers were likewise appointed by the Common Council, who also regulated their stipends. The Council not only appointed the military officials of the town, but also organised the trained bands, arms and munitions needed by the borough.³¹

The administration of the landed property of the borough was of central importance to the Common Councils of every municipal corporation. The Berwick Common Guild, for example, had a large amount of land, 4,500 acres of which was

usually allotted out in meadows or stints. There were also lands and houses belonging to the borough within the town itself. The Newcastle Common Council keenly administered its landed property. On 10th December 1641, for example, a jury of 12 men were charged to ascertain exactly what lands, leases and revenues were held by the town, by whom and in whose hands they were held, and by what right they held those lands. The Common Council's book records the granting of many leases within the town and they dealt peremptorily with those who failed to secure their permission before building. Robert Singleton's case, for example, was not unusual. In August 1641, Robert built a shop in Sandgate 'upon the land of this Corporacion without the leave or licence of the Common Council'. 'The Common Council of the Towne takeinge the Premisses into their Consideracion and the ill Consequences therof, did purpose and intend to have the said Shopp demolished and taken downe.' They were persuaded by Singleton to accept a high rent in lieu of this drastic action.³²

The Common Council book of Newcastle reflects the corporation's concern with maintaining the commercial position of the town. In 1647 for example, five persons who had set up stalls in the market place without first procuring a licence from the Common Council were ordered to be prevented from carrying out their trade in the market. If they disobeyed this order, the serjeant of the market was to demolish their stalls and they were to receive 'such due and condigne punishment as by the law may be inflicted upon them'. In March 1650, Richard Readhead was appointed by the Council to ensure that no-one used any false weights or measures within the town. He was to receive a salary of £10 a year for this task. Every person suspected of using false weights was to be brought 'upp to the Towne Courts and the keep in safe custody'. Those who were found to be 'palpably faulty in the same' were to receive the punishment of the 'lawe of the land'.³³

The Common Council can also be found making by-laws for the good of the borough. In June 1642, for example, they commanded that no-one was to lay

'dales', 'buntings', 'sparrs', pitch or tar on the quay. These by-laws were to be put into execution by the magistrates of the borough. The following case clearly illustrates the power of the magistrates in the borough. In January 1654, the Council complained that although the streets used to be cleaned every Saturday night, this practice, 'since the Reduceinge of this Towne' had fallen into disuse, 'to the dishonour of the Magistrats, the disparagement of the Towne, Discouragement to Traffique and Trade and the begetting of noysome smells and Diseases amongst us.' The Council admitted that the issue of cleaning of streets was 'but of an inferior nature', but considered that 'the inferioritye and indifferencye of those smaller peices of Government are turned into speciall Concernments when the Commands of the Magistrate lye upon them.' The magistrates of the borough then, were regarded by the Common Council (from whom the magistrates were drawn) as the 'legal department' of the Common Council itself. They were there not only to enforce the laws of the land, but also the Council's by-laws. Thus, those who disobeyed the Common Council would, as a matter of course, be punished in the magistrates' court. In May 1650, for example, William Horsley was charged with refusing to obey an order of the mayor.³⁴

The case of Edmond Marshall, however, indicated most clearly how interwoven the magistrates' courts and the Common Council were, with the latter jealously guarding their rights as the former. In June 1649, Edmond Marshall, who had assaulted the mayor and aldermen on election day, was called before the mayor, aldermen and recorder and bound by them to good behaviour and charged to appear at the next quarter sessions. Instead of submitting himself to trial before the mayor and aldermen however, Marshall 'removed the said indictment out of the Court of Sessions of this Towne and by A writ of Certiorari hopeinge thereby to Avoid and escape the just and Condeyne punishment due to him.'

Marshall was ordained never to receive the freedom of the town and never to become a burgess until he publicly confessed and acknowledged his fault before the mayor and aldermen of the town and subjected himself to censure.³⁵

The Webbs found in some boroughs a multitude of specialised jurisdictions - like the court of pie-powder, or the court of the clerk of the market; some boroughs even had a court for orphans or a court of admiralty. In many boroughs however, like Newcastle, all these functions seem to have been absorbed into the Common Council's administration.³⁶

It can be seen that there were many different types of borough government and jurisdictions in seventeenth-century England. A historian of Northumberland wrote in the 1830's, 'very few towns in the kingdom are governed by the same laws; and while many of them have whimsical, many more have exceedingly beautiful schemes of government.' He could also have added that some of them (including the Border corporations of Berwick and Newcastle) were exceedingly powerful.³⁷

Berwick, by holding its own assizes removed its *magistracy* from the scrutiny of the assize judges. Newcastle, at least, could not do that, being one of the main centres of the assize judges' activities on the Northern Circuit. But there seems to be little doubt that the magistracy in corporations received a more comprehensive and complete power than their county counterparts and were able to maintain an almost twentieth century hold over their citizens. No study of law and order could be complete without the inclusion of such corporations; yet it is doubtful whether either Berwick or Newcastle ever experienced the type of disorders which were associated with the Borders and endemic in the rest of Northumberland.

The idea of a burgh as a community in which merchants and tradesmen were granted specific rights to carry out internal and external trade, was (like the justices of the peace and the sheriffs) copied from English practice. The first

burghs were formed by charter from the King - the earliest dating back to the time of David I. Shortly afterwards, barons started to grant special trading privileges to a particular town within their barony or regality. By the seventeenth century, there were some 60 to 70 royal burghs, and by 1707, some 210 burghs of barony. Towns with the first type of grant, were known as royal burghs and there were great and fundamental differences between these and the burghs of barony. The royal burghs were by far the more powerful. They alone were able to trade overseas and retain foreign commodities. They operated fierce protection schemes for their commerce within their bounds and only burgesses of the town were able to carry on any kind of trade within this area. The royal burghs regarded themselves as 'free towns' and were able to send representatives to Parliament and commissioners to the Convention of Royal Burghs, which legislated on economic and financial matters.³⁸

Not all royal burghs had the same powers. All of them had the powers of a baron court in criminal matters and served as courts of record. Some royal burghs had an equivalent jurisdiction to the sheriff - Dumfries was such a burgh. Burghs of barony could have jurisdiction in criminal matters conferred upon them by the baron, but more usually (for reasons of profit) the baron baillie kept the criminal matters for his own court and left the burgh with debt cases, economic regulations, good neighbourhood and inheritance cases. The records of Kelso are typical in this respect - the baron court books being devoid of such possessory actions.³⁹ By the last half of the seventeenth century, the stark division between burghs of barony and royal burghs was starting to become slightly blurred.

For both groups of burghs, local government and self-government depended upon the arrangements made locally with the superior and no one group was better placed to secure concessions than the other. Moreover, some non-royal burghs grew tremendously in size of population and in the amount of trade they attracted. These frequently alarmed the royal burghs in their area,

who then adopted a hostile manner towards what they called 'unfree towns'. Indeed, a Convention of Royal Burghs decided in 1596 to seek redress for the (what they considered to be) grievance of barons 'erecting privatlie of burghis of barroneis, kirkclachanis and utheris small villageis, with als greit liberties as the freburrowis hes.' The act of June 1633, reaffirming the rights and privileges of royal burghs did little in the long run to prevent the growing importance of some non-royal burghs. In the Borders, for example, the prosperous and flourishing non-royal burghs of Hawick and Kelso, were felt as a constant threat to the royal burgh of Jedburgh. From the Reformation onwards, there had been an increasing number of burghs of barony promoted to the status of royal burghs. After 1660, there were more and more markets and fairs held in places holding non-royal burghal, or even, non-burghal privileges and after 1672 the royal burghs lost practically all their monopoly of foreign commerce.⁴⁰

The government of each Scottish burgh was in the hands of a privileged group of burgesses. Any 'indweller' of the town could become a burghess in many different ways, although all involved paying a fee to the town and proving that the applicant's name was on the apprenticeship books of the town. Most new burgesses were the sons, or sons-in-law of existing burgesses and these were able to become burgesses by paying a small entry fee and serving a shorter than usual time as an apprentice. Others had to pay a higher fee and serve a longer apprenticeship and perhaps wait a set period of time after serving that apprenticeship. Strangers, even merchants or craftsmen from other burghs, had to pay a heavy fee for admission to any of the craft guilds or the merchant guild. Most town councils exercised a form of moral and financial selection over applicants, requiring that they be of good behaviour and in possession of a certain amount of property and movable goods.⁴¹

The burghess group itself was divided into craftsmen and merchants - with the merchants as the socially and politically dominant group. In many burghs there was a good deal of friction between these two groups, each trying to score off

the other. The merchant guild provided the organisation whereby the merchants could dominate the town council in most burghs. Two-thirds of Dumfries town council, for example, was comprised of merchants. Selkirk town council consisted of 22 persons in 1687 - one provost, two baillies, the treasurer, six craftsmen, nine merchants and three others. By an act of 1469, the members of the town council were to sit for one year and the old council was to choose the new. In Dumfries, the new dignitaries were traditionally appointed on Michaelmas day. A facade was maintained of preparing lists of candidates for election, although it was well known beforehand who they were to be. This meant that a powerful elite was able to emerge to dominate the government of the town.⁴²

A similar small elite governed the town of Selkirk, of which the Mitchellhill family were the most prominent. This family had representatives on Selkirk council from the 1620's (at least) until the 1680's. By the 1680's however, corruption was evident. John Riddle of Hayning, a Border Commissioner, was appointed provost of Selkirk in October 1688. He found that over many years the 'Common Good', that is, money paid to the burgh of Selkirk by its inhabitants, had been squandered and misapplied. It was found that some members of the council had shared this 'sweet morsell' between them and most of it seemed to have been spent on drink. The Mitchellhill family were accused of setting the tack of lands to their friends and relatives to the prejudice of the town.⁴³

The magistrates of a burgh were to be elected by the old and the new councils and each craft was to have a voice in this election. Burgh jurisdiction was vested in the magistrates, not in the council or community of the burgh. In effect, however, it was the council that exercised this authority. In December 1641, the magistrates and council of Kirkcudbright 'ordanis all materis that concernis the libertie of this burgh, bluidis, ryottis and sicklyk to be treated on be the Counsell. And the magistratis to keip courtes onlie for civill debts and the lyke.' Of Dumfries, one historian of the burgh has written

'We never read in the old minute-books of the Provost and Baillies administering the law: it was the Council, inclusive of them, who dealt out justice on all persons.' The provost and two baillies of each borough enjoyed a great deal of power; from 1609 burgh magistrates were usually named as justices of the peace within their bounds, enjoying a cumulative jurisdiction with the county justices.⁴⁴

The different types of burgh and the varying kinds of jurisdiction possessed by burghs, even within the same group, meant that their position in the judicial hierarchy was very complex. Royal burghs tended to be the caput of the shire, where the sheriff of the county held his courts. In the Borders, they also tended to be the place where the Border Commissioners held their courts. As the caput of the shire, they were the seat of the circuit court when it came to their area and they were to act as host, making the court comfortable, with chambers specially allocated. Because the important criminal courts used the burghs in this way, the burgh gaols were of great importance. It was the burghs that appointed the gaolers and the burghs that had to maintain the poor prisoners, because it was in those prisons where offenders were housed awaiting trial at the criminal courts. In November 1645, for example, the Earl of Buccleugh held a justice court in Jedburgh and delivered five notorious thieves to the baillies of the burgh, to be kept in captivity until further order. The sheriff might require the baillies of a burgh to transport or collect prisoners from another. This happened in June 1654, when the sheriff of Roxburgh requested that the baillies of Jedburgh convey Thomas Kirsopp from Jedburgh gaol to Berwick. The burghs frequently resented the cost and inconvenience of maintaining the gaols and prisoners.⁴⁵

It was usually the gaolers of the burgh that had to carry out the sentence of execution passed upon offenders by the circuit and Border Commissioners' court. In August 1662, for example, the baillies of Jedburgh were to see that the sentence of death was pronounced on witches convicted by John Kincaid, the 'tryer of witches'. In March 1691, the baillies of Jedburgh were ordered to execute two

sheep thieves who had been convicted by the commissioners of justiciary. Because they often housed very serious offenders, the burgh gaols had to be secure and the cost and inconvenience of maintaining them could fall as a great burden on the inhabitants. Many do not seem to have bothered to maintain the gaol until it was in decay. In January 1627 for example, the provost and baillies of Kirkcudbright reported that 'ther tolbuith is altogidder ruinat, fallin to the grund and uterley decayit.' The Border Commissioners complained to the Privy Council many times about the dreadful state of the Border burghs' gaols.⁴⁶

Burghs of barony, like baron courts, could not exclude the sheriff from their bounds, but royal burghs all possessed the power to repledge offenders from the sheriff court. Powerful burghs, like Dumfries for example, jealously guarded their jurisdiction against the county sheriff on numerous occasions. In July 1662 Thomas Johnstone, turnkey of the tolbooth in Dumfries, and William Johnstone, the town officer, were imprisoned for eight days in Dumfries gaol for the crime of 'taking a county man to the Shirreff depute to be judged who committit a batterie in the burgh'. In September 1663, the council there rebuked Elizabeth Gibson for committing:

a great abuse of ther [the council's] authority ... by writing an address to the Shirreff depute of Nithsdail for repairing a wrong done by one of our burgesses to her, whereby she has endeavoured to move the Sheref-depute to encroch upon the priviledges of this burgh, contraire to the bond fidelitie of a burgesses wife; therefore the Magistrats and Counsell discharges her of aney priviledge or libertie she can pretend to of freedom of trade within this burgh.

A similar situation occurred in Jedburgh the same year, when Thomas Porteous was summoned before the magistrates of that town for a riot upon John Olipher. The council reported that 'he incontinent went and complained to the sheriff Depute or his Fiscal upon the said John Olipher and caused summon him to compear before the Sheriff there to be censured, albeit the riot was betwixt burgess and burgess', who should be judged by the Magistrates of the burgh wherein they

live.' Thomas Porteous was fined £50 for this offence. Some burghs sought to impede the justices of the peace, although it was not until after 1707 that the justices started to make any significant inroads into the jurisdiction of the burghs.⁴⁷

The burgh court was usually held in the tolbooth of each burgh and the magistrates would appear to have tried to hold court about once a week. A head court was held once a year in October, although Kirkcudbright in 1610, 1623, and 1634, held extra head courts in January and April/May as well as in October. It was at the head court that the dignitaries and officers of the year were chosen. The burgh courts seem to have employed some law enforcement officers - chief of whom were the constables and birlawmen. This latter have been described in the chapter on the franchise courts and as far as it is possible to tell from the documents, their function in the burghs would appear to have been the same. The Jedburgh burgh court records reveal the constable's duties within that burgh in December 1703.⁴⁸

He was ordered to search the town in order to root out those that might be found drinking after 10 o'clock. Strangers were to be secured and brought to the nearest magistrate; all suspicious 'night walkers' were to be apprehended, together with all vagabonds, egyptians, idle persons with no means of living and all guilty persons, such as thieves. On the appearance of a fray between parties, the constable was to request the assistance of neighbours to appease the fray and to pursue those who fled from it. He was to apprehend anyone who threatened another; to watch the market closely for those who broke the market regulations and after the sermon on Sunday, he was to take note of anyone who had been walking in the fields or in company with their friends instead of church. The names of the people who violated any of the above regulations were to be presented to the magistrates. Kirkcudbright burgh constables appear to have been obliged to carry out similar duties to those in Jedburgh; they too

presented offenders to the magistrates.⁴⁹

The burgh court would also appear to have appointed a 'watch' or 'guard' in each burgh. In Jedburgh, for example, in the 1690's, the 'guard' seems to have been a powerful watch, whereby the captain was paid 30 shillings and the rest 20 shillings each. They were charged to be in readiness on all occasions for assisting the magistrates and council in suppressing tumults and disorders in the town, and to apprehend any 'persons whatsumevir making any disturbances or disorders within the town by night or day and committ them to prison till they be tried.'⁵⁰

Each burgh allotted a portion of its meadow and pasture land to its freemen. This process, known as stenting, was carried out at the head court, sometimes annually, but in other places every several years.⁵¹ Often at the head courts, the towns' 'statutes' for the year would be laid down. This was certainly the case in Kirkcudbright, although like other burgh courts it continued to make statutes or by-laws throughout the year if they were needed. The main burgh statutes were renewed annually at the head court. Like the franchise courts, the burgh court, through these statutes, ensured the smooth running of the town throughout the year and the orderly nature of its inhabitants. The statutes then, could cover a wide range of topics: the Jedburgh court in September 1677 forbade riding to burials; an act of October 1638 in Kirkcudbright ordered that there should be no single women or inmates reset within the burgh; in 1688, Selkirk burgh enacted that 'fleshers blowing and working of flesh at the spalding' should be forbidden to do so in time coming. These by-laws, or statutes reflect clearly the burghs' concern to protect their privileges, to administer their common lands and to keep good neighbourhood within their bounds.⁵²

The by-laws also show the commercial concerns of the burghs. At the head courts all customs, prices, weights and measures were set for the year to come: at the Michaelmas courts of Jedburgh and Kirkcudbright the 'ladles' were set for the year. The head court in Kirkcudbright in October 1650 was typical. Here the customs were 'set', the price of ale and candles set, a list of arms within the burgh was presented and the burgh officers appointed. In November 1658, the Dumfries council ordered that all candles, whether Scottish or English were to be sold within the burgh at 4 shillings . 6 pence each pound Scottish weight. That court also specified that all cloth in the burgh was to be sold in a specific way and at a set price. No stranger was allowed to settle in Dumfries unless leave was asked and obtained and no-one could open a shop or work as a tradesman without becoming a burgher. Like the English towns, the Scottish burghs were anxious to preserve the reputation of their markets and treated forestallers and regraters with high contempt. Jedburgh, in December 1622, even enacted that no butchers were to buy meat or sheep during the night but were to do all buying in the open market place.⁵³

The procedure of the royal burgh courts was very similar to that of the sheriff courts, although in important cases there were two judges instead of one. The baillies manned the courts and it was the duty of all burghers, unless lawfully excused, to be present at the head court.⁵⁴

The type of cases before the courts was also similar to those before the sheriff courts. The courts were dominated by the large number of debt and property actions. Before Kirkcudbright burgh court for example, these comprised 85 per cent of the business between 1606 and 1658. During that period there were, on average, only 12 other cases each year. Dumfries burgh court was likewise dominated by debt cases, especially during the 1650's. Like the sheriff courts, the burgh courts also dealt with actions of removing and could perform the servicing of heirs.⁵⁵

TABLE 40

CASES BEFORE DUMFRIES BURGH COUNCIL1663

RIOT	9
BLOOD AND RIOT	5
ASSAULT	24
SLANDER	12
THEFT	1
RESSET OF THEFT	1
NEGLIGENT OFFICER	2
MARKETING OFFENCES	10
SCANDALOUS CARLIAGE	2
GOOD NEIGHBOURHOOD	3
ILLEGAL BAPTISM	2
MISCELLANEOUS	4
CONTUMACY FINES	63
TOTAL	138

COMPILED FROM DUMF. M.C. 1/1/1

TABLE 41

CASES BEFORE KIRKCUDBRIGHT TOWN COUNCIL

INCLUDING DEBT ACTIONS 1606-8, 1630, 1650

EXCLUDING DEBT ACTIONS 1609-17

	1606	07	08		1630		1650	TOTAL	TOTAL 1609-17
DEBT	43	70	87		52		39	291	
RIOT	3	7	2		8		2	22	51
BLOOD AND RIOT					4		3	7	25
Drunkenness	10							10	2
WRONGFUL PUNISHMENT IN COURT	1						1	2	4
SLANDER		1						1	18
BREAKING PRISON		1						1	2
DAMAGE		1						1	0
THEFT							2	2	0
DEPORTMENT					1			1	5
DISOBEYING THE PROVOST								0	6
ARSON								0	1
BLASPHEMY								0	1
RESETTING BEGGARS								0	1
UNKNOWN		9						9	0
TOTAL	57	89	89		65		47	347	116

COMPILED FROM MARQUIS OF BUTE AND C.J. ARNET (FDS.),
KIRKCUDBRIGHT TOWN COUNCIL RECORDS (EDINBURGH 1957)

A large proportion of the remaining business before the burgh courts fell under the category of quasi-criminal offences. As in the sheriff courts, actions of blood and riot formed the next largest category to debt, taking up in the Kirkcudbright court, for example, 10 per cent of all the cases before the court between 1606 and 1658. Deforcements were also prosecuted in the courts. Those who disobeyed the provost or baillies, or were insulting towards them, could find themselves prosecuted in the burgh court: John Hutchinson, for example, who used 'injurious' words against the baillie was fined £10 before the Kirkcudbright court in January 1610.⁵⁶

As the original baronial jurisdiction was limited by the requirement that the murderer, slaughterer or thief be taken 'with the fang', so the competence of the burgh of barony court was limited and that of a royal burgh subject to the same limitations as the sheriff. Thus, an individual from Dumfries, for example, in June 1663 was 'taken reid hand steilling malt out of the sack standing in the mylne.' Like the sheriff courts then, true criminal cases were not heard very frequently in the burgh courts. There were only four cases of theft before the Kirkcudbright court between 1606 and 1658. All of them were for petty theft and in none was a punishment given. Three of the cases in 1650 were reported to be continued and a convicted offender in April 1635 was ordered to remain in ward until she was punished. These would indicate that the offenders were ultimately judged elsewhere. Certainly, Selkirk burgh referred a serious case of theft for trial before the Border Commissioners. The courts of Jedburgh and Dumfries, however, can be found trying and sentencing serious cases of theft. In June 1681, for example, Margaret Alie was prosecuted by the Jedburgh court for the theft of goods from James Browne and three other charges. She was ordered to be transported to Virginia or Barbados.⁵⁷

There are a number of cases where the burgh courts can be seen to be working closely with the church courts.⁵⁸ In many burghs, the baillies were often elders and it was therefore natural that a close relationship should exist between the

two jurisdictions. The burgh courts passed many by-laws, 'statutes' or acts, in support of the church: Kirkcudbright passed an act in 1612 against selling ale in time of preaching on the Sabbath ; in March 1664, for example, the burgh court of Dumfries passed an act to check those who walked idly from house to house, gossiping out of doors on the Sabbath. Persons who offended against the moral acts of the burgh courts were to be prosecuted before those courts, although such cases could easily have been tried by the kirk session. In April 1642, for example, Janet Suittie was prosecuted by Kirkcudbright burgh court for fornication and in December 1683, eight deacons from Jedburgh were fined 20 shillings each by the burgh court for being absent from the kirk on the Sabbath. In some cases the kirk session would appear to have asked the burgh magistrates to deal with the offenders, when the church had failed to do so. Jedburgh burgh court in May 1696, for example, noted that

several persons guilty of scandals being cited to the Kirk Session to make satisfaction for their offencewill not appear after they are summoned for that effect, wherefore the saids Magistrats and Counsell commands them to give all submission to the church and that under the pain of ten pund and imprisonment of their persons. 59

In most cases, however, the civil magistrates seem to have been required to inflict an additional punishment on the offenders to ensure that they did not commit a similar offence again. A Kirkcudbright act of 1613, for example, proclaimed that 'all blasphemaris of the blissid name of God, banaris and sweiris sall pay xls toties quoties and gif thai be nocht solvendo to be putt in the joggis at the will of the minister and magistrattis.'⁶⁰

There are also occasions where the burgh magistrates requested the kirk session to impose its penalty upon those from the burgh courts. This usually happened in cases where the jurisdiction of the church and burgh courts overlapped. In August 1634, for example, Margaret Callane was fine 5 marks by Kirkcudbright burgh court for blood, striking and slandering Florence McGuffock. The court remitted 'the satisfioun of the slander and punishment thereof to the

session.⁶¹ Cautions were often taken before the burgh magistrates and the minister together.⁶²

The penalties imposed by the burgh courts on all types of offences seem to have been influenced greatly by the church courts. Fining was a popular penalty for blood, riot or deforcement and offences against good neighbourhood. The Kirkcudbright penalty was usually 5 marks for a 'simple' riot, with charges rising to £10 Scots for blood and riot. In Dumfries, a single assault could incur a £5 Scots fine and blood £25 Scots. Slander, swearing or blaspheming could incur the penalty of 40 shillings, but if the words were directed against a court officer, baillie or against the provost, the offender might pay up to £20 Scots. Offenders could be offered an alternative to a fine. The wife of Alexander Neilson, for example, in January 1629, could either pay a fine of 20 shillings for 'flyting' or stand for an hour in the 'gorgardis'. A slanderer was to be fined 20 marks or 'lye in the stocks a day'. The burgh courts frequently seem to have opted for a 'shaming' punishment for offenders. In January 1668, a Dumfries woman, whose 'rauche tongue' had abused a neighbour was ordered to be 'put upon the trone with great letters of 'Scandall' on her heid.'⁶³ In Dumfries in 1670, a drunken servant of the laird of Yorstoun had abused the magistrates of the town with 'scandalous speitches' whilst 'most scandalously drunk'. He was ordered to be 'set upon the Mercat Cross' for four hours and then cast into the 'thieves Hole' for 48 hours.

The most serious punishments inflicted by the burgh were banishment from the town and loss of the freedom of the burgh. The latter was reserved for burgesses who had committed offences. Thomas McGuffock who spoke against the Privy Council, the magistrates of Kirkcudbright and the town council was deprived of the freedom of the burgh and banished in September 1644. Banishment was utilised against the more heinous or incorrigible offenders. A fornicator from Kirkcudbright was ordered to be 'ducked in a pool' and then banished from the

burgh in April 1642. In 1663, a thief in Dumfries was ordered to be conveyed out of the town 'be the hand of the hangman and nevir to return therein and a bauk to be bait at his heills; nane to resett him in their housses' upon penalty of 10 marks.⁶⁴

Indeed, the burghs' authorities seem to have been most anxious to remove all undesirables from their towns. Not only were the grossly immoral and those who had committed serious offences removed, but such people were prevented from coming into the burgh from elsewhere. The burgh of Jedburgh required adequate testimonial before admitting strangers to the town, and indeed in April 1635, appointed a watch of two men to ensure that no strangers came within the town without the consent of the magistrates. Both Jedburgh and Kirkcudbright forbade any inhabitant of the burgh to 'set' a house to anyone who did not have 'honest means to live by' and would accept no single women liable to fall into sin. Honest widows were accepted. All burghs were especially keen to eject beggars and vagabonds.⁶⁵

Most of these acts against beggars occurred during the years of grain shortages, as in the 1690's; or plague, as in the 1630's and 40's. The burghs then had enough problems with their own inhabitants without having to cope with an influx from the country. All burghs were especially fearful of plague. Jedburgh, for example, in May 1637, ordered that no beggars be admitted to the burgh and that no-one from the burgh visit any ports in order to eschew 'the fearful plague of pestilence' which was sweeping the Borders at that time. In December 1644, Kirkcudbright took precautions on account of 'the imminent danger that the town is in throw incoming of beggaris and utharis at sundrie pairttis in this toune ... in respect that the plague is spreiding in this kingdome.' Certainly the Privy Council expected the burghs to take action against the spreading of the plague, because they were the most likely places for the plague to be dispersed, through markets and fairs. The enactments of the Privy Council

during the plagues of 1636 and 1637 illustrate this clearly, when the markets and fairs in the Border burghs were all to be called off.⁶⁶

Some burghs still carried out the execution of thieves and witches in the seventeenth century, but such cases were very rare, the privilege having been usurped by special commissions. Certainly in the Borders the Border Commission seems to have dealt with most cases which would have merited the death penalty. It was the inroads made into the burgh jurisdictions by such special commissions, together with the rise, after 1707, of the justices of the peace and the advance of the sheriff, that contributed towards the decline of the burgh jurisdictions in the eighteenth century. The 1747 act restricted the powers of 'dependant' burghs of barony to those held by actual baronies, which meant that they could only impose fines not exceeding 20 shillings in criminal cases and up to 40 shillings in civil cases. By the end of the eighteenth century, the sheriff courts had taken most of the civil actions and the burghs were left with minor assaults and riots.⁶⁷

For most of the seventeenth century, however, the combined forces of the burgh magistrates and the church held most Scottish burghs under an apparently strict rule. Some historians, however, consider that it was only in moral matters that their efforts were effective and that, in general, councils were inept at enforcing their own regulations. The case of Margaret Henderson in Dumfries illustrates this clearly. In February 1663, the Council ordered her to be banished from Dumfries (for an unspecified crime). In August, she was ordered to leave again. In October, she was prosecuted before the court for scolding and in January 1664 she was, yet again, ordered to leave the burgh. Certainly, the large number of prosecutions for unsuitable chimneys before the Kelso court was to little avail, because that town was ravaged by a terrible fire in 1684. Plagues too, continued to take their toll in towns throughout the century. Yet it is, perhaps, a little unfair to accuse burghs of 'feebleness' in

failing to eliminate such catastrophes; for with wooden buildings and unsophisticated sewage systems and without modern medicine and fire brigades, any seventeenth century jurisdiction would have proved ineffective against plague and fire. Moreover, the burghs had a larger and more concentrated population than the rest of the country.⁶⁸

The burghs and boroughs of England and Scotland can be seen to have imposed a rule within their bounds that was quite unusual for the period. The magistrates of the burghs and municipal corporations wielded great powers - the Scots often combining the powers of burgh official, sheriff, justice of the peace and elder: the English, the powers of town councillor, justice of the peace and sheriff. Even, in the case of Berwick, assize judge. Unlike most of the county law officers, the town magistrates were elected for a limited period and unlike the rest of the county these officials had to deal with a different kind of law and order. There were fewer livestock thefts and more household thefts; there were more women involved; they were more concerned with moral behaviour than the county jurisdictions, with trade and commerce and with excluding undesirables from their bounds.

Covering a smaller area, their methods were different - with more frequent courts and with greater ease of detection and apprehension. Moreover their penalties could assume a slightly different emphasis. Exclusion from a town was much easier to enforce than banishment from a county or country, and shaming the less serious offenders must have had more effect, because more people knew about it. It is interesting that most of these comparisons between town and county hold true for most towns in Scotland as well as England, although the English municipal corporations tended to deal with more serious offenders. There was, in fact, a stronger similarity between the contemporary Scottish and English town court, than between any other jurisdiction operating in both countries at that time. The essentially selfish nature of most of the towns' by-laws was a feature of both countries and the often corrupt officials would have been as recognisable in seventeenth century Scotland and England as in more recent times.

CHAPTER VIIIEcclesiastical Courts

In the ecclesiastical courts of both England and Scotland, the student encounters a totally different concept of law and order. Historians of historic criminality are agreed that theft and fornication cannot be treated together without some significant qualifications. Strictly speaking, offences against the law of the Church are not crimes, being offences against God, not man. In this regard, they are sins and as such lack the criminal element of deliberate and malicious intent against another person's rights, with which the other chapters in this thesis have been concerned. Yet in the seventeenth century, sins (as we in the twentieth century would define them) were not confined strictly to the ecclesiastical courts, nor were all 'crimes' excluded from them. Seventeenth century governments recognised that 'sins' could be socially disruptive and lead to a breakdown in public order; thus, for example, the English and Scottish justices of the peace have been found dealing with moral issues, such as bastardy and defamation, which were also dealt with by the ecclesiastical courts. In Scotland, the division is even more blurred, with adultery being a capital offence, punishable before the highest criminal court in the land - the High Court of Justiciary. Nor did the ecclesiastical courts keep clear of criminal matters. The Scottish kirk session, for example, can be found dealing with blood and riot, a category which was more frequently dealt with before the franchise or sheriff courts. Kirk sessions also saw fit to excommunicate thieves and murderers. As in the English ecclesiastical courts, defamation was an important item of business.

There are, therefore, good grounds for including the ecclesiastical courts in a study of law and order, just on the basis of the type of business before the courts. But these courts frequently served another more subtle and more important

role, especially in Scotland, where, on account of their representatives in every parish, they were useful to the secular courts, who drew on their more intimate knowledge of the community in order to execute criminal law and order more effectively.

It was in Scotland that ecclesiastical discipline was most powerful - yet it was of more recent foundation than the English. John Knox and the Protestant reformers in the early 1560's devised a formula for establishing a Godly Commonwealth in Scotland. In this, the Church and the State were to work closely together - the State to govern strictly and execute the laws and the Church to interpret the divine moral law. The Reformers believed that ecclesiastical discipline was of paramount importance in a Godly Commonwealth, for without it, 'there is no face of ane visible kirk.' The State was expected to back the Church in that discipline. On the deposition of Mary in 1567, the reformed Church of Scotland was established.¹

The basic unit of the new ecclesiastical structure was the Kirk session and these were immediately set up in some parishes, for example St. Andrews; but others were not established until well into the seventeenth century. Each kirk session consisted of the minister and elders of the local church and each session sent representatives to its local presbytery: there were, for example, 33 parishes within the presbytery of Jedburgh, Kelso and Selkirk. Presbyteries were not originally part of the Reformed Church structure and the first 13 were only created in 1581. Moreover the presbyteries were attended by the ministers alone until 1638 when it was decided that elders should be admitted as regular members of the court. Most disciplinary cases were handled by the Kirk session and the majority of offenders never came before the presbytery, which dealt only with the more serious cases and the most obdurate and unrepentant. The presbyteries sent representatives twice a year to the provincial synod. The synod of Merse and Teviotdale, for example, consisted of six presbyteries. It

was only extraordinarily heinous and difficult cases which reached this level and the synods were usually mostly concerned with the regulation of ministers and other administrative affairs. All the synods in Scotland were represented at the General Assembly, to whom there was ultimate appeal for all church courts.²

The situation in Scotland was complicated by the existence, for much of the time, of bishops who operated alongside the presbyterian system. By 1592, however, the Crown recognised presbyteries and synods as legal courts of the Church and by a statute of 1592 the General Assembly was authorised to meet once a year, although it was still an offence to convene an ecclesiastical assembly without the King's authority. The power of the bishops was temporarily superseded by this act, but in 1610 James ordered that administrative episcopacy be reintroduced and bishops be recognised as permanent presidents of presbyteries and synods.

The gradual re-establishment of the power of the Scottish episcopacy continued throughout James's reign to curb the puritan inclinations of the presbyteries and culminated in the Articles of Perth in 1618. These commanded the celebration of the five main festivals of the Christian year. The balance between puritan and non-puritan, between episcopacy and presbyterianism was maintained until Charles I came to the throne. He upset the equilibrium in his attempt to force an Arminian episcopacy onto the Scots. The fall of the Scottish bishops in 1638 saw the introduction of a new period of compulsory puritanism, more intense than that in the sixteenth century. So it was not at the Reformation that the worship, doctrine and model of the Scottish presbyterian church government was drawn up formally, but rather 80 years later. The Cromwellian regime was in complete sympathy with the puritan tendency of the Kirk, but highly suspicious of the independence it enjoyed in Scotland. In January 1652, when all jurisdictions derived from Charles Stuart were abolished, the ecclesiastical courts were then not legitimate. In November 1655, the

establishment of the justices of the peace in Scotland, with specific jurisdiction over moral cases, struck another blow at the church courts. Yet despite this, these courts continued to operate with undiminished zeal and, in fact, in some cases with additional fervour.³

There were no further attacks made on the church courts in the 1650's. At the Restoration the bishops were reinstated in Scotland, to operate the kind of moderate, episcopalian regime envisaged by James VI. This situation created 'a kind of beheaded and imperfect remnant of presbyterianism', whereby the General Assembly was replaced by bishops under parliamentary control, but presbyteries, synods and kirk sessions were retained. Those who objected to this emasculation of presbyterianism were deprived of their livings. In all, a quarter of the ministers in the country were removed. This was far more than had been deprived at the Reformation, or the revival of episcopacy under James VI, or even under the Covenanters. In Dumfriesshire, the figure was even more startling, where the ministers of just over half the parishes were deprived. Despite heavy fines imposed upon those who preferred the illegal ministrations of their ejected ministers, large numbers continued to meet at conventicles. After the Pentland Rising of 1666, centred on Dumfriesshire, a policy of conciliation was adopted by the central authorities in an effort to keep the peace. The first Indulgence of June 1669 resulted in the restoration of 42 presbyterian ministers to their parishes and the second Indulgence of 1672 allowed a further 90 to preach. After 1673, however, the policy of conciliation was replaced by renewed repression and a harsh attitude adopted against the growing number of conventiclers. This attitude was reinforced by the Bothwell Bridge rebellion of June 1679. The 1688 Rebellion was a complete rejection of the King's efforts to reintroduce Roman Catholicism into Scotland - a rejection so strong that it overwhelmed the nation's loyalty to its Stuart dynasty. The settlement that followed the Revolution established the Church of Scotland with a full presbyterian government.⁴

The fluctuations between episcopacy, presbyterianism and episco-presbyterianism affected the church courts at the top of the hierarchy. The General Assembly did not meet between 1618 and 1638, or between 1653 and 1690. To a lesser extent, graph 3 shows how the number of meetings declined at the presbyteries, although the business before those courts does not seem to have been unduly affected. The kirk session continued virtually undisturbed throughout the period with its functions unimpaired. This would seem to indicate that the basic arguments were ideological rather than over the methods by which the ecclesiastical authorities governed their parishes. Indeed, this chapter will show that without the presbyterian hierarchy, the secular authorities could not have governed as effectively as they did.⁵

The synod of Lothian and Tweeddale⁶ met twice a year. In November of each year, it always met in Edinburgh, but its other meeting, in May, was usually held at different centres throughout its area. In 1640, for example, it was held in Peebles, in 1641 in Linlithgow, in 1642 in Dalkeith and in Haddington in 1643. Each meeting lasted around two days and all followed a similar pattern.

A roll call was taken of those who had attended and a note made of those who had failed to appear. There then followed the 'trial' of each presbytery within the bounds of the synod: of which Peebles presbytery was the only one within the Borders region. This 'trial' consisted of an examination of the books of the presbytery by a special 'visitor'. From the books the visitor could tell how the presbytery was being organised and if any problems or difficult cases needed to be referred to the synod. Any defect in the presbytery's organisation was pointed out and the members reprimanded. Thus, the keeping of the books in an orderly manner was of crucial importance in order that the synod might keep strict control over its presbyteries. Any presbytery which failed to keep its books efficiently was immediately rebuked. In April 1641

the visitor found the Peebles book to be 'ill written and uninformall' and in November 1646 found that although several new processes had been entered in the book against those suspected of adultery, there had never been any report on the progress of those cases. A check on the regularity of meetings and on the attendance at those meetings could also be kept through scrutinising the books. In May 1642 the visitor found Peebles presbytery 'verie evil kept' with five or six absent each day, and the books showed, in November 1655, that that presbytery had held 'very infrequent' meetings and had only met twice between 31st May and 31st August that year.⁷

Through the books, the synod was able to keep a check on the behaviour and activities of ministers and at any sign of neglect would summon the offender to appear before them. It was also at synods that any complaints by the presbyteries against ministers were heard and dealt with. For example, Mr. Ninian Douglas, Minister at Traquair was accused in November 1644 of 'profane and godless speaches and some false and reproachful words against a Worthie Brother of the Presbytery.' He was found guilty by the synod and 'deposed from the ministrie.' The minister of Drummelzeir was rebuked in November 1641 for his slack discipline in not giving communion for many years. Later in May 1648, it was reported that he had been suspended by the presbytery of Peebles until the meeting of the synod, for fornication with Marion Burn. The case was then heard before the synod, and the minister pronounced guilty. The court was asked to note that the position of minister of Drummelzeir was now vacant.⁸

It was to the synod that difficult cases were referred by the presbyteries. Many of these were not cases which were considered above the jurisdiction of the lesser courts, but rather cases on which the presbytery needed advice. The following two examples were typical. In November 1642, the presbytery of Peebles reported a woman who was reputed to be married to two husbands. Her

first husband had been absent for 17 years and she had had several children by her second. The presbytery wished to know if she had committed bigamy in the opinion of the synod. Another case was that of Isobel Alexander's illegitimate child. Peebles reported that despite efforts to ascertain the father, they had failed to find out this information and wished the synod to make enquiries over a larger area. Very few cases indeed were heard before the synod. Between April 1640 and May 1648, for example, the synod of Lothian and Tweeddale heard only eight cases from Peebles presbytery; that is, on average, one a year.⁹

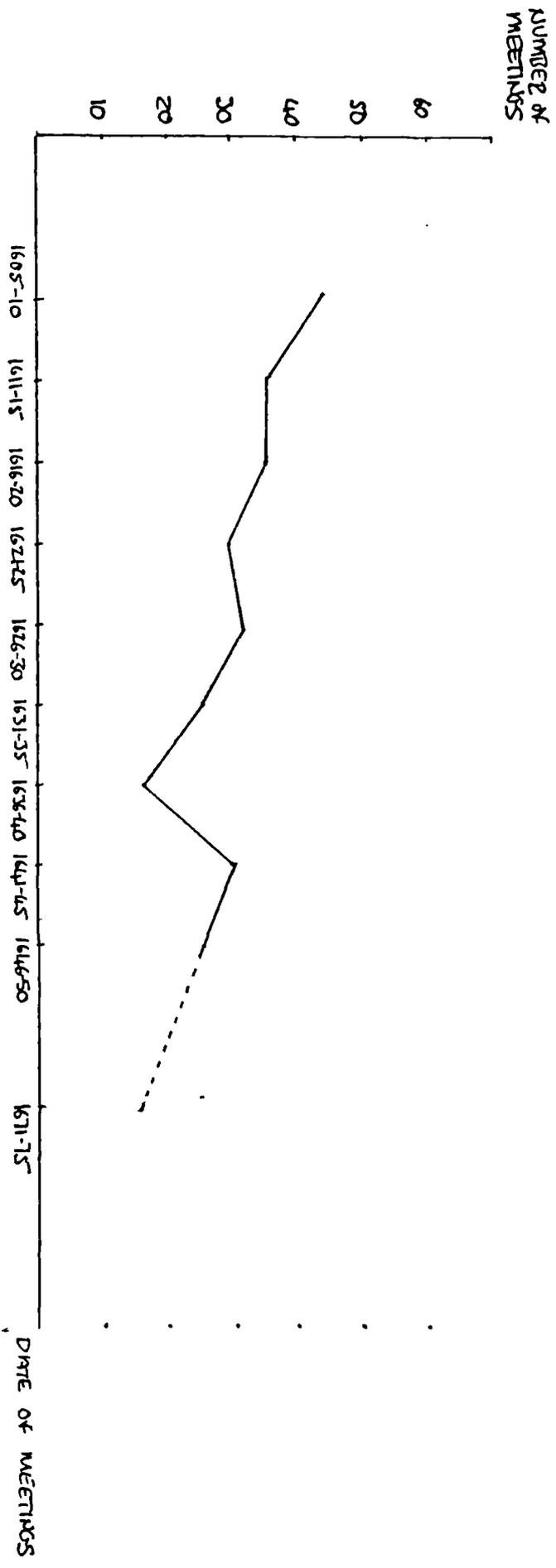
Most of the business before the synod was administrative and much time was taken up with supplying kirks with ministers and providing them with manses and stipends. Weak and old ministers, like the minister of Innerleithan, in April 1640, were supplied with helpers. Administrative problems were often discussed, as in November 1655 when the synod debated what to do about the people of Megget who lived eight miles from their parish church, with two other parishes intervening.

The synods could also issue general orders to be observed by all the presbyteries within its bounds. In May 1644, for example, all presbyteries were to take order with drunkards and in May 1648, money was to be collected and distributed to lame soldiers.¹⁰ The synod then, was important as an administrative court, in charge of the supervision of presbyteries, which heard complaints and charges against ministers and very occasionally dealt with, or offered advice on difficult cases referred to it from the presbyteries.

The presbytery of Jedburgh and Kelso met, on average, about four times a month, but the number of meetings a year fluctuated over the period, from a peak in the period 1605 to 1610 (when there were an average of 43 meetings a year) to around 13 meetings a year in the 1670's. There was a sharp fall in the number of meetings in 1636, which were probably interrupted by the Covenanting Wars. Over the whole period then, the graph 3 shows that the number of meetings of the

GRAPH 3

THE NUMBER OF MEETINGS PER YEAR OF THE PRESIDENCY OF JEDBURGH AND KELSO, 1605-50, 1671-75
(EXPRESSED IN FIVE-YEARLY AVERAGES)



COMPILED FROM SRG. CH2/198/1
CH2/198/2
CH2/198/34

presbytery of Jedburgh and Kelso steadily declined. This may be explained by an act of 1610 which reinforced the bishops' powers in Scotland. From that date, all excommunications were to have the approval of the bishops and throughout Scotland it has been noted that the number of excommunications fell. Moreover, whereas before 1610 the presbytery courts heard appeals from petitions against the kirk sessions, after that date, the bishops were regarded as a more appropriate court of appeal. The graph shows that the abolition of the bishops cannot have had any impact on the presbytery of Jedburgh and Kelso before the Covenanting Wars disrupted the normal pattern of life in the Borders. By the 1670's, however, when the bishops were once again established, the number of meetings had sunk to its lowest level.¹¹

Most meetings took place at Jedburgh, although some were held occasionally in other centres in the area; for example, at Ersilton 22nd April 1607, at Hawick on 19th June 1607, at Ancrum on 26th April 1609, at Nisbet on 10th May 1609, at Hownam on 30th August 1609, and at Abbotrule on 16th May 1610. The main function of these meetings would seem to have been three fold. Firstly, to administer the area under the presbytery; secondly, to hear the more difficult, heinous or recalcitrant cases from the kirk sessions, and thirdly, to initiate the process of excommunication.¹²

In terms of administration, the presbyteries simply tried to enforce the orders of the synods at a more local level; and to them would fall the task of collecting any money as required by the synod, or enforcing fast days. They also supervised the orthodoxy of ministers within their bounds, rebuking the lesser offences themselves, but referring the more serious ones to the higher court. Thus, in August 1607, two ministers, Mr. John Abernethy and Mr. John Boyle were rebuked for not keeping fast days. The presbyteries also supervised the orthodoxy of their inhabitants. In March 1670, William Rutherford, a Quaker, was pursued before the court of Jedburgh and Kelso and ordered to be removed from the area.¹³

The cases which came before the presbytery had all been sent there by the kirk sessions. The cases reveal that offenders could be 'referred' for several reasons. In some cases the offender was of important social status. In November 1606, for example, Helen Gramslaw, Lady Newton, was disciplined by Jedburgh and Kelso presbytery for not attending the kirk regularly. In the same month, Walter Turnbull of Tofts was disciplined for fornication and Walter Scott of Goldilands was rebuked by the court. Ordinary slander or abuse was a matter for the kirk session, but if the invective had been directed against a minister, or even an elder, the case was frequently referred to the presbytery. This happened in December 1608, when Mr. Thomas Abernethy lamented 'the manifold greifs done to him' at Hawick. He told the presbytery that he was afraid people were lying in wait for his life and that they made 'approbious speeches' against both himself and the kirk session. In April 1609, James Gledstones and his wife were charged before the presbytery court of abusing Mr. Clark, the minister, in the street. Likewise, any contempt of a minister or the kirk session's authority could mean that the case was referred to the next court in the hierarchy. Thus, those who were contumacious before the kirk session were summoned. Janet Loch was a typical case. She was ordered by the kirk session of Jedburgh to purge herself the next Sabbath of the slanderous cursing of Harry Stewart. She 'refused contumaciously, affirming that she wald go to the heichest Judicatorie of the land befor she obeyed.' However, as there is no further mention of her in the records, it would appear that she was content to obey the presbytery.¹⁴

The Jedburgh and Kelso presbytery conforms to the general pattern of presbyteries throughout Scotland, whereby the foremost categories of offences dealt with by the court were sexual offences. In 1622, for example, the presbytery dealt with 11 cases of adultery, 9 of fornication, 18 profanation of the Sabbath, 2 illegal marriages in England, a case of desertion and a neglect of duty by an elder. Simple fornication was usually a matter for the

kirk session, but those who had committed fornication several times were likely to be summoned before the presbytery. Mark Black, for example, was summoned in March 1607 for fornicating four times and Marion Hunter in Sowden was summoned in October 1612 for cohabiting in fornication for 24 years. Serious cases of adultery were also referred from the kirk sessions. Simon Elliot an adulterer 'of old' appeared before the court in March 1607 and in September that year, John Glendinning and Bessie Elliot confessed to having lived together in adultery for 12 years. Incest seems to have been entirely reserved to the presbytery of Jedburgh and Kelso, being the most serious of the sexual offences. In many cases, the offenders seemed genuinely amazed to find that they were related. For example, in December 1606, David and Eupheme Ainslie petitioned to say that the 'sin was committed be them under promis of marriage and that they knew na thing off the neirness off bluid to impd thair marriage.' Those suspected of bigamy were also dealt with by the presbytery court because there might be very complicated investigations necessary to ascertain, in the case of a long standing desertion, if the missing husband or wife were alive or not. Rape, too, seems to have been considered too serious for the kirk sessions.¹⁵

Several cases of blood and riot can be found in the records of the presbytery of Jedburgh and Kelso. Invariably such offences were committed either by or against a minister or elder, or had been committed in a church or on the Sabbath. In some cases, the blood and riot had been committed by a man upon his wife and as such was deemed a matrimonial case, best dealt with by the ecclesiastical authorities.¹⁶

Offenders summoned before the presbytery who were prepared to confess were usually remitted to their kirk sessions for punishment. Those who denied the accusation were put to trial with witnesses summoned and evidence taken. The

penalties meted out by the presbytery were, in most cases, very similar to those of the kirk session, laying heavy emphasis on public repentance and penance. These will be discussed in detail later. One of the most important functions of the presbyteries, however, was the supervision of excommunication.

There were two types of excommunication: the lesser, where an offender was banned from communion, and the greater, which was the equivalent of outlawry by the state. Here the offender was not only banished from the church, but barred from burghs, franchises and public office. The sentence of the greater excommunication was rarely imposed. It was read from all pulpits within the bounds of the synod and all persons within those bounds were charged not to resset or converse with the person excommunicated. No kirk session could impose either kind of excommunication without an order from the presbytery. Thus the presbyteries were the key force in imposing the greatest penalty the kirk could issue.

The process of excommunication took place gradually and was first initiated if an offender failed to appear at the court. Usually, before the process was completed, the offender submitted. Some historians believe that excommunication was rarely imposed. Certainly after the act of 1610, which complicated the process, the number of excommunications seems to have fallen: Sir William Brereton, an Englishman, who visited Scotland in 1635, wrote 'very rarely, not once in many years, do they [the ecclesiastical courts] denounce any excommunicate.' The presbytery of Stirling only excommunicated four people between 1640 and 1701 although the process was frequently begun. After the Restoration, the willingness of the presbyteries to impose excommunication on those who failed to appear before them seems to have diminished. It would seem that the threat of excommunication had lost its impact in the 1670's and instead of starting the process of excommunication the presbyteries preferred to refer the contumacious offenders to the civil authorities. In December 1676, John Clunie in Hawick

failed to appear after having been summoned three times and was ordered to be imprisoned by the sheriff until he satisfied the kirk. In June 1679, William Scott and Janet Scheill, who had been 'called many times' to answer for their sin of fornication and had failed to appear, were 'delated' to the laird of Graden 'who has received Commission from his Majesties Council for punishing such disorders.'¹⁷

When excommunication was actually carried out, it was almost always against those who had committed serious criminal offences. Indeed, in this respect, it would appear that the church courts took it upon themselves to give ecclesiastical censure to those who had either received punishment, or were fugitives, from the secular authorities. Thus, in April 1609, Mr. Thomas Abernethy was ordered 'to summon publickly from the pulpit George Allan, to heir himself declarit to be excommunicat for the cruell murther off [blank]'. Of the 25 murderers summoned before the presbytery court of Jedburgh and Kelso between 1606 and 1681, all except one received the punishment of excommunication and he was excused because he produced a King's remission and letter of slanes. Instead, he was ordered to stand for half a year in the place of repentance and pay 100 marks as a fine.¹⁸

At the lowest level of the Scottish ecclesiastical hierarchy were the kirk sessions, the elders of which were the detectives of the entire system of church courts. At this basic level in each parish, the kirk session sought out offenders, dealt with most cases itself and apportioned the most difficult cases to its local presbytery court.

The kirk session consisted of the minister and elders of a parish. Hawick kirk session consisted of 17 elders, including the baillie of the regality, two present magistrates, two or three ex-baillies, several landowners, merchants and heritors, of whom ten were selected from the burgh and the remainder from the landward parish. The kirk session of Lauder in the latter half of the seventeenth century

consisted also of 17 elders; 6 of whom were drawn from the town and 11 from the landward parish. A similar situation existed in Dumfries. The eldership, comprising persons from other secular jurisdictions, indicates that at the most basic level, close links existed between the civil and ecclesiastical authorities.¹⁹

The times and frequency of these meetings seem to have varied considerably from place to place. The Hawick kirk session held its meetings each Sunday after afternoon service, as did the Hassindean kirk session. Both the Jedburgh and Dumfries kirk sessions held their courts on Sundays, although it was not unusual for both sessions to hold extra meetings during the week. The meetings always took place in the kirk. The procedure at these courts was essentially inquisitorial and there was no official prosecutor. Upon summons by the church officer and appearing before the court, the offender was presented with the charge. If he confessed, he or she was promptly sentenced; but if the charge was denied, then witnesses were summoned and proof required.²⁰

The elders were charged to search for any sins within the parish and to report them to the kirk session. The elders of Dumfries in August 1649 were charged to search out all cursers and whilst the inhabitants of Hassindean were in the kirk on Sunday, the elders searched their houses to see if anyone had stayed at home. In March 1707, the elders of Hawick were instructed to report any disorders needing to be redressed. In April 1652, however, the kirk session of Dumfries acknowledged that the efforts of the elders alone could not procure the tight controls necessary to suppress the sins of the inhabitants. They wrote in the records that 'notwithstanding all the pains and travell taken by them [the kirk session] for suppressing sinne and iniquitie, finding the same rather to encrease then decrease in many scandalous outbreakings of peple', the kirk session were to visit each family in the town and put to them a 'list of queries' about sins committed within the parish.²¹

All kirk session records throughout Scotland reveal that it was sexual offences which consumed most of the sessions' time. The majority of these offences were fornication or adultery, although there were some cases of 'scandalous carriage', when the persons involved were seen to behave in an unseemly manner involving too much familiarity. In such cases, fornication was strongly suspected but could not be proved. This strong emphasis on sexual offences is not easy to explain: in the words of Smout it was 'a quite unscriptural emphasis'. The deadly sins of greed, pride, hypocrisy, untruthfulness and self-righteousness, were completely ignored in favour of the repression of sexual offences. But these deadly sins were not only extremely difficult to define, but were virtually impossible to prove and thus prosecute in the courts: yet concrete evidence was available to prove a sin of fornication, in the form of an illegitimate child. In their obsession with sexual offences, the presbyterians went to quite extraordinary lengths to root out offenders in the community. Because such offences were, by their very nature, most personal, this meant that the presbyterians had a very tight grip on the whole parish. The methods the kirk session employed to search out sinners offer some insight as to why the sessions were regarded as so powerful a force that the civil authorities sought their co-operation.²²

All strange children entering a parish were carefully recorded and scrutinised by the church authorities in case any were the result of fornication or adultery (if not in that particular parish, then elsewhere). In this respect the presbytery was useful, covering, as it did, a number of parishes. Lady Newton, for example, was closely investigated by the presbytery of Jedburgh and Kelso for keeping a child in her house whose father was unknown. Obviously, those women who were unmarried and pregnant were the easiest cases to detect and these were frequently in the courts; but the kirk session was always on the lookout for those who bore children within the first nine months of marriage. Alexander

Turnbull and his wife were fined before the Jedburgh kirk session because Agnes was about to give birth, although they had only been married half a year. Those who were 'too familiar' before marriage were particularly carefully scrutinised and severe pressure could be put onto an engaged couple as in the case of Alison Younger and Andrew Brown.²³

This couple were summoned before Jedburgh kirk session in October 1672 on a charge of being too familiar together. When they failed to appear at the court, the session decided that a 'reference' ought to be 'drawn up' to the magistrates about them. In November, they both appeared and denied the charge. Yet later that month, Alison complained to the kirk session that she was 'being threatened' by the magistrates on account of the charge. Another such couple charged with being too familiar, James Krinckles and Bessie Turnbull, who, in denying the charge, even offered money to be kept for three-quarters of a year after their marriage, to prove that they had not committed pre-marital fornication. A large number of those accused of fornication were engaged couples, which would seem to indicate that pre-marital intercourse was part of normal courting practice in the seventeenth century.²⁴

There seems to have been two degrees of fornication:- that between engaged couples, which was treated fairly leniently; and that between persons who did not intend to be married. This latter was treated more harshly by the courts. Whores, like Isobel Hunter and Bessie Hunter in Jedburgh, were regarded as a 'blot' on the parish and were sentenced to be banished. The dual attitude of the courts was prompted by financial as well as moral considerations. There seems to have been, in the kirk session, the same concern as that shown by the English justices of the peace: that an illegitimate child and its mother should not fall onto the parish poor rates. Thus, for example, James Charteris in Kirkmahoe was ordered to be imprisoned until he gave caution that the town of Dumfries would

not be saddled with supporting the child of his fornication with Isobel Brown. Extreme pressure was put onto pregnant unmarried women to reveal the identity of the father of their child. Isobel Moscrop, who refused to give the Jedburgh kirk session such details was referred to the civil magistrates and was to be imprisoned until she confessed. Janet Olypher also refused to give information to the kirk session of Jedburgh, who ordered that 'this verie great and difficult business' of ascertaining the father be delayed 'untill her deliverie, that the Midwife in the time of her travell may put her to it to declare the father of the child.' Janet apparently yielded under this unkind treatment and the midwife gave evidence before the kirk session that John Watson was the father of the child.²⁵

In their desperation, some women gave the name of a false father. Agnes Scott of Hawick, for example, denounced William Gledstanes to be the father of her child, but the kirk session found that she had lied to them. Pressure was then put on the father of the child to marry the mother; thereby ensuring that both mother and child be provided for. James Smith, for example, in Hassindean, was fined and ordered to make public satisfaction on three Sundays, or else marry the woman. On marrying her, he was reprieved from the 'pillar of repentance' and given a reduced fine of £4 15 shillings. Thomas Carlisle had his fine halved when he consented to marry Agnes Harrison, with whom he had committed fornication in 1649. Careful investigations took place on the part of the session if the unmarried mother had died in childbirth; for then the child would, almost certainly, have fallen on the poor rates. Such investigations took place at Hawick when Walter Glendinning was alleged to be the father of Bessie Scott's child. It was alleged that Bessie had named Walter as the father whilst on her deathbed and so the allegation was very difficult to prove or disprove. The anxiety of the kirk session to find a provider for the child can be seen in their eager declaration that Walter had incurred their suspicion by 'offering too

readily to swear more than was demanded of him' and thus 'gave [them] ground to suspect that he was guiltie.' Most men once accused of fathering a child seem to have admitted their guilt; but if the man persisted in his denial, he could be referred to the presbytery for examination and then (if the kirk session permitted) be ordered to take an oath of purgation before the congregation. Few reached this stage; but if it was carried out, the accused was dismissed as innocent.²⁶

Adultery was regarded as far more serious than fornication because it constituted a possible threat to the family and therefore to social and public order. As in fornication cases, adultery was virtually impossible to prove unless the woman was pregnant. It was still very difficult to prove if the husband of the woman was living in the same house, as she could simply claim that the child was his. Thus, the cases of adultery which were brought into the courts tended to be women who had been abandoned by their husbands (whose death they could not prove) or two married persons who were flagrantly consorting together. Because adultery was so much more difficult to prove than simple fornication, it constituted a larger proportion of presbytery court business.²⁷

Miscellaneous sexual offences were described as 'scandalous carriage'; ranging from those couples who behaved in an 'unseemlie manner' together, to general 'lewd behaviour'. Typical of this latter category were Adam Lie, James Borthwick and Bessie Rickarton, who all 'lived scandalously' in one house; or Margaret Houston who was accused of 'lowse walking' in Dumfries.²⁸

Between the years 1672 and 1687, sexual offences before Jedburgh kirk session accounted for 80 per cent of all cases, so other offences were very much in the minority. The percentage of fornication cases gradually increased from 62 per cent in 1672 to 79 per cent in 1687. At the same time, the total number of all sex offences increased from 70 per cent of all cases in 1672 to 85 per cent in 1687. The next largest category was Sabbath-breaking. Sabbath-breaking

CASES BEFORE JEDBURGH KIRK SESSION 1672-5, 1678-81, 1684-7

TABLE 42

	1672	73	74	75		78	79	80	81		84	85	86	87	TOTAL	PERCENTAGE
ADULTERY	1	5						4							10	3%
FORNICATION	25	29	14	12		7	25	18	14		38	14	49	50	295	73%
SCANDALOUS CARRIAGE	4	3	2			1							2	4	16	4%
DRUNKENNESS								1			1	1			3	1%
SARSBANT BREAKING	3	11	6	3							14		5	6	48	12%
HOT KATEPENDING KIRK															0	
SLANDER	2		2											1	5	1%
SWEATZING									1			1			2	0.5%
DISORDERLY MARRIAGE	3	3		1		3	3	1	1		1	2			18	5%
ACT OF BRIDALS	6						1								7	2%
BLOOD ALSO RIST															0	
MISCELLANEOUS															0	
TOTAL	44	51	24	16		11	29	24	16		54	18	56	61	404	

COMPILED FROM
S.R.O. CHZ/SSZ/1

covered a variety of offences which had occurred on the Sabbath; from those who had entertained drunken people in their houses on that day, to working, selling ale, drinking, or even throwing snowballs on Sundays. Those who failed to attend the kirk were also subject to prosecution, although in the Borders this practice seems to have been confined to the Dumfries kirk session.²⁹

The church courts also dealt with swearing, slander and drunkenness and although these charges only constituted just over two per cent of the business before the Jedburgh session, they formed an important item of business at Dumfries, especially during the late 1640's and 1650's. In 1649 for example, drunkenness accounted for 8 per cent of all business, slander 9 per cent, and swearing 22 per cent. Fornication in the same year accounted for merely 28 per cent. In 1657, drunkenness accounted for 17 per cent of all cases, slander 5 per cent, and swearing 9 per cent. The drive against such offences seems to have died at the Restoration, when the proportion of such offences dropped to the same level as those at the Jedburgh court.

Forming five per cent of the actions before the Jedburgh kirk session, were prosecutions of those who had married in a 'disorderley' manner; that is married by either a dissenting minister, or over the border in England. Thomas Grieve, for example, was reported to have married Bessie Haswall in a 'disorderlie manner', which did not conform to the acts of the church, in August 1672.³⁰

Striking or abusing a wife, husband, parent or child also came before the kirk session and was treated seriously. Janet Tansome, the wife of Thomas Jardine was accused by the Dumfries session, in June 1650, of wanting to strangle her husband. She was ordered to be put in the 'bel house' and carried through the town. James Greirson, accused in February 1658 of abusing his parents, was referred to the civil authorities for punishment and was later ordered to be referred to the justiciary circuit court.³¹

There were also a number of miscellaneous cases: Robert Ker, a servant of William Gledstones was accused by the Dumfries session of 'putting womens clothes on and going publickly upon the streets making a great uproar' in 1654. Marie Hay, Margaret Kirkhoe, Agnes Jackson and Marie Rae were rebuked for 'shameless miscarriage' by the same court in 1657: all were to be married on the same day and all had raced to the church gate to see who could get there first and in doing so had outrun their bridegrooms.³²

There are also a number of incidents mentioned in the records which seem out of place in an ecclesiastical court record. These were usually not judged by the kirk session, but were passed on to the civil authorities; they will be dealt with later in the discussion of the relationship between the civil and ecclesiastical authorities in Scotland.

The church courts had an array of penalties against those who were convicted of the offences before them. Unlike the civil courts, the aim of these penalties was to shame the offenders before the whole parish, thereby harnessing the censure of the kirk to that of the population. A private rebuke was the least penalty and this was usually given against minor misbehaviours, such as first offences of swearing. More serious cases, such as habitual swearing or slander were punished with a public rebuke, the offender standing before the pulpit and the congregation. Sexual offenders were usually publicly rebuked whilst on the stool of repentance. a high, four-legged stool. Both the Dumfries and Jedburgh records refer to 'pillar' and 'pillary': offenders are described as having sat at or on the 'pillar' in the course of their punishment and also being sentenced to stand at the 'pillary cross'. It is difficult to know what exactly the courts were referring to. The pillary or pillary cross would seem to refer to a pillory or jugs, a Scottish form of pillory which consisted of an iron ring which went round the neck, hanging by a chain from the top of a stake or pole. Frequently, small offenders would have to stand on tip-toe to prevent themselves from being strangled. Offenders had to undergo these punishments several times before they were considered to be reformed. It was usually three appearances on Sundays for

fornication; one joint appearance for pre-marital fornication and one each for scandalous carriage. For a relapse in fornication, the offender might have to appear as many as six times.³³

The most serious penalties were reserved for those who had committed several lapses in fornication or adultery. Such offenders were ordered to stand at the church door, dressed in sack-cloth, or 'sacco', chained to the joughs, for the space of time between the second and the third bell. They were then to enter the church and sit on the 'pillar'. Offenders were often required to carry out this penance for several days; Isobel Robson, an adulteress, was to endure it for 16 days. In Stirlingshire such penalties were rare, but the Jedburgh kirk session seems to have imposed this penalty quite often and the Dumfries court, instead of reserving the joughs for severe sexual offenders only, ordered Sabbath-breakers, drunkards and cursers to endure this punishment.³⁴

Occasionally both the Dumfries and Jedburgh kirk sessions imposed fines on offenders in their courts. Statute had authorised that fines might be imposed on such people: £5 Scots for a single fornication, £10 Scots for a relapse and so on, with a £40 Scots maximum. Adultery was treated as a quadrilapse. The courts, however, do not appear to have held strictly to these sums. Fines were also imposed for drunkenness on the Sabbath, for violating the act against bridals, for disorderly marriages and for some miscellaneous cases. Marion Carruthers, for example, in May 1649 paid £10 sterling for a 'sin' and was now reported to be 'soberly and christianely walking with the Lord.' Fines, however, were not imposed in all cases and were not generally considered to be a great success. Jedburgh kirk session was opposed to fines because it was considered far easier for some offenders to pay out money and far less reforming than a public rebuke and penance. In December 1679, when they were dealing with a particularly obstinate, unrepentant and difficult fornicator, Robert Rutherford, the kirk session resolved that they would receive no money from him

in regard that it will open the mouths of people if they absolved him from the publick appearing.' Frequently, therefore, a fine was imposed in addition to a public penance. In some cases the offenders were so poor that they were unable to pay the amount they had been fined. Jedburgh kirk session reported in November 1673 that they were unable to fine Beatrix Gledstanes, who had committed fornication numerous times, on account of her poverty. Others, whether out of poverty or obstinacy, refused to pay and so fines tended to be imposed only when the court knew that an offender was wealthy enough to stand the cost.³⁵

Unusual punishments were sometimes inflicted upon offenders. Agnes Scott, a 'lewd woman' was banished from the town of Dumfries in 1655, as were Janet McKie, her daughter and three other women, for 'gross prophanity' the same year. In the case of some hardened offenders, the kirk session obviously felt that ecclesiastical censure was insufficient. The kirk session of Jedburgh referred Bessie Hunter to the civil magistrates on her fourth fornication, because they considered that 'her appearance in the publick place is but a mocking of God.' Margaret Alie 'a demented and foolish quran and thief' who was also an adulteress, was forbidden to appear on the pillar in public because the session considered that 'they will get no satisfaction of her but rather yt will be a mocking of God.' Dumfries kirk session, in regard to the fornication of Robert Turner with Agnes Harbertson and Janet Turner, felt 'they cannot put a deserved censure upon them [and so] have therefore referred them to be censured by the Magistrats and Toun Councill of this Burgh.' In the case of Thomas Goudie and his wife, summoned before Dumfries kirk session for scolding, cursing, swearing and striking each other in drunkenness, the session noted that they were 'wearyed with thir so gross miscareages, and finding that they can medle no more with them doe most seriouslie Recommend and Refer this particular' to the magistrates and town council.³⁶

Sometimes it would appear that the offenders were referred to the civil magistrates if they refused to obey both kirk session and presbytery; but more often it would seem that cases which should have been referred to the presbytery were instead referred to the civil court in the town. It is difficult to know why the kirk session chose civil, rather than ecclesiastical censure, but it would seem to indicate a closer co-operation with the town magistrates than with the presbytery and also a greater confidence that a more fitting and relevant punishment would be inflicted and more readily understood as such by the offender. Such may have been the case with James Rutherford and James Fogo who were cited to the Jedburgh kirk session court for making trouble in the time of divine service; when they appeared before the civil authorities, it was reported that they were 'greatly terrified by the Magistrats and promised not to do the like again.' Some were referred to the civil authorities if they had refused to obey the kirk session or were 'disobedient' in receiving a public rebuke. Others were referred on a relapse from a previous offence; and still more in order that civil punishment, in addition to ecclesiastical penalties might be imposed on them.³⁷

It was not just the kirk sessions who referred cases to the civil authorities. The presbyteries can be found using the Privy Council to enforce their decreets instead of going to the synod. In February 1610 for example, the presbytery of Peebles requested the Council to give force to their enactment that no-one should have the right to bury bodies in the kirk. In March 1628, Sir William Greir of Lag and Sir John Charteris of Amisfield were required by the Privy Council to try Kathie Stewart for abusing the minister of Newabbey. The presbytery of Dumfries can even be found petitioning the Council on behalf of the General Assembly because of a recalcitrant offender. In July 1607, John McGlire, commissary clerk of Dumfries was complained of by the presbytery of Dumfries because he had refused to subscribe a confession of faith to the General Assembly and had refused to appear on two Sundays in the place of public repentance or to terminate his clerkship. He was denounced as a

rebel by the Council. The presbytery of Jedburgh even sought the approval of the Council before starting a process of excommunication against Thomas Turnbull of Minto and his wife, for being absent witnesses in a fornication case. It would seem, then, that in the case of recalcitrant offenders of some standing or social status, the kirk sought the approval of the civil authorities before proceeding against them; presumably out of fear that such people would not succumb to ecclesiastical censure alone.³⁸

Certainly the secular authorities could impose more severe punishments, such as imprisonment, corporal punishment, banishment or very heavy fines; and the records show that all these were, at some time, inflicted upon those referred to them by the kirk session. The practice of referring cases to the civil magistrates was, in normal times, limited to around two a year at the Jedburgh court between 1672 and 1687 and the same at the Dumfries court between 1648 and 1655. But between 1656 and 1661, however, the Dumfries court exhibited a very different trend. It can be seen in Table 43 that there were 80 referrals in 1657 alone. Yet during the period 1656 to 1661, the type of business before the Dumfries kirk session was no different from any other period. Sexual offences, particularly fornication were still the largest category, although drunkenness, slander and swearing assumed greater importance during that time. The type of case referred to the civil magistrate simply follows the normal pattern of the court business. It would appear, then, that Dumfries kirk session, rather than referring a certain type of case to the burgh court, was working very closely indeed with those authorities on all manner of cases and together they encompassed the whole sphere of kirk session business. In this respect, they were following the policy of 'sword and word' so beloved of the Cromwellian puritans.

Other courts at this time have also exhibited a close working relationship with the kirk session. The connections between the franchise courts and the

DUMRIES KEY SESSION :- REFERRALS TO CIVIL MAGISTRATE 1648-61, 168-9

TABLE 43

	1648	49	50	51	52	53	54	55	56	57	58	59	60	61	62	69	TOTAL
ADULTERY										6	5	5			2		18
FORNICATION		1							6	26	19	15	17	10	5	1	100
SUBORNING			1							5	6	3	2				19
DRUNKENNESS			1						1	18	16	5	5	1			47
SAGSATH KIZGAY							2		1	10	9	4	2				28
SUICIDE							1	2	1	3	1		3	1			12
DISORDERLY TO KILY SESSION							3			2							5
SCANDALOUS CARLAGE									8	1	2	1		3			15
ASSAULT BY DELINQUE									2	3	1	2	1				9
MISCELLANEOUS					1					5	3		3				12
UNKNOWN				3					1	1	2	4	2		1		14
TOTAL	0	3	0	3	1	0	6	3	21	80	64	39	35	15	8	1	279

COMPILED FROM S.R.O. CH2/53/13-14

church have been discussed in Chapter VI. Stitchill barony in particular exhibited a great desire that church discipline in the parish might have 'the assistance and concurrence of the Civil Magistrat and help of his authority interponed thereof.' Thus, the baron officer was to put into execution all acts and decreets of the kirk session. Moreover, the justices of the peace, instead of undermining the kirk session's position, even offered to share the fines between them in the case of moral offenders. This period, then, instead of seeing the decline of the ecclesiastical courts, saw the relationship between those courts and the secular courts grow even closer.³⁹

Why was there such close co-operation, especially during the 1650's when the church courts were not officially recognised in Scotland? To answer this, it is necessary to examine why the ecclesiastical courts were held to be so important by the civil magistrates and why courts dealing with 'sins' should become so closely involved with courts dealing with 'crime'.

In Scotland, some sins were also crimes punishable by death before the High Court of Justiciary: slander, fornication, adultery and blasphemy had all been the subjects of legislation by the Scottish Parliament. Thus, there was no conflict between ecclesiastical and civil authorities because both were instruments of the Civitas Dei. The kirk session, in fact, acted as a court of the first instance in many of these cases, dealing with the bulk of the less serious offences and sending on the most heinous offenders to the High Court of Justiciary. Bessie Hunter, for example, in Jedburgh was summoned before the kirk session for a quadrilapse in fornication in June 1672. She named Andrew Brown as the father of her child, but because this was denied by Brown, the case was referred to the presbytery in August 1672. They both failed to appear and in May the following year, Bessie was banished by the magistrates because the church courts admitted they could do no more with her. It must have been ^{as a result of} the frustration of dealing with this persistent fornicator that on her fifth

lapse in fornication she was referred for trial by the justice court in 1679. John Hyndmers, a miller in Jedburgh, was found guilty of adultery before the Jedburgh kirk session in June 1673. After doing penance in sackcloth for 18 days he was referred to the presbytery. When he next committed adultery in 1679, however, he was sent for trial before the High Court of Justiciary.⁴⁰

It is most probable that the kirk session provided the evidence at the trial of these offenders before the justice court. In May 1671, for example, the justice ayre at Dumfries considered a case of adultery and incest between John Willson and Nicholl Clerk. They were unable to come to a verdict and so ordered 'the prebyterie to be cairfull to get informatioun' with regard to the case. In fact, the kirk session, as a court, utilised an inquisitorial method which was very similar to that used by the High Court of Justiciary. Both assumed the accused was guilty and both interrogated remorselessly until they believed the truth had been ascertained. The kirk session, however, had a great advantage over the High Court - speed. Investigations could be made and testimonies and depositions taken by the kirk session soon after the offence had been committed, whereas the High Court might have to wait months before the accused could appear before it. As shown above, the kirk session courts met at least once a week, if not more often and all the details of most cases were to be found locally. It would be the kirk session which drew up and assembled many cases to be sent to the High Court. Therefore, cases such as adultery, blasphemy or fornication, where the kirk session shared cognizance with the High Court, tended to be dealt with more effectively, the kirk session making a vital contribution to prosecution.⁴¹

However, it was not just in the realm of 'sin' that the kirk session made a valuable contribution to law and order, for the investigation of sins by the session could often reveal more serious crimes. For example, in the investigation of James Thompson's alleged fornication with Agnes Robinson, it was found that

they had been married illegally in England. Such an offence could indicate religious dissent or attendance at conventicles, which, in the 1670's and 1680's might have meant involvement in the Bothwell Bridge or Pentland Rebellions.

Investigations for fornication could also reveal a case of infanticide.

Unmarried, pregnant women, anxious to avoid the shame and scorn which would be poured onto them by the kirk session, may have sought to conceal their pregnancy and hoped to dispose of the baby in secret. Those who were thought to behave in an 'unseemlie manner' were under constant suspicion of concealing a pregnancy. Margaret Brown, for example, was frequently summoned before Jedburgh kirk session and persistently denied that she was pregnant. The kirk session did not believe her and sent some women to examine Margaret Brown and to 'trie her breasts' in order to ascertain the truth of the matter. It would appear that the suspicions of the kirk session were not unfounded. During investigations into the fornication between Margaret Kirkhoe and James Lawrie, it was revealed that Margaret had intended to murder her child because she had 'cursed her belly', refused the help of midwives and had borne her child alone in the house. In 1661, Dumfries kirk session's investigation into the fornication between James Fareis and Marion Wallace revealed that Marion had, in fact, murdered the child. She was then referred to the civil magistrates.⁴²

Other investigations could turn into theft actions, as in the case of James Irving, who was accused of Sabbath-breaking, but found by the elders to be a thief. He was ordered to be referred to the civil magistrates. Elspeth Hislop, accused of Sabbath-breaking by the Hawick kirk session was found to be picking fruit which did not belong to her and was therefore accused of stealing. Perhaps without the eager eye of the session many cases would never have reached the civil courts. Whereas murder, theft or assault involved an injured party ready to inform and bring those cases to court; no such informers were available in cases of adultery or infanticide and it was in these cases that the session proved to be invaluable. All rumours and accusations were picked up by the session and local suspicions acted upon.⁴³

The kirk session could also play a most important role in the trial of serious criminals through 'testificates'. Testificates were references given by the minister of a parish to any well-behaved individual who wished to leave the parish and settle elsewhere. The testificate would state that the person was free from sin, was God-fearing and had conducted himself in a proper manner whilst living in the parish. Without such a testificate, a newcomer to a parish could be refused the right to settle there and the with-holding of such testificates was a major weapon in the hands of the kirk session. Before the Border Commissioners' courts, the production of such a testificate at a trial could mean the difference between life and death. John Purves in Bigholmes, for example, was accused of theft and robbery before the Commissioners at Selkirk on 23rd March 1676. He produced a testificate from the elders and ministers of Wauchope parish

We the minster and eldership of Wauchope, being required to give our testimony in reference to John Purvis a parochiner now called in question anent his cariage Wee doe declare that till newlie we niver heard nor knew of any wrongful or scandalous miscariage and that thitherto he lived inoffensively and conformably to outward good order and without any notor misdemeanour.

This testimony saved John Purvis's life, for instead of the death penalty, he was ordered to be banished from the King's dominions. It would appear that accused prisoners could request such a testimony from their local kirk session specifically for this purpose.⁴⁴

The relationship between the civil and ecclesiastical courts was not one sided, for the secular courts could also refer cases back for the censure of the kirk. Adultery cases before the High Court, which did not result in the death penalty, were usually required to satisfy the kirk. John Tompson, for example and Margaret Philips were ordered to satisfy the kirk for their adultery in 1679.⁴⁵

The importance of the church courts lay not so much in the type of offence they dealt with, but rather in the methods they employed. The presbyterian church courts were an essential part of the machinery of law and order, performing as they did, the duties of policemen, prosecutors, detectives and witnesses. The kirk session was not eclipsed during the Interregnum because it was so essential to the administration of law and order in Scotland. Until a similar secular organisation was developed at parochial level, the kirk session would remain in a supremely powerful position.

In England, the ecclesiastical court system was more complex than that of Scotland and it lacked the close contacts that those tribunals enjoyed with the criminal law courts. There were *many different types of church courts*, most of which had been inherited from pre-Reformation times and to explain the functions of each, it is necessary to examine the structure of church administration in England.

At the beginning of the sixteenth century about one third of the land in *England belonged to the church and in those lands the church enjoyed special privileges and liberties*. Every church and churchyard then, constituted a sanctuary where offenders could take refuge from the King's law. But these mattered little compared with the great liberties where the King's writ did not run. The northern counties in particular were riddled with such liberties. The whole county of Durham, for example, was a religious liberty which included, not only the present county of Durham, but the isolated parishes of Norham and Bedlington, which were in the midst of Northumberland. The Archbishop of York held not only the powerful liberties of Ripon and Beverley in Yorkshire, but also Hexhamshire which was in Northumberland.

Before the Reformation, Northumberland and Cumberland came under the jurisdiction of the bishop of Durham, and Westmorland came under the bishop of Lichfield. But the 1530's saw the creation of the diocese of Carlisle, which encompassed Cumberland: and Westmorland was taken, with Lancashire into the new diocese of Chester. Northumberland, with the exception of Hexhamshire, which remained with the Archbishop of York, remained under the bishop of Durham. All three northern counties, however, still came under the metropolitan authority of the Archbishop of York.

Each diocese was divided into a number of archdeaconries, within which there could be anything between 20 and 90 parishes. Through the centuries, the archdeacon had become the intermediary between the bishop (or archbishop) and the parish clergy. At the head were the chancery courts in York, which were held by the archbishop. They dealt with appeals from all the courts within the Northern province and granted the administration of the estates of clergymen. The courts of the bishops were known as consistory courts and these were held usually in the cathedral, but sometimes in an episcopal residence. In some small dioceses, such as Chichester or Ely, this court could deal with most of the business within the diocese, but it was more usual for the bishop to leave the regular work of correction to the archdeaconry courts. The bishop, however, could choose to go on 'visitation' every four years.⁴⁶

Visitations were the main means by which the administration of correction was carried out and were the regular method of inspecting a diocese. During the times of a bishop's visitation, he could inhibit the archdeacon from acting in any judicial or administrative capacity and so cause all business to come before his own court. As an alternative to the bishop's personal visitation, he could appoint a chancellor to sit in the archdeaconry courts. Visitation was the main

method of church government by the archdeacons who held the lowest courts in the ecclesiastical hierarchy. In many dioceses the archdeacons were the main correctional instruments. In Norwich, for example, they held two inquisitions a year and travelled on circuit to deal with ordinary business during most of the year as well. Some bishops, particularly in the middle ages, had sought to keep an eye on the archdeacons and therefore appointed local commissaries as episcopal watchdogs. This often caused jealousy and rivalry between the archdeacon and the commissary. By the seventeenth century, however, rivalry between the archdeaconry and episcopal courts had been virtually eliminated as the archdeacons had come to appoint the respective commissaries to be their officials and chancellors. Thus, one judge could serve in each district, combining in himself as both episcopal and archdeaconal representative, all local ecclesiastical power. Such was the case in Lincoln and Norwich where this arrangement rendered episcopal visitations virtually unnecessary.⁴⁷

This may have removed friction between the bishop and the archdeacon, but it renders the situation complex for historians, because it meant that the court to which an individual went for litigation could vary from one area to another depending upon the current arrangements between the bishop and the archdeacons and how they agreed to share the business. In the diocese of York, for example, the three archdeacons failed to secure any share of the ecclesiastical administration and litigation except the summary discipline of their annual visitation courts. In the diocese of Carlisle, the archdeacons did not even carry out annual visitations. Writing in 1905, the Victoria County History noted 'we have not noticed a single record of archdiaconal visitation from 1534 until the new departure of recent years.'⁴⁸

Before the early sixteenth century, the church courts had used canon law, according to traditional European practice; but Henry VIII at the Reformation abolished the study of canon law and so the church courts were forced to adopt civil law. Yet a total transformation was impossible and so, from the 1530's onwards, a peculiar mixture of canon and civil law was practised in the English church courts.

The general procedure at all church courts followed presentments made by the churchwardens at episcopal or archdiaconal visitations and those presented were tried summarily. In consistory courts, both civil and disciplinary cases were conducted by lawyers acting for the parties and each case progressed by a series of well defined stages. These stages were taken at, roughly, fortnightly intervals. Between each stage, citations were issued, evidence collected and documents exchanged. At the final stage, when the facts had been ascertained, counsel argued the case before the judge at 'informations'. These were held in public, but were not regarded as formal court sessions and so are not entered in any of the court books. The verdict of the judge, however, was delivered at a formal session.

The 'ex officio' oath has, through puritan propoganda, become notorious for its supposedly unfair condemnation of the accused; but, in fact, under the law practised in these courts, the accused was at a greater advantage than in the common law courts. He was able to testify on oath in his own defence and it was only in official prosecutions, such as non-civil causes or prosecution by a private individual that the ex officio oath was used. Although the accused did not know the contents of the charge against him until he was examined, he had the advantage over his counterpart in the common law courts of only being examined on the specific charges itemised in the articles of the charge. Moreover, after his examination, he was allowed full representation in court and could compel the attendance of witnesses on his behalf. The examination and cross-examination of the accused was undertaken by an impartial officer of the court, who read the articles submitted by either side and framed the required questions. The answers to these questions, which he wrote down, were later read in the presence of a judge and each deposition was then signed by the person making it and was endorsed by the judge. Copies of the accused and all witness depositions and of any documents exhibited in court, could be granted to the accused.

The judges at consistory courts could be appointed by the chancellors of the diocese and were often drawn from men whose training had been almost totally academic. At the beginning of the sixteenth century, for example, Archbishop Waltham appointed Cuthbert Tunstall (the future bishop of Durham) to be his chancellor, only three years after the completion of his university studies.

The consistory courts were held once a week in the diocese of Durham and dealt with a large amount of business from all over the diocese, which had been referred to them from archdeacons' courts. The archdeacons administered correction to offenders presented to them, if they could be dealt with in a summary way. If not, they required a formal proceeding at law and their cases would be referred together with difficult and recalcitrant offenders to the consistory court. The consistory court records show that sexual offences dominated the business: in 1617 for example, the Durham consistory court dealt with 47 such cases out of a total of 93; that is, 51 per cent. Twelve cases concerned illegal or clandestine marriage (13 per cent) and eight with not attending church (9 per cent). There were seven cases of defamation and seven of not paying church dues (8 per cent each). When these cases are compared with those before the visitation courts (see Table 44), it can be seen that the visitations dealt with a wider range of cases and were more closely involved with the general administration of church discipline. When it is considered that a mere 4 of the 93 cases dealt with by the consistory court in 1617 came from Northumberland, it is clear that visitations, then, were the main means of enforcing ecclesiastical discipline in Northumberland.⁴⁹

The regular visitations between 1603 and 1619 however, were not carried out by the archdeacon of Northumberland, but rather by the bishop's chancellor, hence the low number of cases from Northumberland which came before the consistory court in Durham until 1619. After 1619, archdiaconal visitations resumed.

During the period to 1619, the visitations were held three or four times a year by the chancellor and so completely usurped the archdeacon's function that he held no visitations whatsoever (at least according to the survival of documents). The significance of 1619 seems to lie in the death that year of the old chancellor Clement Colmore, who was renowned for his zeal in enforcing ecclesiastical discipline in the diocese of Durham. Similar situations have been found in other dioceses; in Gloucester, for example, the chancellor held annual visitations right through the eighteenth century in the face of opposition from the archdeacons. However, whether the chancellor or the archdeacon held the visitation seems to have had little impact on the type of cases heard before the court.⁵⁰

Visitations meant that the bulk of the correction process was carried out in the parish without any loss of efficiency through travelling to and from distant courts. Visitation was also the regular method of inspecting parishes and ensuring that the parishioners of each were sufficiently provided for. By operating on a parish-to-parish basis, however, visitations also fulfilled the important function of facilitating the application of a particular policy devised by the ecclesiastical authorities or the government of the day.

If a bishop or archbishop was to carry out a visitation, a warning of his intention was first sent out, which not only informed the area of his coming, but also superseded all inferior jurisdictions during his visitation. In the case of an archdeaconry visitation, such a warning was not necessary - the archdeacon being on the lowest rung in the ladder of ecclesiastical jurisdictions. Instead of the 'premonition', the archdeacon merely sent out a citation mandate which stated the time of his visitation and summoned all concerned to appear. With this citation was sent to each parish a copy of the Book of Articles, for which pleasure the parishes often had to pay a fee. The Articles were a series

of questions requiring answers in detail, concerning the condition of the church and churchyard, the conduct of public worship and behaviour of the incumbent, the nature and condition of all church property (including goods, lands and buildings) and the moral standards and behaviour of the laity. It was the responsibility of the church-wardens to compile the answers and return the Book of Articles to the archdeacon before his visitation.

By the seventeenth century, church-wardens had developed a key role in ecclesiastical and secular administration, with specific duties. They were responsible for repairs to the nave and steeple of the parish church, (the chancel was the responsibility of the rector), the maintenance of the churchyard, the provision of the requisite books, vestments and ornaments for worship. They had the power to act as the legal representatives of the parishioners in any collective actions and could raise funds for specific parochial expenditure. *Particularly important was their role as administrators of the poor relief in conjunction with the justices of the peace.* The church-wardens were also responsible for maintaining law and order in the church and churchyard, compiling a list of absentees from divine service on Sundays and Holy Days, to be *presented for inspection at the visitation so that the statutory fines might be levied.* All swearers, drunkards, scolds, fornicators, unlicensed schoolmasters and such like were to be presented at the visitation by the wardens. During the Interregnum, additional duties were conferred on the wardens, when they were allowed to present moral offenders at the classis meetings and at the quarter sessions.⁵¹

Wardens were to hold office for one year unless re-elected; but (perhaps not surprisingly), the office was not a popular one. A neighbour presented for an offence one year might claim revenge the following year when the warden was out of office. Church-wardens, then, throughout England were liable to fall prey to the temptation to issue false presentments or to omit others.⁵²

When a visitation took place, it was in two parts. The first was rather to detect offenders than to correct them, but the second part was the court of correction. The first part of the visitation took place in the parish church where the rural dean was the incumbent and lasted usually for one day only. At this first stage, the clergy in the area presented their Letters of Orders and the church-wardens from the previous 12 months presented their annual statement of accounts, together with a list of their answers to the Book of Articles. New church-wardens were usually elected at this stage. The names of persons presented by the church-wardens for offences were noted down by a registrar so that they might be summoned to appear at the court of correction. Schoolmasters, surgeons, parish clerks and midwives were also required to be present at this first stage in order to exhibit the licences which authorised them to carry out their duties.⁵³

Courts of correction seem to have been held in Northumberland three or four times a year, in February or March, June or July, and November. They were held in Corbridge, Morpeth, Newcastle, Alnwick and Bamburgh. The personnel at the courts consisted of the archdeacon or chancellor, the official principal, two public notaries and apparitors. These apparitors were the general messengers of the court, whose duty was to serve citations upon those who were to appear at the courts of correction. Where a person had not been cited personally by the apparitor, an order for a new citation was made and this second citation was regarded as effective, even if not delivered personally, but nailed to the accused front door or that of the parish church. If the accused failed to appear after being called three times by the court crier, he could be pronounced contumacious by the judge and declared excommunicated. If he appeared later in the day in person or by proxy, he could be absolved without having to pay the contumacy fee. If, however, he completely failed to appear, a letter of excommunication from the judge was sent to the incumbent of the accused parish church, which was required to be read in time of divine service on the next Holy Day or Sunday.⁵⁴

The cases before the court arose out of rumour or suspicion as often as out of provable fact. Roland Hall was presented in February 1604 at Newcastle for living 'suspiciously' with a woman; Kathleen French in July 1604 was presented for living apart from her husband and in a house 'suspiciously' with her former husband's brother. If persons presented upon rumour denied the charge, they were permitted to employ the old method of purgation to prove their innocence, as at the Scottish courts. Such was the case of John Charleton, charged with fornication at the Corbridge court in June 1605. For those who were presented on provable fact or who confessed, the court procedure was summary. Before 1640, when an accused appeared, he was sworn by the ex officio oath, which was admitted before the accused was examined in open court. The ex officio was abolished in 1640 as a result of puritan propaganda insisting that through the oath, innocent people had been oppressed by the court of High Commission. They insisted that the oath was designed to extract from the accused an admission of guilt based on his answers to charges of which he had no previous knowledge, until his examination. At the Restoration, the ex officio oath was not renewed.⁵⁵

Evidence in the visitation courts could be provided by the church-wardens if necessary and after hearing the evidence the judge would either pronounce sentence, postpone the case to the next court day, or continue the hearing by issuing a certificate to appear again on a specific day.⁵⁶

The Table 44 on page 446 shows cases heard at the chancellor's visitation of Northumberland in 1604 and 1605. The table compares the case of Northumberland with the deaneries of Doncaster and Frodsham, as found by R. A. Marchant. It has been written that 'the records of the Ecclesiastical Courts, particularly in the post-Restoration period form one of the most intractable and forbidding of historical sources. Much labour is apt to produce little, save material for a historical gossip column.' Certainly, the table reveals the church courts'

TABLE 44

PERCENTAGE OF CASES BEFORE VISITATION COURTSDONCASTER DEANERY (YORK) 1590, 1613; FRODSHAM (CHESTER)1590, 1613 AND NORTHUMBERLAND ARCHDEACONRY 1604-5

	* DEANERY OF DONCASTER 1590	* DEANERY OF DONCASTER 1613	* DEANERY OF FRODSHAM 1590	* DEANERY OF FRODSHAM 1613	+ ARCHDEAC- -ONRY OF NORTHUMB- -ERLAND 1604	+ ARCHDEAC- -ONRY OF NORTHUMB- -ERLAND 1605
DEFECTS IN CHURCH	2.8	0.7	10.3	0.8	19.7	13.1
DEFECTS IN CLERGY	5.2	0.9	6.1	6.2	2.9	0.8
DEFECTS IN CHURCHWARDENS	1.0	0.9	1.0	3.8	0.8	0.6
REWSANCY / /NON-CONFORMITY	3.8	9.1	1.0	19.8	0.2	4.0
NOT ATTENDING CHURCH/COMMUNION/ -ICM	17.8	5.5	5.2	10.6	4.4	11.8
SABBATH BREAK	0	2.2	0	2.9	13.1	0.8
DISTURBANCE IN CHURCH	1.7	3.6	0	3.2	1.3	0.5
ABUSE OF CLERGY / WARDEN	0	1.9	0	0	1.5	1.5
SEX OFFENCES	49.3	49.5	56.7	31.3	43.5	51.6
SCOLDING, SWEARING DRUNKENNESS	3.8	0.7	0	3.5	0	0.5
ILLEGAL BAPTISM/ MARRIAGE / BURIAL	0	1.2	3.1	0	0.3	3.0
NON-PAYMENT CHURCH DUES	4.2	12.2	1.0	9.4	4.5	4.5
DEFAMATION	0	0	0	0	0.2	0.2
REMAINING EXCOMMUNICATED	4.2	6.0	2.1	4.1	3.2	0.2
NOT CO-HABITING WITH SPOUSE	4.5	0.9	9.3	0	0.5	0.3
MISCELLANEOUS	1.4	4.3	4.1	4.1	2.2	0.7
UNKNOWN	0	0	0	0	2.8	5.8

* TAKEN FROM R.A. MARCHANT, THE CHURCH UNDER THE LAW, p. 219, TABLE 32

+ COMPILED FROM DUR. UNIV. DEPT. PAL. AND DIP., DR/II/5

obsession with sexual offences, particularly fornication. In the Northumberland court records of 1604, 82 per cent of the sexual offenders were fornicators, and in 1605, 99 per cent were fornicators. (This compares with 53 per cent at the consistory court in 1617. The remaining 47 per cent were all adultery cases, which would seem to indicate that the more serious sexual cases were likely to be referred to the higher court at Durham.) The remaining sexual offenders at the visitation courts were those accused of adultery, incest and also those living 'suspiciously' together (who, by inference, were suspected of either fornication, adultery or incest). Compared with the Scottish records, there are few incest cases:- only two out of 259 sex cases in 1604 and five out of 311 in 1605.⁵⁷

As in the Scottish courts, many of the fornicators were engaged couples. Some, like Thomas Awder and his wife, were only found guilty of pre-marital fornication when they produced a child within the first nine months of marriage. Other offenders would seem to have been 'stable repeaters'; that is a couple producing more than one illegitimate child. One such couple was Gavin Stokoe and Isabel Dawson, who, in November 1619, were charged with having three bastards. But the records also reveal that prostitution existed in Northumberland. In 1620, for example, John Newlands and his wife were charged with keeping a common bawdy house and Jane Storie was charged with being a common whore. The concentration on fornication in the English courts was the result of the same factors which produced a similar pattern in the Scottish church records - like the Scots, the English were most keen to save a parish from having to maintain an illegitimate child and its mother. Thus entries can be found in the records of couples accused of fornication, who were ordered by the courts to marry as soon as possible.⁵⁸

Those who refused to cohabit with their spouses were likewise summoned before the church courts; those summoned on such a charge were likely to be required to resume cohabitation. George and Margaret Wilson, were accused before the consistory court at Durham of not living together. George was

ordered 'to go home to his wife and to cohabit with her embracing her in all love and loialtie' and Margaret was told 'henceforth to live with trew and to use all love and loialtie to him as becometh a wife.'⁵⁹ Scolding, reviling, swearing and slander cases also appear in the records and were usually committed by women. Offenders rarely appear on a simple charge of drunkenness, but are found having compounded this offence with slander or swearing. There are, however, presentations against those who had drinkers in their houses during the time of divine service. John Foster and Thomas Summerskaile, in July 1604, were alehousekeepers who were reputed 'to have more persons in their houses drinking in evening praier tymes then are in the Churche.' Sabbath-breakers also appear in the records, although the high percentage in 1604 was due to a large number of people, 48 in all, being prosecuted in February 1604 for 'casting coles' on the Sabbath. In general, however, it can be seen that the number of such moral offences is minimal compared with the large number of sexual offenders.⁶⁰

The second most important section of cases are those which deal with defects in the churches in the area. These cover a wide range of items, from structural to spiritual matters. In July 1604 for example, Wooller church was reported to lack windows, a register book and a surplice and its bible was torn. Rectors, vicars and curates who had been defective in their obligations were reported at visitations. Thus, the vicar of Corbridge, in June 1604, was accused of refusing to administer communion to a sick woman, who had later died and Thomas Lyons, curate of Netherwitton, was charged with marrying excommunicated persons. Church-wardens too, could be reported at a visitation for defective behaviour, from failing to submit their accounts to neglecting to levy 12 pence from those who failed to attend church.⁶¹

The levies from such people would seem to have formed quite a considerable sum, judging from the number of people accused of recusancy or non-attendance at church, communion or catechism. This was especially so in 1605. In that year

the number of recusant prosecutions rose from one in 1604 to 24 and the number of those reported for not attending church, from 26 to 71. Similarly, the number of prosecutions for illegal marriages and baptisms increased from 2 to 18 over the same period. It could be suggested that the increase in such prosecutions was connected with the activities of the protestant Border Commissioners, who, from 1605, were very active in an area which was traditionally staunchly roman catholic. The ecclesiastical records tend to name people only vaguely in their records, which makes it difficult to make any positive identifications, but two cases would seem to illustrate that a connection could be made with the Border Commissioners' activities. One Dodd of Donklewood is recorded in the consistory court documents as being excommunicated for recusancy in July 1609. Gilbert Dodd of Donklewood was indicted by the Northumberland justices of the peace for sheep theft in 1610 and 1618. John Rutherford, called John the Calyard was excommunicated for an unknown offence in July 1604. In December 1608, he was reported to be in Newcastle gaol without bail, committed by a warrant of the Earl of Dunbar.⁶²

As in the Scottish courts, the penalties imposed by the ecclesiastical authorities sought primarily to shame the offenders through penance. There were two main types of penance. The first was the full penance. This was usually performed bare headed, bare-legged, and bare-footed, with the offender dressed only in a white sheet and holding a white rod. This penance was always performed in church at the time of morning service on the Sabbath and could, in addition, be required to be performed in the market place of the offender's home town. It was inflicted on the more serious offenders, particularly those who had committed adultery, incest or a relapse in fornication. John Douglas and Barbara Wanless, for example, were convicted of fornication at the visitation court at Morpeth in November 1605 and had to perform this penance for two days in church and also in the market place at Morpeth.⁶³

The lesser penance, involved the offender making a declaration of his or her offence in church and reciting an approved schedule of contrition and promise of amendment. This penance was to be performed in ordinary clothes. Sometimes this was performed in public in church and at other times in a private place, such as the vestry or even in a private house in the presence of the vicar, the church-wardens and a select number of apparitors. Sometimes a judge would commute the penance to a fine, as in the case of Gavin Cooke and Elizabeth Harper who were fined 10 shillings for their adultery in May 1604; but this was rare and was generally unpopular because of bribery and corruption and because, as in Scotland, paying out money was thought to be easier than performing a shameful penance.⁶⁴

In theory, the most severe penalty the church could enforce until 1677, was death by fire for a heretic. In effect, however, the worst penalty imposed, certainly in the north, was excommunication. As in Scotland, there was the lesser and the greater excommunication. The lesser penalty excluded the party from participation in the sacraments and the greater excluded him not only from these, but also from the company of all Christians. An excommunicate could not perform several acts - serve on juries, be a witness in any court, or bring any action to recover lands or money due to him. The weapon of excommunication was used primarily in the seventeenth century against those who disobeyed the ecclesiastical courts' sentences and orders, but could also be used against those who were repeatedly contumacious. Thus, persons like Margaret Atkinson and Edward Charleton, who failed to carry out their penance for fornication could be excommunicated, together with those like Margaret and George Elrington and four others, who had repeatedly refused over two years to pay their dues to the church. Persistent refusal to attend communion could result in the same penalty. If the excommunicate offered to do penance with obvious contrition, his or her

sentence could be lifted. R. A. Marchant has estimated that in Chester diocese in the seventeenth century, about 2000 persons were excommunicated in a year and about 2100 in the diocese of York. In all, he estimates that about five per cent of the population stood excommunicate. This compares sharply with the reluctance of the Scottish ecclesiastical courts to impose excommunication and would seem to indicate that in England the threat of excommunication had, by this time, lost its sting.⁶⁵

Moreover, if the offenders chose to ignore the penalties of the church courts, there was little that could be done. From the archdeaconry courts, difficult cases could be referred to the consistory court at Durham. If an offender had not been suppressed by the threat of excommunication from the archdeacon, he was unlikely to be co-erced into undertaking the long journey to Durham in order to receive the same penalty. In some cases an offender could be referred to the justices of the peace if his offence was of a suitable nature, but outside the Interregnum, this was rare. In exceptional cases, Marchant found that offenders could be referred to the court of High Commission and in the case of influential offenders this was certainly the case in the diocese of Durham. In general, the course settled on by most courts seems to have been to allow the offenders to remain excommunicate. The records from Northumberland show, indeed, that many people chose to remain excommunicated for several years. The ineffectiveness of excommunication as the ultimate ecclesiastical penalty can be seen in the attitudes of many of these people. Bartholomew Pott and Thomas Gibson, perhaps, expressed this attitude best. It was stated in the visitation book in July 1604 that Pott and Gibson 'stand excommunicate and so have done these two yeares last and saie that when they of Durham done send them horse and money they will come to be absolved.' The Northumbrians then, do not appear to have held the ecclesiastical authorities in as much esteem as did their Scottish counterparts.⁶⁶

Whereas in the seventeenth century the Scottish church courts were going from strength to strength, the English church courts were increasingly under attack from all quarters. There was always a body of people opposed to any court; but courts dealing with moral offences were inevitably deemed the most unpopular in England. The church courts were particularly unpopular for the fees they charged. At each junction of proceedings, the church demanded fees: for receiving the Book of Articles; hospitality fees were paid to the person carrying out the visitation by the clergy and church-wardens and, of course, the court fees themselves. These varied from diocese to diocese and even from deanery to deanery. For example, the diocese of York as a whole charged a 5 shilling fee for appearance and dismissal in 1633, whereas the archdeaonries of Nottingham and the East Riding charged 2 shillings and 4 pence in the same period. Fees were payable on a pronouncement of excommunication or absolution from excommunication and on receipt of a penance. Once again, the fees varied from area to area. It was 3 shillings for excommunication and absolution in the diocese of York in 1633, but only 2 shillings and 8 pence in the archdeaonry of Nottingham, yet 3 shillings and 8 pence in the East Riding. The fees for a penance ranged from 3 shillings at York to 1 shilling and 6 pence in Nottingham archdeaonry. Yet the church fees were not really exorbitant for the seventeenth century, compared with those charged at the quarter sessions. At the quarter sessions, a fee of 2 shillings was usually levied for each appearance, with an additional 2 shillings for dismissal, or bond to keep the peace and 4 shillings for a bond for good behaviour. *It would seem then, that* in the seventeenth century, it was simply fashionable to criticise the church courts.⁶⁷

Ironically, it was a secular court which brought most disrepute to the English church courts. The Ecclesiastical Court of High Commission had begun life as a commission to enforce clerical discipline and conformity to the act

of Supremacy in 1559. As a commission it consisted of bishops, Privy Councillors, and common lawyers and, until 1580, was visitorial. By the 1580's however, the pressures of puritan non-conformity had gradually turned it into a regular court deciding cases between parties, with a regular province of jurisdiction and a regular procedure using the ex officio oath. It had a regular body of judges consisting of bishops and ecclesiastical lawyers. The main body of commissioners acted under the presidency of the Archbishop of Canterbury in the south of England and a separate body of commissioners presided in the province of York, under the archbishop there. In the northern province the special position of Bishop of Durham was recognised by the establishment of a separate court under the bishop, in which the commissioners were drawn from the diocese of Durham. Unlike an ordinary ecclesiastical court, then, it encompassed the whole realm and was thus ideally suited to impose Whitgift's 24 Articles on clerical conformity in 1583. By the time of the accession of James I, then, it was the court of first instance in church matters and a court of appeal. Operating under letters patent, it could claim jurisdiction over almost any crime and the right to impose any punishment short of death.

From 1604, James I began to use the full powers of the High Commission to impose conformity on the clergy and thus aroused the opposition of the common law judges, led by Coke, who resented the great powers wielded by the High Commission. They argued that the High Commission should only be able to deal with conventional ecclesiastical matters and be able only to mete out the standard ecclesiastical punishments of penance and excommunication. It should not in their opinion, have been able to imprison offenders and it should not have employed the ex officio oath. The judges did not object to the oath being utilised in Star Chamber, yet they pressed for the abolition of ex officio between December 1606 and 1610. In 1610 new letters patent were issued which defined the crimes within the scope of the High Commission and granted it power to use the ex officio oath and 'to punish the person so offending by censures ecclesiastical or by reasonable fine or imprisonment.' The death of Bancroft in 1611 and Coke's dismissal in 1616 deflated

most of the judges' arguments, but grumblings and rumblings against the High Commission as an 'illegal court', based on its dubious creation by letters patent, continued. During the 1630's, these grumblings were fired by rumours that the High Commission was the main weapon of Archbishop Laud's policy of 'Thorough' against the puritans and so the Arminianist policies of that time created ill feeling against the clergy. These reinforced those naturally felt against the church courts. Ever since 1611 the common law judges had been as obstructive as possible with the church courts, but by 1640, opposition against the King's personal rule had come to a head, with Star Chamber and the High Commission held up to be the main culprits of his policy. In 1641, the High Commission was abolished.⁶⁸

The documents of the High Commission do not reveal a court dedicated to oppressing puritans. The records for the diocese of Canterbury show that although it acted against sectaries and non-conforming clergy, this type of business by no means predominated. Eighty per cent of the cases before the Commission between 1611 and 1640 were brought by private litigants, who, in many cases, sought the removal of drunken or immoral clergymen. Of the remaining 20 per cent, only a quarter of these were initiated by the commissioners themselves. By the 1630's, a great deal of its time was taken up with matrimonial offences and the allocation of alimony. *The records of the High Commission in the diocese of Durham confirm those of Canterbury.*⁶⁹

Table 45 shows the type of business before the High Commission for the whole of the diocese of Durham. Of the 281 persons brought before the High Commission between 1626 and 1637, some 86 can be positively identified as coming from Northumberland archdeaconry. When compared with Table 44 of the business before the visitation courts, it can be seen that the two different types of court concentrated on different matters. The most important item before the High Commission was the enforcement of religious conformity amongst the inhabitants. Clandestine marriages, baptisms and burials, if taken with allegations of popery and protestant non-conformity, account for a quarter of

TABLE 45

CASES BEFORE THE DURHAM HIGH COMMISSION, FROM
ALL THE DIOCESE, 1626-37

	1626	27	28	29	30	31	32	33	34	35	36	37	TOTAL	PERCENT- AGE
SEXUAL OFFENCES	1	1		4			4	7	8	17	3	6	51	18%
ABUSING THE MINISTER		2	5				2	1				2	12	4%
ASSAULTING THE MINISTER							1	3	1	3		1	9	3%
SABBATH BREAK		5											5	2%
CONTEMPT OF CHURCH COURTS					3	1		2	10	5	8	7	36	13%
NOT PAYING CHURCH DUES												13	13	5%
MISBEHAVIOUR IN CHURCH			1	1					2			1	5	2%
NOT ASSISTING THE MESSENGER				2				1			7	1	11	4%
NOT PAYING ALIMONY									2	2	1	1	6	2%
SCANDALOUS WORDS								5		8	3	1	17	6%
'MISDEMEANOURS'									3	10		7	20	7%
NON- CONFORMITY				1					1	1			3	1%
POPERY									2	4			6	2%
CLAUDESTINE MARRIAGE/BAPTISM /BURIAL			2					10		27	9	13	61	22%
CLERGY DEFECTS		3						3	4	4	1	2	17	6%
MISCELLANEOUS									1	3	1		5	2%
UNKNOWN							1					3	4	1%
TOTAL	1	11	8	8	3	1	8	32	34	84	33	58	281	

COMPILED FROM ACTS OF THE HIGH COMMISSION IN THE

DIOCESE OF DURHAM SURVEYS SOCIETY, VOL. XXXIV (1958)

the court's business.⁷⁰ The regulation of sexual offences was also of importance, but whereas the lesser courts were concerned in the main with fornication, only two out of the 51 sexual offences before the High Commission were fornication - the rest were adultery or incest: - a reflection of the superiority of the High Commission. This superiority is also shown in the number of cases of contempt of lesser ecclesiastical jurisdictions which were brought before the court. The figure of 36 cases of contempt is only a shadow of the true figure, for these are only cases where no other offence was stated; most of the other cases indicate some degree of contempt.

The people before the High Commission seem to have fallen into three main categories. Firstly, clergymen accused of serious misbehaviour: like Thomas Harriman who was accused of keeping an alehouse, addiction to drunkenness, abusing the vicar of Haltwhistle and offering to baptise a child begotten in adultery. Secondly, those who had committed very serious offences: like Edward Nicholson, who had not only committed incest, but had married the woman. Most cases, however, seem to have exhibited marked contempt for lesser ecclesiastical courts and for that reason had been summoned before the High Commission.⁷¹

It is clear from the records that the lesser jurisdictions had great trouble in bringing powerful and influential offenders to order. Of the 86 offenders from Northumberland, four were clergymen, four were burgesses or bailiffs of boroughs and 24 were either named as gentlemen, baronets or esquires. Included in this last category were some of the most powerful men in the Borders - Sir William Selby, Henry Widdrington, Sir Edward Radcliffe of Dilston, William Fenwick and William Orde. The case of Robert Brandling of Alnwick Abbey Esq., illustrates perhaps most clearly the problems which faced the ecclesiastical courts.⁷²

He was summoned before the High Commission in August 1633 for adultery, after having scorned the archdeacon's authority. Brandling was not only charged with failing to appear at that court, but

he was likewise charged with shutting and locking up of the chancell doores at Alwick to prevent the ecclesiasticall officers to keepe there courts there, which they ought to do by law and custom and his disgracefull and contemptible speaches unto them and some other times his leaving openn the chancell doores and caussinge his servants to lock them up whilst the officers and manie others of the clergie and other were in the court. ⁷³

The records of the Canterbury High Commission reveal that court was also used to coerce the more powerful members of the community: Sir Giles Allington was prosecuted by them for incest and Viscountess Purbeck for adultery. Like many other cases, however, the case of Robert Brandling illustrated also that the High Commission could also have difficulty in enforcing its own actions; for as late as April 1634 Brandling had still failed to appear before the court despite having been excommunicated for his absence. Brandling was reported to have said that 'he cared not one pinn for them of the High Commission for it was the most wicked court in England.'⁷⁴

The problem of dealing with powerful offenders was compounded by the distance between Durham and Northumberland. Robert Lumsden, who was charged in July 1630, with contempt of lesser jurisdictions and beating their messenger, was to be sent a warrant to appear before the High Commission, but as late as January 1633, the messenger was only able to report that 'the place is soe farr distant from this cittie of Durham the messenger could not get the warrant executed.' Lumsden's penalty was not finally performed until July 1635.⁷⁵

The penalties imposed by the High Commission reveal the more powerful nature of that court and contrast with the lower jurisdictions. The High Commission could impose the normal penalties of public penance - both the lesser and the greater, but could also insist that they be performed not only in the offender's local church and market place, but also in Durham Cathedral. In addition, high

finer could be imposed together with excommunication and imprisonment. For Robert Brandling's 'enormous and unparalleled offences' he was ordered to be imprisoned during his Majesty's pleasure, to make public penance in Alnwick and Newcastle, to make open acknowledgement of his offences at the archdiaconal and episcopal visitations and to be fined £500. He was also excommunicated. Robert Lumsden was excommunicated, ordered to make public penance before the High Commission, in his own parish church and at the market cross in Alnwick. He was further imprisoned in the common gaol for one month and fined 100 marks. It is clear that the High Commission sought to make an example of these influential people. They said, in 1633, that the penalties imposed on Lumsden were on account of 'the great scandall thereby given to other refractory persons in that rude part of the country where he lived.' That the High Commission dared to prosecute such influential people and to impose such shaming, and degrading penalties upon them, may account for the intense and powerful opposition mounted against that court in 1640.⁷⁶

With the exception of the High Commission, the English church courts imposed a lax discipline with ineffectual punishments which were frequently despised and ignored. Yet at the same time, the Scottish courts were rigorous, restrictive, intruding and imposing strict penalties - and they were mostly esteemed and obeyed. Ironically, the court which had the most in common with the Scottish courts was the High Commission. Yet whereas the Scottish courts flourished, the High Commission was deemed intolerable in England. The close relationship between the Scottish church and secular courts can have had no small influence over this.

CONCLUSION

It is clear that the pacification of the Borders took place between 1603 and 1707, by a progressive but not entirely continuous development. Ultimately, there were many different indicators of this process. There was a marked decline in the number of felonies committed in the area. The number of cases before the Scottish Border Commissioners fell from extremely large courts in the early seventeenth century to around 30 cases a year after the Restoration. The Commissioners' records - the archives of the body most intimately connected with Border crime - also show a definite change of attitude on behalf of the law officials and the community to the Border problem. The English Commissioners after the Restoration were less likely to execute offenders than they had been in the early part of the century, but more eager to commit accused persons to prison without bail to await trial. The Scottish Commissioners, however, were far more likely to execute the offenders they dealt with after the Restoration. Although apparently contradictory, these records would seem to indicate the same situation on both sides of the Border - that whereas most of the population were now law-abiding, a hard core of thieves remained. To understand fully what had taken place over the years, it is not enough to look at the Borders just from the point of view of the law courts; it is necessary to examine the people who committed the crimes and see how they and their methods altered during the course of the century.¹

The documents give the names of the offenders and often that is all: (this is especially true of gaol calendars) which is particularly unhelpful and frustrating considering the large number of recurring names in the Border region.² Formal indictments, however, were supposed to give full details of the offender, his or her name, status and place of residence. As described on pages xiii-xiv above, these were not always correct and can lead to confusion. In the English

records, yeoman and gentleman were sometimes interchangeable (although rarely), but the most frequently muddled were yeoman/husbandman/labourer. The Scottish records rarely give the social status of the offender beyond 'feuar of' or 'portioner of'. They do, however, show some indication of status by the use of the preposition 'of' to denote a landed person and 'in' to denote one without land. Yet even this is subject to confusion. If an offender was particularly notorious in his area, but not landed, he could be labelled as 'called of' except in some cases the 'called' was omitted, making him appear of landed status. Moreover, English clerks never seem to have grasped the Scottish way of labelling people and persistently noted 'of' whereas it should often have been 'in'. The documents, then, should not be expected to place an individual precisely within a social category. Nevertheless, certain conclusions can be drawn.

It is plain that few gentlemen were involved in the English Border crimes. In the early seventeenth century, the records of Border Commissioners, assizes, and quarter sessions alike, reveal that several gentlemen and families of armigerous status were prosecuted. The Grahams of the Moat and of Netherby were the most striking examples of involvement by persons of this social category; and the Musgrave brothers of Edenhall and Bewcastle were notorious in the early years of the Border Commissioners. But they were exceptional and never formed a large proportion of the prosecutions as graph 4 shows.³ The Scottish records reveal that, in the same period, although the majority of offenders were of the 'in' category, there were not inconsiderable numbers with the preposition 'of'. For example, in the lists of those executed at Hawick, Peebles, Jedburgh and Dumfries, in May 1606, 6 out of 31 carried the preposition 'of'. The Scottish Privy Council records confirm that the Scottish landed classes were far more turbulent than those in England. In November 1607, the Council was forced to exile 15 Border lairds to beyond the Tay in an attempt

to impose law and order on the Borders. As the century progressed, however, the number of gentlemen and lairds who were prosecuted before the courts for serious crimes gradually declined, until after the Restoration they never seem to have been involved in any of the Border crimes. Why should there be so few gentlemen involved in Border crimes anyway; why should there be more of them in Scotland than England; and why should the numbers fade away as the century progressed?⁴

Statistically speaking, there would always be fewer gentlemen or lairds prosecuted, because they formed a smaller proportion of the population. Moreover, such people were usually more prosperous - being in regular 'employment', in that they had a reasonable income from their lands. They often possessed a considerable amount of property which they were less likely to risk losing through forfeits incurred as the necessary outcome of a successful prosecution for felony. Furthermore, as described in Chapter V, the English gentry were especially conscious of maintaining their position in the county social hierarchy; their franchises were neither powerful nor independent and so their main claim to high social status was through inclusion on the commission of the peace. Aspiring to, obtaining and maintaining a position on the bench, automatically prevented most of the English Border gentry from entering into Border crime.

By contrast, the Scottish lairds had no similar social position as law enforcers to maintain. Their franchises were relatively independent, with little or no check kept on them by the central authorities. If they were heritable jurisdictions, the Crown could not remove the holder from office. The only social position which many of them had to maintain was as the leader of a clan or surname. Maintaining that position involved vindicating and revenging members of their own clan against others and naturally led to their involvement in the kind of crime that the Border Commissioners set out to eradicate. Four developments

then, were crucial in weaning the turbulent Scottish lairds away from their lives of disorder.

First, the determined policy of central government to eradicate feuds from society. Second, the deliberate attempt of the Border Commissioners to attack the peculiar social structure of the region, with the systematic dismantling of the clans and surnames. Without the clans and their feuds, the whole life of the Border laird was altered. Third, the fact that without raids on livestock and the destruction of corn, the economic well-being of the landowner must have significantly improved - a state which he must have been anxious to maintain, or indeed, improve. And finally, the introduction in 1605 of the Border Commission and in 1609 the justices of the peace, seems to have provided some Scottish lairds with an important social target at which to aim.

A good example of this process can be seen in the career of Walter Scott of Buccleugh. From a raiding clansman, he grew to be a staunch supporter of the Border Commission and in 1611 became justice of the peace for Roxburgh and Selkirkshire. The gradual progression from being instigators of disorder to pillars of law enforcement can be traced in numerous families. Buccleugh himself as Border Commissioner nominated Francis Armstrong of Whithaugh to be one of his subordinates in July 1622. Yet in May 1611, the same Francis, with a host of notorious Border families, had raided and killed Lionel Robson in Northumberland in true sixteenth century style. Another example is that of the Carruthers of Holmendis. John Carruthers was despatched to Montrose in 1607 as a turbulent Border laird liable to instigate trouble in the area. Yet by the 1670's his descendant, John Carruthers, was not only Stewart depute of Annandale, but also justice of the peace and a Border Commissioner.⁵

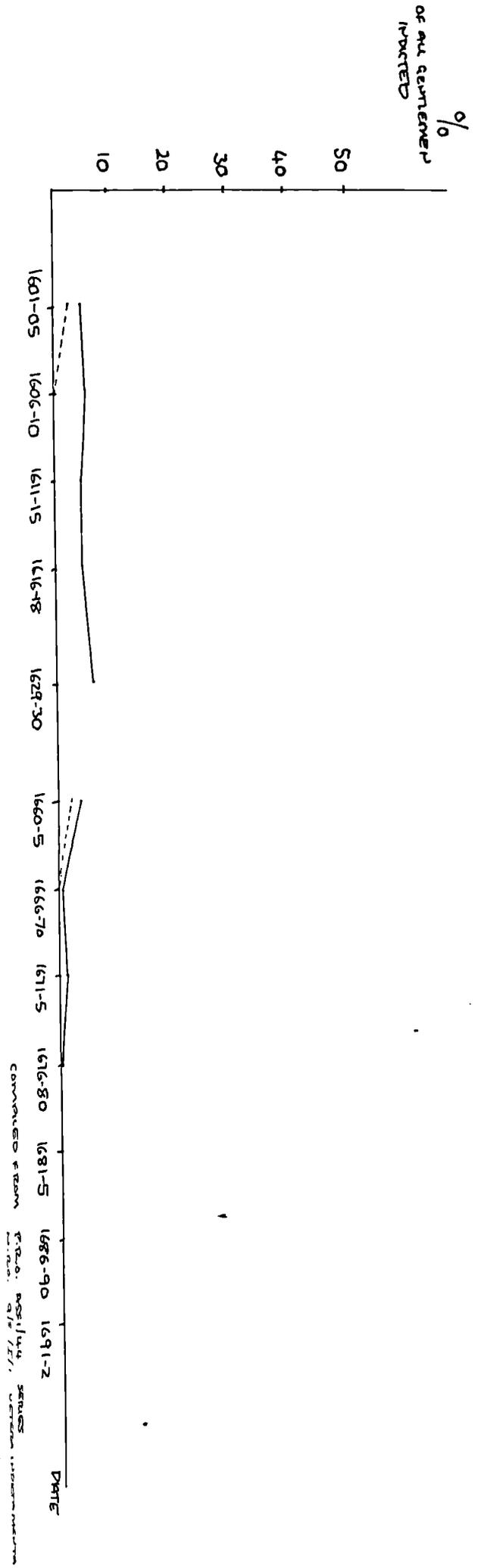
Feuds took place at all levels of society, but were usually led by the head of the clan or surname. Thus, when the Privy Council ordered a feud to be suppressed, it called before it the lairds responsible. The combined policy of James VI and I to wean the lairds away from a life of disorder and the suppression of feuds, had a most important effect on law and order on the Borders which went far beyond the level of the lairds. Traditionally, each clan had taken upon itself the role of law enforcer 'as gif the place and authority of a magistrat were to no purposis'; thus many Borderers did not feel the need for strong law enforcement by government officials and they certainly felt no need for the honourable institution of trial by jury. Because so many of the Borderers belonged to clans, then it was virtually impossible to procure an unbiased jury. Under the protection of the clans, the Borderers found it relatively easy to escape the consequences of their actions - the feeble law authorities being incapable of bringing them to justice. For many Borderers there was, thus, no active deterrent from committing a crime. Without feuds and clans, the situation was bound to change.

The evidence would seem to suggest that the landowners left their lives of crime quite early in the seventeenth century. Some lairds, like Buccleugh and Cesford had been willing right at the beginning of the century to join the forces of law and order; but others seem to have taken longer. Yet by 1617, several Scottish lairds petitioned the Privy Council for the right to sit with the Border Commissioners and themselves be allowed to pursue criminals who tried to flee to Ireland. The last submission of a Border feud before the Privy Council was in June 1623 when the Maxwell-Johnston feud was resolved, but such submissions had started to dwindle about ten years before that date.⁶

It was very rarely that a craftsman was indicted for a Border crime. Those that do appear in the records usually come from the large towns of Newcastle, Carlisle, Jedburgh, Dumfries or Selkirk. If they were indicted for theft, it

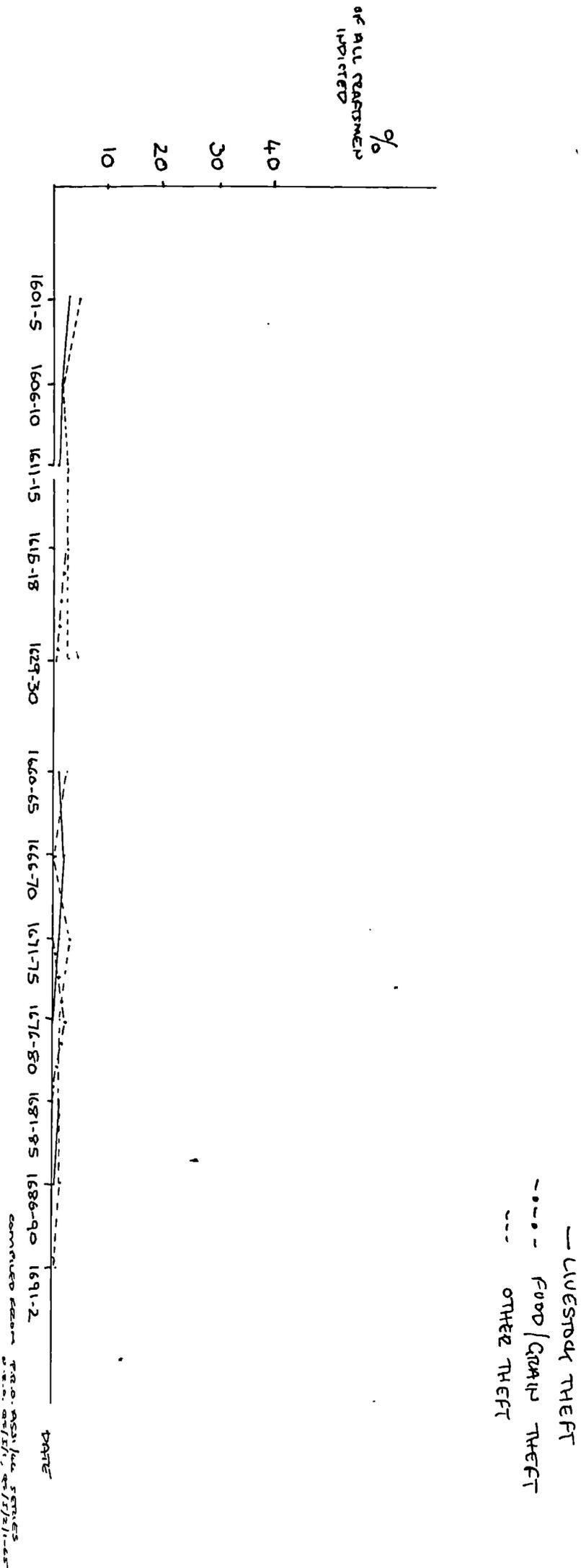
PERCENTAGE OF DEPTLEMEN INVOLVED IN THEFTS IN PORTHUMBURGH AND 1601-90
FROM ASSIZE AND QUARTERS SESSION DOCUMENTS. IN FIVE YEARLY AVERAGES

— LIVESTOCK THEFTS
---- OTHER THEFTS
NO THEFTS OF FOOD OR
GAIN COMMITTED BY
DEPTLEMEN



PERCENTAGE OF CRAFTSMEN INVOLVED IN THEFTS IN PORTHUMBURG AND 1601-90

FROM ASSIZE AND QUARTER SESSION DOCUMENTS. IN FIVE YEARLY AVERAGES.



was normally housebreaking, or the theft of clothes, cloth, money, household goods or shop items. The graph 5 shows how few craftsmen stole livestock.⁷

The typical Border malefactor, then, was of yeoman/husbandman/labourer status (see graphs 6 and 7) which would seem to indicate that not only did he work on the land, but that he lived in the country. Indeed, this was most often the case. Urban offenders tended to steal from someone else within the same town, but rural offenders would steal livestock from a much wider area. This was not always the case, especially on the English side of the border, but in general, the typical Border malefactor operated well away from the centres of population. If the regions where the majority of offenders lived are plotted on a map, it can be seen that in the early seventeenth century, the most important areas on both sides, were those areas close to the actual border, mainly Liddesdale, Redesdale, Bewcastle, and Kielder. These areas were not only the poorest, in isolated and hilly zones, but they were also at the farthest point from the centres of judicial authority, and thus often at the meeting points of jurisdictions. Kielder and Bewcastle were on the boundaries of Northumberland, Cumberland and Scotland; Redesdale on the border of England and Scotland; Liddesdale on the borders of Northumberland, Cumberland, Dumfriesshire and Roxburghshire.⁸

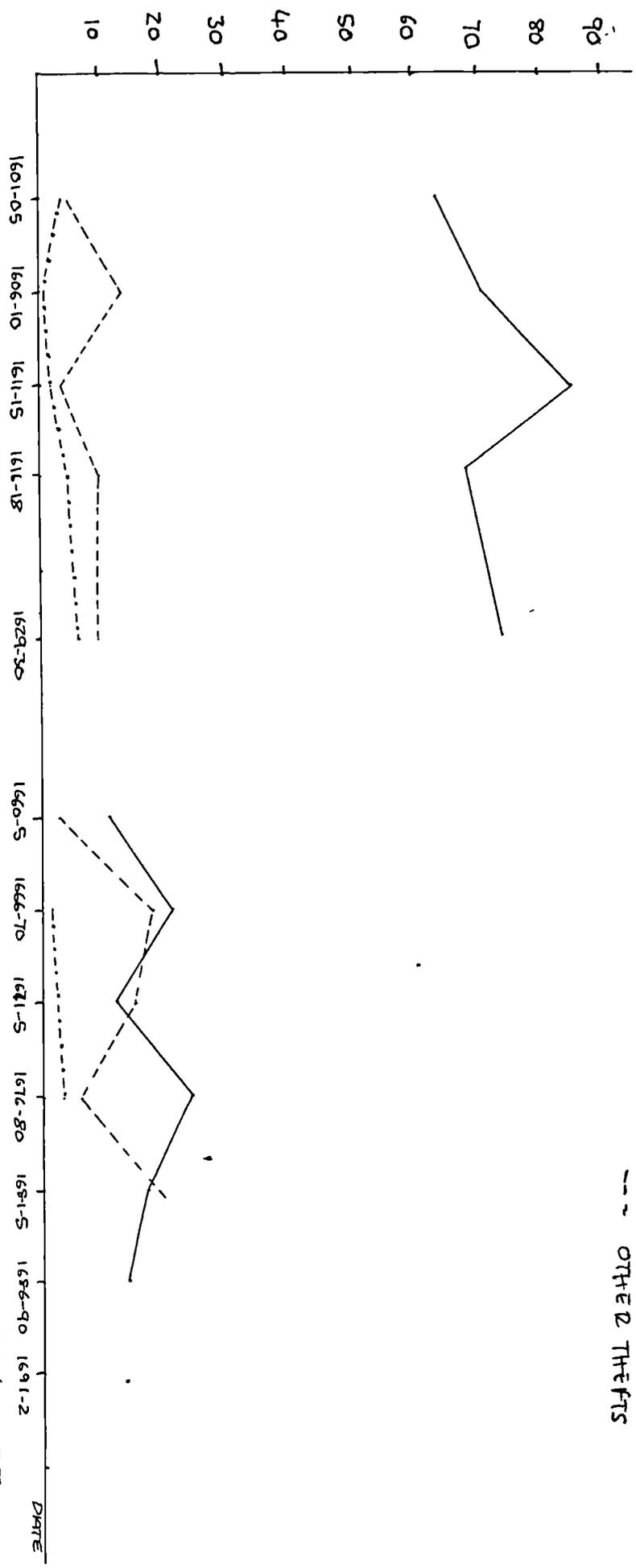
Isolated, hilly regions near boundaries would appear to have been popular for several reasons. The thieves were able to confound county-based jurisdictions by stealing from one shire and ressetting the stolen goods in another. These areas were remote and therefore free from prying eyes and the law authorities had to make a special, often lengthy, journey in order to catch the offender. Such areas were popular places for fugitives to live as shown by the survey of 1618. Throughout the century, the advantages of these regions were fully appreciated by each generation of Border malefactor and were exploited to the full. Offenders can be found freely crossing jurisdictions

PERCENTAGE OF YEOMEN INVOLVED IN THEFTS IN PORTHUMBERTLAND, 1601-90 FROM ASSIZE

AND QUARTER SESSION DOCUMENTS. 10 FIVE YEARLY AVERAGES

%
OF ALL YEOMEN
INVOLVED

— LIVESTOCK THEFTS
--- FOOD/GRAIN THEFTS
--- OTHER THEFTS

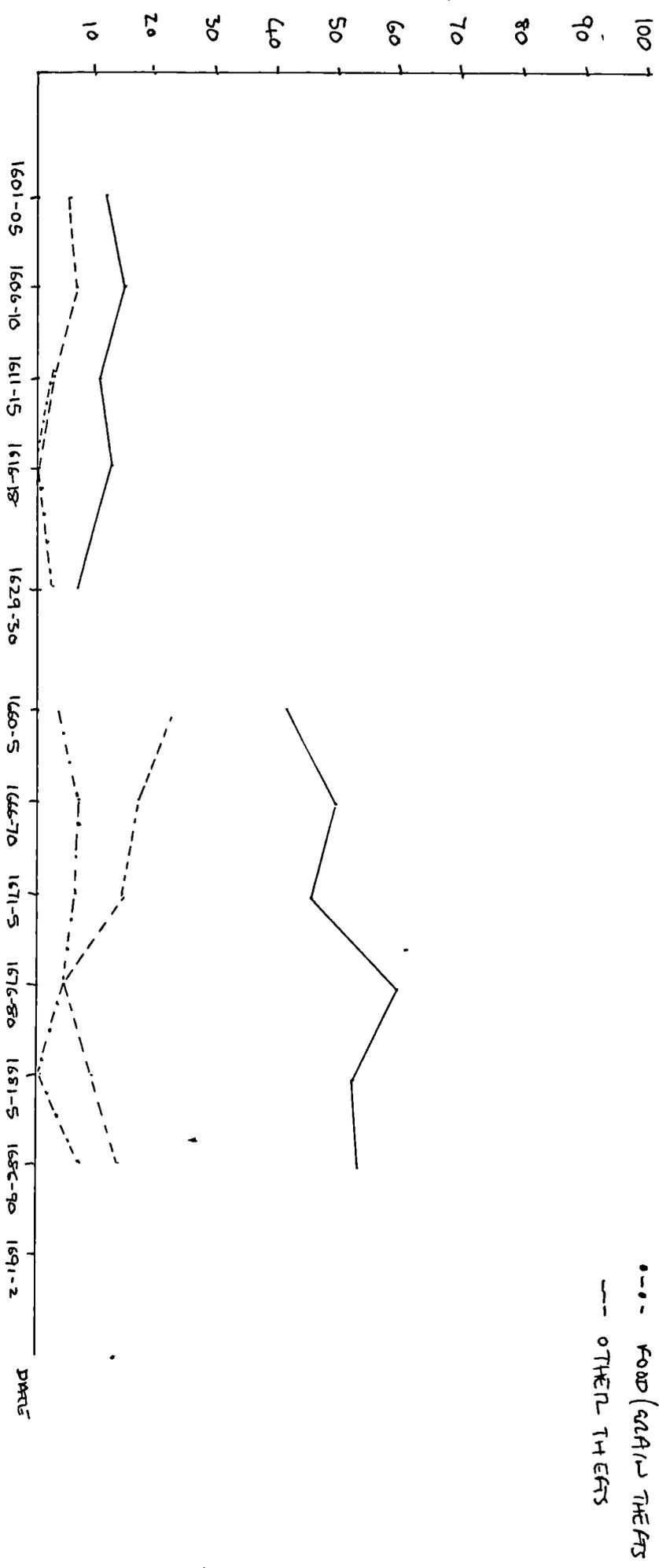


COMPILED FROM C.R.O. 9251/44 SERIES

%

OF ALL
LABOURERS
INDICATED

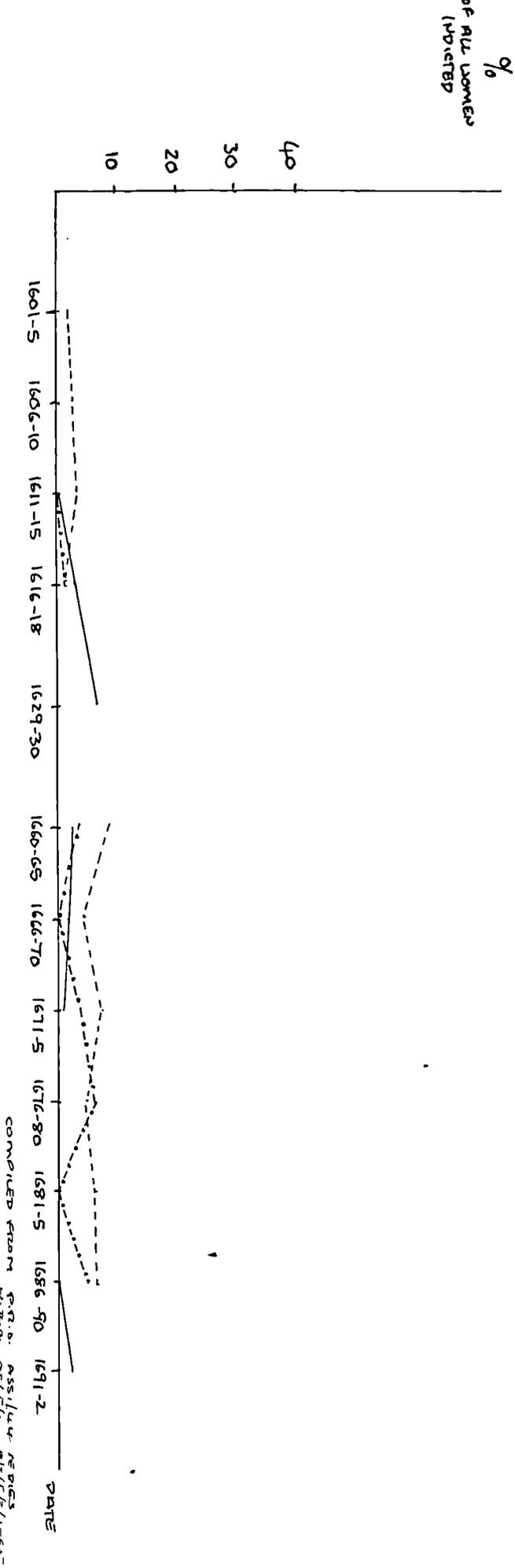
PERCENTAGE OF CAPBOUNTERS INVOLVED IN THEFTS IN NORTHUMBRIA AND 1601-92
FROM ASSIZE AND QUARTER SESSION DOCUMENTS. IN FIVE YEARLY AVERAGES



COMPILED FROM THE NORTHUMBRIA SERIES

PERCENTAGE OF WOMEN INVOLVED IN THEFTS IN NORTH WYOMING FROM 1601-90 FROM ASSIZE AND QUARTER SESSION DOCUMENTS. IN FIVE YEARLY AVERAGES.

- LIVESTOCK THEFTS
- FOOD/GRAIN THEFTS
- - - OTHER THEFTS



COMPILED FROM P.W.O. ASSIZES RECORDS W.Y.O. 1875/1. 418/1/2/11-61-

specifically to evade detection and capture. Thus, a map of the dwelling places of thieves in the 1670's would not be remarkably different to that of the early seventeenth century.⁹

It is significant that the areas inhabited by the largest number of thieves were the poorest and most deprived in the whole of the Border region. It has been stated that the majority of Border malefactors were of yeoman/husbandman/labourer status. Yet, although these terms were frequently interchangeable, yeoman and husbandman denote an aura of respectability and prosperity which the common Border criminal seems to have lacked. All over the Borders there were malefactors who lived by working on the land, augmenting their incomes by stealing, but there were others who seem to have lived only by stealing.

In May 1603, the Earl of Cumberland, after visiting the Borders, came to the conclusion that the Borderers had 'no trade but stealing'. The English Border survey of 1618 confirms this - that there were many offenders and outlaws with no employment other than theft. Rinion Blackburn of the Rigghead, living in Gilsland, was reported to have no trade but theft and Ralph Smith lived just by 'picking and filching'. Indeed, of the 70 persons contained in the survey within the parishes of Bewcastle, Arthuret and Liddelside, 50 were reported to have no other employment. Most of them seem to have spent their time in alehouses or playing cards. The rest of the time, they were professional thieves, or 'runners' to and from Ireland or Scotland, disposing of the stolen goods. No such survey exists for Scotland, but considering the similarities in agriculture, poverty and other types of crime prevalent, it is highly probable that the same situation existed there: large numbers of people, officially yeomen, husbandmen, or labourers, living not off the land, but from crime.¹⁰

Concrete evidence for the continuation of this 'professional' class of Border malefactor throughout the seventeenth century, is hard to find in the

absence of similar surveys. But the number and extent of the thefts committed by some offenders, together with their obviously well-established connections for disposing of the stolen goods, indicates that such professionals still existed on the post-Restoration Borders. The patterns of theft as described on page 169 of the chapter on the Border Commissioners would seem to indicate that they had little time for anything other than theft and disposing of the stolen goods; although all were at some time described as yeomen or labourers. The very fact that they had established channels for disposing of the goods rather than keeping them at home for their own use, seems to indicate a change in attitude from subsistence and survival to professionalism.

In contrast with the gentry and the lairds on the Borders, whose families had gradually become law enforcers and officials, many of these 'professionals' had a considerable pedigree with regard to theft. The notorious Mungo Noble of Crew in Cumberland, who stole over a wide area in the post-Restoration period, had an ancestor bearing the same name who was an equally notorious thief in the early part of the century. Percival Potts of Ironhouse in Northumberland had an ancestor of the same name who was described in 1617 as a 'great thief' and as such was banished to Ireland, although he soon returned home. James Irving of Bonschaw in Scotland was executed at Dumfries in October 1611, yet his descendant of the same name was still plaguing the Borders in the 1670's. There are innumerable examples of thieves like these.¹¹

It may be presumed from this that theft in the Borders was a profitable concern and one in which fathers coached their sons. Certainly families of thieves were commonplace, especially in the early years of the century. The Johnstons of Earshag, whose history has been described elsewhere, were typical in this respect.¹² On a smaller scale, fathers and sons were working together at all periods in the century. Edward Armstrong and his son Thomas were noted as

'special malefactors' in the Borders in the early seventeenth century having committed 12 murders. Simon Armstrong of Whithaugh, in Liddesdale, his brother Lencie and his son John, stole together in both England and Scotland in the same period. But whereas family groups were very common in the early years of the century on both sides of the Borders, they seem (with the notable exceptions of Scottish families, like the Johnstones of Earshag) to have disintegrated as the century progressed. Most of the professional thieves of the 1660's, 1670's and 1680's worked with 'partners', but it was rarely a member of their own family.¹³

This was probably the result of the anti-clan or surname policies pursued by the Border Commissioners in the early years of the century. At that time, almost every person had a nick-name or alias. William Hall of Elsdon was also called Clarks Will, whereas William Hall of Sharperton was known as Sandies Willie. A Scottish fugitive, William Armstrong was known as Langside of the gall. These names reflect parentage, physical attributes, sometimes even mental attributes (Mad Helenes Tam) as well as place of abode. Such names as Lang Hob Hoddum, Caldute, Halfelug and Jessie the Babb are indicative of a very close-knit society which had no need for full names and addresses.

Almost everyone was known by a nick-name in the period 1603 to 1611; by 1623 they were common, but not as numerous as previously. Scottish court records for 1623 reveal that in 23 per cent of the indictments, the offender was called by a nick-name, but by 1637 this had dropped to only 18 per cent. The occasional one or two appeared in the Interregnum records, but by the Restoration most have died out and the full, formal, name and address became the norm for indictments before the Border Commissioners. The change in nomenclature would seem to indicate that the close family links of the Borderers began to break down by the 1620's and 1630's. This was bound to have an effect on the methods of the Border criminals.¹⁴

In the early seventeenth century, large family raiding parties were common. The large scale marauding of the Busy Week was typical in this respect. The groups consisted usually of horsemen and others on foot, who stormed the fortified houses and pele towers, often setting fire to them and all the lands around. The cattle were driven back to the raiders' houses and anyone who tried to stop them was killed. The robbery and murder of Hector Armstrong of Tweeden was committed by a raiding party of six men from Northumberland in 1603. Sometimes very large numbers of people were involved in these raids. The reports of the raid against Lionel Robson in May 1611 assessed the raiding party at 70, with 50 on horseback. In May 1618, a group of 100 'all of the disordourit clannis of the lait Marches', gathered together in Roxburghshire. But by the Restoration, the thieves were operating singly or in pairs - rarely were there more than three in a group.¹⁵ The Scottish thieves seem to have liked to operate singly. Out of 34 thieves prosecuted by the Scottish Border Commissioners in 1676 and 1677, 22 (or 65 per cent) had committed the crimes by themselves. English documents of the same years reveal an equal division between those thieves who preferred to work with partners and those who liked to work alone.¹⁶

The change in the number of persons working together had several consequences. Firstly, the actual numbers of livestock stolen were smaller and they were almost always taken through stealth and cunning rather than through brute force of numbers. The crime was, therefore, unlikely to be accompanied by the arson, murder, pillage and laying waste of fields which had accompanied the earlier raids. Greater cunning and skill was employed by the thieves in disposing of their stolen goods. All these factors combined to make the later seventeenth century thief more difficult to identify and apprehend and the Border Commissioners began to utilise quite modern methods of detective work in order to catch the offenders.¹⁷

Further comparisons are apparent between the working practice of the early and later seventeenth century thieves. This is illustrated in Table 46. This table shows the partnership links between the offenders and illustrates clearly just how 'international' the criminal relationships were. Beginning in Cumberland, the partnerships move through Scotland, Northumberland and down to County Durham. In the early seventeenth century when the thieves were bound by clans and surnames, such a network was not possible. Once the close links had been broken up however, they started to act on their own initiative, choosing their partners for reasons of convenience rather than family and tradition. The network incorporates most of the notorious criminals that the Border Commissioners had to deal with and illustrates clearly how difficult detection and apprehension must have become by the post-Restoration period. Thus, as the Borders were united across their man-made boundaries by physical features, such as topography, agriculture and economy, so the criminal elements in their society were united across all boundaries. Until the Border Commissioners could, like them, treat the whole area as one and not two nations, they would never eliminate Border crimes.

The 'network' reveals that there was no question of anti-Scottish or anti-English activity in the post-Restoration period. Nor was such activity apparent in the early years of the century. The Graham clan, for example, took money from both England and Scotland to act as a kind of border 'buffer force'. Trans-border raids took place, one suspects, because it was easier for the offenders to evade detection and capture by retreating to the other side of the frontier. Indeed, the first Border Commission in 1605 stated that criminals 'committed [offences] in either country to escape punishment by flying into the other.' Why then, did the Borderers steal?¹⁸

This question has been answered in part by the discussion of the poor economic state of the Borders.¹⁹ But the economy seems to have affected people

in three different ways. Firstly, there were those who needed to steal to supplement their incomes all the time. These were the ones described by Ellerker and Bowes in the latter part of the sixteenth century, as 'the yonge and actyve people [who] for lacke of lyvinge be constrayned to steall or spoyle continually in either England or Scotland for the mayntenunce of ther levyng.' These people lived in the poorest parts of the Borders - in the upland areas of Redesdale, Tynedale, Bewcastle, Liddesdale and Eskdale. Secondly, there were those who seem to have relied solely upon stealing for a livelihood. These were the 'professionals', although officially described as 'labourers'. As true labourers, they would have had to rely upon a wage to buy food, rather than be able to grow it themselves on their own plots of land. For them, the profits from theft provided a more reasonable wage than one earned as a labourer. In general, these people also lived in the poorest upland areas. Thirdly, there were those who stole only to augment their incomes in times of hardship.²⁰

These people are very difficult to identify because, by their very nature, they usually only appear once in court and 'hard times' affected more than one category of offender. In times of hardship, certain trends are apparent, however; most important of which was the increase in the number of thefts of foodstuffs. These offences were most likely to occur at times when the food would be particularly hard to come by, such as in the winter or spring. There were also more thefts from areas not usually associated with stealing on a large scale: for example, the wealthier more southerly parts of the English Borders and the more prosperous parts of the Scottish side; and in the towns. This trend has been identified all over Britain. In Essex, for example, one of England's wealthiest counties, during the harvest failure of 1597 the number of thefts rose to 258 from 111 in 1596 and then fell back to 165 in 1598. Samaha concluded from this study that 'economic hardship in the 1590's drove expanding numbers of people to steal in order to live.'²¹

Such trends can be identified in the Borders in the 1690's. The percentage of thefts of all cases had been stable for most of the post-Restoration period, although with a slight increase in the 1670's, and by around 1680, the percentage of livestock thefts had begun to fall; a trend which continued into the 1690's. There was a 10 per cent increase in theft between 1685 and 1690, but a sudden leap by 25 per cent between 1690 and 1695. Records for Cumberland show the increase in the theft of foodstuffs in that county. The gradual increase in the prosperity of the Border region described above, pages 20-1 must have been a major factor in preventing people within the categories of those who stole to augment their livings, and those who stole only in times of hardship, from stealing.²²

Hardship, then, was the fundamental reason for the large number of thefts on the Borders; but it was not the only reason. Feuds and the clan system made a major contribution towards the lawless nature of the area, as well as the knowledge that crimes were 'easily' committed and justice readily avoided. The economic lot of the average Borderer only improved slightly during the course of the century, but the improvements in law and order were beyond compare. To these must be attributed the systematic efforts of the legal authorities in ensuring that crimes were readily detected and prosecuted. To achieve this, they had to strike at the very roots of Border society and bring that area into conformity with the rest of Britain. It is, perhaps, a measure of the Border Commissioners' achievement that the area which was once ranked equal in disorder to the Highlands of Scotland, should have been so radically tamed so many years before.

To date the exact time when the pacification was accomplished is impossible. Some historians have declared that the process was completed by 1607. It is hoped that this thesis has shown how important the early years were in the history of the Borders, but that at no stage in the first decade of the century

could a complete transformation have taken place. The chapter on the Border Commissioners shows how set-backs like the death of Dunbar, the abolition of the Guard and the Civil War could severely disrupt the peace. Yet from the first meeting of the Border Commissioners in April 1605, the Borders began to be changed. As with all trends, it is difficult to identify any one point - but some effort must be made to indicate when the Borders reached the point where they definitively took the road to recovery.

Large scale raiding seems to have ceased between 1609 and 1611. The last raid in 1611 attracted so much attention, that one is tempted to suggest that they had ceased to be commonplace quite a while before that time. Around 1615 feuds seem to have started to become rare, but it seems to have taken several years more for the family nick-names to vanish, probably as late as the 1630's. The change in attitude of the courts in Scotland took place between 1611 and 1623. Although no Border Commissioners' records are available for England at that time, assize documents reveal that between 1607 and 1628, the 'execution rate' had started to drop significantly.²³ The evidence suggests, then, that the so-called pacification of the Borders had made major advances by the last few years of James VI and I's reign and the first years of his successor. Yet if the pacification of the area had taken place then, why did a special commission need to be issued to deal with the Borders as late as 1684?

No amount of effort by law enforcing officials could alter the geography and economy of the Borders and they would always remain remote, difficult and potentially disorderly. The 1620's were only the point at which the Borders started to change and the change was not a very dramatic one. The area did not suddenly change from disorderly to law-abiding, allowing the officials to sit back. The transition was rather from an area out-of-control to one under control,

but needing constant supervision. The longer that supervision was maintained, the less likely the Borders were to revert to their pre-1611 state, for the longer that took, the fewer people remained who had not been brought up in the 'Middle Shires' under a sovereign of both nations.

There is every indication that it was Scotland which had the greater problems with law and order on the Borders. In the 1630's and after the Restoration, it was from that country that the first demands came for the reintroduction of the Border Commissions, and it would seem that it was that country which had the greater problems in maintaining judicial pressure on the Borderers. Scotland lacked the clear chain of command that existed in England, from parish constable right up to the highest courts in London. The Scottish High Court of Justiciary had the machinery to send out justice ayres, but until the last quarter of the seventeenth century rarely did so. The Border Commission, then, was the only real link between the Borders as a whole and the central government and it only began work after 1605. For the first time in the Borders, there was a permanent body with powers of life and death, which could cross the jurisdictional boundaries that the justice ayre could. Without the Border Commission, the permanent bodies of quarter sessions and assizes could carry on reasonably efficiently in England, whereas the Scottish Borders were devoid of a similar influence. Yet in order that the Borders as a whole region might be tamed, Commissioners had to be active on both sides. They were, thus, equally fundamental to the imposition of law in both England and Scotland.

Abbreviations

A.P.C.	Acts of the Privy Council
A.P.S.	Acts of the Parliament of Scotland
B.C.	Border Commission
bar.	baron
Brit. Lib.	British Library
B.R.O.	Berwick-upon-Tweed Record Office
C.R.O.	Cumberland Record Office
C.S.P.D.	Calendar of State Papers, domestic
Cumb.	Cumberland
D.G.N.H.A.S.	Dumfries and Galloway Natural History and Antiquarian Society
Dumf.	Dumfries
Dumf. M.C.	Dumfries Municipal Chambers
Dur. Univ. Dept. Pal. and Dip.	Durham University Department of Palaeography and Diplomatic
Dur. Univ. Lib.	Durham University Library
H.M.C.	Historical Manuscripts Commission
Hawick Mus.	Hawick Museum
J.C.	Justice Court
Jed.	Jedburgh
J.P.	Justice of the Peace
K/S	Kirk Session
L.R.O.	Lancashire Record Office
N.C.A.	Newcastle City Archive
N.L.S.	National Library of Scotland
N.R.O.	Northumberland Record Office
presby.	presbytery
P.R.O.	Public Record Office
Q/S	Quarter Session
reg.	regality
Rox.	Roxburghshire
R.P.C.S.	Register of the Privy Council of Scotland
S.C.	Sheriff Court
S.R.O.	Scottish Record Office
syn.	synod
T.C.W.A.A.S.	Transactions of the Cumberland and Westmorland Antiquarian and Archaeological Society
West.	Westmorland
W.R.H.	West Register House
W.R.O.	Westmorland Record Office

NOTES TO PREFACE

1. See below p.505 note 15
2. G. R. Elton, 'Introduction: Crime and the Historian', J. S. Cockburn (ed.), Crime in England, 1560-1850 (London, 1977), p.8
3. J. S. Cockburn, 'The Nature and Incidence of Crime in England, 1559-1625,' J. S. Cockburn (ed.), Crime in England, p.50
4. P.R.O. ASSI/45/6/1 nos. 116-19, 16th July 1661, 20th July 1661, 1st August 1661
5. J. S. Cockburn, 'Early Modern Assize Records as Historical Evidence', Journal of the Society of Archivists, vol. V, no. 4 (October 1975), pp. 215-31

NOTES TO INTRODUCTION

1. Hearth tax brought in 1662 at 2 shillings for each hearth, abolished 1688
2. A. Appleby, Famine in Tudor and Stuart England, (Liverpool, 1978) pp. 24-9
3. Watts does concede that the apparent population increase between 1584 and 1627 could be accounted for by the more complete returns of 1627. S. J. Watts, From Border to Middle Shire (Leicester, 1975) pp. 40-1
4. M. Flinn (ed.), Scottish Population History from the Seventeenth Century to the 1930's (Cambridge, 1977), pp. 188-91: T. C. Smout, A History of the Scottish People, 1560-1830 (Fontana ed., 1973), pp. 240, 242
5. A. Appleby, Famine in Tudor and Stuart England, pp. 18, 212 (n 2)
6. G. Manley, 'Sir Daniel Fleming's Meteorological Observations at Rydal, 1689-93', Transactions of the Cumberland and Westmorland Antiquarian and Archaeological Society (T.C.W.A.A.S.), vol. LXXVII (1977) p. 125
7. G. Parker and L. M. Smith (eds.), The General Crisis of the Seventeenth Century (London, 1978), pp. 6-7
8. P.R.O. SP/14/9 nos. 97,98, October 1604
9. Richard Wallace, yeoman of Kirkhaugh in South Tynedale died in 1586 and left goods to the value of £24 13 shillings 4 pence, of which £20 13 shillings 4 pence was the value of his livestock. David Bell of Orsby, in Cumberland left 60 lambs in 1614, but no grain or plough, neither did Percivall Dodd of Croglin who died the same year and left 13 cattle and 81 sheep. S. J. Watts, From Border to Middle Shire, p. 43: A. Appleby, Famine in Tudor and Stuart England, pp. 39-41
10. For example, the coastal plains around Alnwick in Northumberland, the Solway Plain and Eden valley in Cumberland.
11. C. Lowther, R. Fallow, P. Mauson, Our Journall into Scotland, 1629, (Edinburgh, 1894), p.9: A. Appleby, Famine in Tudor and Stuart England, pp. 43-5: S. J. Watts, From Border to Middle Shire, p. 45
12. A. R. B. Haldane, The Drove Roads of Scotland (Edinburgh, 1952), p. 161;
13. I. Whyte, Agriculture and Society in Seventeenth Century Scotland (Edinburgh, 1979), p. 21: S. G. E. Lythe, The Economy of Scotland in its European Setting, 1550-1625 (Edinburgh, 1960), p. 10: D. Mathew, Scotland under Charles I (London, 1955), p. 100
14. A. Appleby, Famine in Tudor and Stuart England, p. 63
15. I. Whyte, Agriculture and Society in Seventeenth Century Scotland, pp. 29-30
16. T. C. Smout, A History of the Scottish People, pp. 126-140
17. *ibid.*, p. 136
18. C. Lowther, Our Journall into Scotland, pp. 11-12: 'Black Book of Taymouth', Bannatyne Club (1855), p. 418: R. T. Spence, 'The pacifying of the Cumberland Border, 1593-1628', Northern History, vol. XIII (1977), pp. 152-3:

- J. Bain (ed.), Calendar of Letters and Papers relating to the Affairs of the Borders (Edinburgh 1894-6), vol. II, p. 131, 18th May 1596 [Border Papers]
17. Border Papers, vol. II, p. 131: F. Grainger and W. G. Collingwood, Register and Records of Holm Cultram, T.C.W.A.A.S., record series, vol. VII. (Kendal, 1929), p. 173: A. Luders et al (eds.), The Statutes of the Realm (London 1810-1828), vol. IV, part i (1819), pp. 663-7: T. C. Smout, A History of the Scottish People, pp. 136-7
18. R. T. Spence, 'The Graham Clans and Lands on the eve of the Jacobean pacification', T.C.W.A.A.S., new series, vol. LXXX (1980): See the chapter on the Border Commissioners (Chapter III) for further details of the Grahams and partible inheritance.
19. S. J. Watts, From Border to Middle Shire, p. 42
20. A. Appleby, Famine in Tudor and Stuart England, pp. 51-2: I. Whyte, Agriculture and Society in Seventeenth Century Scotland, p. 74
21. A. Appleby, Famine in Tudor and Stuart England, p. 45: T. C. Smout, A History of the Scottish People, p. 134: S.R.O. GD/123/155, undated recipe
22. A. Appleby, Famine in Tudor and Stuart England, p. 46: T. C. Smout, A History of the Scottish People, pp. 142-3: M. Flinn (ed.), Scottish Population History, pp. 125-6
23. A. Appleby, Famine in Tudor and Stuart England, pp. 156-8: S.G.E. Lythe, 'The Economy of Scotland under James VI and I', A. G. R. Smith (ed.) The Reign of James VI and I (London, 1979), p. 57: R. Howell, Newcastle upon Tyne and the Puritan Revolution (Oxford, 1967), pp. 7,8
24. M. Flinn (ed.), Scottish Population History, pp. 119, 192-3: R. Howell, Newcastle and the Puritan Revolution, p. 13
25. A. Appleby, Famine in Tudor and Stuart England, p. 174: S. Middlebrook, Newcastle upon Tyne: its Growth and Achievement (Newcastle, 1950), pp. 86-9
26. S. G. E. Lythe, 'The Economy of James VI and I', pp. 71-2: A. Appleby, Famine in Tudor and Stuart England, p. 179
27. M. Flinn (ed.), Scottish Population History, p. 183: A. Appleby, Famine in Tudor and Stuart England, pp. 156-8
28. R. North, The Lives of the Norths (ed. A. Jessop) (London, 1890), vol. I, p. 178: S. J. Watts, From Border to Middle Shire, p. 174
29. A. Appleby, Famine in Tudor and Stuart England, p. 162
30. I Whyte, Agriculture in Seventeenth Century Scotland, pp. 248-51: G. Donaldson, Scotland James V to James VII, (Edinburgh, 1976), p. 387: e.g.:- J. Donaldson, Husbandry anatomized or an enquiry into the present manner of tilling and manuring the ground in Scotland, 1697: [James, 2nd Lord Bellhaven]

The Countryman's Rudiments: or An Advice to farmers in East Lothian, how to labour and improve their ground, by ABS, 1699: R. A. Dodgshon, 'Farming in Roxburgh and Berwickshire on the eve of Improvement', Scottish History Review, vol. LIV (1975), p. 144

31 E. J. Buckatsch, 'The Geographical distribution of wealth in England, 1086-1843', Economic History Review, vol. II, no. 2 (1950-51), p. 187:

A. Appleby, Famine in Tudor and Stuart England, pp. 166-7: D. Adamson, 'The Hearth Tax of Dumfriesshire', Transactions of the Dumfries and Galloway Natural History and Antiquarian Society (T.D.G.N.H.A.S.) ser. 3 , vol. XLVII (1970), pp. 156-177

32. See the chapter on the Border Commissioners for details of the over-population of the Graham's lands, below, p. 103 : Sir R. Bowes, 'A Book of the State of Frontiers betweixt England and Scotland', 1550, written and printed in J. Hodgson, A History of Northumberland (Newcastle, 1828), part iii, vol. II, pp. 171-248

33. S.R.O. JC 26/49, 22nd January 1678: S. J. Watts, From Border to Middle Shire, p. 38: R.P.C.S., ser. 3, vol. IX, p. 63, 22nd July 1684

34. C.R.O. D/Pen./216 Muncaster MSS (Hereafter Munc.MSS), f. 50, 15th November 1605, 23rd November 1605; f. 115, 19th May 1606; f. 117, 1st June 1606; (John Rylands Library, Manchester, Crawford MSS, (hereafter Crawf.MSS), ff. 51, 52, 130, 132)

NOTES TO CHAPTER I: THE CENTRAL COURTS

I. Sources

1. England

The Acts of the Privy Council of England have been printed from 1601-1633 and reproduced in facsimile from 1637-1645. For the rest of the century, the acts have been catalogued by contemporary index only which is housed in the Round Room of the P.R.O. There is an unfortunate hiatus in the records from January 1602 to April 1613 on account of a fire at Whitehall in January 1618, in which they were destroyed. The manuscripts of the Marquis of Salisbury, printed by the Historical Manuscripts Commission, provide important information on the activity of the Council during the period 1602-1613 (H.M.C., 9th report, Salisbury MSS, vols. XIV-XXIV). The State Papers are, of course, invaluable for the whole of the century, for which both the Calendar (C.S.P.D.) of domestic papers and the originals have been used.

The cases before Star Chamber have been indexed for the reign of James I and part of the reign of Charles I. This index is in the P.R.O. (STA/8/3 - STA/8/308; STA 9/1/35) and includes details of the plaintiff, defendant and case. This has been used for the description of Star Chamber.

Despite instructions that records should be kept of the proceedings of the Council of the North and evidence that records were in existence in the mid-seventeenth century, none survive today. Only a few references to the Council of the North can be gleaned from other sources. In the C.R.O. is a document of 'Instructions to Viscount Wentworth, the Lord President of the Council in the North Parts' (D/Lons./Council of North) dated 1637. There is also an 'Historical and Legal Record of His Majesty's Council in the North Parts', compiled by Sir John Lowther, a seventeenth century J.P. This covers the years

1594-1637 and consists of extracts of cases from the original documents. These cannot, however, give any indication of the day to day business of the court. The 'Instructions to Viscount Wentworth', however, do give some indication of the manner in which the court was expected to deal with offenders. The Delaval Papers in the N.R.O. offer some insight into the relationship of the Council of the North with the Northumberland justices. (1/DE/7 series).

2. Scotland

The Register of the Privy Council of Scotland, has been printed in numerous volumes and covers the seventeenth century as far as 1691. These have proved invaluable for all courts in Scotland as they contain not only acts and court cases, but also all correspondence between the Council, the King and the localities. The Acts of Parliament of Scotland have likewise been printed.

The documents of the High Court of Justiciary are housed in the S.R.O.. There are a very large number of court records, which, for the seventeenth century, are largely unindexed. The High Court minute books are contained in the series JC 6/4 to JC 7/1, covering the years 1652 to 1706. An important set of documents with regard to the general working of this court are the Small Papers, the JC 26 series. These are unindexed, loose documents in boxes of years. This makes it difficult to give precise references. Thus, just box numbers and dates have been given.

II. Notes

1. J. P. Kenyon, The Stuart Constitution 1603-1688 (Cambridge, 1976), p. 18: J. Bodin, Six Books of the Commonwealth, M. Tooley (ed.), (Oxford, 1955), pp. 43-5
2. J. P. Kenyon, The Stuart Constitution, pp. 477-81: G. R. Elton, England Under the Tudors (London, 1971), pp. 405-7: W. Holdsworth, A History of English Law (London, 1945), vol. IV, p. 72
3. H.M.C., 9th report, Salisbury MSS. vol. XVI, p.4, 10th January 1604: P.R.O. SP/14/40 no. 11, 1608? ; SP/14/86 no. 96, 19th March 1616: N.R.O. 1/DE/7 no. 53, 22nd April 1618: C.S.P.D. 1667-68, p. 143, 1667?

4. See below p. 70
5. A.P.C. 1637, P.R.O. reproduction in facsimile, vol. I, p. 330, 28th October 1637: N.R.O. 1/DE/7 no. 82, 23rd December 1623: T. G. Barnes, Somerset 1625-1640: A County's Government during the Personal Rule, (Cambridge, Mass., 1961)
6. See the chapter on the Border Commissioners (Chapter III) for details of remanding. A.P.C. 1616-17, pp. 381-2, 21st November 1617; 1619-21, p. 98, 29th December 1619: N.R.O. 1/DE/7 no. 74, undated [1619]: 1/DE/7 no. 108, undated
7. C.S.P.D. 1680-1, p. 100, 9th December 1680
8. J. P. Kenyon, The Stuart Constitution, pp. 482-91
9. G. R. Elton, England Under the Tudors, pp. 414-17: G. R. Elton, Star Chamber Stories (London, 1958), pp. 11-13
10. P.R.O. Star Chamber Index, STA/8/3-STA/8/308 James I reign; STA/9/1/35 Charles I reign
11. H. Phillips, 'The Last Years of the Court of Star Chamber, 1630-41' in J. Christie (ed.), Essays in Modern History, p. 91: J. P. Kenyon, The Stuart Constitution, p. 117
12. J. P. Kenyon, The Stuart Constitution, p. 120
13. C.R.O. D/Lons/Council of the North, 'Instructions to Viscount Wentworth, the Lord President of the Council in the North Parts', article 19: D/Lons/Coun. of the North, 'A Historical and Legal Record of His Majesty's Council in the North Parts' compiled by Sir John Lowther, pp. 52, 123, 136, 145: R. Reid, The King's Council in the North, (London, 1921), p. 149
14. R. Reid, Council in the North, pp. 261-70
15. See Chapter II, pp. 61-70 for details of oyer and terminer commissions.
16. P.R.O. Crown Office Entry Book of Commissions, C/181/2, p. 310, 5th February 1617: A.P.C. 1616-17, p. 380, 21st November 1617: R. Reid, Council in the North, pp. 284, 406-7
17. P.R.O. SP/14/97 no. 37, 24th April 1618: N.R.O. 1/DE/7 no. 48, 22nd June 1617: C.R.O. D/Lons/Coun. of the North, 'A Historical and Legal Record', pp. 32-35: See Chapter III for the history of the Border Commissioners.
18. C.R.O. D/Lons./Coun. of the North, 'Instructions to Viscount Wentworth', article 46
19. C.S.P.D. 1631-3, p. 567, 11th March 1633; p. 585, 26th March 1633; 1633-4 p. 209, 16th September 1633
20. The Admiralty held an active and regular court at York, at least as late as 1745, presided over by the Archbishop of York. J. S. Purvis, The Records of the Admiralty Court of York, St. Anthony's Hall Publication, no. 22 (York, 1962)
21. W. Holdsworth, A History of English Law, vol. I, p. 469: P.R.O. Crown Office Entry Book of Commissions, C/181 series
22. W. Holdsworth, History of English Law, vol. I, pp. 204-17: J. S. Cockburn, A History of the English Assizes, 1558-1714 (Cambridge, 1972), pp. 131, 140:

- T. Barnes, Somerset, p. 95: M. Blatcher, The Court of King's Bench 1450-1550: a study in self help (London, 1978), pp. 1,7, 34-35
23. M. Blatcher, King's Bench, pp. 48-50
24. M. Blatcher, King's Bench, pp. 51-3, 55-6, 139
25. R.P.C.S., ser. 1, vol. VI, p. 567, 1st May 1603
26. See Chapter III for the activities of the Earl of Dunbar as Border Commissioner: M. Lee, 'James VI's government of Scotland after 1603', Scottish Historical Review, vol. LV, part i, no. 159 (April 1676), pp. 42-3
27. H.M.C., Salisbury, vol. XX, p. 177, 1608: M. Lee, 'James VI's government of Scotland after 1603', p. 48
28. R.P.C.S., ser. 1, vol. VI, p. 594, 5th January 1604; vol. VIII, p. 508, 31st May 1608; vol. XIII, p. 257, 14th June 1623; ser. 2, vol. VI, p. 429, 13th May 1637; pp. 431-2, 3rd June 1637; pp. 443-5, 10th June 1637: G. Donaldson, Scotland: James V - James VII (Edinburgh, 1971), pp. 288, 289: P. Rayner, B. Lenman, G. Parker, 'Handlist of Records for the study of Crime in early modern Scotland to 1747' (Typescript in S.R.O.), pp. 7, 12 (hereafter, 'Handlist')
29. R.P.C.S., ser. 1, vol. X, p. 847, 9th November 1616
30. For heritable jurisdictions, see Chapters IV and VI. R.P.C.S., ser. 1, vol. VII, pp. 270-1, 20th November 1606; vol. XI, p. 216, 26th August 1617
31. R.P.C.S., ser. 1, vol. X, p. 393, 15th September 1615
32. See Chapter III for details of the Border Commissioners' activities against feuds. R.P.C.S., ser. 1, vol. VI, pp. 594-6, 5th January 1604; vol. VII, p. 24, 21st March 1605; p. 29, 28th March 1605; p. 58, 11th June 1605
33. R.P.C.S., ser. 2, vol. VI, pp. 429-30, 13th May 1637; p. 439, 8th June 1637; p. 442, 10th June 1637
34. 'Handlist', p. 13: The number of debt cases before the Council declines in the mid-1620's, when an increasing number of people are referred to the Court of Session.
35. R.P.C.S., ser. 1, vol. VII, p. 719, 17th May 1606; ser. 2, vol. II, p. 590, 6th May 1628; vol. V, p. 229, 11th March 1634; p. 263, 3rd June 1634
36. R.P.C.S., ser. 1, vol. VII, p. 553, 22nd May 1604; p. 658, 29th October 1606; vol. XI, p. 227, 10th September 1617; ser. 2, vol. IV, p. 198, 1st April 1631
37. 'Handlist', p. 32: See the Conclusion for a discussion of the changing patterns of crime throughout the century
38. Civil cases went to the Court of Session
39. W. Croft Dickinson, G. Donaldson, Source Book of Scottish History, (Edinburgh, 1961), vol. III, pp. 275-286: 'Handlist', p. 31
40. See S.R.O. JC 26 series, boxes, /16, 1654; /49, 1678; /50, 1679; /61, 1683; JC 6/4 - JC 7/1 minute books, 1652-1706
41. See the chapter on the sheriff courts (Chapter IV)

42. J. I. Smith, Selected Justiciary Cases II, Stair Society, vol. XXVII (1972), pp. v-vi: S.R.O. JC 26/50, box relating to 1679
43. S.R.O. JC 26/36, box relating to 1669; JC 26/49, box relating to 1678: JC 27/4, court Edinburgh 1652: J. I. Smith, Selected Justiciary Cases II, p. iii
44. S.R.O. JC 26/45, box relating to 1669
45. See Chapter VI for details of the charters and rights of franchise courts; J. I. Smith, Selected Justiciary Cases III, Stair Society, vol. XXVIII (1973), p. 592
46. S.R.O. J.C. 26 series, boxes /49, 1678; /62, 1683
47. S.R.O. JC 26/49 box relating to 1678: JC 27/4 court Edinburgh 1652
48. G. Donaldson, Scotland, p. 288: R.P.C.S., ser. 1, vol. VII, p. 2, 19th April 1604; p. 41, April 1605
49. J. I. Smith, Selected Justiciary Cases II, pp. vi, 324-5, 327, 328: R.P.C.S., ser. 2, vol. VI, pp. 609, 12th August 1636; pp. 637-8, 3rd November 1636
50. R.P.C.S., ser. 1, vol. X, p. 152, 15th September 1613; ser. 2, vol. VI, p. 269, 21st June 1636
51. R.P.C.S., ser. 1, vol. VIII, p. 470, 31st May 1610; vol. X, p. 231, 6th April 1614; ser. 3, vol. V, p. 320, 18th January 1678; vol. VI, p. 373, 6th January 1680

NOTES TO CHAPTER II: ASSIZES AND JUSTICE AYRESI Sources1. England

The documents of the assize judges are almost exclusively housed in the P.R.O. They are not a complete series. Unlike the quarter sessions documents which were, by tradition, kept in continuous custody in one place in their original county, assize records seem to have been alternately handed down from one clerk of assize to another, or, when the bulk of material grew too cumbersome, were destroyed. The problem of record survival for assize records in the first half of the seventeenth century is so acute that it has been considered 'impossible to draw from the accumulated records of the six English circuits a comprehensive picture of the working of the assizes.' (J. S. Cockburn)

For the Northern Circuit the survival of records is relatively fortunate, although riddled with hiatuses from damaged, lost or destroyed documents. Within the N.R.O. is a collection of indictments from quarter sessions, Border Commission courts and assizes. In this are details of assize courts at Newcastle in 1602, 1604, 1605, 1606, 1608 and 1616. This series has been organised, sorted and, in fact, reproduced in typescript. It furnishes material for a most crucial period in the history of the Borders which would otherwise have been lost. (QS/I/1). Gaol calendars from Newcastle assizes in 1628 and 1629 are contained in Thomas Swinburne's sheriff book, within the Mickleton and Spearman MSS in Durham University Library (Book 9/1).

Assize documents in the P.R.O. start from the mid-seventeenth century. The indictments (ASSI/44 series), unlike those for other circuits, remain unsorted and unrepaired. They are in a filthy, rotting and therefore extremely fragile, condition. Many of the boxes supposedly containing documents of a single, stated year, are in fact, mixed and the muddle of loose pages makes it difficult to ascertain to which court, in what year they should be attributed. Although the

indictments for the northern circuit date back to 1607, the early years are exclusively concerned with Yorkshire. The earliest references to the Border counties are those concerned with quarter sessions held in 1648. Scattered references to Westmorland survive from the 1650's, (ASSI/44 boxes, 5, 6 and 7) but it is not until 1660 that the main series of documents for all three counties begins. By 1661-2, they may be said to survive on an adequate level, although there are clearly years where little or no record can be found. The court profiles show these weaknesses.

The category 'indictments' covers not only indictments, but also commissions, bills ignoramus, gaol calendars, *recognizances*, *lists of jurors*, coroners' inquisitions and grand jury presentments. There are also some records of nisi prius sittings and some constables presentments. With the exception of these constables presentments, all are in latin.

The depositions (ASSI/45 series), in contrast, have all been cleaned, sorted and repaired. As with the indictments, the early boxes are exclusively concerned with Yorkshire. A few scattered references to Westmorland occur in 1646 and 1653 (ASSI/45/1/5, ASSI/45/4/3), to Cumberland in 1650 (ASSI/45/4/1) and Northumberland in 1654 (ASSI/45/5/1). From 1655, however, an increasing number of items refer to the Border counties, providing a suitable backcloth to the more adequate post-Restoration depositions. Unlike the indictments, the depositions are in English and in addition, include lists of witnesses, petitions, some grand jury presentments, recognizances and constables presentments.

In addition to these general categories of assize records, there is a collection of northern gaol books (ASSI/42/2) only one of which is relevant to this study - the gaol book of the Border Commissioners. There is also a collection of miscellaneous assize papers for the seventeenth century including petitions, sacrament papers and certificates, depositions referring to the Border counties and gaol calendars.

2. Scotland

The records of the Scottish justice ayres are all in the S.R.O. The box JC 10/2 contains details of the court proceedings in 1658 and 1659: JC 10/3, the courts held in 1671: JC 10/4, those in 1679 and 1683: JC 27/3 contains details of the courts held in 1643, 1656 and 1659, and JC 27/4 is the court book of the circuit court held in Edinburgh in 1652. The small papers, series JC 26, contain information on the organisation of the ayres in 1679 and 1683, porteous rolls and lists of fugitives from the ayres. (See notes and sources to Chapter I, for details of JC series in general).

The records of the Border Commissioners contain lists of delinquents, assizers and witnesses and sometimes court proceedings for courts held in Jedburgh 1656, Jedburgh 1657, Kelso 1658, and Jedburgh 1659 (GD/123/192). The Register of the Privy Council contains details of the commissions issued and indications when an ayre was held.

II. Notes

1. 'The Office of the Clerk of Assize', printed in J. S. Cockburn, A History of the English Assizes, 1558-1714 (Cambridge, 1972), p. 23
2. R.P.C.S., ser. 2, vol. II, p. 345, 30th June 1628; p. 373, 14th July 1628; p. 435, 8th August 1628
3. *ibid.*, p. 518, 9th December 1628: vol. IV, p. 12, 9th August: S.R.O. JC 27/3, Dumf. J.C., 12th-18th March 1643
4. S.R.O. JC 27/4, Edinburgh J.C., 1652
5. See Chapter I for description of procedure in the High Court
6. David Gordon of Glenlair was fined £12 Scots for not pursuing Fergus Wilson for perjury; S.R.O. JC 10/2 Dumf. J.C., 9th April 1658; JC 27/4 Jed. J.C., May 1657
7. S.R.O. JC 27/3 Jed. J.C., May 1657
8. See Chapter I for description of repledging, also sheriff courts, p.240
9. S.R.O. JC 10/2, Kelso J.C., 14th April 1658, Dumf. J.C., 2nd April 1659
10. S.R.O. JC 10/2, Dumf. J.C., 9th-10th April 1658
11. I am grateful to Dr. Lesley M. Smith for supplying the information on the ratio of soldiers to population; L. Smith, 'Scotland and Cromwell: a study in early modern government', unpublished, D. Phil. thesis, 1979, Brasenose College, Oxford.

12. S.R.O. JC 10/3 Dumf. J.C., 12th May 1671, Jed. J.C., 20th-25th May 1671: JC 10/4, Jed. J.C., 15th September 1679: JC 26/61, box of papers relating to 1683
13. S.R.O. JC 27/3, Dumf. J.C., 13th-15th May 1656, Jed. J.C., 20th May 1656: JC 10/3 Dumf. J.C., 12th May 1671, Jed. J.C., 20th-25th May 1671: JC 10/4 Jed. J.C., 15th September 1679: JC 26/61-65, porteous rolls for 1683
14. S.R.O. JC 10/2, Dumf. J.C., 10th April 1658, Kelso J.C., 14th April 1658
15. See the chapter on the justices of the peace for a description of the Cromwellian justices.
16. See Chapter I for explanation of nisi prius. P.R.O. C181/1-7, Crown Office Entry Book of Commissions, 1601-1673
17. This was not always out of order. Special commissions of oyer and terminer, gaol delivery and nisi prius might be issued at any time for hearing unusual cases or dealing with dangerous situations like the Gunpowder plot in 1606 or the Northern Rising in 1663. Ad hoc gaol delivery commissions often contained professional judges. See below, the chapter on the Border Commissioners, the longest serving special commission in the north of England. P.R.O. C181/2, p. 12, Northumberland commission for the trial of Thomas Percy, 21st July 1606: C181/7, p. 221, commission for trying conspirators and traitors in the Northern Insurrection, 9th December 1663: ASSI/45/6/3, nos. 178-227, depositions from the Northern Rising 1663 and 1664
18. See following chapter for history and details of the Border Commissioners: P.R.O. C181/1, p. 310, Commission for the Middle Shires, 5th February 1617; C181/7, p. 194, Commission for the Borders, 2nd March 1663; C181/7, p. 392, Commission for the Borders, 4th March 1667
19. Disputes over precedence took place in June 1602 and June 1633, when the Vice-President of the Council of the North was given precedence over the assize judges. C.R.O. D/Lons. 'A Historical and Legal Record of His Majesty's Council in the North Parts, 1626-36', compiled by Sir John Lowther, pp. 32-3
20. Brit. Lib. Harlein MSS, 7581, ff. 61-2, Serjeant Davis's charge at York assizes, lent 1620: James I in Star Chamber underlined the political function of the judges.

Remember that when you go on your circuit, you go not only to punish and prevent offences, but you are to take care for the good government in general of the parts where you travel You have charges to give to justices of peace that they do their duties when you are absent, as well as present: take an account of them and report their service to me at your return ... now I charge you again that at your next return you repair to my Chancellor and bring your account to him in writing of those things which in particular I have given you charge: and then when I have seen your accounts, as occasion shall serve it may be I will call for some of you to be informed of the state of that part of the country where your circuit lay.

'His Majesty's speech in Star Chamber', 20th June 1616, printed in J. S. Cockburn, A History of the English Assizes, p. 10: See also Lord Keeper Francis Bacon's Star Chamber charge, February 1618, quoted *ibid.*, p. 13

21. J. P. Kenyon, The Stuart Constitution, pp. 90-4: J. S. Cockburn, A History of the English Assizes, pp. 219-37

22. P.R.O. C181/5, p. 217, commission for Northern Circuit assize judges, 23rd January 1642; p. 245, commission for Northern Circuit assize judges, 17th December 1644: B. Worden, The Rump Parliament (Oxford, 1977), p. 178

23. Sir Francis Bacon's charge, 1617, printed in J. S. Cockburn, A History of the English Assizes, p. 153

24. See below for details in the chapter on the justices of the peace, pp.312-4

25. James I disapproved of patents for non obstante and consequently between 1616 and 1634 none were issued. J. S. Cockburn, A History of the English Assizes, p. 269-71

26. R. North, Lives of Norths, vol. I, pp. 179-80

27. Cockburn has calculated the daily allowances for the two judges of each circuit in 1581 to be as follows: West and Midland Circuits, £6 17 shillings and 4 pence: Norfolk Circuit, £6 9 shillings and 4 pence: Home and Oxford Circuits, £6 12 shillings: Northern Circuit, £5 14 shillings: J. S. Cockburn, A History of the English Assizes, pp. 55-6

28. The sheriff's duties are described in the chapter on the sheriff courts. R. North, Lives of Norths, vol. I, p. 182; J. S. Cockburn, A History of the English Assizes, p. 59

29. It was not unknown for bad weather, plague or political unrest to delay the assizes by a month or so. For example, in 1690 the rumour of a French invasion postponed the summer assizes until the end of August. J. S. Cockburn, A History of the English Assizes, p. 24

30. R. North, Lives of Norths, vol. I, p. 173

31. C.R.O. D/Lons./L. Shrievalty, 'Preparation against the Assizes 1662'

32. In 1663, the Northern Rising presented a more serious kind of treason. No record of this and the prosecutions that followed can be found in the indictments of the assizes because the rebellion was dealt with by special commission. See pp.161-2 below for a description of the Northern Rising. The Northern Rising, however, was particularly important in helping to explain why, from that time onwards, the post-Restoration governments were most concerned to keep down the number of Quakers and protestant non-conformists in the Borders. P.R.O. ASSI/44/11 Westmorland ass. court, summer 1663: ASSI/45/6/3 nos. 178-227, depositions from the Northern Rising, 1663 and 1664.

33. The common law in early modern England singled out some crimes as being so conspicuously heinous that a man convicted of them must automatically incur, in addition to his sentence, a forfeiture of property of either lands, goods, or both. These crimes were felonies. Originally all felonies, except petty larceny, (theft of goods valued under 12 pence) were punishable by death. Lesser crimes, known as misdemeanours did not incur either penalty. No felon could call witnesses in his defence or have any counsel to defend him. Anyone who suspected a person of being a felon was allowed to arrest him forthwith and anyone who saw a felony being committed was not only permitted, but was required to arrest the felon if he could. Eye-witnesses, however, could never arrest the committer of a misdemeanour without first obtaining a magistrates warrant. C. S. Kenny, Outlines of Criminal Law, (Cambridge, 1922), p. 92

34. See the chapter on the justices of the peace for referrals which took place in the early seventeenth century, p.271 . See also the chapter on the Border Commissioners for a discussion of the type of business before that court and comparisons with the quarter sessions and the assizes. J. S. Cockburn, A History of the English Assizes, p. 91: P.R.O. ASSI/44/26 Carlisle ass. court, summer 1678: C.R.O. QS/I/1, f. 38, Cockermouth Q/S court, 10th January 1673; f. 75, Penrith Q/S court, 7th October 1674; f. 98, Carlisle Q/S court, 25th April 1677; f. 106, Cockermouth Q/S court, 16th January 1678

35. See the case of William Batie quoted in the chapter on the Border Commissioners, below, p.108. J. S. Cockburn, A History of the English Assizes, p. 97

36. It is possible that these figures are distorted by two factors. (1) The large number of religious prosecutions. But even without these, the larceny indictments only reach 32 per cent of the cases in Northumberland, 35 per cent in Cumberland and 36 per cent in Westmorland. (2) The presence of the Border Commissioners who were holding regular courts. Yet (a) this had not affected the early seventeenth century percentage and (b) even if these cases from the Border Commissioners' courts are added to those of the assizes, the percentage is raised only to an average of 36 per cent (50 if the religious cases are discounted). See the conclusion for a discussion of these figures. The figures are taken from N.R.O. Q/S/I, 'Vetera Indictamenta', and P.R.O. ASSI/44 series.

37. See the chapter on the Border Commissioners for the mobility of thieves, pp.169-70

38. To qualify as the crime of burglary, the offender must break into another's house with the intent to commit a felony there. Burglary was usually differentiated from housebreaking by being committed at night. Housebreaking however, would not appear to have been bound by any particular hours. An

indictment for burglary normally stated that the offence was committed at night, but an indictment for housebreaking does not allege that the offence was committed by day, but rather seems to omit all mention of time. The indictments show that both housebreaking and burglary could refer not only to houses, but also shops and warehouses. The difference between theft and breaking into a building was very important, the former being eligible for benefit of clergy, the latter not. See below, p.94

39. N.R.O. QS/I/1, f. 33, Newcastle ass. court, 9th August 1604; f. 44, Newcastle ass. court, 8th August 1605

40. Included in the assize indictments are many coroners reports of inquests. In homicide cases, at least 12 members of an inquest had to find before the coroner that a death had been occasioned by a named person. This acted as an indictment upon which the accused could be arraigned for homicide, although an indictment could also be drawn up in the usual way at the beginning of the assize court. P.R.O. ASSI/45/6/1, nos. 108, 109, June 1661

41. Not all infanticide cases fall into this category. In December 1664, for example, the apparently insane Richard Foster, convinced that his wife and child were 'bedevilled', threw the child into the fire. P.R.O. ASSI/45/7/1, nos. 12-14, May 1664; nos. 78-80, December 1664

42. W. Blackstone, Commentaries on the Laws of England (Oxford, 1765-9), vol. IV, p. 220

43. Other serious offences, such as bigamy, sodomy or smuggling are rare. Rape was marginally more common, although the cluster of indictments for 1678 in Northumberland is misleading because all were committed by one man, Newcastle labourer, James Ainsley. P.R.O. ASSI/44/24, Newcastle ass. court, summer 1678

44. N.R.O. QS/I/1, f. 158, Newcastle ass. court, 24th July 1616

45. P.R.O. ASSI/44/15, Newcastle ass. court, summer 1667; ASSI/44/19, Newcastle ass. court, summer 1671; ASSI/44/24, Carlisle ass. court, summer 1676; C.R.O. QS/I/1 f. 79, Cocker mouth Q/S court, 13th January 1675

46. See above p,63 for the religious cases before the Scottish justice ayre. See the chapter on the church courts for the ecclesiastical history of the area, pp.409-10 also the justices of the peace, pp.302-3

47. See the chapter on the justices of the peace for a discussion of the low figures for non-conformity in Cumberland with regard to the activities of the justices of the peace, pp.302-3. As it was the justices who would present offenders to the assize judges, this is of great relevance to the low number of prosecutions of religious dissenters.

48. P.R.O. ASSI/42/1 York ass. court, lent 1670

49. Grand jury presentments do occur in the assize documents. For example, at the court held on 9th August 1679 at Newcastle, the Grand Jury presented that a parson minister to the prisoners in the gaol at Morpeth; that there be an adequate house of correction for the county and that servants wages be regulated in the area. P.R.O. ASSI/44/27, Newcastle ass. court, summer 1679
50. J. S. Cockburn, A History of the English Assizes, p. 127: J. H. Baker, 'Criminal courts and Procedure at Common Law, 1550-1800' in J. S. Cockburn (ed.), Crime in England, pp. 19-20
51. Z. Babington, 'Advice to Grand Juries in Cases of Blood' (1677), printed in J. S. Cockburn, A History of the English Assizes, p. 114-15
52. P.R.O. ASSI/44/13, Appleby ass. court, summer 1665; ASSI/47/20/3, box of constables presentments. The manorial court of Holm Cultram records show that in August 1616, Sir Edward Bromley, assize judge, ordered by-laws agreed in the assizes to be administered by the J.P.'s through the manorial court authorities. F. Grainger, W. Collingwood, The Register and Records of Holm Cultram, T.C.W.A.A.S., record series, vol. VII (1929), p. 265.
53. Roger North told how, whilst he was on the Northern Circuit in the 1670's, one murderer refused to plead until he saw that 'the press' was ready and then rapidly pleaded. R. North, Lives of Norths, vol. I, p. 179: Dying in this way would preserve an offender's goods from forfeiture for his family.
54. J. S. Cockburn, A History of the Assizes, pp. 118, 123: W. Holdsworth, A History of English Law, vol. I, p. 333
55. The seventeenth century theory behind this was explained by Coke, who considered that in capital cases the evidence against the prisoner should be so manifest that it could not be 'contradicted'. Yet Bulstrode Whitelocke and Chief Justice Jeffreys expressed misgivings about this practice. Chief Justice Finch even assigned four counsel to a man accused of murder in 1633 on the Home Circuit. J. S. Cockburn, A History of the English Assizes, p. 121
56. Until the end of the sixteenth century, it had been considered that defence witnesses were no more acceptable than counsel, but from Mary I's time onwards, this notion gradually fell into disuse and by the end of that century, it had become law that witnesses be summoned for the defence.
57. C. S. Kenny, Outlines of Criminal Law, p. 364: P.R.O. ASSI/45/5/7, no. 55, 4th April 1660
58. Assize depositions housed in boxes P.R.O. ASSI/45/1 - ASSI/45/18; Special commission depositions are also with these, including those of the Border Commissioners.
59. R. North, Lives of Norths, vol. I, p. 166; J. S. Cockburn, A History of the English Assizes, p. 123

60. Benefit of clergy had evolved in medieval times after William the Conqueror had separated the ecclesiastical from the secular courts. Thereafter, the clergy began to put forward claims that all persons in Holy Orders should be exempt from secular jurisdiction in all litigation and so all were sent to the bishops courts where they could not be punished by death. Around 1300, it was decided that clerks should not be surrendered to the bishops court unless they had first undergone conviction in the secular courts and had forfeited their goods. About the same time, it was decided that 'benefit' should not be used in cases of misdemeanour or treason. In 1487 it was enacted that laymen should only receive the benefit once and that branding on the thumb would ensure that this was conformed with. Benefit of clergy was abolished in the reign of George IV. C. S. Kenny, Outlines of Criminal Law, pp. 480-1
61. Roger North reported that in the north, 'violent suspicion there was next to conviction' and that harsh justice was the norm in the 1670's. This would seem to be unlikely. See R. North's comments below p.192: R. North, Lives of Norths, vol. I, p. 179
62. P.R.O. ASSI/44/17 Newcastle ass. court, summer 1670
63. Cockburn cites examples of judges prompting criminals as they stumbled through the neck-verse and one judge in 1605 apparently saved a convict's life by lending him his spectacles. J. S. Cockburn, A History of the English Assizes, pp. 126, 128: C. S. Kenny, Outlines of Criminal Law, p. 481n: Dur. Univ. Lib., Mickleton and Spearman MSS, Book 9/1, Newcastle ass. court, summer 1629
64. Cuthbert Hobson obtained a King's pardon in 1671. P.R.O. ASSI/44/19, Carlisle ass. court, summer 1671. See below pp.200-1 for details of the Border Commissioners' methods of transporting criminals and their destinations.
65. J. S. Cockburn, A History of the English Assizes, p. 131
66. M. Mader, 'Thoughts on Executive Justice with Respect to our Criminal Laws particularly on the Circuit, 1785', printed in D. Hay et al. (eds.), Albion's Fatal Tree (London, 1977), pp. 17-18; E. Burke, 'Some Thoughts on the Approaching Execution', printed in *ibid.*, pp. 56-7; J. S. Cockburn, A History of the English Assizes, p. 3: Dur. Univ. Lib., Mickleton and Spearman MSS, Book 9/1, Newcastle ass. court, summer 1628
67. See below p.127 for conditions of prisons during this period. P.R.O. ASSI/44/16, Appleby ass. court, summer 1668; ASSI/44/33, Carlisle ass. court, summer 1685; ASSI/44/44, Newcastle ass. court, summer 1699: Dur. Univ. Lib., Mickleton and Spearman MSS, Book 9/1, Newcastle ass. court, summer 1628
68. Nisi prius business can be found in boxes, P.R.O. ASSI/44/15, ASSI/44/16, ASSI/44/19, ASSI/44/21, ASSI/44/36; J. S. Cockburn, A History of the English Assizes, pp. 135, 140

69. W. Scott-Moncrieff (ed.), The Records of the Proceedings of the Justiciary Court in Edinburgh, vol. I, Scottish History Society, ser. 2, vol. XLVIII (1905), p. xvi

NOTES TO CHAPTER III: THE BORDER COMMISSIONERSI. Sources1. England.

For the early part of the century, the English Commissioners' records are contained in the Muncaster Manuscripts, housed in the Cumberland Record Office. There is a contemporary copy of these documents contained in the Crawford Manuscripts and housed in the John Rylands Library in Manchester. Both sets of records have been studied and although the layout on each page may not exactly correspond, I am satisfied that the documents as a whole are identical. The notes give the references to both sets of documents. These documents are a collection of correspondence and court records of the early Border Commissioners, kept by Joseph Pennington, one of the Commissioners until 1607. They offer a most valuable insight into the work of the English Commissioners and their relationship with the Scots and other law enforcing bodies. They also contain correspondence between the Commissioners and the Privy Council in London.

Further court records for the early years are contained in N.R.O. QS/I/1, entitled 'Vetera Indictamenta'; a collection of indictments from assizes, quarter sessions and Border Commissioners' courts held in Northumberland. Here the English Commissioners' courts for June 1605, November 1605, January 1606, April 1606, April 1607, October 1607 and May 1609 are recorded. These have been used by S.J. Watts in his assessment of the Border Commissioners achievements in the early years of the century. But Table 20 shows that these documents cannot be relied upon. At no point does the information contained in them correspond with that in the Border Commissioners own records in the Crawford and Muncaster Manuscripts, or in the Salisbury Manuscripts, or the State Papers. They have, therefore, been treated with extreme caution.

The Delaval Papers, housed in the Northumberland Record Office (1/DE/7 series) contain information on the activities of the Commissioners between the years 1611 and 1619, when Sir Ralph Delaval was an active Commissioner in Northumberland. These records take the form of correspondence with the English Privy Council and the Scottish and English Commissioners and with the justices of the peace and sheriffs. There are also lists of prisoners in gaol, which have proved useful. The correspondence of the English Commissioners and the Privy Council can be found in the State Papers where their proceedings (as they wished the Council to know of them) can be traced. No court records are contained in the State Papers, although lists of fugitives, prisoners and the survey of notorious, idle persons of 1618 can be found there. The early years of the century are full of references to the Commissioners, but these gradually grow fewer and fewer, until by the Restoration period, it is rare that there is any mention of them.

The Privy Council's acts, after a hiatus, start in 1613 and contain correspondence with the Border Commissioners and details of instructions from the Council. As with the State Papers, references to the Commissioners diminish in number as the century progressed. The hiatus in the Privy Council records is bridged by the Salisbury documents, printed by the Historical Manuscripts Commission. These documents contain correspondence between Cranbourne, Salisbury, the Council and others and the Commissioners. These span the years 1605-13 and tell of the Commissioners' proceedings at their courts, together with details of their actions against the Graham clan. Further correspondence can be found amongst the documents of the Household Book of Lord William Howard of Naworth, for the years between 1616 and 1636.

When the Commissioners renewed their activities after the Restoration some of their court proceedings were written in a volume entitled 'Gaol Book

of the Border Commissioners', which is housed with the assize records in the P.R.O. (ASSI/42/2). This gives details of prisoners indicted at gaol deliveries, brought there on recognizance and of some courses of action decided upon in conjunction with the Scottish Commissioners. Although this book covers the period 1662 to 1676, it does not include all the records of the Commissioners' courts. A further two court records can be found within the assize indictments in boxes ASSI/44/14, ASSI/44/15, ASSI/44/24, ASSI/44/25 for the courts 17th January 1667 and 11th January 1677. Some of the depositions in the assize records were obviously taken and used by the Border Commissioners.

2. Scotland.

The records of the Scottish Commissioners are divided between three main groups of documents. The Register of the Privy Council of Scotland contains some record of the Commissioners' activities and proceedings at their courts between 1605 and 1622. Often, however, these are only lists of names of those executed, banished or declared fugitive, which makes any analysis of the courts very difficult. After 1623, references to the Commissioners are confined to correspondence, instructions and the issuing of new commissions.

The Riddle of Hayning Papers within the Erskine of Dun muniments contain the official records of the Scottish Commissioners. (S.R.O. GD/123/159-212). These documents take the form of bundles of indictments, executions of writs on assizors, offenders and witnesses, sederunts, bands, lists of witnesses and court proceedings. None of the items within each box are individually numbered, which caused difficulty in identifying references. Dates, however, have been given to clarify references. For only five years (1674 to 1679) are the court records entered into a book. Thus it is very difficult to ascertain whether or what

documents are missing outside those years. The earliest reference in the Riddle of Hayning Papers is a list of cautions taken at a court held in 1611. There is a document referring to a court held in 1612, but when this was compared with other sources and documents, it was found to be a contemporary copy of a court record for 1622. Isolated slips of paper refer to activities of the Commissioners in 1613, 1616, 1643 and 1649 and there are quite detailed accounts of proceedings during the 1650's. But the bulk of the papers refer to the post-Restoration period, especially 1674-1679. The records of the High Court of Justiciary support these papers, particularly during the 1650's.

I. Notes

1. R.P.C.S., ser. 1, vol. VI, p. 558, 4th April 1603
2. R.P.C.S., ser. 1, vol. VI, pp.560-1, 7th April 1603; p.596, 12th January 1604
3. George, 3rd Earl of Cumberland was appointed Warden of the West and Middle Marches, Keeper of Carlisle Castle and other royal properties in the Marches in 1603. He was also Lord Lieutenant of Cumberland and Westmorland and a Privy Councillor. He died in 1606 and was succeeded by his brother, Francis.
H.M.C. Salisbury, vol. XV, p.345, December 1603
4. P.R.O. SP/14/1 no. 28, 17th April 1603: H.M.C. Salisbury, vol. XV, pp.46-7, 14th April 1603
5. Walter Scott of Buccleugh became Keeper of Liddesdale in 1593. He was a powerful laird and there was much personal friction between himself and Thomas, 10th Lord Scrope, who, in the same year, was appointed Warden of the West March. This personal animosity was greatly exacerbated by the Kinmont Willie episode. See footnote 6 below.
6. Kinmont Willie was imprisoned in Carlisle in 1596 by the English in reprisal for an offence against the bailiff of Bewcastle. The Scots claimed he had been imprisoned unjustly as he was captured on a day of truce. Despite lengthy negotiations, Buccleugh failed to obtain Kinmont Willie's release and therefore resorted to direct action in alliance with the Grahams. The assault he mounted on Carlisle Castle rescued Kinmont Willie from inside Lord Scrope's own head-quarters. It was Buccleugh's ability to lead the combined forces of Grahams, Scotts and Armstrongs that rendered him so dangerous on the Borders. See Rae, The Administration of the Scottish Frontier, pp.35-7, for the importance of the office of the Keeper of Liddesdale; pp.47-59, for a description of days of truce; pp.217-18, for details of the aftermath of the Kinmont Willie episode.
7. Warding was the process whereby human pledges undertook responsibility for their clan members to keep good order. These pledges were usually demanded by the Scottish government, but during periods of good relations with England, pledges could be sent to that country. The individuals demanded as pledges were usually the clan leader or his son, in the hope that the clan members would restrain their disorderly activities if punishment was going to be inflicted on their head man. The pledges were transferred by royal messenger

to their place of imprisonment and were to be released upon instructions from the government only. See Rae, The Administration of the Scottish Frontier, pp.119-21

8. Border Papers, vol. II, p.629, 5th November 1599
9. Quoted in R.T. Spence, 'The Pacification of the Cumberland Borders' p.94
10. The Kinmont Willie episode had underlined the need for tighter supervision of the Border region. The result was the Carlisle Treaty negotiated between England and Scotland in April 1597. There were 36 clauses: Border churches were to be kept in good repair and provided with good preachers: wardens were to pay £10 for every months delay in apprehending murderers, thieves and raiders, who were to be handed over to the opposite warden to be punished at his discretion. Pledges were to be named and handed over to the opposite warden until the bills from each March were settled. Both sovereigns were to appoint special councils in each March, made up of the most trustworthy Borderers who would meet twice a year to settle disputes. No warden or any other officer was to ride in the opposite realm without special licence. Other clauses concerned the blacklisting of thieves and the punishment of those that pursued deadly feuds. Idle persons on the Borders were censured. J.B. Gavin, 'The Bishop of Durham, the West March Border Negotiations and the Treaty of Carlisle, 1597', T.C.W.A.A.S., new series, vol. LXXIII (1973), pp.120-42
11. R.T. Spence, 'The Pacification of the Cumberland Borders', pp.85-6
12. See Rae, The Administration of the Scottish Frontier, pp.47-59.
13. J. Graham, The Condition of the Border at the Union (London 1906)
14. R.T. Spence, 'The Pacification of the Cumberland Borders', pp.100-3
15. Surveys of the Border line in 1542 and 1550 showed six areas where the boundary was doubtful and a subject of contention. Three of these areas were in the English East March and the Scottish Middle March from the Tweed at Redenburn to the Cheviot. There were two further disputed areas between the two Middle Marches at Gamelspathwalls and near Liddesdale. The largest area lay between the two West Marches between the rivers Esk and Sark, about ten miles long and four miles wide. It was this last area which was called the Debateable Lands in the seventeenth century and it encompassed most of the Graham lands. T.H.B. Graham, 'The Debateable Land', T.C.W.A.A.S. new series, vol. XII (1912), pp.35-58; vol. XIV (1914), pp.132-157.

16. R.T. Spence, 'The Cumberland Borders', p.61: J.V. Harrison, 'Five Bewcastle Wills, 1587-1617', T.C.W.A.A., new series, vol. LXVII (1967), pp. 93-111: G.P. Jones, 'King James I and the Western Border', T.C.W.A.A., new series, vol. LXIX (1969), pp.133-135
17. G.P. Jones, 'King James I and the Western Border', p.132.
18. *ibid.*, p.137.
19. P.R.O. SP/14/6 no. 43, January 1604
20. *ibid*; SO/14/9 no. 88, 27th October 1604
21. H.M.C. Salisbury, vol. XV, p. 261, October 1603: P.R.O. SP/14/6 no. 43, January 1604; SP/14/5 no. 58, 1603?; SP/14/10 no. 43, 29th November 1604.
22. T. Rymer, Foedera (London 1727-35) vol. XVI, pp.603, 609: R.P.C.S., ser.1, vol. VII, p.706, 14th March 1605
23. T. Rymer, Foedera, vol. XVI, p.609.
24. T.G. Barnes, Somerset, p.144
25. *ibid.*, p.146: P.R.O. C/181/2 p. 4, 30th April 1606, Commission of oyer and terminer for Cumberland, Northumberland and Westmorland.
26. P.R.O. ASSI/42/2 p.1, Morpeth B.C. court, 3rd October 1665; p.15, Carlisle B.C. court 17th December 1666; p.18, Morpeth B.C. court 17th January 1667; p.20, Carlisle B.C. court 13th March 1667; p.21, 'Northumberland' B.C. court, 15th April 1667; p.25, Morpeth B.C. court 16th January 1668; p.32 Morpeth B.C. court 22nd March 1669; p.43 Carlisle B.C. court 31st May 1676
27. See the cases of John Glendinning of Saughtrees, Andrew Beattie, Edward Blackburn, William Gaire and Andrew Hall, P.R.O. ASSI/42/2 pp.5,7, Morpeth B.C. court 5th October 1665; pp.11,12 Hexham B.C. court 7th March 1666; ASSI/45/6/3 nos. 46-51, depositions taken between 20th March 1663 and 1st August 1663; ASSI/45/7/1 no. 22, 20th April 1664; ASSI/45/7/2. no. 13, 1st August 1665; no.39, 2nd November 1665; no.44, 4th September 1665; S.R.O. GD/123/188, 11th August 1663; GD/123/201, 16th December 1674; GD/123/211, p.13, 17th March 1675; p.21, 6th April 1675
28. John Rylands Lib. Crawford MSS., f.217, 20th January 1606; f.223, 17th August 1606. (Munc. MSS., ff.182-185)
29. For example, the case of William Armstrong in Gilmerhead, P.R.O. ASSI/42/2 p.43, Carlisle B.C. court, 31st May 1676; ASSI/44/23 Carlisle assize court, August 1676
30. N.R.O. 1/DE/7 no. 48, 22nd June 1617
31. S.R.O. GD/123/208, Jedburgh B.C. court, 13th January 1675
32. S.R.O. GD/123/201, 22nd December 1674; GD/123/210, p.182, 15th April 1679

33. See the case of Robert Laidlaw, May 1669, S.R.O. GD/123/194.
34. S.R.O. GD/123/208, 13th January 1675, 18th January 1675; GD/123/212. p.1, Jedburgh B.C. court, 1st February 1665; R.P.C.S., ser. 1, vol. XIII, p.367, 1st October 1623.
35. S.R.O. GD/123/196, 15th February 1676; GD/123/201, January 1675; GD/123/211 p.20, 6th April 1675.
36. R.P.C.S., ser. 1, vol. XIII, pp.470-72, 4th February 1624: S.R.O. GD/123/200, 27th January 1675; GD/123/208 Jed. B.C. court, 22nd July 1674
37. Walter Scott of Buccleugh, R.P.C.S., ser. 1, vol. IX, p.55, 28th August 1610; vol. XI, p.lxxxiii: John Charteris of Amisfield, R.P.C.S., ser. 1, vol. VIII, P.814, 22nd October 1609; vol.IX, p.320, 21st January 1612; vol. XI, p.lxxxiii; vol. XIII, p.156, 23rd January 1623; ser.2, vol. I, p.373, 27th July 1626; pp.659-60, July 1625: William Douglas of Drumlanrig, R.P.C.S., ser.1, vol. VIII, p.814, 22nd October 1609; vol.XI, p.lxxxiii, ser.2, vol.1, p.373, 27th July 1626; pp.659-60, July 1625: William Greir of Lag, R.P.C.S., ser.1, vol.VIII, p.352, 17th August 1609; p.814, 22nd October 1609; vol.XI, p.lxxxiii; vol. XIII, p.156, 23rd January 1623; ser.2, vol.I, p.373, 27th July 1626; pp.659-60, July 1625: Robert Dalzell of Glenae, GD/123/185, 1st August 1676, 30th October 1680: Robert Ker, baillie of Jedforest, GD/123/211, p.10, 22nd December 1674: Alexander Don of Newtown, GD/123/185, 15th February 1680; GD/123/188, 22nd March 1676, 22nd October 1678, GD/123/201, 19th December 1674: Robert Pringle of Stitchill, GD/123/189, 18th January 1666: John Scott of Rennaldburn, GD/123/210 p.176, 15th January 1679
38. P.R.O. C/181/1 p.166, 24th April 1604: T. Rymer, Foedera vol. XVI, p.609: N.R.O. 1/DE/7 no. 74, [1619]: C.S.P.D. 1635, p. 510, 30th November 1635: P.R.O. ASSI/44/14, 17th January 1668; ASSI/44/25, 8th November 1676: R.P.C.S., ser.2, vol. V, p.496, 25th November 1634; vol. VI, p.161, 23rd December 1635; ser.3, vol.I, pp.306-9, 16th December 1662; pp.512-14, 23rd February 1664; vol.II, pp.43-4, 3rd May 1665; vol.III, p.518, 1st May 1672; vol.IV, p.415, 22nd June 1675
39. T. Rymer, Foedera, vol.XVI, p.609: R.P.C.S., ser.1, vol.VII, p.703, 18th April 1605; p.707, 14th March 1605; p.714, 26th November 1605: Sir William Cranston was granted a peerage on 4th June 1610. R.P.C.S., ser.1, vol. VIII, p.471
40. R.P.C.S., ser.1, vol.VII, p.708, 9th April 1605: C.R.O. Munc. MSS, f.5, 9th April 1605; (Crawf. MSS, f.5)

41. R.P.C.S., ser.1, vol. VII, p.703, 18th April 1605; pp.707-8, 9th April 1605: C.R.O. Munc. MSS, f.5, 9th April 1605; (Crawf.MSS, f.5)
42. R.P.C.S., ser. 1, vol. VII, p.271, 20th November 1606; p.703, 18th April 1605; p.708, 9th April 1605; C.R.O. Munc. MSS, f.5, 9th April 1605; (Crawf. MSS, f.5)
43. C.R.O. Munc.MSS; f.15, 2nd June 1605; f.16, 13th June 1605; f.18, 30th June 1605; f.24, 6th July 1605; f.27, July 1605; (Crawf. MSS, ff.15, 16, 18, 24, 27).
44. P.R.O. SP/14/6 no. 43, January 1604: C.R.O. Munc. MSS, f.3, 14th February 1605; (Crawf. f.3).
45. R.P.C.S., ser.1, vol. VII, p. 743, 30th November 1605.
46. See pp.102-3, above.
47. C.R.O. Munc. MSS, f.12, 17th May 1605; f.23, 25th June 1605, 30th June 1605, 4th and 6th July 1605; f.43, 19th October 1605; f.83, 13th and 20th March 1606; f.124, 24th June 1606; f.128, 5th July 1606; f.129, 19th July 1606; (Crawf.MSS, ff.12, 23, 43, 95, 139-40, 144, 145): P.R.O. SP/14/19 no. 10, 3rd March 1606: H.M.C. Salisbury, vol. XVII, p.309, 6th July 1605, vol.XVIII, p.79, 20th March 1606; p.191-2, 6th July 1606; p.402, [1606].
48. J. Nicholson and R. Burn, The History and Antiquities of the Counties of Westmorland and Cumberland 2 vols.,(London,1777), vol. I, pp.cxviii-cxx: H.M.C. Salisbury, vol XVIII, p.285, 13th September 1606; vol.XIX,p.126 11th May 1607; p.176, 8th July 1607: C.R.O. Munc. MSS,f.142, 13th September 1606; (Crawf. MSS, ff.159-60): P.R.O. SP/14/26 no.58, 22nd February 1607
49. H.M.C. Salisbury, vol. XVIII, pp.368-9, December 1606; p.457, [1606]; vol. XIX, p.44, 10th February 1607: C.R.O. Munc. MSS, f.166, 3rd December 1606; (Crawf. MSS, f.17): P.R.O. SP/14/19 no. 61, 20th March 1606; SP/14/21 no. 10, 3rd May 1606. It was said in early 1607 that the number of felonies in Northumberland outnumbered 'six for one with Cumberland'.
50. C.R.O. Munc. MSS, f.5, 9th April 1605; f.9, 18th April 1605; f.94, 27th March 1606; f.113, 19th May 1606; (Crawf. MSS,ff.5, 9, 106-7, 127): R.P.C.S., ser. 1, vol.VII, pp. 712-13, 21st May 1605
51. R.P.C.S., ser. 1, vol.VII, pp.712-23, 21st May 1605; pp.719-20, 17th May 1605; p.724-5, Dumf. B.C. court, 7th April 1606; p.726, Peebles B.C. court, 16th December 1605, Jed. B.C.court, 29th October 1605.
52. C.R.O. Munc. MSS, f.53, 10th December 1605; f.94, 27th March 1606; f.98, 13th April 1606; f.107, 3rd May 1606; f.113, 19th May 1606; (Crawf. MSS, ff.55, 106-7, 111, 120, 127)

53. R.P.C.S., ser.1, vol.VII, p.486, 4th March 1606: C.R.O. Munc. MSS, f.33, 1st September 1605; f.56, 21st April 1605; (Crawf. MSS, ff.33, 59)
54. C.R.O. Munc. MSS., f.83, 20th March 1606; (Crawf. MSS, f.96): J. Graham, The Condition of the Border at the Union, p.125
55. H.M.C. Salisbury, vol.XVIII, pp.457-60, [1606]: P.R.O. SP/14/21, no.10, 3rd May 1606
56. Sir George Home of Spott, later Earl of Dunbar, held extensive lands on both the English and Scottish sides of the Border. He was Treasurer of Scotland between 1601 and 1611, although he was mainly resident in England, where he was Master of the Wardrobe under James I. He died in 1611. See Chapter I
57. R.P.C.S., ser.1, vol.VII, p.504, 19th December 1606: C.R.O. Munc. MSS, f.162, 13th December 1606; (Crawf. MSS, ff.182-3): S.J. Watts, From Border to Middle Shire, p. 152
58. H.M.C. Salisbury, vol. XIX, p. 44, 16th January 1607, 10th February 1607. The Salisbury MSS tell of courts held in April 1607 at Carlisle and Newcastle, where 10 were executed at Newcastle and 2 at Carlisle: vol. XIX, p.95, 14th April 1607; p.100, 19th April 1607
59. *ibid.*, p.95, 14th April 1607; p.254, 22nd September 1607; vol.XVIII, p.293, 19th September 1606: P.R.O. SP/14/27 no. 23, 24th May 1607; Robert Pott of Carryck and John Bilton of Flotterston were banished to Ireland, SP/14/103 no. 68, 3rd November 1618: N.R.O. 1/DE/7 no. 105, [1618]: G. Ornsby (ed.), Selections from the Household Books of Lord William Howard of Naworth Castle, Surtees Society, vol. LXVIII (1877), p.420; (Hereafter Howard Household Books): S.J. Watts, From Border to Middle Shire, p.154
60. H.M.C. Salisbury, vol. XIX, p.427, September 1607: R.P.C.S., ser.1, vol.VIII, p.li: R. Chambers (ed.), Domestic Annals of Scotland (Edinburgh, 1859), vol. I, p.423
61. R.P.C.S., ser. 1, vol.VI, p.lxxxiii-iv; vol. VIII, p.86, 12th May 1608; p.243, 9th February 1609; p.301, 13th June 1609
62. R.P.C.S., ser. 1, vol. VII, p. 709, 21st May 1605; vol. IX, p.497, 24th November 1612; vol.X, p.239, 17th May 1614
63. R.P.C.S., ser. 1, vol. VIII, p.167, 29th September 1608; pp.188-9, 3rd November 1608; vol. XIII, p.484, 30th March 1624; pp.525-6, 14th June 1624
64. C.R.O. Munc. MSS, ff.12-13, 17th May 1605, 27th April 1605; f.42, 24th October 1605; f.113, 19th, 20th and 21st May 1606; f.179, 4th March 1607; (Crawf.MSS, ff. 12-13, 43, 209): A.P.C. 1621-23, p. 398,

31st January 1623: C.S.P.D. 1619-23, p.559, 18th April 1623: H.M.C. Salisbury, vol.XVII, p.237, 2nd June 1605; vol.XIX, p.6, 11th January 1607

65. R.P.C.S., ser. 1, vol.VII, pp.286-7, 23rd December 1606
66. *ibid.*
67. *ibid.*, pp.714-15, 2nd January 1606: C.R.O. Munc. MSS, f.33, 1st September 1605; (Crawf. MSS, f.33)
68. C.R.O. Munc. MSS, f. 45, 14th November 1605; f.70, 25th January 1606; f.88, 11th March 1606; f.103, 25th April 1606; f.124, 24th June 1606; (Crawf. MSS, ff. 46, 79, 101, 116, 139-40): P.R.O. SP/13/20 no. 48, 27th April 1606; SP/14/20 no. 49, 29th April 1606
69. R.P.C.S., ser.1, vol.VII, p.710, 21st May 1605
70. C.R.O. Munc. MSS, f.168, 21st November 1606: P.R.O. SP/14/6, no.43 January 1604; SP/14/20 no. 48, 27th April 1606
71. P.R.O. SP/14/40 no. 11, 1608?: H.M.C. Salisbury, vol. XIX p.487, June 1607: N.R.O. 1/DE/7 no. 54, 25th April 1618.
72. R.P.C.S., ser. 1, vol. IX, p.244, 30th August 1611.
73. P.R.O. SP/14/63 nos. 99I, 99II, 26th May 1611
74. Howard Household Books, p.416: A.P.C. 1615-16, p.235, 30th June 1615; p.404, 19th February 1616: P.R.O. SP/14/90 no. 156, March 1617; N.R.O. 1/DE/7 no. 51, 24th February 1619; no. 108, undated.
75. R.P.C.S., ser. 1, vol. X, p.393, 15th September 1615; pp.443-4, 11th January 1616; vol. XI, p.327, 10th March 1618; vol.XII, p.100, 27th October 1619; pp.493-4, 7th June 1621; pp.620-22, 20th December 1621; p.626, 8th January 1622; p.644, 12th February 1622
76. P.R.O. SP/14/64 no. 2, 2nd June 1611; SP/14/86 no. 34, February 1616; no. 45, 7th February 1616; SP/14/90 no. 157, March 1617; SP/14/97 no. 60, 8th May 1616; nos. 62, 63, 64, May 1618; SP/14/103 no. 68, 3rd November 1618: N.R.O. 1/DE/7 no. 62, 21st October 1618; no. 105, undated [1618]: Howard Household Books, p.445
- 77.P.R.O. SP/14/67 no. 162, 1611?; SP/14/86 no. 45, 7th February 1616; SP/14/87 no. 14, 7th May 1616; SP/14/90 no. 157, March 1617; SP/14/92 no. 17, 9th May 1617: S.J. Watts illustrates that the lists of offenders of 1617 might be false, see From Border to Middle Shire, p.190
78. P.R.O. SP/14/95 no. 19, 1617: Howard Household Books, pp.417-58
79. P.R.O. SP/14/71 no. 21, 13th October 1612; SP/14/97 no. 60, 8th May 1618: Howard Household Books, p.418

80. S.J. Watts, From Border to Middle Shire, pp.184, 191
81. P.R.O. SP/14/71 no. 21, 13th October 1612: Howard Household Books, p.434: N.R.O. 1/DE/7 no. 51, 24th February 1619
82. P.R.O. SP/14/86 no. 45, 7th February 1616: R.P.C.S., ser. 1, vol.XI, pp.313-17, 17th February 1618: N.R.O. 1/DE/7 no. 48, 22nd June 1616: Howard Household Books, p.445.
83. P.R.O. SP/14/97 no. 37, 24th April 1618; no. 44, April 1618; no.60, 8th May 1618; nos. 62, 63, 64 May 1618; no. 65, 8th May 1618; no. 72, 12th May 1618; SP/14/103 nos. 68, 68I, 3rd November 1618
84. R.P.C.S., ser. 1, vol. IX, p. 705, Jed. B.C. court, 18th July 1611; vol.X, p.331, 1st June 1615; p.399, 4th October 1615; p.455, 11th January 1616, p.847, 9th November 1616, vol.XI, p.14, 21st January 1617; pp.216-19, 26th August 1617
85. N.R.O.1/DE/7 no. 72, 30th November 1619; no. 74, undated [1619]
86. Howard Household Books, pp.450-1: R.P.C.S., ser. 1, vol. XI, p.315, 17th February 1618; vol.XII, p.672, 13th March 1622
87. R.P.C.S., ser. 1, vol. XI, pp.288-91, 8th January 1618; p.315, 17th February 1618; vol.XII, p.582, 1st November 1621
88. R.P.C.S., ser. 1, vol. XII, p.650, 14th February 1622; pp.775-9, February 1621; vol.XIV, p.587, undated.
89. A.P.C. 1621-23, p.398, 31st January 1623: R.P.C.S., ser. 1, vol.XII, pp.672-79, 13th and 14th March 1622: P.R.O. C/181/3 p.83, 10th March 1622
90. R.P.C.S., ser. 1, vol. XII, pp.672-9, 13th and 14th March 1622; p.694 26th March 1622
91. R.P.C.S., ser. 1, vol. XIII, p.261, 17th June 1623; p.543, 6th July 1624; pp.625-6, 4th November 1624; p.790, 8th May 1623; vol.XIV, pp.667-714, Dumf. B.C. court, 21st to 23rd May 1622, Jed. B.C. courts, 27th to 30th August 1622, 22nd October 1622, 15th to 19th April 1623.
92. P.R.O. SP/14/149 no. 100, 30th July 1623; SP/14/152 no. 64, 23rd September 1623: R.P.C.S., ser. 1, vol. XIII, p. 626, 4th November 1624
93. Charles I only paid one official visit to Scotland, in 1633: R.P.C.S., ser. 2, vol.II, p.143, 6th December 1627; p.223, 7th February 1628; vol.III, p.265, 30th July 1629
94. R.P.C.S., ser.2, vol.I, p.226, 2nd February 1626; p.667, 29th May 1626; pp.675-6, 18th August 1626; p.678, August 1626; vol.II, p.136, 29th November 1627; p.143, 6th December 1627
95. R.P.C.S., ser.2, vol.II,p.143, 6th December 1627, vol.III, p.265, 30th July 1629; vol.V, p.229, 11th March 1634

96. 'Calendar of the prisoners confined in the High Castle in Newcastle upon Tyne, at the assizes for Northumberland in the years 1628 and 1629', Archaeologia Aeliana, vol.I (1822), pp.153, 156, 160
97. C.S.P.D. 1629-31, p.261, 20th May 1630; p.346, 24th September 1630; p.382, 15th November 1630; p.489, 23rd January 1631: 1631-3, p.568, 12th March 1633; p.590, March 1633: 1633-4, p.209, 16th September 1633: A.P.C. 1630-1, pp.213-14, 13th January 1631: Howard Household Books, p.465
98. C.S.P.D. 1635, p.510, 30th November 1635: R.P.C.S., ser. 2, vol.VI, pp.161-4, 23rd December 1635
99. C.S.P.D. 1635-6, p.253, 25th February 1636
100. R.P.C.S, ser.2, vol. VI, pp.246-7, 24th May 1636; p.292, 19th July 1636 p.303, 28th July 1636; pp.310-11, 7th September 1636: Another great plague struck in the summer of 1637 when similar precautions were again taken. This plague, however, seems to have been worse than the first - the penalty for violation of the regulations being death. See R.P.C.S., ser.2, vol. VI, pp.431, 432, 435, 437, 438-445, 455, 473, 475, 491, 505, for regulations passed between 3rd June and the 2nd August 1637
101. C.S.P.D. 1636-7, p.358, 13th January 1637: Howard Household Books, pp.465-9: R.P.C.S., ser. 2, vol. VI, pp.404-8, Jed. B.C. court, 23rd February 1637, recorded in the register under 14th March 1637
102. R.P.C.S., ser. 2, vol.VI, pp.404-8, Jed. B.C. court, 23rd February 1637, recorded in the register under 14th March 1637: 'Calendar of Prisoners at Newcastle assizes, 1628 to 1629', pp.153 ff.
103. C.S.P.D. 1638-9, p.367, 26th January 1639; p.385, 30th January 1639; p.504, 25th February 1639; p.545, 8th March 1639
104. R.P.C.S., ser.2, vol. VII, pp.351-3, Jed. J.C. 1st February 1643; pp.353-4, Dumf. J.C. 15th February 1643; recorded in register under 29th November 1643
105. R.P.C.S., ser.2, vol.VIII, p.44, 7th May 1645; p.45, 6th June 1645; p.48, 16th April 1646: SRO GD/123/190, 212, Jed. B.C. court, July 1649
106. C.S.P.D. 1649-50, p.360, 23rd October 1649; p.408, 27th November 1649; 1651, p.294, 22nd July 1651; p.475, 14th October 1651: J. Nicoll, A Diary of Public Transactions and other occurrences, chiefly in Scotland, from January 1650 to June 1667, Bannatyne Club, (1836), pp. 40, 64-70; (hereafter Diary): See other examples, C.S.P.D. 1645-7, pp. 255-6, 10th December 1645; 1648-9, pp.17-18, 15th February 1648; 1650, pp.178-9, 29th May 1650; p.192, 5th June 1650.

107. J. Nicoll, Diary, pp.66, 102: C.S.P.D. 1652-3, p.131, 28th January 1653; 1657-8, p.15, 26th June 1657
108. These court records are contained in the boxes S.R.O. GD/123/192; GD/123/196; GD/123/212: See note 109 below.
109. See the chapter on the assizes and justice ayre for the history of the circuit courts. 1656 saw the initiation of the southern circuit under the Cromwellian government, which moved from Glasgow and Ayr to Dumfries and Jedburgh in one month. I am most grateful to Lesley Smith for the light that her thesis has shed on the problem of the Border courts during this period. Her thesis points out that the large army of occupation in the Borders during the 1650's seems to have taken upon itself a considerable judicial role. General Monck, in November 1654, proclaimed that all who harboured vagabonds, mosstroopers and such, were to be tried in the Court Martial. Dr. Smith found that both military and civilian courts were very active at this time and cites a case of open conflict between the military courts and the High Court on circuit in 1655. She found that it was General Monck who had commissioned Charles Howard to hold a justiciary court on the Borders. L. Smith, 'Scotland and Cromwell: a study in early modern government', unpublished D. Phil. thesis, 1979, Brasenose College, Oxford, pp.157-9: S.S. Webb, The Govenors General: the English Army and the Definition of the Empire, 1569-1681 (Carolina, 1979), pp.69-100.
110. S.R.O. boxes GD/123/192, GD/123/196, GD/123/212, contain information on Jed. B.C. court, October 1657.
111. C.S.P.D. 1653-4, p.433, 29th August 1653
112. C.S.P.D. 1650, p.58, 25th March 1650; 1654, p.100, 14th April 1654; p.245, 6th July 1654; 1655, p.108, 30th March 1655; p.116, 5th April 1655; p.387, 19th October 1655; 1656-7, p.208, December 1658; 1660-1, p.304, 1st October 1660; p.431, December 1660: S.S. Webb, The Govenors General, pp.69-100
113. R.P.C.S., ser.3, vol.I, p.71, 5th November 1661, p.275, 6th November 1662: C.S.P.D. 1661-2, p.500, 30th September 1662
114. C.S.P.D. 1660-1, p.470, 10th January 1661; p.572, 24th April 1661; 1661-2, p.239, 9th January 1662; p.263, 3rd February 1662
115. P. Hume Brown, editor of the Register of the Scottish Privy Council seems, however, to have taken these steps as an indication that the Borders in 1662 were very similar to their pre-1605

state. This is most improbable: the major sources of disorder in the early seventeenth century had been whole families dedicated to theft, raiding and pillaging; living by feuds, under the protection of powerful lairds and magnates and operating on both sides of the Border. No feuds can be found to exist in 1662. The landowners had moved to a position of law enforcers, rather than protectors of thieves (see the conclusion on Borders and Borderers). Few families of thieves remained and it is most unlikely that the level of theft in 1662 would reach that of 1605. It was certainly not the case in England, where the assize records show, to the contrary, that the level of theft in the north of England was probably lower than that in the south. R.P.C.S., ser.3, vol.I, p. xxviii; pp.306-9, 16th December 1662: P.R.O. C181/7 p.194, 2nd March 1662

116. P.R.O. C181/7 p.194, 2nd March 1662
117. These court records are contained in the box S.R.O. GD/123/212
118. S.S. Webb, The Govenors General, pp.82-84:
C.S.P.D. 1663-4, p.280, 27th September 1663: P.R.O. ASSI/44/11 Westmorland ass. court, summer 1663: ASSI/45/6/3 nos. 178-227, depositions from the Northern Rising 1663 and 1664.
119. R.P.C.S., ser. 3, vol.I, p.446, 13th October 1663; p.466, 1st December 1663; p.512, 23rd February 1664; vol.II, pp.xxiii-xxiv; pp.45-6, 3rd May 1665; vol.III, p.xxiv
120. P.R.O. ASSI/42/2 pp.3-4, Morpeth B.C. court, 3rd October 1665, for cases of Roger Hangingshaw, Giles Hall, Anthony Pott, Alexander Hall, and Andrew Beattie. R.P.C.S., ser.3, vol. II, pp.120-1, 21st December 1665
121. S.R.O. GD/123/200, 1666
122. Scottish court records contained in boxes S.R.O. GD/123/194 and GD/123/200: R.P.C.S., ser.3, vol.III, p.512, 1st May 1672; vol.IV, pp.12-13, 13th February 1673; pp.220-4, 2nd July 1674: C.S.P.D. 1672-3, p.529, 8th February 1673: P.R.O. ASSI/42/2 p.36, Carlisle B.C. court, 17th June 1671.
123. P. Hume Brown's comments in the introduction to the Register of the Privy Council for the years 1673 to 1676 refer to the 'weak executive' of the Commissioners; their 'impotent' efforts to deal with crime; how they showed 'very little vigour'. In the volume referring to the years 1676 to 1678

he writes disparagingly of the feeble efforts they made. His comments are inaccurate and misleading: R.P.C.S., ser. 3, vol.V, pp.xix-xx.

124. Charles Ker of Abbotrule, John Riddle of Hayning, John Murray of Philiphaugh, Sir Alexander Don of Newtown and John Rutherford of Edgerston.
125. See footnote 38 above.
126. See below p.174 for discussion of the relationship between the Commissioners of England and Scotland. S.R.O. GD/123/199, 1676
127. P.R.O. ASSI/42/2 p.36, Carlisle B.C. court, 29th August 1674: C.S.P.D. 1678 p.52, 18th March 1678: The inquisitions and depositions housed in box S.R.O. GD/123/196 occurred at Selkirk 12th May 1675, Annandale 1676; in GD/123/201, at Jed. 9th, 14th December 1674, 5th January 1675; at Selkirk 1st December 1674; at Hopkirk in December 1674; at Arkinholme 16th December 1674; Dumf. 16th December 1674; in GD/123/204, at Quarrelwood 6th July 1676; in GD/123/211 p.24, at Jed. 18th May 1675
128. P.R.O. ASSI/44/25, 8th November 1676: R.P.C.S., ser.3, vol. VI, p. 254, 22nd June 1679, p.259, 25th June 1679; p.260, 26th June 1679; vol. VIII, p.183, 2nd July 1683; p.682, February 1684; vol.IX, p.443, 14th October 1684; vol.XI, p.395, 12th December 1685; vol.XVI, pp. 287-9, 29th May 1691
129. C.R.O. Munc. MSS, f.45, 14th November 1605; f.167, 11th January 1607; f.168, 9th January 1607; 169, 13th January 1607; (Crawf. MSS.f.46, 190, 192): N.R.O. 1/DE/7 no. 40, 9th July 1610, no. 51, 24th February 1619: P.R.O. SP/14/63 no. 99, 26th May 1611
- 11 See also the case of Christopher and Robert Orde of Orde in Northumberland, who stole sheep from Scotland in 1619, N.R.O. 1/DE/7 no. 73, undated; Archibald Noble of the Parkhead, who stole cattle in Northumberland and Scotland, then fled to Ireland, R.P.C.S., ser. 1, vol. XIV, pp.684, 685, 691, Jed.B.C. court, 27th to 30th August 1622; P.R.O. SP/14/97 no. 60I, 30th April 1618: William Wilson of Carlisle stole sheep in Scotland, R.P.C.S., ser. 1, vol.XIV, pp.702, 704, 713, Jed. B.C. court, 17th to 19th April 1623.
130. P.R.O. ASSI/45/5/3 no. 55, 5th December 1656; 5/6 no. 14, 10th October 1659; 5/7 no. 3, 17th September 1660; no. 98, 24th February 1660; 6/2 nos. 76-81, 26th November 1662; 6/3 nos. 46-51, 15th, 20th April, 30th May,

- 29th June, 1st August 1663; nos. 98-101, 24th April 1663; nos. 132-7, 14th, 22nd, 24th October 1663: S.R.O. GD/123/185, 26th May 1663: GD/123/211, p.31, Jed. B.C. court, 29th May 1675
131. T. Rymer, Foedera, vol. XVI, p.609: R.P.C.S., ser. 1, vol. VII, p.705, 14th March 1605
132. C.R.O. Munc. MSS, f.33, 1st September 1605; (Crawf. MSS f.33): S.J. Watts, From Border to Middle Shire, pp.149-51
133. H.M.C. Salisbury, vol.XIX, p.300, 27th October 1607: A.P.C. 1616-17, pp. 381-2, 21st November 1617: P.R.O. SP/14/149, no. 100, 30th July 1623: N.R.O. 1/DE/7 no. 72, 30th November 1619; no. 108, undated: Howard Household Books, pp.465-9: S.J. Watts, From Border to Middle Shire, pp.149-51
134. C.R.O. Munc. MSS, f.65, 13th October 1605; f.74, 26th February 1606; (Crawf. MSS ff.71, 84-5): See also cases in 'Vetera Indictamenta', Thomas Frizzell of Overtoun, John Tait of Dowknow, John Armstrong of Whithill, James Young of Blagdon and James Young in Cocks, N.R.O. QS/I/1 ff. 51,54,58,59, Newcastle B.C. courts, 3rd November 1605, 2nd January 1606, 31st April 1606
135. Symon Hall of Sykes, N.R.O. QS/I/1 f.22, Morpeth Q/S court, 30th July 1604: Robert Frizzell, N.R.O. QS/I/1 f.48, Morpeth Q/S court, 10th October 1605: Willaim Ainstay, N.R.O. QS/I/1 f. 64, Morpeth Q/S court, 8th October 1606
136. Francis Elliot of Copshaw, R.P.C.S., ser. 1, vol.IX, p.707, Jed. B.C. court, 29th October 1611; vol. XIV, pp.685-6, 691, Jed. B.C. court, 29th-30th August 1622: William Elliot of Prinkenhaugh, R.P.C.S. ser. 1, vol. X, p.331, 1st June 1615
137. See for example, John Musgrave of Edenhall, Hob Blackburn in Gilsland, Randie Sewell in Carlisle, John Nixon of the Flatt and Gregory Wanless, C.R.O. Munc. MSS, f.89, 27th March 1606; f.94, 3rd April 1606; f.95, 30th April 1606; f.96, 14th April 1606; f.100-1, 17th April 1606; (Crawf. MSS ff.102, 107, 109, 113)
138. S.R.O. GD/123/187, Jed. B.C. court, 16th May 1676; GD/123/190, Jed. B.C. court, 18th August 1677; GD/123/192, Jed. B.C. court, 12th October 1657; GD/123/200, Jed. B.C. court, 27th February 1666; GD/123/207, Morpeth B.C. court, 13th January 1676; GD/123/211 p.2, Jed. B.C. court, 22nd July 1674; p.5, Jed. B.C. courts, 24th August 1674, 2nd September 1674; GD/123/212, Jed. B.C. courts, 12th October 1657, 26th May 1663: P.R.O. ASSI/42/2 pp.3,4, Morpeth B.C. court, 3rd October 1665

139. P.R.O. ASSI/42/2 pp.4,6,7, Morpeth B.C. court, 3rd-5th October 1665; p.11, Hexham B.C. court, 7th March 1666; pp.38-9, Carlisle B.C. court, 27th January 1675; S.R.O. GD/123/197, 16th January 1679; GD/123/200 Jed. B.C. court, 19th January 1666; GD/123/201, Selkirk B.C. court, 21st December 1674; GD/123/210 p.180, Jed. BC.court, 30th March 1679; GD/123/211 p.4, Selkirk B.C. court, 13th March 1666; p.28, Jed. B.C. court, 18th March 1675; GD/123/212 Jed. B.C. courts, 19th January 1666, 15th February 1676, 29th February 1676
140. R.P.C.S., ser. 3, vol. V, p.226, 10th August 1677; p.235, 4th September 1677; p.240, 6th September 1677, pp.276-8, 1st November 1677: S.R.O. GD/123/190 Jed. B.C. court, 8th August 1677
141. See relationship between the Commissioners on p.121 above: C.R.O. Munc. MSS, f.15, 2nd June 1605; f.34 13th September 1605; f.38, 7th October 1605; f.52, 5th December 1605; f.53, 10th December 1605; f.87, 20th March 1606; f.94, 27th March 1606; f.98, 13th April 1606; f.107, 3rd May 1606; f.113, 21st May 1606; f.127, 5th July 1606; (Crawf. MSS.ff. 15,34,38,54,55,100,106-7,111,120,128,142): P.R.O. SP/14/21 nos. 8,10, 3rd May 1606; SP.14.71 no. 21, 13th October 1612; no.27, 29th October 1612
142. S.R.O. GD/123/187, Jed. B.C. court, 16th May 1676; GD/123/109, Jed. B.C. courts, 31st July 1677, 8th August 1677; GD/123/196, Jed.B.C. courts, 29th April 1679, 5th May 1679, 5th April 1680, Kelso B.C. court, 5th April 1680, Selkirk B.C. court 27th May 1679; GD/123/201, Jed. B.C. court, 14th December 1674; Kelso B.C. court, 21st March 1678; GD/123/207, Jed. B.C. courts, 13th January 1676, 26th January 1677, 16th April 1677, 1st October 1677, Kelso B.C. court 13th August 1678; GD/123/210 p.32, Jed. B.C. court, 16th May 1676; p.185, Jed. B.C. court, 5th May 1679; p.190, Jed. B.C. court, 4th May 1680; GD/123/212, Jed. B.C. courts, 19th January 1666, 15th February 1676, 29th February 1676
143. S.R.O. GD/123/210 p.115, Jed. B.C. court, 31st May 1677
144. *ibid.*, p.32, Jed. B.C. court, 16th May 1676
145. T. Rymer, Foedera, vol. XVI, p.609
146. See details of depositions in footnote 127 above.
147. For example, Nicholl Beattie in Wolls, S.R.O. GD/123/201, Jed. B.C. court, 14th December 1674; GD/123/208, Jed. B.C. court, 13th January 1675
148. See for example, John Henderson, John Lamb, Andrew Little, Arthur Foster; *ibid.*

149. For example, under caution to appear on band were Robert Elliot and John Little, S.R.O. GD/123/201, Jed. B.C. court, 14th December 1674: Indicted, secured and imprisoned were James Elliot and Walter Lock, GD/123/201, Jed. B.C. court, 21st December 1674
150. P.R.O. SP/14/97 no. 60 I, 8th May 1618: R.P.C.S., ser.1, vol.VII, p.725, 727, Hawick B.C. court, 26th August 1605, Jed. B.C. courts, 14th April, 20th October 1606; vol. IX, p.711, Dumf. B.C. court, 21st-30th October 1611; vol.XIV, pp.689-90, Jed. B.C. court, 30th August 1622
151. P.R.O. SP/14/5 no. 16, 12th December 1603: A.P.C. 1615-16, pp.404-7 19th February 1616; 1616-17, p.380, 21st November 1617: R.P.C.S., ser.1, vo;. IX, p.705, Jed. B.C. court, 18th July 1611: N.R.O. 1/DE/7 no. 33, 25th December 1609
152. N.R.O. 1/DE/7 no. 51, 24th February 1619; no. 53, 22nd April 1618: P.R.O. SP/14/103 no. 68 I, 3rd November 1618; SP/14/108, no. 87, 30th April 1619
153. R.P.C.S., ser. 1, vol. VII, p.717, 17th May 1606; p.721, 20th November 1606; p.723, 23rd December 1606; pp.724-7, Dumf. B.C. courts 7th April, 13th October 1606, Hawick B.C. court, 26th August 1605, Jed. B.C. court, 29th October 1605, Peebles B.C. court, 16th December 1605
154. There are numerous examples of cautions and bands for the Scottish Commissioners contained in box S.R.O. GD/123/196: GD/123/198, 1678: P.R.O. ASSI/42/2 p.36, Carlisle B.C. courts 29th August 1674, 27th January 1675: ASSI/44/15, 24th September 1666
155. The following account of the Commissioners' methods is drawn, for England, from the Crawford and Muncaster MSS, covering the early years of the century and from the post-Restoration gaol book of the English Commissioners. For Scotland, the information comes, in the main, from post-Resotration documents where details survive in reasonable quantity.
156. See the chapter on the assizes. C.R.O. Munc. MSS, f.168, 21st November 1606; (Crawf. MSS, f.191): On 22nd April 1669 at the B.C. court in Carlisle, it was reported that no jurors appeared; P.R.O. ASSI/42/2 p.35.
157. P.R.O. SP/14/6 no. 43, January 1604; SP/14/20 no. 48, 27th April 1606; SP/14/21 no. 10, 3rd May 1606; SP/14/65 no. 46, 20th July 1611; SP/14/87 no. 14, 7th May 1616

158. See for example, P.R.O. ASSI/45/5/7 no. 98, 24th February 1660; ASSI/45/6/2 nos. 76-81, 26th November 1662; ASSI/45/6/3 no. 46, 20th April 1663; no. 132, 14th October 1663; no. 133, 22nd October 1663; ASSI/45/7/2 no. 74, 1st May 1665; no. 123, 13th October 1665; ASSI/42/2 p.41, Morpeth B.C. court, 22nd February 1676: See the complex theft patterns described above p.170
159. P.R.O. SP/14/21 no. 8, 3rd May 1606; SP/14/48 no. 25, 10th September 1609; H.M.C. Salisbury, vol. XVIII, pp.212-13, 28th July 1606
160. George Wardell, Alexander Rutherford, Matthew Hall, reprieved of the death penalty, to be transported, P.R.O. ASSI/42/2 p.2, Morpeth B.C. court, 3rd October 1665; p.37 'Northumberland' B.C. court, 1st December 1674
161. P.R.O. SP/14/20 no. 48, 27th April 1606: Sir William Selby, John Baxter, John Noble, Richard Graham, pleaded benefit of clergy and were reprieved, P.R.O. ASSI/42/2 p.32, Morpeth B.C. court, 22nd March 1669; p.43, Carlisle B.C. court, 31st May 1676
162. P.R.O. SP/14/18 no. 41, November 1605; ASSI/42/2 p.2, Morpeth B.C. court, 3rd October 1665: ASSI/44/24, Newcastle ass. court, August 1677
163. R. North, Lives of Norths, vol. I, p.179
164. T. Rymer, Foedera, vol. XVI, p.609: P.R.O. ASSI/42/2 p.2, Morpeth B.C. court, 3rd October 1665; p.12, Hexham B.C. court, 7th March 1666
165. See below p.204 for a discussion about the relatively few offenders dealt with by the Scottish Commissioners.
166. R.P.C.S., ser. 1, vol.XIV, pp.667-713, Dumf. B.C. court, 21st-23rd May 1622, Jed. B.C. courts, 27th-30th August 1622, 22nd October 1622, 15th-19th April 1623.
167. R.P.C.S., ser.1, vol. XII, pp.776-9, February 1622: See also depositions listed in note 127 above.
168. See discussion of B.C. courts in the 1650's, above p 154-8
R.P.C.S., ser. 1, vol.X, p.477, 14th March 1616; ser. 2, vol. II, p.224, 7th February 1628; p.373, 14th July 1628
169. The following account is largely drawn from the court records of 1622-3 and 1675-77
170. See above p.185 : R.P.C.S., ser.2, vol.XIV, p.687, Jed. B.C. court, 29th August 1622; p.692, Jed. B.C. court, 22nd October 1622; p.706, Jed. B.C. court, 18th April 1623: S.R.O. GD/123/208, Jed. B.C. court 22nd July 1674.

1. S.R.O. GD/123/187, Dumf. B.C. courts, 2nd August 1676, 2nd May 1677, 28th October 1680, 8th December 1680, 11th January 1681; GD/123/189, Dumf. B.C. court, 11th January 1681; GD/123/190 Dumf. B.C. court, 11th January 1681; GD/123/196, Dumf. B.C. court 1st May 1677; GD/123/203, Dumf. B.C. court, 1st August 1676; GD/123/204, Dumf. B.C. court, 3rd May 1677; GD/123/212, Dumf. B.C. courts, 4th May 1677, 11th January 1681
2. James Maxwell, William Pringle, William Dixon were fined £100 for being absent from Jed. B.C. court in April 1676: S.R.O. GD/123/209, p.3, Selkirk B.C. court, 21st March 1676; GD/123/210 p.27, Jed. B.C. court, 25th April 1676; p.37, Dumf. B.C. court, 1st August 1676.
13. R.P.C.S., ser. 1, vol.XIV, pp.669-99, courts as described in note 166 above: S.R.O. GD/123/192, 3rd October 1657; GD/123/209, Selkirk B.C. court, 22nd March 1676; GD/123/210 p.8, Selkirk B.C. court, 21st March 1676; p.27, Jed. B.C. court, 25th April 1676
74. S.R.O. GD/123/211 p.37, Jed. B.C. court, 15th June 1676; GD/123/212, Jed. B.C. court, 14th March 1681
75. R.P.C.S., ser. 1, vol. VII, pp.717-20, 17th May 1606: See the acts of exoneration for Lord Cranston, above p.128
76. R. North, Lives of Norths, vol.I, p.179. The misleading picture given by Roger North with regard to the English Commissioners has been noted above on page 192. It may be worth considering that in October 1677, one year after Roger North visited the north, Mungo Noble did fall into the hands of the Scottish Commissioners. He was not executed but was banished to Ireland with all his family, although by 1681 he had returned to Scotland.
177. R.P.C.S., ser.1, vol. XIV, p.677: S.R.O. GD/123/194 Dumf. B.C. court 4th August 1676
178. S.R.O. GD/123/188, Selkirk B.C. court, 23rd March 1676; GD/123/206 Selkirk B.C. court, 23rd March 1676.
179. R.P.C.S., ser. 1, vol.VII, p.719, 17th May 1606: S.R.O. GD/123/207, Kelso B.C. court, 31st May 1678, Jed. B.C. court, 28th August 1677; GD/123/210 p.130, Jed. B.C. court, 28th August 1677; p.142, Jed. B.C. court, 10th October 1677
180. S.R.O. GD/123/207, Jed. B.C. court, 28th August 1677; GD/123/211 p.4, Kelso B.C. court, 13th August 1674
181. R.P.C.S., ser. 1, vol.X, p.331, 1st June 1615; vol.XI, p.327, 10th March 1618: S.R.O. GD/123/188, 15th February 1681; GD/123/198, 9th March 1681; GD/123/202, May 1677; GD/123/212, Jed. 20th October 1680

82. S.R.O. GD/123/157, 16th January, . . . 9th April 1675
83. S.R.O. GD/123/185 Jed. B.C. court, 4th January 1682; GD/123/205
18th November 1678, 24th February 1681; GD/123/207, Jed. B.C.
court, 13th January 1675; GD/123/210 p.66, Dumf. B.C. court, 1st May
1677.
84. R.P.C.S., ser. 1, vol.VII, pp.714-15, 2nd January 1606:
S.R.O. GD/123/192 Jed. B.C. court, 13th October 1657;
GD/123/212 Jed. B.C. courts, 2nd February 1665, 19th January
1666.
85. S.R.O. GD/123/210 pp.165-7, Kelso B.C. court, 11th April 1678:
For explanation of 'poinding' see below p.224
86. Thomas McClamerock was reported in May 1677 to have been stealing
since 1659. James Johnston, elder of Earshag, who was indicted at
Dumfries in 1676 had been a fugitive from the B.C. courts at Jed.
in February 1637 and Dumf. in March 1643. His brother Edward,
had also been a thief with him since that time. Edward's sons,
James, Robert, Francis and William were banished for theft in 1677
by the Commissioners. John Smith in Dalswynton was reported, in
August 1676, to have been under an 'evil report' of theft for 50
years. S.R.O. GD/123/210, p.50, Dumf. B.C. court, 3rd August 1676;
p.55, Dumf. B.C. court, 4th August 1676; pp.65-6, Dumf. B.C. court,
1st May 1677; pp.75-90, Dumf. B.C. court, 2nd-4th May 1677: R.P.C.S.,
ser.2, vol.VI, p.408, Jed. B.C. court, 23rd February 1637; vol.
VII, p.351, Jed. B.C. court, 1st February 1643; ser.3, vol.II,
p. 625, 4th March 1669; vol.III, p.8, 8th April 1669.

NOTES TO CHAPTER IV: THE SHERIFF COURTSI. Sources1. England

As a consequence of the decline of the sheriff by the seventeenth century, there are few contemporary documents relating to the duties of that official in the three northern counties. Two documents within the Lonsdale Manuscripts in the C.R.O., 'Memoirs for the Assizes at Carlisle, 22nd August 1661' and 'Preparations against the Assizes, 1662' give a clear picture of shrieval duties as practised after the Restoration (C.R.O. D/Lons). For Northumberland, the Delaval Papers in the N.R.O. offer some insight into the activities of the Delaval family whilst they were sheriffs of that county in the early seventeenth century. These include writs issued from and instructions issued to the sheriff. Perhaps the most informative document is the sheriff book of Sir Thomas Swinburne, sheriff of Northumberland in the late 1620's. This book is contained in the Mickleton and Spearman Manuscripts in the University Library, Durham. It gives details of the office and origins of sheriffs and their officers, indentures of gaols and accounts.

2. Scotland

The Dumfries sheriff court records start in 1679 and are housed in W.R.H.,. They are a collection of loose papers and bundles which contain, almost without exception, accounts of civil actions, such as debt or the service of brieves. There is little else. (W.R.H. SC 15/10 series).

The records of Roxburghshire sheriff court start in the early seventeenth century and take the form of general diet books, with one exception for the period 1665 to 1668, when the diet book records only criminal processes (W.R.H. SC 62/2 series). The Peeblesshire diet or minute books start in the 1650's. (W.R.H. SC 42/ series). It is strange that although the records are all supposed to be diet books, each book is different. Some contain both civil

and criminal actions. Yet within this category, some have a vast number of civil cases, with few criminal actions (such as Jedburgh 1612-1615 where civil cases numbered 553 and criminal 23). Others have a less drastic division: the record from 1652-53 contains 54 civil and 18 criminal actions. In the Roxburghshire record of 1634-51, however, criminal actions actually outnumber civil by 153 to 105. Other diet books, notably the book of criminal processes for Roxburghshire, contains no civil actions. The supposedly general diet books for Peebles for 1667-89 and 1690-1707 also fall within this category.

There are further differences between the diet books. For example, the Jedburgh book of 1682-87 contains a great number of cryptic formulaic statements, such as, '... to answer verbo to qualify defences in the action ... against ... delyt claime and excercise.' These reveal nothing of the nature of the crime, the verdict, or punishment. The same diet book also contains no cases and is devoted to such statements and numerous cautions. The Roxburghshire diet book of 1634-52 also includes such statements, but none of the other diet books do. It is, therefore, very difficult in such circumstances to assess the reliability of the documents. There is, however, a diet book for Peebleshire for 1674-8 which coincides with a period within the 1667-9 diet book. An analysis of these two records, within the four years overlap, is interesting.

It is not easy to understand why two books were necessary, although the book labelled Peeblesshire 1/2 contains no civil matters, whereas 1/3 contains both civil and criminal. The number and date of meetings for each court do not exactly match, although it would appear that whenever a criminal case was heard, both documents record that a meeting took place. However, meetings when only one debt action might be heard are recorded in 1/3 but not 1/2. The division, however, is not simple, for during 1675, three cases appear in 1/2 but not in 1/3.

II. Notes

1. D. M. Stenton, English Society in the Early Middle Ages (Harmondsworth, 1974), pp. 135-6: T. C. Smout, History of the Scottish People, p. 29
2. T. C. Smout, History of the Scottish People, p. 29
3. What were known as trespasses in the seventeenth century (from the latin transgressio) are now called misdemeanours. Detinue was an action whereby a plaintiff sought to recover a belonging unlawfully detained.
4. W. Holdsworth, History of English Law, vol. I, p. 66
5. *ibid*, p. 69: C. H. Hunter-Blair, 'The Sheriffs of Northumberland', Archaeologia Aeliana, ser. 4, vol. XXI (1943), pp. 14-90: T. Barnes, Somerset, pp. 124-5: G. R. Elton, England Under the Tudors, p. 58: G. M. Trevelyan, England in the Age of Wycliffe (London, 1972), pp. 57-58. See below, p. 243 for Scottish J.P.'s acting as sheriff.
6. J. S. Cockburn, History of the English Assizes, pp. 55, 105: H.M.C., 13th Rept.; App. pt. vii, pp. 244-5: C.R.O., D/Lons./L Shrievalty, 'Memoires for the Assizes at Carlisle, 22nd August 1661', (hereafter 'Memoires'): Dur. Univ. Lib., Mickleton and Spearman MSS, The Sheriff Book of Thomas Swinburne, Book 9/I, pp. 23-25: W. Holdsworth, History of English Law, vol. I, p. 69
7. P.R.O. ASSI/44/15, Newcastle ass. court, August 1667; ASSI/44/32 Newcastle ass. court, July 1684: N.R.O. 1/DE/7 no. 29, 16th June 1609; no. 71, 29th November 1619
8. In May 1609 Lionel Snell, bailiff of Glendale ward, was ordered to distrain the lands of persons owing money to the Crown, in the name of the sheriff of Northumberland. In 1617 it was noted that many felons had escaped out of the custody of the sheriff of Cumberland. In June 1683, the sheriff of Northumberland was reported to the Privy Council for allowing papists to escape out of his custody. N.R.O. 1/DE/7 no. 16, 22nd December 1608; no. 21, 30th March 1609; no. 69, 23rd May 1619; no. 74, undated [1619]: C.S.P.D. 1683 (1), p. 303, 8th June 1683: A.P.C. 1628-9, p. 383, 31st March 1629: Howard Household Books, p. 456
9. Dur. Univ. Lib., Mickleton and Spearman MSS, The Sheriff Book of Thomas Swinburne, Book 9/II, pp. 28-38; Howard Household Books, p. 458
10. See the table of Border Sheriffdoms, p. 212 : See below p. 245 for the removal of Sir James Murray of Philiphaugh as sheriff of Selkirkshire. T. I. Rae, The Administration of the Scottish Frontier, p. 12: W. Croft Dickinson (ed.), The Sheriff Court Book of Fife, Scottish History Society, ser. 3, vol. XII (1928), p. xxxiii (hereafter Fife Sheriff Court).
11. R.P.C.S., ser. 3, vol. I, p. 339, 24th February 1663
12. R.P.C.S., ser. 2, vol. VII, p. 365, 3rd January 1643: ser. 3, vol. V, p. 306, 3rd January 1678

13. R.P.C.S., ser. 1, vol. XIV, p. 522, 21st July 1607; ser. 3, vol. I, p. 142, 23rd January 1662
14. R.P.C.S., ser. 2, vol. VII, p. 290, 5th July 1642
15. R.P.C.S., ser. 1, vol. XI, p. 585, 3rd June 1619
16. R.P.C.S., ser. 1, vol. XII, p. 289, 13th June 1620; ser. 3, vol. II, pp. 64-5, 29th June 1665; vol. IV, pp. 90-1, 5th August 1673; F. H. Groome (ed.), Ordnance Gazeteer of Scotland (Edinburgh, 1884), vol. VI, p. 289
17. F. H. Groome, Ordnance Gazeteer of Scotland, vol. V, p. 173
18. R.P.C.S., ser. 3, vol. IV, pp. 37-9, 2nd April 1673; ser. 3, vol. V, p. 306, 3rd January 1678; p. 451, 2nd May 1678
19. R.P.C.S., ser. 2, vol. II, p. 478, 11th November 1628
20. R.P.C.S., ser. 2, vol. IV, pp. 31, 39, 8th September 1630
21. There is no indication within the documents studied that such an occasion arose in the Borders in the seventeenth century, although the efforts of an efficient sheriff depute could conceal any change that may have taken place in the running of the sheriffdom.
22. Fife Sheriff Court , pp. xxxvi, xxxvii: R.P.C.S., ser. 1, vol. XI, p. 585, 1st June 1619; ser. 2, vol. IV, p. 31, 8th September 1630; pp. 503-4, 3rd July 1632; vol. V, p. 391, 23rd September 1634
23. Scottish deputy sheriffs were called depute, not deputy as expected. Fife Sheriff Court , p. iv: R.P.C.S., ser. 2, vol. III, p. 32, 3rd February 1629; p. 169, 11th June 1629; p. 195, 25th June 1629; p. 270, 1st August 1629; p. 340, 6th November 1629; p. 550, 1st June 1630; ser. 3, vol. II, pp. 64-5, 29th June 1665; p. 250, 31st January 1667; vol. IV, p. 29, 7th March 1673
24. W.R.H., SC 42/1/1, Peebles S.C., 2nd April 1654; SC 42/1/2, Peebles S.C., 2nd February 1668, 1st December 1674, 20th January 1680; SC 42/1/4, 13th June 1704: SC 62/2/7, Jed. S.C., 1st October 1650; SC 62/2/8, 1st April 1656, 17th June 1656: R.P.C.S., ser. 3, vol. II, p. 191, 8th September 1666; p. 521-31, 2nd September - 3rd September 1668; vol. V, pp. 521-3, 8th February 1678; pp. 526-7, 11th February 1678
25. R.P.C.S., ser. 1, vol. XI, p. 77, 25th March 1617; p. 92, 16th April 1617; pp. 188-90, 17th July 1617; pp. 196-9, 22nd July 1617
26. Fife Sheriff Court , p. xlvi: For explanation of poinding, see p. 224 below: R.P.C.S., ser. 1, vol. VII, p. 450, 15th October 1607; vol. VIII, p. 164, 15th September 1608; vol. IX, p. 206, 27th June 1611; vol. XIII, p. 154, 23rd January 1623; ser. 2, vol. II, p. 481, 11th November 1628; p. 583, 7th April 1628; vol. VII, p. 53, 31st July 1638: S.R.O. GD/123/207, 28th December 1682
27. A wappenshaw was a formal exhibition of arms within each district. Literally a 'weapon show'.

28. In April 1678 the King, through the Council, ordered the sheriff of Dumfriesshire, the Duke of Queensberry, 'to convocat and arme such companies and troops of his militia as shall be thought necessary' to suppress and quieten conventicles. S.R.O. GD/123/205, June 1682: R.P.C.S., ser 3, vol. V, pp. 432-3, 4th April 1678; vol. VI, p. 220, 7th June 1679
29. S.R.O. JC/26 box 50, 1679; JC/26 boxes 61-5, 1683: R.P.C.S., ser. 1, vol. V, p. 798, 14th August 1590; ser. 2, vol. I, pp. 244-5, 16th March 1626; vol. II, p. 303, 3rd April 1628
30. R.P.C.S., ser. 1, vol. VII, p. 265, 23rd October 1606; vol. X, p. 455, 6th February 1616; ser. 3, vol. II, p. 15, 7th February 1665
31. Fife Sheriff Court , p. xxxix: R.P.C.S., ser. 1, vol. V, p. 801, 14th August 1590; ser. 2, vol. II, p. 148, 11th December 1627; p. 242, 26th February 1628
32. Fife Sheriff Court , pp. xiii-xiv, xxi
33. W.R.H. SC 62/2/7 Jed. S.C., 20th January 1651
34. S. J. Davies, 'The Courts and the Scottish legal system, 1600-1747: the case of Stirlingshire', 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 (London, 1980), pp. 120-54
35. Fife Sheriff Court , p. xii
36. *ibid.*, pp. 406-7: W.R.H. SC 42/1/1 Peebles S.C., 15th January 1656; SC 42/1/2, 20th July 1678; SC 42/1/4, 3rd May 1692: SC 62/2/11, Jed. S.C., 6th August 1667
37. Numerous examples in W.R.H. SC 62/2/3, Jed. S.C.
38. W.R.H. SC 42/1/2 Peebles S.C., 17th August 1669; SC 42/1/3, 6th June 1677: SC 62/2/7 Jed. S.C., 5th September 1643
39. For barony and regality courts, see below, p.345; Fife Sheriff Court , pp. 315-319
40. See below for explanation of spulzie, deforcement, bloodwit.
41. Fife Sheriff Court , pp. 325-7, 334, 335
42. W.R.H. SC 62/2/7, Jed. S.C., 19th July 1642; SC 62/2/8, 16th June 1657
43. W.R.H. SC 42/1/1, Peebles S.C., 26th July 1653: SC 62/2/3, Jed. S.C., 1682-7
44. There are numerous examples of service briefes in W.R.H. SC 62/2/6 Jed. S.C., 1610-15; general and special services, SC 15/10/1, Dumf. S.C., 1697: edict of curatory, SC 42/1/4 Peebles S.C. 23rd February 1692
45. In June 1676, James Hopkirk and his wife Marion Dalzell were accused of theft, but found guilty only of resset. In May 1649, Adam Robson, called 'ryper' was reported to be a thief and was presented to the court. John Dixon was

- strongly suspected to be a thief and was to have his house searched for proof. W.R.H. SC 42/1/1, Peebles S.C., 25th February 1662; SC 42/1/2, 24th October 1674, 2nd June 1676, 6th June 1676; SC 42/1/2, 14th April 1685: SC 62/2/7, Jed. S.C., 17th May 1647, 21st May 1647, 8th May 1649
46. W.R.H. SC 42/1/2, Peebles S.C., 7th March 1671, 14th March 1671
47. R.P.C.S., ser. 1, vol. IX, p. 301, 17th December 1611; p. 304, 19th December 1611; vol. X, p. 152, 15th September 1613; p. 170, 18th November 1613; p. 414, 28th November 1615; vol. XI, p. 453, 30th September 1618; p. 492, 24th December 1618; vol. XIII, p. 197, 25th March 1623; p. 469, 23rd March 1624; ser. 2, vol. I, p. 31, 4th May 1625; p. 146, 28th September 1625; p. 210, 6th December 1625; vol. II, p. 201, 22nd January 1628; vol. III, p. 592, 6th July 1630
48. W.R.H. SC 42/1/2, Peebles S.C., 3rd December 1678: SC 62/2/7, Jed.S.C., 22nd April 1636, 3rd June 1641; SC 62/2/8, 3rd March 1655; SC 62/2/11, 13th March 1666
49. Fife Sheriff Court , p. 337: J. Avon Clyde (ed.), Hope's Major Practicks, 1608-1633 , Stair Society, vol. V (1937), part ii, p. 34.
50. R.P.C.S., ser. 1, vol. VIII, p. 215, 27th December 1608; p. 765, 5th November 1607; vol. IX, p. 55, 28th August 1610; vol. X, p. 249, 1st July 1614; p. 332, 1st June 1615; vol. XI, p. 224, 20th August 1617; p. 310, 12th February 1618; p. 515, 11th February 1619, p. 552, 23rd March 1619; vol. XII p. 178, 18th January 1620; p. 222, 2nd March 1620; p. 720, 15th May 1622; vol. XIII, p. 277, 3rd July 1623; ser. 2, vol. I, p. 447, 21st November 1626; vol. II, p. 148, 11th December 1627; p. 229, 14th February 1628; p. 265, 11th March 1628; p. 269, 13th March 1628: W.R.H. SC 62/2/7, Jed. S.C., 17th April 1639, 18th April 1639
51. W.R.H. SC 42/1/2, Peebles S.C., 11th October 1670, 25th June 1678: SC 62/2/11, Jed. S.C., 16th June 1668: Fife Sheriff Court , p. 335: A.P.S., vol. III, p. 460
52. S. J. Davies, 'The Courts and the Scottish legal system', pp. 120-54: Fife Sheriff Court , p. 326
53. Selkirkshire records scattered throughout S.R.O. GD/123/ boxes 189-200: See pp.244-5 below with regard to the Meldrum/Philiphaugh dispute; the large number of prosecutions for religious non-conformity immediately after this quarrel indicates a reaction by the new sheriff of Selkirkshire against his predecessor's policies.
54. R.P.C.S., ser. 1, vol. XIII, p. 392, 8th January 1624; ser. 3, vol. V, p. 267, 9th October 1677
55. As in the case of other commissions issued, no trace of these cases can be found in the existing sheriff court records. It has not been possible, then, to analyse the methods used by the sheriffs with regard to these serious offences.

W.R.H. SC 42/1/1, Peebles S.C., 26th February 1664, 28th April 1665: SC 42/1/2, 8th October 1678, 16th January 1683: R.P.C.S., ser. 1, vol. X, p. 231, 6th April 1614; p. 327, 3rd May 1615; vol. XII, p. 222, 2nd March 1620; ser. 2, vol. II, p. 328, 5th June 1628; p. 516, 4th December 1628; p. 540, 18th December 1628; vol. III, p. 15, 20th January 1629; p. 62, 24th February 1629; p. 97, 17th March 1629; p. 110, 24th March 1629; p. 488, 11th March 1630; p. 550, 1st June 1630; vol. V, p. 339, 30th July 1634; p. 358, 17th September 1634

56. It is interesting that in 1653 the sheriff of Roxburghshire prosecuted three people for grinding their corn away from their local mill. At no other time does a similar prosecution take place in the sheriff courts of either Roxburgh or Peebles, although they are commonplace in the records of franchise courts. During the Commonwealth period regalities were officially abolished and evidence has been found in Stirlingshire that cases which would normally have gone before franchise courts did, in their absence moved to the sheriff courts. Although this could be the state in the Borders, the documents do not permit such a statement to be made. The franchise court documents which do survive are for those courts which seem to have continued to hear cases throughout the 1650's, despite their supposed abolition. None of the cases of abstracted multures before the sheriff courts came from within the bounds of these franchise courts. See the chapter on franchise courts (Chapter VI) for details of abstracted multures. 'Handlist', p. 47: W.R.H. SC 62/2/8, Jed. S.C., 8th February 1653, 22nd February 1653, 12th April 1653

57. See for example, the case of Simon Heckford and John Johnston, in October 1661, described above p. 229 : W.R.H. SC 42/1/2, Peebles S.C., 22nd October 1661, 25th February 1662, 6th June 1676: S.R.O. GD/123/189, Selkirk S.C., 3rd August 1686; GD/123/197, Selkirk S.C., 11th August 1686; GD/123/198, Selkirk S.C., 3rd August 1686

58. Fife Sheriff Court, pp. xciii, xcvi: R.P.C.S., ser. 2, vol. II, p. 294, 31st March 1628; vol. VI, p. 199, 23rd February 1636: W.R.H. SC 62/2/8 Jed. S.C., 15th March 1653

59. S.R.O. JC/26, box 16, 1683

60. W.R.H. SC 42/1/2, Peebles S.C., 20th August 1672: SC 62/2/7, Jed. S.C., 18th April 1639, 21st May 1647; SC 62/2/8, 1st July 1653

61. W.R.H. SC/42/1/4, Peebles S.C., 17th January 1699, 26th June 1699: SC 62/2/7, Jed. S.C., 11th August 1635

62. W.R.H. SC 62/2/11, Jed. S.C., 16th March 1666, 22nd June 1666; SC 62/2/12, 22nd March 1670, 12th July 1670

63. R.P.C.S., ser. 2, vol. III, p. 628, 27th July 1630

64. Fife Sheriff Court , pp. 344-5: W.R.H. SC 62/2/7, Jed. S.C.,
22nd August 1643
65. Hope's Major Practicks , part ii, p. 32: W.R.H. SC 62/2/7, 29th August
1636; 17th November 1643, 22nd June 1646
66. These offenders cannot be checked against English records: no quarter
session or assize documents survive for this period and the English Border
Commissioners were not meeting at this time. W.R.H. SC 62/2/7, Jed. S.C.,
17th May 1647, 21st May 1647, 8th May 1649, 1st October 1650; SC 62/2/8,
29th October 1652.
67. S. J. Davies, 'The Courts and the Scottish legal system', pp. 120- 54:
W.R.H. SC 42/1/2, Peebles S.C., 16th December 1679, 1st August 1682,
2nd December 1687, 16th January 1688: SC 42/1/4, 12th August 1692
68. W.R.H. SC 62/2/7, Jed. S.C., 5th June 1649: R.P.C.S., ser. 2, vol. V,
pp. 498-9, 24th February 1635; vol. VII, p. 353, 29th November 1642
69. R.P.C.S., ser. 1, vol. XIII, p. 342-3, 20th August 1623; ser. 2, vol. I,
p. 659, 2nd July 1625
70. The following section taken from R.P.C.S., ser. 3, vol. VI, pp. 606-14,
16th December 1680: S.R.O. GD/123/196, undated [1680/1]; GD/123/205,
21st January 1681
71. S.R.O. GD/123/205, 21st January 1681
72. Printed in Fife Sheriff Court , p. xxxvi: R.P.C.S., ser. 2, vol. I, p. 402,
20th September 1626; vol. II, p. 24, 26th July 1627; p. 205, 24th January 1628
73. Fife Sheriff Court , pp. cii-ciii: R.P.C.S., ser. 2, vol. V, p. 135,
27th September 1633

NOTES TO CHAPTER V: THE JUSTICES OF THE PEACE

Sources

1. England

The main sources for the history of the northern justices are, naturally, their own records. Quarter session indictments survive from the Northumberland justices' courts from 1604 to 1618 (with incomplete years 1604, 1614 and 1618), an incomplete year for 1629 and a complete year for 1630. These are in N.R.O. 'Vetera Indictamenta' QS/I/1. For the reliability of this series with regard to the Border Commissioners records, see p.114 : as quarter session records, however, there is no reason to query their reliability. A few indictments survive from two courts held in 1648 and from one court held in Hexham in 1649, housed within the assize indictments, P.R.O. ASSI/44/2. The post-Restoration order books and indictments do not commence until the late 1670's when loose indictments in a very faded, poor condition survive from 1675 to 1680. It is unlikely that all the indictments from the Northumberland courts are contained within this series. The Northumberland Order Books begin in 1680 and from that time onwards (with some hiatuses and poor years, 1688, 1689, 1690-3, 1694-96) both the indictments and Order Books are relatively complete and in good condition. (N.R.O. QS/I/2 - QS/I/56, quarter sessions indictments. Quarter sessions Order Book I, 1680-6; Book II, 1687-97.) No Cumberland quarter sessions records survive before 1668, but from that date the indictments are in good condition and, as far as can be ascertained, complete; although the order books are missing. (C.R.O. QS/I/1, indictments, 1668-95; QS/I/2, indictments 1696-1707.) The Westmorland justices operated in two divisions, Kendal and Appleby, and each division kept separate records. Four indictment books exist, Kendal 1656-67, 1669-91, Appleby 1661-85 and Kendal and Appleby 1692-1724. There are four order books: Kendal 1669-96, 1696-1724 and Appleby 1676-1699, 1699-1724.

Orders of the justices for the period 1656-1667, however, in the Kendal division, are contained in the indictment book for that period. These records are in good condition but some of the page numbering is extremely odd, as if the leaves had been bound out of order.

2. Scotland

Evidence for the work of the Scottish justices in the early and later parts of the century are hard to find and for these periods, the register of the Scottish Privy Council is virtually the only source. The Roxburghshire justice of the peace records, housed in the National Library of Scotland (MS 5349) cover the years 1656-9. The Peebleshire records in West Register House, Edinburgh, cover the years 1656-78 in three volumes. (JP 3/2/1, 1656-60; JP/3/2, 1656-7; JP 3/2/3, 1664-1678.) The second volume of this series seems to repeat much of the business of the first. The Riddle of Hayning papers, in the Erskine of Dun muniments (S.R.O. GD/123/153 - GD/123/212) supply information on the Selkirkshire justices after the Restoration although these are loose papers and do not form any comprehensive or consistent record.

Notes

1. A.P.S., vol. IV, p.434
2. See above description of documents for paucity of material for this period. A.P.S., vol.VIII, p.472; vol. IX, p.178: R.P.C.S., ser.3, vol. V, p.213, 7th August 1677; vol. VI, p.146, 11th March 1679; vol. VIII, p.170, 31st May 1683: 'Handlist', pp.71-2: T.I. Rae (ed.), The Union of 1707 (Glasgow, 1974), p.33
3. The commission for Roxburghshire in July 1680 included William Elliot of Stobbs, Sir Francis Scott of Thirlstane, Sir Patrick Scott of Ancrum and William Elliot of Dunlaybyre. C.S. Romanes (ed.), The Records of the Regality of Melrose, vol. III, Scottish History Society, ser.2, vol. XIII, p.5, court 29th April 1682: R.P.C.S., ser. 1, vol. VII, pp. lxxx-lxxxiii; vol. VIII, p.352, 17th August 1609, p.814, 22nd October 1609; vol. IX, pp.75-80, 6th November 1610, p.121, 17th January 1611, p. 244, 30th August 1611; vol. X, p.164, 2nd November 1613; vol. XI, p. lxxxiii;

- vol. XIII, p.156, 23rd January 1623; ser.2, vol. I, p.373, 27th July 1626, p.659-60, 27th June 1625; ser.3, vol. VI, p.508, 27th July 1680
4. William Cranston: JP, Chief of Border Police, 1605-11, Border Commissioner 1605-1617: William Greir of Lag, Border Commissioner, 1609-1630, JP 1611-1630 and sheriff of Dumfriesshire 1615: William Elliot of Dunlaybyre, JP and Border Commissioner, 1670's and 1680's. R.P.C.S., ser.1, vol. IX, pp.184-5, 30th May 1611; ser.2, vol. VI, p.175, 26th January 1636; ser.3, vol.VI, p.508, 27th July 1680
 5. R.P.C.S., ser.2, vol. VI, p.90, 4th August 1635; p.504, 1st August 1637
 6. C.H. Firth, Scotland and the Protectorate (Edinburgh, 1899), pp.98, 106
 7. R.P.C.S., ser. 1, vol.IX, p.75, 6th November 1610.
 8. *ibid.*, pp.220-4, 25th July 1611; p.410, 16th July 1612; vol.X, p.477, 14th March 1616
 9. In August 1625 Kirkcudbright burgh court was held in the presence of the baillie at the command of Sir Robert Gordon of Lochinvar, JP and at that court William Gordon agreed to appear at the next JP court to answer complaints against him; so did Andrew Arnet and John McCoskerie. Marquis of Bute and Miss C. Arnet (eds.), Kirkcudbright Town Council Records (Edinburgh, 1958), vol.I, pp.300-1, Coun. Mins. 14th April 1624; p.317 Coun. Mins. 20th August 1625; R.P.C.S., ser. 1, vol.XIII, pp.550-1, 8th July 1624; pp.825-832, Selkirk JPCourts, 9th October 1623, 16th October 1623; Rox. JP courts, 17th October 1623, 29th October 1623, 12th November 1623; Dumf. JP courts, 13th November 1623, 22nd November 1623; ser.2, vol. I, pp.671-683, 1st August 1626, 18th August 1626; vol.II, pp.553-556, 19th July 1627, 13th August 1627, 27th August 1627; vol.VIII, p. 342, 11th January 1615
 10. R.P.C.S., ser.2, vol.I, p.93, 26th July 1625
 11. The JPs still continued to exercise the right in petty sessions to warn and not prosecute offenders. This was a considerable instrument of social control which would not appear in the formal records. A recent thesis produced a completely different set of figures for business before the Rox. JP court in 1656. The figures produced here in table 27 have accordingly been checked from every angle; but at no point can the two sets of figures be reconciled. L. Smith, 'Scotland and Cromwell: a study in early modern government', unpublished D. Phil. thesis, 1979, Brasenose College, Oxford, p.190

12. The percentage of penal prosecutions in Roxburghshire in 1656 was far above that for the period 1657-9 where it dropped to secondary importance to moral offences, see below p.257
13. N.L.S. MS 5349, Rox. JP courts, p.2, 2nd June 1656; p.11, 29th October 1656; W.R.H. JP 3/2/1 Peebles JP courts, p.20, 8th April 1656; p.25, 28th May 1656; p.32, 22nd July 1656.
14. J. Nicoll, Diary, pp.172, 185, 194, 207, 208, 222
15. See also the court profiles of the sheriff courts, tables 24 and 25
 .. James Guilan, a vagabond, was ordered by Peebles JPs to be banished to the place where he had been born, Haddington.
 W.R.H. JP 3/2/1 Peebles JP courts, p.14, 11th March 1656; p.36, 18th August 1656; p.55, 6th July 1657
16. See the long accounts of payments at the back of N.L.S. MS.5349, Rox.J.P. courts: C.A. Malcolm (ed.), The Minutes of the Justices of the Peace for Lanarkshire, 1717-1723, Scottish History Society, ser.3, vol.XVII (1931), p.xxii: W.R.H. JP3/2/1: Peebles JP courts, p.15, 25th March 1656; p.61, 8th April 1658; p.63, 24th May 1658; p.69, 9th May 1659; p.78, 9th January 1660.
17. John Nicoll typified this attitude when he described in 1653
 the grouthe of sin of all sortis, particularly pryde, uncleanness, contempt of ordinances, oppressioun, violence ... the maist part of the pepill grouping wors and wors and revolting moir and moir, few or nane acceptand the punischment of their iniquitie to get thair uncircumcized hartis humbled. J. Nicoll, Diary, p.106
18. Agnes Scott was fined £20 Scots for a second offence of fornication with William Wilson, whereas Christian Dixon was fined £40 Scots for a third offence of fornication with Mungo Eccles.
 Note that these fines were much heavier than those imposed by the kirk session. Moreover, they seem to have been actually collected, a poinder collected the fine of £100 Scots from George Pringle of Blindlie. W.R.H. JP 3/2/1 Peebles JP courts, p.25, 28th May 1656: N.L.S. MS 5349, Rox.JP courts, p.26, 26th February 1657; p.29, 25th September 1657; p.45. 28th August 1658; p.50, 2nd May 1659.
19. James Brown in Faldonside was acquitted of fornication by the JPs 'in respect he has satisfied the kirk'. See the chapter on the kirk session and church courts. W.R.H. JP3/2/1 Peebles JP courts, p.16, 25th March 1656: N.L.S. MS 5349, Rox. JP courts, p.7, 11th July 1656; p.44, 28th August 1658; p.50, 2nd May 1659

20. There is evidence in the Rox. records of a 'punder' or poinder who enforced the collection of fines for the court. There is also mention of birlaw men in October 1656. As that particular meeting was held in Melrose, it is possible that these were the Melrose community birlaw men, usually attached to the regality court, but here acting on behalf of the JPs. There are no other birlaw men mentioned in either of the records at any other time. See the chapter on the franchise courts for details of birlaw men. W.R.H..JP 3/2/1 Peebles JP courts, p.54, 15th June 1657; p.67, 3rd May 1659; N.L.S. MS 5349, Rox.JP courts, p.5, 29th October 1656; p.14, 28th June 1657; p.29, 28th October 1657; pp.44, 45, 28th August 1658; p.51, 2nd July 1659
21. The Archbishop's remark was rather rash considering the dubious legality of his own title! W.R.H. JP 3/2/1 Peebles JP court p.64, 31st May 1658: R.P.C.S., ser. 1, vol. IX, p.714, August 1611?, vol.XIV, p.621, 13th June 1611; ser.2, vol. VIII, pp.326-31, 11th January 1615
22. This was part of a larger dispute with *burghs in general*, and especially Edinburgh. The burghs claimed that the 1609 act had permitted their baillies to act as a commission within, but separate from the shire commission. They were, however, authorised to accept prisoners from the shire and to co-operate with any legislation which might be passed by the shire justices; L. Smith, 'Scotland and Cromwell: a study in early modern government', unpublished D. Phil. thesis, 1979, Brasenose College, Oxford, p.178
23. R.P.C.S., ser. 3, vol. VI, p.570, 11th November 1680; pp.606-14, 16th December 1680; vol.VII, p.133, 16th June 1681; pp.163-6, 21st July 1681, p.435, 17th May 1682; W.R.H. JP 3/2/1 Peebles JP courts, p.20, 8th April 1656; p.34, 9th August 1656; p.64 31st May 1658; JP 3/2/3, p.8, 9th August 1664. The Meldrum/Philiphough struggle has been described in the chapter on the sheriff courts, above pp.244-5
24. Nine constables failed to appear at Peebles in April 1656. W.R.H. JP 3/2/1 Peebles JP courts, p.15, 25th March 1656; pp. 19-20, 13th August 1656; p.32, 5th August 1656; p.39, 3rd November 1656; p.41, 3rd February 1657; JP 3/2/3 p.3, 5th May 1664; N.L.S. MS 5349 Rox.JP court, p.7, 13th August 1656: R.P.C.S., ser. 1, vol.IX, pp.225-6, 25th July 1611
25. W.R.H. JP 3/2/1 Peebles JP courts, p.41, 2nd February 1657; p.5, 21st May 1657; JP 3/2/3 p.18, 28th May 1668; N.L.S. MS 5349, RoxJP courts, p.4, 13th August 1656; p.16, 28th June 1656

26. Commissions of the peace were issued to Annandale in October 1671 and Roxburghshire in 1680. R.P.C.S., ser.3, vol.III, p.393 3rd October 1671; vol.VI, p.508, 27th July 1680; vol.VII, p.18, 20th January 1681
27. R.P.C.S., ser.3, vol.VI, pp.606-9, 16th December 1680; vol.VII, pp. 164-6, 21st July 1681; pp.435-6, 17th May 1682: S.R.O. GD/123/198, 24th February 1681; GD/123/205, 6th March 1681, 21st July 1681
28. S.R.O. GD/123/204, 6th July 1676; GD/123/205, 6th July 1676.
29. T. Barnes, Somerset, p.40: G.C.F. Forster, The East Riding Justices of the Peace in the Seventeenth Century, East Yorkshire Local History Society booklet (Guisborough, 1973), p.15.
30. See discussion of casus difficultatis in Chapter II, pp.75-6
See court profiles for the quarter sessions records. Lambard in Eirenarcha claims the clause was revolutionary, whereas J.S. Cockburn claims it was a regularisation of standard practice. Compare with Somerset, where the clause was definitely not operational 1625-40; V.C.H.: Wiltshire, vol.V, p.80: J.S. Cockburn. History of the English Assizes, p.91: T. Barnes, Somerset, p.93.
31. See the chapter on the Border Commissioners, (Chapter III)
32. See the chapter on the assizes (Chapter II) and on the Border Commissioners (Chapter III).
33. Edward Errington of Belliston, gentleman, was referred to the assizes in August 1604 for setting fire to a house. John Errington of Errington was referred to the same court for highway robbery. N.R.O. QS/I/1 f.21; N/umb.Q/S court, 30th July 1604; f.35, Newcastle ass. court, 9th August 1604
34. See below p.287 for details of the difference between felonious and non-felonious theft.
35. N.R.O. N/umb. JP Order Book I, p.68, court 5th January 1682; JP Order Book II, f.123, court 18th April 1694; C.R.O. QS/I/1, Cumb. Q/S courts, p.6, 15th January 1668; p.88, 5th January 1676; p.98, 25th April 1677: P.R.O. ASSI/44/24 Carlisle ass. court, August 1675
36. P.R.O. Crown Office Entry Book of Commissions, C/181/1 - C/181/7; T.G. Barnes and A.H. Smith, 'Justices of the Peace from 1558 to 1688 - A revised list of sources', Bulletin of the Institute of Historical Research, vol.XXXII (1959), pp.221-42: N.R.O. 1/DE/7 no. 48, 22nd June 1617; no.54, 25th April 1618

37. P.R.O. Crown Office Entry Book of Commissions, C/181/2, pp. 137-8, commission of oyer and terminer for the northern counties, 16th February 1610: SP/14/27 no. 11, 27th April 1606; SP/15/6 23rd July 1603
38. The Delaval family of Seaton Delaval were on the commission of the peace for Northumberland throughout the seventeenth century, as were the Talbots and Fenwicks. The Cumberland ruling families were the Dalstons of Dalston, the Musgraves of Edenhall, the Curwens, Dacres, and Lowthers. The Westmorland ruling families were the Bellinghams of Levens, the Stricklands of Sizergh and the Brathwaites of Ambleside.
39. C.M.F. Greenhalgh, 'The Impact of the Civil War and Interregnum on Bury, Lancashire'; unpublished thesis for M.A., St. Andrews University, 1977: J.S. Morrill, 'The Northern Gentry and the Great Rebellion', Northern History, vol. XV (1979), p.79: L.K.J. Glassey, Politics and the Appointment of Justices of the Peace 1675-1720 (Oxford, 1979), p.6: S.S. Webb, The Governors General, pp.69-100
40. N.R.O. N/umb. JP Order Book II, p.2, court 13th July 1687; pp. 25-37, courts, 16th January 1689, 17th July 1689, 9th October 1689, 15th January 1690: A.L. Browne, 'King James the Seconds Proposed Repeal of the Penal Laws and Test Act in 1688: His Questions to the Magistrates of Cumberland, With their Answers thereto', J.C.W.A.A.S., vol.XXXVIII (1938), pp.180-95
41. See the chapter on the Border Commissioners (chapter III) for the history of Charles Howard, pp.158-9 and for the activities of justices Wilfrid Lawson, Joseph Pennington, William Selby and the Delaval family. Mark Shafto and Robert Brandling were sheriffs of Northumberland. C.H. Hunter-Blair, 'The Sheriffs of Northumberland', Archaeologia Aeliana, ser.4, vol. XXI (1943), pp.2-19
42. See the chapter on the town courts for details of Newcastle, Berwick, Kendal and Carlisle. The nearest the Northumberland justices could go to Newcastle, was the Castlegarth. When however, at the end of 1685, the King granted to the Castlegarth the right to be incorporated into the town of Newcastle, the location of the sessions for the county justices had to be moved. The records of Newcastle justices exist for the years 1650-54 and so do not coincide with those of the county justices at any point.

This makes it difficult to ascertain if there was any co-operation between the two sets of justices. From the lack of references to either in the records, there would appear to have been no liaison whatsoever. N.R.O. N/umb. JP Order Book I, p.263, court 13th January 1686

43. The Westmorland records do not suggest that there was any increase in co-operation between the justices and the ecclesiastical courts during the Interregnum, in contrast to Scottish experience.
44. This pattern was disrupted in 1690 and 1691, when all the courts were held in Carlisle, but resumed in 1692
45. W.R.O. West, Q/S indicts., 1655-1667, Kendal div., p.49, court 'Easter' 1660: N.R.O. N/umb. JP Order Book II, f.74, court 23rd January 1692: G. Forster, East Riding Justices, p.26: C.S.P.D. 1644-5, p. 329, February 1645
46. Northumberland knot of working justices: early seventeenth century, Ralph Delaval, Edward Talbot, Thomas Middleton, William Fenwick: Post-Restoration, John Blackiston, Richard Neile, Ralph Jennison, Thomas Lorraine, Patrick Crow, Ralph Delaval. Cumberland knot of working justices: Post-Restoration, Thomas Denton, Wilfrid Lawson, George Fletcher, Andrew Huddleston, Daniel Fleming.
47. K. Wrightson, 'Two concepts of order: justices, constables and jury-men in seventeenth century England', in J. Brewer and J. Styles (eds.), An Ungovernable People (London, 1980), p.26: H.B. Simpson, 'The Office of Constable', English Historical Review, vol.X (1895): An order of the Westmorland justices underlines the deficiencies in the petty constables:

Whereas the office of petty-Constable doth now goe and hath a longe time gone by turne in most if not all Constablewicks within Kendall and Lonsdale Wards, which rule doth often oblige poore, aged and other unfitt persons to serve on that office ... And whereas there is now a greater necessity for the chouseinge of able and responsible persons to be petty-Constables then there was formerley by reason of the great sums of money that are quarterley collected by them for the royal Ayde and other assessments. It is therefore ordered by the Court that the office of petty-Constable shall for the future goe by turne as it hath done formerley.. only with this difference, that when the said office shall come by turne to any person who shall not have a reall Estate within the said Constablewick of tenn pounds per annum, that thensuch person shall be joynd with soe many of his next in turne as will make up tenn pounds per annum as aforesaid and that the fittest person amongst them shall be made

choyce of to execute the office and all the rest shall contribute unto him according to their several Estates and abilities.

W.R.O. West Q/S indicts., 1655-1667, Kendal div., p. 114, court 27th April 1665

48. The Grand Jury presentments at a court held in Morpeth in January 1681 covered profaners of the Lord's Day, drunkards, swearers, illegal drovers and badgers, the large amounts of rubbish and dung piled in the Castlegarth, the treasurers accounts, the rates to be levied for the Country Keeper (see below pp.308-11) the maintenance of the house of correction, recusants, and the maintenance of roads and bridges. N.R.O. N/umb. JP Order Book I, pp.25-7, court 12th January 1681.
49. See the chapter on the assizes and contrast with J.S. Cockburn's figure of 12 percent for ignoramus bills in the south of England. J.S. Cockburn, History of the English Assizes, p.127
50. The Northumberland records reveal 15 jurors present at a court in October 1609, 16 at courts in October 1608 and 1680. The Westmorland justices usually had either 15 or 17 jurors. In some counties, for example the East Riding of Yorkshire, there could be 31 on the grand jury. There are no details of jurors in the Cumberland records. N.R.O. N/umb. JP Order Book I, p.1, court 6th October 1680, p.15, 13th April 1681, p.64, 11th January 1682: QS/I/1, f.94, court 11th October 1609: G. Forster, East Riding Justices, p.33
51. C.R.O. QS/I/1, Cumb. Q/S courts, p.18, 14th July 1669; p.102, 3rd October 1677
52. See also Thomas Meggoe's information against John Maddison for illegal pasturing. N.R.O. N/umb. Q/S indicts. QS/I/3, no. 6, court 10th January 1677: C.R.O. QS/I/1, Cumb. Q/S court, p.11, 7th October 1668: M. Beresford, 'The Common Informer, the Penal Statutes and Economic Regulation', Economic History Review, ser.2, vol.X (1957-8) pp.221-7: B. Osborne, Justices of the Peace 1361-1848 (Shaftesbury, 1960), p.85
53. These figures are obviously open to interpretation: some of those which show no verdict may well have been guilty and some were certainly removed by writ of certiorari to King's Bench. Some

went for trial at the assizes. Indeed, when the felons from the Cumberland Q/S records for the 1670's with no verdict against their names, were checked against the assize records, it was found that out of 26 people, 4 were referred to the higher court. Considering the imperfect state of preservation of the assize documents this figure may well have been much higher.

54. V.C.H. Wiltshire, vol.V, p.92
55. The Cumberland records show that each of the two persons indicted for murder were reported to be 'in gaol'. They can be traced in the assize documents, where they were found guilty before the higher court. P.R.O. ASSI/44/26, Carlisle ass. court, August 1677: C.R.O. Q/S I/1, Cumb. Q/S court, p.96, 10th January 1677
56. John Hudspeth was indicted of rape before the Northumberland justices in October 1685. His indictment was found true by the grand jury although no judgement was recorded in either the order book or the indictments. There is no record of this case in the assizes and it may well have been tried by the justices as a case of assault. N.R.O. N/umb. Q/S indicts. QS/I/21, no. 10, court 7th October 1685: Order Book I, p.249, court 7th October 1685
57. It should be remembered that unlike the rest of England, the Border Commissioners as well as the assize judges were dealing with serious crimes, especially theft. N.R.O. N/umb.JP Order Book I, p.31, court 13th April 1681; p.52, court 5th October 1681; p.135, court 11th July 1683
58. G. Forster, East Riding Justices, p.41
59. This is curious considering the value of the goods involved, for travers was a form of trial for misdemeanours. It was an action brought on the Crown's behalf by the presentation of a bill to the grand jury, although, in fact most were actually brought by indictment. In travers, the offender came in of his own volition and pleaded his exception to the charge. In this respect it was in direct contrast to a felony case, for a felon was brought in by arraignment by an officer or by compulsion of bail. The pleading in travers resembled that in a civil suit, with plea and counter-plea and the offender was usually bailed to appear at the next session. These three treatments of what

would appear to have been grand larceny, by the post-Restoration justices, indicate that whereas some of these cases were referred to the assizes, many were tried by the justices' courts and sentenced as petty larceny. This may have been a conscious effort by the justices, either to keep business and the fines for their own courts; or to try the offender at the earliest possible court to prevent high prison costs; or to spare the offender the risk of punishment for grand larceny. Certainly some items seem to have been valued at very low prices. Travers was also popular at the Westmorland court, although only for misdemeanours. N.R.O. N/umb. JP Order Book I, p.66, court 11th January 1682: W.R.O. West. Q/S indicts., 1655-1667, Kendal div., p.34, court 16th July 1658

60. C.R.O. QS/I/1, Cumb. Q/S courts, p. 111, 15th January 1679; p.250, 2nd April 1697; p.253, 17th July 1697: N.R.O. N/umb, JP Order Book II, f.36, 15th January 1690: W.R.O. West. Q/S indicts, 1655-1667, Kendal div., p.85, court 15th January 1664: See also p. 72, court 17th January 1663 for the branding of a vagrant.
61. N.R.O. N/umb. Q/S indicts., QS/I/53, court 'Christmas' 1699: C.R.O. QS/I/1 Cumb. Q/S courts, p.4, 15th January 1668; p.118, 14th July 1680; QS/I/2, f.180, 3rd October 1705
62. C.R.O. QS/I/1 Cumb. Q/S courts, p.7, 15th January 1668; p.79, 13th January 1675
63. J.S. Cockburn, 'The nature and incidence of Crime in England, 1559-1625: A Preliminary Survey', in J.S. Cockburn (ed.), Crime in England, p. 51
64. N.R.O. 1/DE/7, no. 56, 12th May 1618; no. 59, 9th September 1618, 2nd October 1618; no. 60, 2nd October 1618; no. 61, 13th October 1618; no. 69, 23rd May 1619; no. 82, 23rd December 1623; no. 83, 20th January 1624.
65. There were, in fact, three Books of Orders in the years 1630 and 1631 issued by the government. (1) April 1630: a handbook for magistrates entitled 'Certain Statutes especially selected and commanded by his Majesty to be carefully put into execution by all Justices'. This repeated Elizabethan legislation on vagrancy and the poor laws. (2) September 1630: 'Orders appointed by his Majesty to be straitly observed for the preventing and remedying of the dearth of Graine and Victuall'. (3) January 1631,

- 'Orders and Directions'. This last was the most detailed and the one commonly referred to as The Book of Orders, the details of which are here described. P. Slack, 'Books of Orders: The making of English Social Policy, 1577-1631', Transactions of the Royal Historical Society, ser. 5, vol. XXX (1980), pp.1-2
66. The January 1631 Book of Orders printed in J.P. Kenyon, The Stuart Constitution, pp.497-501
67. The East Riding records show that each parish was supposed to provide tools and a stock of raw materials on which the poor could work. N.R.O. N/umb. JP Order Book II, ff. 67, 68, 69, court 15th July 1691; W.R.O. West Q/S indicts., 1655-1667, Kendal div., f. 31, court 'Easter' 1658: G. Forster, East Riding Justices, p.48
68. N.R.O. N/umb. JP Order Book II, f.68, court 15th July 1691; f.71, court 7th October 1691
69. *ibid.*, ff.66-7, court 15th July 1691; f.124, court 18th April 1694; f.137, court 16th January 1695; f.141, court 30th April 1695; f.145, court 17th July 1695; In 1658 the overseers of the poor complained to the Westmorland justices that a child had been brought from Hawkeshead in Lancashire, to Windermere in Westmorland and left there. The court was informed that 'the last residence of the parents was att Hawkeshead' and so ordered 'that the Overseers of the poore of Windermire do carry backe the said Childe and leave the same with the Overseers of Hawkeshead to be taken care of according to lawe'. W.R.O. West Q/S indicts., 1655-1667, Kendal div., f.31, court 'Easter' 1658
70. N.R.O. N/umb. JP Order Book II, f.38, court 5th February 1690
71. In July 1656 the Westmorland justices heard details from two women who swore 'that they were present when Margarett Burrow was in extremity of travell and heard her constantly both before, in and after her travell affirm that one Hugh Tomlinson... begott her with child and that none else had carnall dealings with her'. See also the Scottish church courts, below pp. 423-4
Note that the Westmorland justices required the father of a bastard to maintain the child until the age of 14, or until the child had been apprenticed for two years. W.R.O. West

Q/S indicts., 1655-1667, Kendal div., f.6, court 13th July 1656; f.37, 8th October 1658; f.44, 13th January 1660: N.R.O. N/umb. JP Order Book II, f.27, court 17th July 1689; ff.38-9, court 5th February 1690; f.44, court 6th July 1690; f.49, court 14th January 1691; f.62, court 22nd April 1691

72. The 1653 marriage act imposed further duties on the JPs. According to this act, all forthcoming marriages had to be published on three Sundays in church or on three market days in the market place. All those wishing to be married were to take a certificate that they were compelled to obtain from their 'register' to the nearest JP who then solemnized the marriage. D. McLaren 'The Marriage Act of 1653: its influence on parish registers', Population Studies, vol.XXVIII (2), (1974), pp.322-323: Parish Register of Elswick Hall, 1592-1742, reproduced in typescript by J. Welford, (1975), p.xii. I am indebted to Rev. Canon D.T. Eastwood for this reference. C.M.F. Greenhalgh, 'The Impact of the Civil War and Interregnum on Bury, Lancashire', p.45
73. Moral prosecutions of the Westmorland justices in the Interregnum may also have taken place in petty sessions, see pp.301,307 and note 89; K.E. Wrightson, 'The Puritan Reformation of Manners, 1640-1660,' unpublished Ph.D. thesis, Cambridge, 1974: K.E. Wrightson, 'The nadir of English illegitimacy', in P. Laslett, K. Oosterveen, R. Smith (eds), Bastardy and its comparative history (London, 1980)
74. Of the 33 vagabonds in Northumberland whose place of origin is stated, 14 came from Scotland. These were concentrated mainly in October 1684, when 3 came from Kelso, 6 from Duns. 4 from Coldstream and one from Ednam. The register of the Privy Council of Scotland states that in July 1683, persons suspect of involvement in the Rye House plot were hiding in the Borders. The Enterkin affair of 1684 was followed by careful searches of the Borders for the persons concerned and for all who were thought to be religiously disaffected. In March 1685 a letter was sent from the Scottish Council to one 'Dacre, Esq.' concerning the number of Scottish rebels who were sheltering on the English side of the Borders. It can only be conjecture, but perhaps the longer than usual list of vagrants for 1684, together with the predominance of those from Scotland, could reflect such a movement across the Borders. R.P.C.S., ser.3, vol.VIII, p.183, 2nd July 1683; vol.IX, p.xii; vol.X, p.207, 30th March 1685: N.R.O. N/umb. JP Order Book I, p.194, court 8th October 1684:

- P. Slack, 'Vagrants and Vagrancy in England, 1598-1664', Economic History Review, ser. 2, vol. XXVII (1974), p.360
75. N.R.O. N/umb. JP Order Book II, f.42, court 6th July 1690:
W.R.O. West Q/S indicts, 1655-1667, Kendal div., f.72, court 17th January 1663: G. Forster, East Riding Justices, p.47
76. A.P.C. 1637 P.R.O. reproduction in facsimile, vol. I (1967)
p. 330, 29th October 1637: N.R.O. N/umb. JP Order Book I, p.25,
court 12th January 1681; p.277, court 14th April 1686: C.R.O.
QS/I/1, Cumb. Q/S courts, p.9, 1st April 1668: W.R.O. West
Q/S indicts., 1655-1667, Kendal div., f.12, court 11th January
1656; f.19, court 10th October 1656; f.30, 23rd April 1658
77. C.R.O. QS/I/1, Cumb. Q/S courts, p. 153, 14th July 1686.
78. See the chapter on the Border Commissioners (Chapter III, pp.126-8)
for details of early modern gaols. N.R.O. N/umb. JP Order Book II,
f.14, court 25th April 1688; f.72, court 7th October 1691; f.76,
court 23rd January 1692: A.P.C. 1637, P.R.O. reproduction in
facsimile, vol. I. (1967) p.330, 29th October 1637
79. J.P. Kenyon, The Stuart Constitution, p.352: E.Axon, 'Life of
John Angier,' Chetham Society, new series, vol. XCVII (1937), p.144
80. Demographic studies of the north of England and south of Scotland
have shown that 1623 was a year of terrible dearth which reached
famine proportions in many parishes. N.R.O. 1/DE/7 no. 56,
12th May 1618; no. 59, 9th September 1618, 2nd October 1618; no.
60, 2nd October 1618; no. 61, 13th October 1618; no. 69, 23rd
May 1619; no. 82, 23rd December 1623; no. 83, 20th January 1624:
A. Appleby, 'Disease or Famine? Mortality in Cumberland and
Westmorland, 1580-1640', Economic History Review, ser. 2,
vol. XXVI (1973), pp.403-432: M. Drake, 'An elementary exercise
in parish register demography', Economic History Review, ser.2,
vol. XIV (1961): P. Laslett, The World We Have Lost (London 1973),
pp.119-124: A. Appleby, Famine in Tudor and Stuart England:
M.W. Flinn (ed.), Scottish Population History, pp.116-26:
J.D. Chambers, Population Economy and Society in Pre-Industrial
England (Oxford, 1972), pp.91-2
81. C.R.O. QS/I/1, Cumb. Q/S courts, p.49, 15th January 1673: It seems most
probable that the Westmorland justices dealt with many unlicensed
alehouses out of sessions. See the quarter sessions records
for Lancashire in the 1650's, L.R.O. QSR/40 - QSR/54

82. Outside the years of food shortage, there were few marketing offence prosecutions in quarter sessions. Although the justices may have dealt with them out of sessions, there is little indication of this in the Order Books. G. Forster found the same in East Yorkshire and suggested that this could be a reflection of the relative unimportance of East Riding markets; but as the same phenomenon appears in all the northern counties, it is more likely to be a reflection either of the difficulties in the administrative machinery available to the justices, a reluctance to prosecute such offenders except in times of necessity, or else that the borough courts took upon themselves much of the day to day regulation of their own markets. G. Forster, East Riding Justices, p. 58
83. See the chapter on the assizes (Chapter II) for prosecutions of such offenders before those courts. P.B. Munsche, 'The Game Laws in Wiltshire', in J.S. Cockburn (ed.), Crime in England, pp.210-211
84. C.S.P.D. 1667-8, p.143, 1667?; 1668-9, p.73, 23rd November 1668; pp.268-9, 7th April 1669; 1670, p.59, 9th February 1670; 1675-6, p.547, 10th February 1676; 1676-7, p.431, 24th November 1676; 1678, p.417, 24th September 1678; p.431, 29th September 1678; p.553, 4th December 1678
85. N.R.O. N/umb. JP Order Book II, ff. 12, 13, 25th April 1688: C.R.O. QS/I/1, Cumb. Q/S courts, p.32, 3rd May 1671; p.42, 16th April 1672
86. G. Forster, East Riding Justices, p.58: T. Barnes, Somerset, p.66
87. J.P. Kenyon, The Stuart Constitution, p.493: T. Barnes, Somerset, pp.82-4: W. Holdsworth, History of English Law, vol. IV, p.146: H.M.C. Salisbury, vol. XVII, p.382, 21st August 1605; pp.427-8, 21st September 1605: N.R.O. 1/DE/7 no. 116, undated
88. T. Barnes, Somerset, pp.84-5
89. Only two of these extraordinary meetings are recorded in the Cumberland documents; one at Dalston in May 1698, the other at Carlisle the following month. These do not show any of the features of petty sessions as defined by Barnes, but appear to be extensions of the business of quarter sessions. It is, however, impossible to make any sure statements from such a small sample. The Westmorland documents record four different petty sessions and seem to indicate that these were a flourishing part of the JPs activities from the

- 1650's. C.R.O. QS/I/2, Cumb. Q/S courts, f.49, 6th May 1698, 18th June 1698: W.R.O. West Q/S indicts., 1655-1667, Kendal div., f.35, court 16th July 1658; f.48 court 'Michaelmas' 1659; f.49, court 'Easter' 1660; f.61 court 17th January 1662
90. N.R.O. N/umb. JP Order Book II, f.37, court 5th February 1690; f. 64, court 31st (sic) April 1691; f.126, court 30th April 1694; f.127 court 9th May 1694
91. See assize depositions class P.R.O. ASSI/45
92. O. Ruffhead, Statutes at Large (London, 1763), vol.III, pp.255 391: J.L. Kirkby, 'Border Service', T.C.W.A.A.S., new series, vol. XLVIII (1948), pp.125-6: C.R.O. QS/I/1, Cumb. Q/S courts, p. 9, 1st April 1668: p.19, 6th October 1669; p.27, 5th October 1670; p.47, 9th October 1672; p.110, 15th January 1679; p.156, 6th October 1686; p.172, 3rd October 1688
93. Edward Widdrington, John Shafto and James Howard were all gentlemen and justices: C.S.P.D. 1683 (1), p.9, 10th January 1683: N.R.O. N/umb. JP Order Book I, p.25, 12th January 1681; p.32, 13th April 1681
94. N.R.O. N/umb. JP Order Book II, f.32, 9th October 1689; f.84, 13th July 1692; f.157, 25th April 1696
95. *ibid.*, f.105, 26th April 1693
96. *ibid.*, f.32, 9th October 1689; f.72, 7th October 1691: C.S.P.D. 1683 (1), p.9, 10th January 1683; p.72, 22nd February 1683; pp.78-9 26th February 1683; p.98, 8th March 1683, p.110, 16th March 1683; p.130, 24th March 1683; p.156, 4th April 1683; p.173, 4th May 1683; p.268, 25th May 1683; R. North, Lives of Norths, vol.I, p.179
97. R.D. Hunt (ed.), 'Henry Townshends's 'Notes on the Offices of a Justice of Peace', Worcestershire Historical Society Miscellany, vol. II (1967), pp.113-4; V.C.H. Wiltshire, vol. V. p.93: J.S. Cockburn, History of the English Assizes, p.170: T. Barnes, Somerset, pp.79-80, 92
98. P.R.O. SP/14/185 no. 43, March 1623
99. C.S.P.D. 1670, pp.611-12, undated: G. Forster, 'The North Riding Justices and their Sessions, 1603-25', Northern History, vol.X (1975), pp.108-10
100. J.R. Tanner (ed.), Constitutional Documents of the Reign of James I (Cambridge, 1966), pp.19-21: C.S.P.D. 1675-6, p.573, 24th February 1676: N.R.O. 1/DE/7 no. 53, 22nd April 1618: See also the chapter on the Border Commissioners (Chapter III)

101. J.R. Tanner, Constitutional Documents of the Reign of James I, p. 19: C.S.P.D. 1667-8, p.143, 1667?
102. C.S.P.D. 1675-6, p.573, 24th February 1676; 1683 (1), pp.78-9
26th February 1683: See also P.R.O. ASSI/44/32 for a long list of gentry and knights presented by the Northumberland justices from a court 22nd April 1680 for refusing to take the oaths of Allegiance and Supremacy.
103. J.S. Cockburn, History of the English Assizes, p.171: T. Barnes Somerset, p.92: J.P. Kenyon, The Stuart Constitution, pp.498-9: C.S.P.D. 1678, p.431, 29th September 1678
104. See the chapter on the assizes (Chapter II) for further references to supervision by the assize judges, above p.72: N.R.O. 1/DE/7 no. 54, 25th April 1618: P.R.O. SP/14/9a no. 88, 27th? October 1604.
105. C.S.P.D. 1660-1, p.3, 5th June 1660; p.179, 4th August 1660; 1667 p.33, 14th April 1667: 1667-8, p.143, 1667?

NOTES TO CHAPTER VI: THE FRANCHISE COURTS

I. Sources

1. England

Many of the English franchise court records are fragmentary, but good records survive for two courts - Gilsland in Cumberland and Hexham in Northumberland. The Gilsland records, housed in the Howard of Naworth documents in the Department of Palaeography and Diplomatic at the University of Durham, start in 1611 and continue until the end of the seventeenth century. (C/178 a series). They are well kept and bound, showing a well organised and regularly kept court. The records of the 'manor and regality' of Hexham, are in the N.R.O., within the Allendale MSS. There are two records associated with this series. The court rolls, (pleas) running from 1624-1707 and the records of jury presentments and inquiries, which start in 1606. There is a marked difference in these two sets of records. The pleas seem to deal with civil cases, the presentments with misdemeanours. The pleas are in latin, the presentments in English. The jury presentments and inquiries were conducted at only a few courts in the year, whereas civil cases were heard at many. When the two records are combined, however, they produce an identical pattern to that of Gilsland. It is upon these two franchise courts that much of the account is based.

Other franchise material survives for the manor of Simonburn, in the N.R.O. (ZAL/14/2 series). These are loose bundles of paper dating from 1672, 1683, 1689, 1690 and 1691. The records of the manor of Goswick (N.R.O. ZHG/II series) are very patchy and sparse, although they date from 1645. In comparison, the records of Netherwitton, for the years 1618, 1662, 1665, 1686, and 1695 are much fuller, (N.R.O. ZTR/XII/1-13), although they do not reveal the holder of this jurisdiction. Morpeth barony, like Gilsland, was owned by the Howard family. Because of its status as a manorial borough, Morpeth's records are, in two different repositories. (See Chapter on borough courts). The manor court rolls, dating from 1696, are in the Department of Palaeography and Diplomatic at Durham University (C 180). There are earlier records covering the years 1632, 1653, 1654, 1656, 1658, 1659,

1660 and 1668 in N.R.O. (ZAN M16 B27)

The records of the manor of Holm Cultram in Cumberland have been published by T.C.W.A.A.S., record series, vol. VII and date from the beginning of the seventeenth century. Cockermonth court leet records (C.R.O. D/Lec. boxes 103, 105 and 299A) cover the years 1639, 1640, 1641 and 1654-76.

2. Scotland

For the Scottish Borders, documents survive from 13 franchise courts. The most complete series is that of the regality of Melrose. These documents, housed in the S.R.O., have been published by the Scottish History Society and it is the published version which has been used for this study, C. S. Romanes (ed.) Selections from the records of the regality of Melrose, Scottish History Society, ser. 2, vols. VI, VIII, XIII (1914, 1915, 1917). The records cover the period between 1605 and 1609 in acts and decreets; from 1657 to 1676 as a court book and as another court book from 1682 to 1684. Also printed by the Scottish History Society are the records of the baron court of Stitchill. Although starting at a later date than Melrose, in 1655, these documents continue through until 1807 and give a clear picture of the working of a baron court. C. B. Gunn (ed.), Records of the baron court of Stitchill, 1655-1807, Scottish History Society, vol. L (1905).

Next, in terms of completeness, is the baillie court book of Kelso, which would appear to cover the burgh of Kelso and the barony of Halydene. This runs from June 1623 to September 1682. The records are contained in a book with rather erratic page numbering. (S.R.O. RH 11/42). The records of one of the most powerful regalities in the Borders, Jedforest, are, unfortunately only fragmentary, although they contain some cases which offer insight into the business of the court in the early seventeenth century. The few items in this collection, however, are often undated and frequently in very poor condition. (S.R.O. GD/111/1/17 series). More records exist for the baron court of

Elshieshields. These are contained in a single book, although entries progress from the front towards the middle of the book, with page numbers from 1 and from the back to the middle of the book, with the same system of numbering. There are therefore, for example, two page 3. One series, however, contains the rentals of the barony and details of pasturing, whereas the other gives details of the courts held. The rentals cover the period from the 1650's, whereas the court records survive only for 1662, 1663, 1665, 1670, 1671, 1672, 1674-80. (S.R.O. CS/2256, or RH/15/2256).

The Homes of Wedderburn were the lords of the baronies of Godscroft, Horndean and Wedderburn and the records of these three Berwickshire courts have been preserved in the S.R.O. (GD/1/35 series). They are not a complete series. The Godscroft records are for the year 1629 only. Those for Horndean are for 1639, 1704 and 1705 and those for Wedderburn for the first seven years of the eighteenth century. Also contained in these bundles of documents, were cases from the Coldingham baron court in 1699 and 1703. All these courts are insufficiently documented to provide anything more than a mere glimpse into their practices, although they do substantiate evidence from other courts. The baron court of Cockburnspath has good records, particularly for the period 1649-56, although the documents date from 1636 (S.R.O. RH/11/15/1). Only fragments exist from the Wamphray courts in 1684 and 1687 (S.R.O. RH/11/69/1).

II. Notes

1. Brit. Lit. Sloane MSS. 1856, 'The General Causes of Disorder in the Scottish Commonwealth', ff. 31-4
2. *ibid.*, f. 31
3. The charter was defined in ancient terms such as 'soc' or 'sacca' which granted the right to deal with litigious questions; 'tol' or 'thol', which gave the right to exact customs or payment of goods on entering or passing through the lands; 'bloodwit', which gave the right of jurisdiction in cases of assault where blood was shed and 'furca and fossa', which was the right of pit and gallows.

The charter of the regality of Annandale was granted 'cum quatuor loquellis corone nostre' and that of Kelso 'cum loquellis nostre'. In other words, they were given the right to hear the 'four pleas of the crown'. The grant to Melrose, however, although in similar terms to the Kelso charter, expressly excluded the four royal pleas. The difference in charter probably accounts in a large way for the different court profiles of Kelso and Melrose. See also below, note 25.

T. I. Rae, The Administration of the Scottish Frontier, p. 20: C. S. Romanes (ed.), Selections from the records of the Regality of Melrose, Scottish History Society, ser. 2, vol. VI, (1914), pp. xxi-xxii. (Hereafter Melrose reg.): C. B. Gunn (ed.), Records of the baron court of Stitchill, 1655-1807, Scottish History Society, vol. L (1905), p. xi (Hereafter Stitchill bar.)

4. Stewarties could also be hereditary. 'Handlist', p. 113: S. J. Davies, 'The Courts and the Scottish legal system, 1600-1747', pp. 141-6: S.R.O. GD/111/1/17, GD/111/1/30 Jedforest reg. records.

5. Hope's Major Practicks, part ii, p. 38

6. T. I. Rae, The Administration of the Scottish Frontier, pp. 15-17

7. Sir James Nicholson of Cockburnspath was sheriff of Berwickshire and lord of the barony of Cockburnspath. See the chapter on the Border Commissioners (Chapter III) and the justices of the peace (Chapter V) for details of important men holding several judicial positions.

8. The baillies of the regality of Melrose were Walter Chisholm of that ilk, Gideon Jackson of Lothouse, George Pringle of Blindlie: Sir Alexander Don of Newton, Border Commissioner, was baillie of the Kelso court.

9. T. I. Rae, The Administration of the Scottish Frontier, pp. 15-17

10. A.P.S., vol. IV, p. 549: Fife Sheriff Court, p. xxxvi

11. See the court profiles of the franchise courts, below pp. 328-30

12. The poor state of preservation of most of the Border franchise court records prevent an exact statement to be made about their meetings: the Elshishield records reveal that the court could meet at least twice a year. Balfour states that 'all Baronis may thryse in the zeir clenge and purge his lands of misdoaris and malefactouris and utheris that are of evil fame.' Melrose reg., vol. I, pp. 21, 22, court 15th October 1606: P. G. B. McNeil, The Practicks of Sir James Balfour of Pittendreich, Stair Society, vol. XXI (1962), part i, p. 40: S.R.O. CS 96/2256, Elshie. bar. court 15th December 1680

13. Melrose reg., vol. I, pp. 21-22, court 15th October 1606; p. 29, court 17th June 1607

14. Stitchill bar., p. 86, court 7th August 1680: Melrose reg., vol. I, p. 326, court 8th December 1660: S.R.O. GD/1/35/1, Horndean bar. court, 19th October 1704: Abstracted multures explained below p. 336

15. Stitchill bar., p. 126, court 23rd January 1697: S.R.O. GD/1/35/1, Hutton bar. court, 26th June 1704: GD/111/1/17 no. 6, Jedforest reg. court 11th January 1620; nos. 14, 15, court July 1610
16. The Kelso records can be seen to be very different, see note 25 for explanation. The records of Cockburnspath would probably show a similar pattern were it not for the large number of persons prosecuted for keeping swine. As however, all but one of the debt actions were against those owing money to the holder of the barony, perhaps this is an exceptional case.
17. Melrose reg., vol. II, p. 207, court 30th May 1668; pp. 337-8, court 14th June 1673: S. J. Davies, 'The Courts and the Scottish legal system, 1600-1747', pp. 141-6
18. Chambers Scots Dictionary defines intromission as 'interference with another's money or effects.' As spulzie is defined as illegal meddling with another's movable goods, intromitting is probably a degree of spulzie.
19. Stitchill bar., p. 106, court 4th November 1691: Melrose reg., vol. II, p. 170, court 16th February 1667
20. As in the sheriff courts, riot could refer not only to brawling, but to other minor incidents. Hope's Major Practicks, part ii, p. 43: Balfour, part i, p. 40: S. J. Davies, 'The Courts and the Scottish legal system 1600-1747', pp. 141-6
21. Theft case in Stitchill records: Robert Hamilton was fined 30 shillings for stealing peas. The penalty was so small, less than that incurred for a riot, or for cutting an ash tree, it is unlikely that the sheriff was called to preside. Stitchill bar., p. 80, court 5th December 1677: Balfour, part i, pp. 39, 40: S. J. Davies, 'The Courts and the Scottish legal system 1600-1747', pp. 141-6
22. Balfour, part i, p. 40: Hope's Major Practicks, part ii, p. 43
23. John Notman and John Hunter settled their dispute over a pan in court: Andrew Darling of Westhouses was fined £5 Scots for taking George Pringle's fruit: Andrew Darling was imprisoned in the tolbooth of Melrose until he refunded the damage caused by him to fruit trees whilst he was stealing the fruit.
24. It was not that Melrose was unable to pronounce more severe punishments. 'That wicked woman' Barbara Ker was banished from the regality for theft in June 1662. Melrose reg., vol. II, p. 18, court 10th June 1662; pp. 42-3, 10th June 1662; pp. 420-21, 24th July 1675
25. The difference between the Kelso and Melrose court records would seem to be attributable to two factors. (1) The charters are different, as described above, note 3, and Melrose not allowed to try the 'four pleas of the Crown'. (2) The absence of debt cases seems to suggest that the burgh of Kelso dealt with such matters and so the cases would be recorded in their court records, whereas the baron kept the more profitable criminal cases to his own court.

- S.R.O. RH/11/42/1 Kelso bar. courts, p. 31, 10th April 1666; p. 43, 19th April 1667; GD/111/17/1 Jedforest reg. courts, no. 5, undated; no. 6, 11th January 1620
26. S.R.O. RH/11/42/1 Kelso bar. courts, p. 42, 24th July 1667; p. 44, 16th November 1667: R.P.C.S., ser. 3, vol. II, p. 276, 25th March 1667; p. 283, 18th May 1667: Melrose reg., vol. II, p. 346, court 4th October 1673
27. Melrose reg., vol. I, pp. 15-16, court 16th July 1606; vol. II, p. 407, court 27th March 1675: Hope's Major Practicks, part ii, p. 43
28. Melrose reg., vol. I, p. 120, 20th September 1648; p. 135, 8th June 1641; vol. II, pp. 103-4, 30th July 1664: S.R.O. RH/11/42/1 Kelso bar. court, p. 44, 25th November 1667: CS/96/2256, Elshie. bar. court, 15th March 1678
29. See Introduction, p.10 above for details of feu-duty and feu-ferme.
30. Melrose reg., vol. II, pp. 167-8, court 22nd December 1666; p. 219, 10th October 1668: Stitchill bar., p. 87, court 27th November 1680
31. S.R.O. RH/11/42/1 Kelso bar. court, p. 69, June 166-[blank]: GD/1/35/1, Hutton bar. court, 26th June 1704: Stitchill bar., pp. 36-7, court 20th April 1665; p. 43, court 13th December 1666; p. 47, court 13th July 1667: Melrose reg., vol. II, pp. 161-3, court 20th October 1666
32. In November 1695 all tenants in Stitchill were ordered to contribute a sufficient 'worker day' to help to carry rubbish out of the churchyard. S.R.O. RH/11/15/1 Cockburnspath bar. court, 28th June 1656; Stitchill bar., p. 50, court 14th September 1667; p. 107, court 5th September 1692; pp. 116-17, court 23rd November 1695; p. 153, court 18th November 1704: S. J. Davies, 'The Courts and the Scottish legal system, 1600-1747', pp. 141-6
33. S.R.O. RH/11/42/1 Kelso bar. court, p. 1, 17th October 1623: Melrose reg., vol. I, p. 82, court 17th June 1609; pp. 313-14, court 13th October 1660
34. Also the work of the sheriffs and justices of the peace, see above pp.253,258 S.R.O. RH/11/42/1, Kelso bar. court, p. 22, 5th November 1659: Melrose reg., vol. I, p. 23, court 15th October 1606; vol. II, p. 383, court, 29th August 1674
35. Also the work of the sheriffs and justices of the peace, see above pp.253,258 Melrose reg., vol. I, p. 358, 2nd November 1661
36. Melrose reg., vol. I, p. 173, court 2nd January 1658; p. 358, court 2nd November 1661
37. Melrose reg., vol. III, pp. 22-44, courts 4th March 1682-3rd March 1684
38. Melrose reg., vol. I, pp. 33-4, court 7th June 1607: Stitchill bar., pp. 49-50, court 14th September 1667
39. Melrose reg., vol. I, p. 268, court 4th February 1660; p. 293, 23rd June 1660
40. Melrose reg., vol. I, p. 145, court 16th May 1657; p. 161, court 17th October 1657: S.R.O. CS/96/2256, Elshie. bar. court, 16th December 1672: S. J. Davies, 'The Courts and the Scottish legal system 1600-1747', pp. 141-6

41. Birlawmen also existed in the English franchise courts. Holm Cultram, for example, had a similar institution in a group of men called the 'Sixteen'. These would appear to have been chosen at the head court and acted under the steward of the manor. Their duties were to maintain sea-dykes, confirm by-laws, and appoint the schoolmaster. They were usually chosen as a court of appeal as arbitrators in matters arising within the barony. See p.396 for burgh birlawmen. T. C. Smout, A History of the Scottish People, p. 117: F. Grainger and W. G. Collingwood, The Register and Records of Holm Cultram, T.C.W.A.A.S., record series, vol. VII (1929), p. 225
42. Stitchill bar., p. 2, court 8th January 1655
43. S.R.O. CS/96/2256, Elshie. bar. courts, 1st December 1658; 1st October 1671; 23rd November 1675, 23rd December 1676, 1st November 1679: Stitchill bar., p. 2, court 8th January 1655; p. 15, court 3rd November 1658; p. 115, court 4th May 1695: Melrose reg., vol. II, p. 173, court 23rd March 1667; p. 289, court 16th December 1671; pp. 423-4, court 11th September 1675; p. 438, 11th March 1676
44. Melrose reg., vol. II, p. 212, court 13th June 1668: Stitchill bar., p. 24, court, 23rd August 1662: S.R.O. RH/11/15/1 no. 7, Cockburnspath bar. court, 4th December 1649
45. S.R.O. CS/96/2256, Elshie. bar. court, 12th December 1665: RH/11/15/1 no. 9, Cockburnspath bar. court, 3rd November 1655: Stitchill bar., p. 15, court, 3rd November 1658; p. 18, court 17th February 1659; p. 158, court 24th May 1707: Melrose reg., vol. I, pp. 310-11, court 6th October 1660, vol. II, p. 107, court 12th August 1664
46. S.R.O. GD/1/35/2, Hutton bar. court, 31st July 1699: RH/11/42/1, Kelso bar. court, p. 87, 11th April 1646: Melrose reg., vol. I, pp. 35-6, court 8th July 1607: Stitchill bar., p. 31, court 4th January 1664; p. 151, court 3rd June 1704
47. Melrose reg., vol. I, p. 65, court 18th May 1608; vol. III, p. 29, court 29th July 1682
48. S.R.O. GD/111/1/17, no. 6, Jedforest reg. court, 11th January 1620: Stitchill bar., pp. 1-2, court 8th January 1655
49. Melrose reg., vol. I, p. 6, court 2nd April 1606; p. 7, court 16th April 1606; p. 231, court 23rd April 1659; vol. II, pp. 59-60, court 11th April 1663: Stitchill bar., p. 159, court 8th November 1707
50. Melrose reg., vol. I, p. 47, court 25th November 1607; p. 54, court, 16th December 1607
51. S.R.O. RH/11/42/1, Kelso bar. courts, p. 35, 28th January 1667; p. 42, 27th July 1667: Melrose reg., vol. I, p. 236, court 21st May 1659; vol. II, p. 28, court 9th August 1662: Stitchill bar., p. 80, court 15th December 1677

52. See the chapter on the ecclesiastical courts (Chapter VIII) p. 433
Stitchill bar., p. 6, court 27th November 1655; p. 23, court 23rd August 1662;
 pp. 111-12, 8th April 1695: Melrose reg., vol. II, p. 296, court 24th February 1672
53. S.R.O. GD/111/1/17, no. 16, Jedforest reg. court, 11th January 1620. See
 the chapter on the central courts (Chapter I) for details of repledging.
54. Stitchill bar., p. 108, court 5th September 1692: S. J. Davies, 'The
 Courts and the Scottish legal system, 1600-1747', pp. 141-6
55. S.R.O. GD/111/1/17, no. 6, Jedforest reg. court, 11th January 1620:
Stitchill bar., pp. 6-7, court 19th June 1656; p. 23, court 23rd August 1662:
Melrose reg., vol. II, p. 10, court 8th March 1662; p. 57, court 26th March 1663;
 p. 345, court 4th October 1673
56. See above, note 24 on Barbara Ker. S.R.O. GD/111/1 /17 no. 17, Jeforest
 reg. court, July 1610: RH/11/42/1 Kelso bar. court, p. 44, 16th November 1667:
Melrose reg., vol. II, pp. 17-18, court 10th June 1662
57. Melrose reg., vol. II, p. 232, court 30th January 1669; pp. 345-6, court
 4th October 1673
58. See the chapter on the ecclesiastical courts (Chapter VIII).
59. The Stitchill court in August 1655 passed an act against blasphemy and
 drunkenness: The Melrose court in October 1605 and 1606 decreed against Sabbath
 breakers; in June 1607, December 1607. and July 1660, it passed acts against
 drunkenness: Kelso in July 1625 punished Alexander Woddrell for adultery. T. Ford,
Reformation Sure and Steadfast (London, 1641): S.R.O. GD/1/35/4, Godscroft bar.
 court, 8th August 1629: RH/11/15/1 no. 2, Cockburnspath bar. court, 4th December
 1645: RH/11/42/1 Kelso bar. court, p. 10, 23rd July 1625: Stitchill bar., pp. 4,
 5, court 22nd March 1655; pp. 33-4, court 19th November 1664: Melrose reg.,
 vol. I, pp. 2-3, court 23rd October 1605; p. 33, court 17th June 1607; pp. 48-9,
 court 9th December 1607; pp. 298-9, court 10th July 1660; vol. II, p. 26,
 court 31st July 1662
60. Stitchill bar., pp. 5-6, court 18th August 1655; p. 57 court 8th October 1670:
Melrose reg., vol. I, p. 49, court 9th December 1607; p. 77, court 16th November
 1608; vol. II, p. 13, 7th April 1662
61. Melrose reg., vol. III, p. 24, court 11th March 1682; p. 24, court
 22nd April 1682
62. It should be pointed out that all the examples in this paragraph have been
 taken from prosecutions for conventicles, or similar delinquencies, in the early
 1680's, when circumstances were exceptional in the Borders. No similar examples
 occur elsewhere in the records of the regality of Melrose. Melrose reg., vol. III,
 p. 4, court 25th April 1682; p. 37, court 1st November 1682; p. 40, court 27th
 January 1683; p. 41, court 17th March 1683

63. Melrose reg., vol. I, p. 157, court 3rd October 1657; p. 165, 21st November 1657; p. 203, court 3rd October 1658; p. 343, court 6th July 1661
64. Although the Scottish baron courts survived with restricted jurisdiction, see above p. 325.
65. See the chapter on the church courts (Chapter VIII) for details of the ecclesiastical liberties in the north of England.
66. The charters were issued in terms of 'sake', 'soke', 'toll', 'team' and 'infangenthef', as in the Scottish charters (see above note 3). V. A. Morris, 'The Frankpledge System', Harvard Historical Studies, vol. XIV (1910), p. 139
67. N.R.O. 1/DE/7, no. 48, 22nd June 1617: G. R. Elton, England under the Tudors, p. 176: W. Holdsworth, History of English Law, vol. I, pp. 112-13
68. See notes on sources, for details of the court records which are referred to.
69. A court of record is a 'court where acts and judicial proceedings are enrolled for a perpetual memorial and testimonial, whose rolls are the records of the court': J. B. Saunders (ed.), Mozley and Whiteley's Law Dictionary (London, 1977), p. 89: J. H. Baker, 'The Criminal Courts and Procedure at Common Law', in J. S. Cockburn (ed.), Crime in England, p. 31
70. V. A. Morris, 'The Frankpledge System', pp. 1-2, 132: For borough court leets, see chapter on borough courts (Chapter VII).
71. At the Gilsland court in April 1613, a statement was made by the vicar of Haiton concerning one Thomas Knight, who had been accused at the coroner's inquest, of murdering his wife. The Gilsland court noted other witnesses' reports, but made no judgement itself and seems to have been acting in a supportive role to the higher court of assize. N.R.O. QS/I/1, N/umb. Q/S courts, f. 179 15th June 1629; f. 188, 13th January 1630; f. 193, 14th July 1630: Allendale MSS, Court rolls of the manor and regality of Hexham, jury presentments and inquiries, no. 14, court 14th October 1628; no. 19, 12th October 1630: (Hereafter Hex. man. court, pres. and inqs.): Durham Univ. Dept. Palaeography and Diplomatic Howard of Naworth MSS, court rolls of the manor of Gilsland, C 178a, court book I, pp. 56-7, court 9th April 1612; book II, f. 2, court 8th April 1613; ff. 45-6, court 'Michaelmas' 1613: (Hereafter Gilsland man. court).
72. Morpeth and Gilsland baronies were held by the Howards of Naworth, one of the most powerful families in the north of England. See the chapter on Border Commissioners (Chapter III) for details of Lord William Howard and Charles Howard. Simonburn manor was held by Cuthbert Heron, a Border Commissioner and J P : Hexham was held by the Fenwick family, also J P 's and Border Commissioners.

73. F. Grainger and W. G. Collingwood, The Register and Records of Holm Cultram, T.C.W.A.A.S., record series, vol. VII (1929), p. 205: N.R.O. Hex. man. court pleas, p. 234, court 18th January 1672
74. Hexham manorial steward in the early 1650's was Lancelot Algood; for 1653-1660, it was Stephen Anderton and Mark Shafto. Algood, Shafto and Anderton were all gentlemen and J.P.s. The Widdrington family, J.P.s and gentlemen, were stewards at the Morpeth court after the Restoration.
75. See notes on sources for the two records kept by the Hexham court.
76. N.R.O. Hex. man. court, pres. and inqs., no. 1, court 1606?; no. 12, court 16th October 1627
77. N.R.O. Hex. man. court, pres. and inqs., no. 15, court 14th October 1628; no. 19, court 12th October 1630
78. *ibid.*, no. 3, court 14th October 1619: See the chapter on the justices of the peace for their problems with dealing with influential people, Chapter V, p. 313. Nicholas Stephenson was presented to the assize judges in 1684, for speaking against the Earl of Carlisle (Charles Howard) and his steward of the court of Morpeth: he was reported to have said 'I Gare not one fart for the Count of Morpeth nor the Earle of Carlisle, nor his steward of the Court, for his Court is not worth coming to.' Stephenson was a gentleman, reputed to be of 'evil fame' and the manorial court could well have had difficulty in suppressing him on its own. P.R.O. ASSI/44/32, Newcastle ass. court, summer 1684
79. N.R.O. Hex. man. court, pleas, p. 101, court 28th September 1647; p. 102, court 20th October 1647; p. 106, court 8th February 1648; p. 337, court 10th October 1704
80. N.R.O. ZTR/XII Netherwitton man. court, 7th October 1662: ZHG/II/3, Goswick man. court, 18th August 1645: Cockermonth court leet records are likewise dominated by petty debt cases. C.R.O. D/Lec. boxes 103, 105, 299A : R. S. Dilley 'The Cumberland court leet and use of the common lands', T.C.W.A.A.S., new series, vol. LXVII (1967), p. 125-33
81. Dur. Univ. Dept. Pal. and Dip., C 178a, Gilsland man. court, book I, p. 54, court 9th April 1612: N.R.O. Hex. man. court, pleas, p. 16, court 14th October 1628: ZTR/XII Netherwitton man. court, 12th October 1618, 7th October 1662: ZAN M16 B27, Morpeth man. court, 'Michaelmas' 1660: ZAL 14/2/2, Simonburn man. court, 26th April 1672; ZAL 14/2/5 Simonburn man. court, 30th September 1689; ZAL 14/2/7 Simonburn man. court, 28th September 1691
82. An affrày, or fray in English is equivalent to a riot in the Scottish records.
83. N.R.O. Hex. man. court, pres. and inqs., no. 15, court 14th October 1628; no. 19, court 12th October 1630: Dur. Univ. Dept. Pal. and Dip., Gilsland man. court, book I, p. 55-6, court 9th April 1612: Holm Cultram, p. 212

84. N.R.O. Hex. man. court, pres. and inqs., no. 18, court 13th October 1629; no. 19, court 12th October 1630: ZTR/XII Netherwitton man. court, 12th October 1618: Dur. Univ. Dept. Pal. and Dip. Gilsland man. court, book I, pp. 54-6, court 9th April 1611
85. Dur. Univ. Dept. Pal. and Dip., Gilsland man. court, book II, f. 43, court 22nd July 1613; f. 44, court 'Michaelmas' 1613: N.R.O. Hex. man. court, pres. and inqs., no. 5, court 14th September 1624; no. 12, court 16th October 1627; no. 17, court 13th October 1629; no. 19, 12th October 1630: ZAN M16 B27, Morpeth man. court, 3rd April 1654: ZTR/XII Netherwitton man. court, 12th October 1618, 7th October 1662: ZAL/14/2/2, Simonburn man. court, 26th April 1672: ZHG/II/1 Goswick man. court, 28th April 1666
86. Holm Cultram, p. 215: N.R.O. Hex. man. court, pleas, p. 58, court 8th April 1641; p. 73, court 11th October 1642; p. 104, court 21st December 1647
87. At Bamburgh manorial court in 1705, two of the tenants were fined 39 shillings and 11 pence each - one for getting the other arrested on a writ issued by the King's Bench, the other for indicting his adversary at quarter sessions. S. and B. Webb, English Local Government: The Manor and the Borough (London, 1929), part i, p. 91: N.R.O. Hex. man. court, pleas, p. 12, court 16th October 1627; pres. and inqs., no. 15, court 14th October 1628: ZAL 14/2/3 Simonburn man. court, 13th October 1683: Dur. Univ. Dept. Pal. and Dip., Gilsland man. court, book I, p. 29, court 16th January 1612; book II, f. 45, court, 'Michaelmas' 1613
88. The Border Commissioners and the justices of the peace often held courts at Hexham and it seems likely that the prisoners in gaol there would be destined for trial before the higher courts. It does seem strange, however, that the gaoler should have been prosecuted before the manorial court, rather than the higher courts. N.R.O. Hex. man. court, pleas, p. 12, court 16th October 1627; p. 31, court 23rd August 1631
89. N.R.O. Hex. man. court, pres. and inqs., no. 12, court 16th October 1627; no. 19, court 12th October 1630: ZAN M16 B27 Morpeth man. court, 3rd April 1654, 7th April 1668

NOTES TO CHAPTER VII: THE TOWN COURTS

I. Sources

1. England

The records of Morpeth borough are in the N.R.O. and have been discussed in the notes on sources in Chapter VI: the franchise courts. (ZAN M16 B 27). The records of Newcastle borough are in the N.C.A. The quarter sessions records are limited to recognizances for the years 1649-51 and 1656-57 (540/39, 540/49). Although both these volumes are recorded as quarter session recognizances however, they are both very different: the first volume being concerned with felonies and misdemeanours and the second with debt and civil cases. This would seem to indicate that the second record is not the recognizances of the corporate magistracy of Newcastle, but cases from one of the civil courts of the borough. The number of cases would seem to indicate that this was the main civil court of Newcastle. The page numbering for both these volumes is very erratic.

Extracts from the Minute Book of the Newcastle upon Tyne Common Council have been published by the Newcastle upon Tyne Records Committee. (Newcastle upon Tyne Records Series, vol. I (1920), for the years 1636-56).

The records of Carlisle court leet are housed in the C.R.O. These start in 1597. Each court is recorded on separate sheets of paper, many of which are in poor condition. It would seem that many courts are not represented in this collection, for there are some years without any courts held. They are kept within the Ca/3 series. The Dormont Book of Carlisle, containing the oaths to be taken by city officials, decrees of title and the by-laws of the borough, has been published in part. (R.S. Ferguson, W. Nanson, Some Municipal Records of the City of Carlisle, T.C.W.A.A.S. Extra series (1887)). The mayor and aldermen of Carlisle did not

receive the right to act as J.P.'s until 1684 and even then did not hold their own quarter sessions; thus cases from Carlisle city were tried by the county justices. (See Chapter V).

The records for Berwick-upon-Tweed are disappointingly poor. Although it had the right to hold its own assizes, no records exist whatsoever of these courts. The quarter sessions records start only in 1695 and, naturally, contain the less serious offences. They are housed in the B.R.O. (C8/1). Unlike normal quarter session records, the cases are not recorded as indictments, nor do they seem to have been brought to the court in that way, but rather through grand jury presentment.

2. Scotland

Border burgh courts seem to have heard only civil actions and most of the other cases came before the Town Council. Thus, it is the minute books of the Town Councils which have proved to be the most interesting. Kirkcudbright Town Council minutes have been transcribed by the Marquis of Bute and Miss C. M. Arnet and printed in two volumes, copies of which have been kept by the S.R.O. Kirkcudbright Town Council Records 1606-58, 2 vols. (Edinburgh, 1958).

Dumfries burgh court books, in the Municipal Chambers at Dumfries, are devoted to debt cases over the years 1658-62. The Council Minutes however, from 1643-1671, bound in three volumes, are very informative on the workings of the burgh and contain not only cases, but also by-laws and acts in a similar fashion to those of Kirkcudbright. (1/1/1, 1643-1650; 1/1/2, 1651-1663; 1/1/3, 1663-1671). In the Museum at Hawick are Jedburgh Town Council Minutes from 1618 to 1704. These too, give valuable insight into the business before this important royal burgh. (1/1/1, 1618-62; 1/1/2, 1662-1668; 1/1/3, 1672-1688; 1/1/4, 1691-1704)

Extracts from the records of the burgh of Peebles have been published by the Scottish Burgh Record Society. (Extracts from the Records of the Burgh of Peebles, 1605-1710, Scottish Burgh Record Society, (1872))

II Notes

1. S. and B. Webb, English Local Government: the Manor and the Borough (London, 1929), (hereafter The Manor and the Borough)
2. *ibid.*, pp. 89-90
3. *ibid.*, p. 148
4. By ancient definition a stallinger was a stallholder, or foreigner who paid for a market stall, but who did not enter the freedom of the borough. By the seventeenth century, this term was used to describe those who held a small area of pasturage, but were not entitled to be burgesses.
5. S. and B. Webb, The Manor and the Borough, pp. 160, 161
6. Or burgesses, see above on Holy Island.
7. G. Tate, History of Alnwick, 2 vols. (Alnwick, 1866-69), vol. II, pp. 255, 291, 295: S. and B. Webb, The Manor and the Borough, p. 190-1
8. G. Tate, History of Alnwick. vol. I, p. 348, vol. II, pp. 239; 256
9. N.R.O., M16 B27, Morpeth bar. courts, 3rd April 1654, October 1660
10. *ibid.*, Morpeth bar. court, 7th April 1668
11. Each trade company could choose 2 stewards and a 'Common Driver'. The stewards administered the 400 acres of the common pasturage of the borough. J. Hodgson, 'An account of the customs of the court leet and court baron of Morpeth', Archaeologia Aeliana, new series, vol. XVI (1894), pp. 52-3
12. J. Hodgson, History of Northumberland. (Newcastle, 1832), part ii, vol. II, pp. 183, 431, 432, 454
13. S. and B. Webb, The Manor and the Borough, pp. 493-4, 499: J. Hodgson, 'An account of the customs of the court leet and court baron of Morpeth', pp. 52-75: J. Hodgson, History of Northumberland, part ii, vol. II, p. 523. See similar cases in franchise courts, pp. 347-8, 366.
14. Berwick was within the archdeaconry of Northumberland and so could be visited by either the archdeacon or bishop's chancellor. The High Commission in Durham noted in July 1632 that William Risen of Berwick, who had been summoned before that court for adultery with Elinor Burrell, claimed to have already been punished for that offence 'by the official of that jurisdiction where he lived.' This was accepted by the Commissioners; Acts of the High Commission in the Diocese of Durham, Surtees Society, vol. XXXIV (1858), p. 20, court, 5th July 1632. See the chapter on the Border Commissioners for details of the Berwick Commissioners court. J. Fuller, History of Berwick-upon-Tweed, (Newcastle, 1973), pp. 239-40
15. See the chapter on the justices of the peace for details of where the county justices held their courts, especially p. 536, note 42.
16. See the chapter on the franchise courts for description of courts leet.

17. C.R.O. Ca/3/21, Ca/3/31, Carlisle court leet, 21st April 1619, 11th October 1651. R. S. Ferguson, W. Nanson (eds.) Some Municipal records of the City of Carlisle, T.C.W.A.A.S., extra series (1887), pp. 15, 18
18. S. and B. Webb, The Manor and the Borough, pp. 342, 515: Newcastle City Archives (N.C.A.), 540/49, 'Q/S Recog.' [Newcastle civil courts], 10th October 1656 to March 1657; see sources for description of these documents
19. Kendal borough was also anxious to keep down alehouses, passing an act for licencing them in January 1603; R. S. Ferguson (ed.), 'A Boke off Recorde' or Register of Kirkby Kendall, T.C.W.A.A.S., extra series, vol. VII (1892), pp. 152-3: C.R.O. Ca/3/21, Carlisle court leet, 21st April 1619; Ca/3/25, 21st October 1625; Ca/3/31, 11th October 1651
20. S. and B. Webb, The Manor and the Borough, p. 350
21. The wards do not seem to have followed any logical boundaries, but are believed to have some connection with the constables 'beats' of the original parishes.
22. S. and B. Webb, The Manor and the Borough, pp. 309-21: C.S.P.D. 1664-5, p. 575, 28th September 1665
23. The Webbs' study began in 1689. By that time, as the chapter on the justices of the peace in the counties shows, the county justices were meeting very frequently, whether in petty sessions or sessions of adjournment. It was then, perhaps a trend throughout the area to meet more frequently than earlier in the century. N.C.A. 540/39, Newcastle Q/S Recog. January 1650 to July 1651: B.R.O. C8/1, Berwick Q/S court, 11th October 1695
24. See the chapter on the justices of the peace
25. N.C.A. 540/39, Newcastle Q/S Recog., p. 11, 22nd February 1650, p. 12, 4th March 1650; p. 27, 10th July 1650
26. N.C.A. 540/39, Newcastle Q/S Recog., pp. 8-9, 14th January 1650; p. 22, 16th March 1650; p. 23, 24th May 1650; p. 34, 2nd October 1650: See also C.R.O. Ca/3/21, Carlisle court leet, 11th October 1651: C.S.P.D. 1650, p. 159, 13th May 1650: See also p. 389 for close connection between the Common Council and Newcastle Q/S. There were obviously many more cases before the Q/S not recorded in the recognizances.
27. N.C.A. 540/39, Newcastle Q/S Recog., p. 10, 2nd February 1650; p. 18, 4th April 1650; p. 23, 24th May 1650: The case of Margaret Armstrong would seem to indicate that she had committed fornication and was likely to fall on the parish rates.
28. C.S.P.D. 1631-3, p. 567, 11th March 1633; p. 568, 12th March 1633, p. 570, 13th March 1633; p. 585, 26th March 1633; p. 587, 29th March 1633: C.S.P.D. 1625-49 Addenda, p. 453, March 1633

29. B.R.O. C8/1 Berwick Q/S court, 15th July 1695. A recognizance taken at that court ordered an offender to appear either at the next quarter sessions court or gaol delivery. Two different courts, then, must have been held.
30. S. and B. Webb, The Manor and the Borough, p. 366: Extracts from the Newcastle upon Tyne Council Minute Book, 1639-56, Newcastle upon Tyne Records Committee (Newcastle, 1926)
31. Newcastle Council Minute Book, pp. 12-13, 7th March 1642; pp. 14, 15, 10th August 1642; p. 20, 19th September 1642; p. 24, 21st April 1643; p. 35, 28th March 1645; p. 52, 1st October 1645; pp. 58, 60, 20th February 1646, pp. 66-7, 26th October 1646; p. 85, 20th February 1647; p. 156, 6th April 1653; p. 185, 14th February 1654; pp. 202-3, 18th May 1655
32. *ibid.*, pp. 7-10, 10th December 1641; p. 11, 22nd February 1642; pp. 104-5, 24th August 1649; p. 131, 16th January 1652; p. 174, 15th September 1654; N.R.O., PC (D) 1, PC (D) 2, Burgh court book of Berwick-upon-Tweed
33. See also John Watson appointed officer of the town, on a salary of 40 shillings a week to 'look to the fforestallinge of Butter at the Kale Cross and the Ingrossinge of other Comodities by the Huxters there.' Newcastle Council Minute Book, p. 46, 9th June 1645; pp. 88-9, 15th March 1648; pp. 117-8, 25th March 1650
34. *ibid.*, pp. 182-3, 12th January 1655: N.C.A. 540/39, Newcastle Q/S Recog., p. 22, 16th May 1650
35. Newcastle Council Minute Book, pp. 102-4, 4th June 1649
36. S. and B. Webb, The Manor and the Borough, p. 499
37. J. Hodgson, History of Northumberland, part ii, vol. II, p. 429
38. T. Smout, A History of the Scottish People, p. 27
39. See the chapter on the franchise courts with regard to Kelso,
40. T. Smout, A History of the Scottish People, p. 147
41. *ibid.*, p. 148
42. W. McDowall, History of the Burgh of Dumfries (Dumfries, 1906), p. 350: G. S. Pryde, 'The burgh courts and allied jurisdictions', in Introduction to Scottish Legal History, Stair Society, vol. XX, (1958), p. 385; S.R.O., GD/123/183 p. 1, Selkirk burgh court, 9th December 1687; GD/123/205, Selkirk burgh court, 6th December 1687
43. James Mitchellhill, burgess of Selkirk, son of William Mitchellhill, baillie of Selkirk, 1668-88, son of William Mitchellhill, baillie of Selkirk in the 1620's. Michael Mitchellhill, burgess of Selkirk in the 1660's, son of Michael Mitchellhill, burgess of Selkirk in 1634: S.R.O. GD/123/182, 5th August 1668; GD/123/183 p. 1, Selkirk burgh court, 9th December 1687; GD/123/184, 16th January 1621, 17th July 1634, October 1688; GD/123/185, 27th January 1687; GD/123/190, undated documents; GD/123/194 undated documents; GD/123/195, 16th August 1672

44. W. McDowall, Dumfries, p. 359: Marquis of Bute and Miss C. Arnet (transcribed), Kirkcudbright Town Council Records, (Edinburgh, 1958), p. 649, Counc. mins, 3rd December 1641. (Hereafter Kirkcudbright)
45. Hawick Mus., 1/1/1 Jed. Coun. Mins., 15th August 1622, 20th November 1645, 26th June 1654: 1/1/2, 25th October 1665: 1/1/3, 30th June 1683: See the Border Commissioners gaolers' accounts S.R.O. GD/123/157, 11th January 1675: See also Jedburgh refused to commit the Earl of Buccleugh's prisoner to gaol until the bailiffs received payment, R.P.C.S., ser. 1, vol. XIII, p. 485, 30th March 1624: Rosina McKoscrie, a suspected witch, was detained in Kirkcudbright until she received trial by a superior court; Kirkcudbright, p. 712, Coun. Mins., 21st March 1644: Dumf. M.C., 1/1/3, Dumf. Coun. Mins., 21st September 1663
46. Hawick Mus., 1/1/2, Jed. Coun. Mins., 4th August 1662; 1/1/4, 15th March 1691: See the Border Commissioners and the burgh gaols, pp. 126-8: Kirkcudbright p. 341, Coun. Mins., 31st January 1627
47. See the chapter on the justices of the peace for details of the disagreement between Selkirk Burgh and the justices of the peace, p. 264: Dumf. M.C., 1/1/2, Dumf. Coun. Mins., 11th July 1662: 1/1/3, 5th September 1663: Hawick Mus., 1/1/2, Jed. Coun. Mins., 15th July 1663,
48. Selkirk appointed 2 birlaw men in January 1688 and 2 'landimoorers' (beaters of the bounds) at the same time; both were annual appointments. Dumf. M.C., 1/3/1, Dumf. burgh court, 18th December 1658, 29th January 1659: Hawick Mus., 1/1/4 Jed. Coun. Mins., 18th December 1707: Kirkcudbright, p. 3, Coun. Mins., 23rd July 1606; p. 24, 13th October 1607; p. 38, 12th October 1608; p. 421, 13th October 1630; p. 471, 17th April 1633: W. McDowall, Dumfries, p. 350: S.R.O. GD/123/183, p. 4, Selkirk burgh court, 21st January 1688: Dumf. M.C., 1/1/3, Dumf. Coun. Mins., 12th October 1663, 13th October 1663
49. Hawick Mus., 1/1/4, Jed. Coun. Mins., 18th December 1707: Kirkcudbright, p. 628, Coun. Mins., 6th January 1641
50. Kirkcudbright, p. 750, Coun. Mins., 29th May 1645: Hawick Mus., 1/1/4, Jed. Coun. Mins., 18th April 1691: Dumf. M.C., 1/1/2, Dumf. Coun. Mins., 6th January 1663: -Charters and Documents relating to the Burgh of Peebles, Scottish Burgh Record Society, (1872), p. 360
51. Kirkcudbright, p. 230, Coun. Mins., 20th May 1618; p. 882, 9th October 1650: S.R.O. GD/123/183, p. 9, Selkirk burgh court, 19th May 1688: G. S. Pryde, (ed.) Court Book of the Burgh of Kirkintilloch, 1658-94, Scottish History Society, ser. 3, vol. LIII (1963), p. lxviii
52. G. S. Pryde, Kirkintilloch, p. lxix: Kirkcudbright, p. 16, Coun. Mins., 29th April 1607; p. 19, 27th June 1607; p. 584, 17th October 1638: Hawick Mus., 1/1/1 Jed. Coun. Mins., 13th November 1648; 1/1/3, 22nd September 1677, 25th September 1680: S.R.O. GD/123/183, p. 3, Selkirk burgh court, 14th January 1688

53. Kirkcudbright, p. 24, Coun. Mins., 13th October 1607; p. 38, 12th October 1608; p. 75, 27th June 1610; pp. 421-2, 13th October 1630; p. 882, 9th October 1650: Hawick Mus., 1/1/1 Jed. Coun. Mins., 31st December 1622, 10th November 1651: W. McDowall, Dumfries, p. 352
54. Dumf. M.C. 1/3/1, Dumf. burgh courts, 18th December 1658, 12th February 1659
55. See sources for a description of Dumfries court records. G. S. Pryde, 'Burgh Courts', p. 387: Kirkcudbright, p. 26, Coun. Mins., 28th October 1607; p. 35, 1st June 1608; p. 420, 25th August 1634
56. Lawburrows were also taken by the burgh courts. Kirkcudbright, p. 18, Coun. Mins., 2nd June 1607; p. 32, 5th April 1608; p. 60, 9th January 1610
57. Richard Halywell, merchant of Selkirk was referred to the Border Commissioners for trial. S.R.O. GD/123/190, 17th June 1687, 15th January 1688: Kirkcudbright, p. 506, Coun. Mins., 15th April 1635; p. 876, 26th June 1650: Dumf. M.C. 1/1/2 Dumf. Coun. Mins., 12th June 1663: Hawick Mus., 1/1/3, Jed. Coun. Mins., 14th June 1681
58. See the chapter on the church courts.
59. The inhabitants of Kirkcudbright in 1615 were forbidden to eat flesh on Fridays or Wednesdays. Drunkards and blasphemers were to be fined 20 shillings and 40 shillings respectively. Dumf. M.C., 1/1/3, Dumf. Coun. Mins., 14th March 1664: Hawick Mus., 1/1/1 Jed. Coun. Mins., 20th May 1632, 1/1/3, 31st December 1683; 1/1/4, 14th May 1696: Kirkcudbright, p. 121, Coun. Mins., 21st October 1612; pp. 175-6, 11th October 1615; p. 662, 14th April 1642; p. 712, 21st March 1644
60. Mary Neverne was fined 40 shillings by the Kirkcudbright magistrates in November 1615 for blaspheming Elspeth Scott 'as is provin befoir the Sessione.' Margaret Calek was fined 10 marks by them for evil words against the magistrates and ordered to appear before the minister and congregation to confess her sins: Kirkcudbright, p. 140, Coun. Mins., 13th October 1613; p. 180, 15th November 1615; p. 585, 29th October 1638
61. Gilbert Read was fined £10 by Kirkcudbright magistrates for striking John Callan and his wife in March 1637. Because the offence had been committed on the Sabbath, he was referred to the kirk session for further punishment. Kirkcudbright, p. 491, Coun. Mins., 27th August 1634; p. 548, 5th March 1637
62. Thomas Haining stood caution for John Kermount before Kirkcudbright magistrates 'that he sall haf na carnall copulation with Marione Queitheid quhill they be maryit.' Andrew Rig, 'actit to the minster and magistrats that William Schennane webster sall mak his repentance and pey his penultie for his fornicatioun with Helen Staffeine and that he sall be tryis proclamit at the kirk of Kirkcudbright afoir his mariage under the pane of xx lib.' Kirkcudbright,

p. 207, Coun. Mins., 11th December 1616; p. 263, 29th November 1620; p. 339, 24th December 1626: Dumf. M.C., 1/1/3, Dumf. Coun. Mins., 29th January 1668; 9th July 1670

64. See above p.401, Margaret Alie, a thief in Jedburgh, banished to Barbados. Kirkcudbright, p. 464, Coun. Mins., 19th December 1632; p. 566, 4th December 1637; p. 588, 27th November 1638; p. 725, 23rd September 1644; p. 662, 14th April 1642; p. 757, 21st June 1645: Hawick Mus., 1/1/3 Jed. Coun. Mins., 14th June 1681: Dumf. M.C., 1/1/2 Dumf. Coun. Mins., 4th August 1662, 12th June 1663

65. Hawick Mus., 1/1/1 Jed. Coun. Mins., 24th May 1635; 1/1/4, 14th May 1696, 18th December 1703: Kirkcudbright, p. 584, Coun. Mins., 17th October 1638

66. See Peebles burgh plague precautions, 1636. Charters and Documents relating to the Burgh of Peebles, Scottish Burgh Record Society, (1872), p. 373: See chapters on the Central Courts and Border Commissioners for details of plague acts of 1636 and 1637: Hawick Mus., 1/1/1, Jed. Coun. Mins., 3rd May 1637; 1/1/3, 1st December 1674; 1/1/4, 7th November 1692: Kirkcudbright, p. 16, Coun. Mins., 29th April 1607; p. 735; 9th December 1644: W. McDowall, Dumfries, p. 341: R.P.C.S., ser. 2, vol. VI, pp. 246-7, 24th May 1636; p. 292, 19th July 1636; p. 303, 28th July 1636; pp. 310-11, 7th September 1636; pp. 431-2, 3rd June 1637; p. 444, 10th June 1637

67. G. S. Pryde, 'Burgh Courts', p. 387

68. T. Smout, A History of the Scottish People, p. 150: Dumf. M.C., 1/1/2, Dumf. Coun. Mins., 24th February 1663; 1/1/3, 31st August 1663, 5th October 1663, 4th January 1664

NOTES TO CHAPTER VIII: THE ECCLESIASTICAL COURTS

I. Sources

1. England

It has been explained in the text how, until 1619, it was the bishop's chancellor who carried out the regular visitations of Northumberland archdeaconry. There are, therefore, no archdeaconry books for that period; but the chancellor's visitations are recorded in a series of volumes. These are housed in the Durham University Department of Palaeography and Diplomatic. (DR II/5, 1601-8; DR II/6, 1608-9 ; DR II/7, 1609-18). These bound volumes contain probations and administrations as well as the judicial proceedings at each court held. The archdeacon resumed visitations in 1619 and details of those prosecuted are contained in act books (DR VIII/2 and DR VIII/3, 1619-24). Unfortunately, the proceedings of the archdeacon at each court in each year are not shown, merely lists of names with the offence committed and punishment given. These are not arranged chronologically. It is, therefore, impossible to tell how many cases the archdeacon dealt with in any one year.

The records of the consistory court at Durham are in two sections. In one section are the registers of civil suits between party and party, with criminal suits brought by the judge at the promotion of others. (DR III series, /6 to /16, 1606-78). A separate series of act books 'ex officio' were kept for criminal cases brought by the judge on his own accord. (DR IV series). As explained in the text however, there are few cases in these records from the archdeaconry of Northumberland between 1603 and 1619, because the chancellor was carrying out visitations. As the seventeenth century progressed, criminal actions became increasingly rare.

The records of the Ecclesiastical Court of High Commission in the diocese of Durham have been printed by the Surtees Society. (vol. XXXIV (1858)). These give full details of cases between 1626 and 1637. For some years, particularly those before 1632, there are few cases, which probably reflects the state of survival of the records.

2. Scotland

Numerous kirk session records survive for the Scottish Borders in the seventeenth century. Some of these are in very poor condition, some only cover a few years; but all reveal the same type of court business. As it was the interaction between the civil and ecclesiastical authorities that was the crucial issue in this study, it was decided that beyond noting the main characteristics of kirk session records in general, those documents from the main legal 'centres' on the Borders should be chosen for close analysis. Thus Dumfries and Jedburgh were selected for this purpose.

The Dumfries records cover the period 1648-61, 1668-88 and 1689-1712. The first of these volumes is in excellent condition and extremely detailed, giving a clear picture of the business of the kirk session. It is an especially valuable record with regard to the 1650's. The second and third volumes do not give as much detail as the first. (S.R.O. CH 2/537/13 - 15). The Jedburgh records do not give the same detail as the Dumfries documents, which are clearly out of the ordinary. They do, however, give the normal information on the type of case before the court and the administration of the kirk session. (CH2/552/1)

A similar large number of court records survive for the presbytery courts, but the choice of records was really determined by the kirk session records, so that the interaction between the different levels of the hierarchy might be studied. Thus, the excellent records of the presbytery of Jedburgh and Kelso were chosen (the Dumfries presbytery records do not survive for the same period as the kirk session documents). These cover the years 1606-1621, 1622-44, 1644-58 and 1663-82 (S.R.O. CH 2/198/1 - 4).

The number of synod records was, by their very nature, much smaller and few seem to have survived for the Borders. The Dumfries synod court records start only in 1691 (S.R.O. CH 2/98/1). The Lothian and Tweeddale synod records are the only other ones for the Borders and the only Border county they include is

Peeblesshire. Few cases, however, came before any synod court and the documents tend to be concerned with administrative matters. The Lothian and Tweeddale records reveal this function with regard to Peeblesshire quite adequately. (S.R.O. CH 2/252/2 - /7) between the years 1640 and 1710 (with a hiatus 1648-1655).

II. Notes

1. T. Smout, A History of the Scottish People, p. 67
2. 'Handlist', p. 145: W. Roland Foster, 'The Operation of Presbyteries in Scotland, 1600-1638', Scottish Church History Society, vol. XV (1963-5), pp. 21-2: J. J. Vernon, 'The Parish and Kirk of Hawick, 1711-25', Transactions of the Hawick Archaeological Society (1900), p. 100
3. G. Donaldson, Scotland, p. 199
4. *ibid.*, pp. 363, 365: See the chapter on the Central Courts for details of the Pentland Rising.
5. T. A. Martin, 'Church and Social life in Lauder during the latter half of the Seventeenth century', Transactions of the Hawick Archaeological Society (1902), p. 61
6. S.R.O. CH/2/252/2, /3, /4, /5, /6, /7: Lothian and Tweeddale syn.
7. S.R.O. CH/2/252/2, Loth./Tweed, syn., p. 25, 27th April 1641; p. 51, 3rd-4th May 1642; p. 170, 3rd November 1646: CH/2/252/3 p. 22, 7th November 1655
8. S.R.O. CH/252/2 Loth./Tweed. syn. p. 40, 1st-4th November 1641; pp. 114-5, 5th November 1644; pp. 258-9, 2nd May 1648
9. See also the presbytery of Jedburgh and Kelso requested the synod's advice on the case of Andrew Turnbull who baptised his children in an illegal manner. He had refused to concur with either the kirk session or the presbytery and was therefore referred to the synod. S.R.O. CH/252/2 Loth./Tweed. syn. p.65, 1st-3rd November 1642; p. 171, 3rd November 1646; p. 188, 4th May 1647; CH/2/198/3A Jed./Kel. presby., 2nd April, 4th June 1673
10. S.R.O. CH/252/2 Loth./Tweed. syn. p. 2, 14th April 1640; pp. 34, 45, 1st-4th November 1641; p. 65, 1st-3rd November 1642; p. 100, 20th April - 1st May 1644; p. 257, 2nd May 1648: CH/252/2 p. 22, 7th November 1655
11. W. Roland Foster, 'The Operation of Presbyteries in Scotland', pp. 27-30: R.P.C.S., ser. 3 vol. I, p. 125, 2nd January 1662
12. S.R.O. CH/2/198/1 Jed./Kel. presby., 22nd April 1607, 19th June 1607, 26th April 1609, 10th May 1609, 30th August, 1609, 18th January 1610, 16th May 1610
13. See the case of Andrew Turnbull, note 9 above. S.R.O. CH/198/1 Jed./Kel.

presby. 22nd October 1606, 26th August 1607, 20th May 1612: CH/198/3A,
23rd March 1670, 18th May 1670, 2nd October 1672

14. See also Ragwell Bennet of Chesters who was charged with fornication and adultery in 1613 and 1617. S.R.O. CH/198/1 Jed./Kel. presby., 20th November 1606, 27th November 1606, 12th August 1607, 25th November 1607, 15th December 1607, 7th December 1608, 5th April 1609, 3rd September 1613, 29th October 1617

15. S.R.O. CH/198/1 Jed./Kel. presby., 25th December 1606, 25th March 1607, 6th May 1607, 8th July 1607, 30th September 1609, 14th October 1612, 19th May 1619, 31st May 1620: CH/2/198/2 24th September 1628

16. S.R.O. CH2/198/1 Jed./Kel. presby., 8th July 1607, 15th July 1607, 22nd July 1607, 4th November 1607, 11th November 1607, 29th August 1610, 20th December 1615, 2nd September 1618

17. See the case of James Foster and Janet Glendinning who were summoned six times by Jed./Kel. presby. and threatened with excommunication, 1606, 1607. George Douglas of Cavers was excommunicated for the slaughter of Mr. George Douglas of Tympenden in 1614: Jok of the Tongs and his two sons were excommunicated for the slaughter of George Herds in 1607, by Jed./Kel. presby. . W. Roland Foster, 'The Operation of Presbyteries in Scotland', p. 28: S. J. Davies, 'The Courts and the Scottish legal system 1600-1747', pp. 120-154: S.R.O. CH2/198/1 Jed./Kel. presby., 29th October 1606, 6th November 1606, 13th November 1606, 20th November 1606, 25th December 1606, 5th February 1607, 12th February 1607, 17th June 1607, 27th December 1614: CH2/198/3A, 5th December 1676, 25th December 1678, 1st June 1679

18. S.R.O. CH2/198/1 Jed./Kel. presby., 5th April 1609; CH2/198/2 14th May 1634, 26th August 1634. Letters of slanes were letters subscribed, in the case of slaughter by the wife or relative of the one slain, acknowledging that satisfaction had been given - thus soliciting pardon for the offender.

19. J. J. Vernon, 'The Reverend Alexander Orrock of Hawick', Transactions of the Hawick Archaeological Society (1909), p. 25: T. A. Martin, 'Church and Social Life in Lauder', p. 62: W. McDougall, History of the Burgh of Dumfries (Dumfries, 1906), p. 392

20. J. J. Vernon, 'The Parish and Kirk of Hawick', p. 107: J. J. Vernon, 'The Parish and Kirk of Hassindean', Transactions of the Hawick Archaeological Society (1879), pp. 18-37: S.R.O. CH2/537/13 Dumf. K/S, 19th December 1648, 22nd December 1648, 29th December 1648, 1st January 1649, 5th January 1649, 8th January 1649, 26th January 1649: CH2/552/1 Jed.K/S, 21st March 1672, 24th March 1672, 31st March 1672

21. J. J. Vernon, 'The Reverend Alexander Orrock', p. 30: S.R.O. CH2/537/13 Dumf.K/S, 23rd August 1649, 27th April 1652: J. J. Vernon, 'The Parish and Kirk of Hassindean', p. 31; J. J. Vernon, 'The Parish and Kirk of Hawick', p. 104: T. A. Martin, 'Church and Social Life in Lauder', p. 65
22. T. Smout, A History of the Scottish People, p. 77: 'Handlist', p. 145: S. J. Davies, 'The Courts and the Scottish legal system 1600-1747', pp. 120-54
23. S.R.O. CH2/198/1 Jed./Kel. presby., 28th October 1607, 11th November 1607
24. S.R.O. CH2/552/1 Jed.K/S, 2nd June 1672, 20th October 1672, 3rd November 1672, 17th November 1672, 1st September 1678: CH2/537/13 Dumf.K/S, 29th January 1649, 1st February 1649: J. J. Vernon, 'The Parish and Kirk of Hassindean', p. 32: J. J. Vernon, 'The Reverend Alexander Orrock', p. 26
25. S.R.O. CH2/552/1 Jed.K/S, 25th May 1673, 4th April 1680, 25th April 1680, 17th February 1684, 27th July 1684, 3rd August 1684, 25th January 1686: CH2/537/13 Dumf.K/S, 29th December 1648, 23rd July 1657
26. J. J. Vernon, 'The Reverend Alexander Orrock', pp. 27, 28: J. J. Vernon 'The Parish and Kirk of Hassindean', p. 31: S.R.O. CH2/537/13 Dumf.K/S, 3rd May 1649, 10th May 1649, 31st May 1649, 4th June 1649, 16th August 1649
27. S.R.O. CH2/198/1 Jed./Kel. presby., 30th September 1607. See cases in English High Commission courts where a spouse would complain against his/her partner for adultery: e.g. Alexander Veatch and Elinor Boswell presented to the court by William Boswell. Acts of the High Commission in the Diocese of Durham, Surtees Society, vol. XXXIV (1858), p. 178, court 20th June 1637
28. S.R.O. CH2/537/13, Dumf.K/S, 29th January 1649, 15th March 1655: CH2/552/1 Jed. K/S, 2nd November 1673
29. S.R.O. CH2/537/13 Dumf.K/S, 1st January 1649, 5th January 1649, 19th January 1649, 1st November 1649: CH2/552/1 Jed.K/S, 22nd September 1672, 10th February 1684, 25th May 1684
30. S.R.O. CH2/537/13 Dumf.K/S, 16th August 1649: CH2/552/1 Jed.K/S, 6th August 1672, 17th October 1675, 28th July 1678
31. S.R.O. CH2/537/13 Dumf.K/S, 6th June 1650, 11th February 1658, 11th March 1658
32. See also James Kennan and wife in Dumfries who were fined in 1657 for breaking Elspeth Morton's chair. S.R.O. CH2/537/13 Dumf.K/S, 21st December 1654, 23rd July 1657, 6th August 1657
33. S.R.O. CH2/537/13 Dumf.K/S, 29th December 1648, 1st January 1649, 5th January 1649: CH2/537/14, 14th January 1669, 11th March 1669: CH/552/1 Jed.K/S, 2nd April 1672, 14th April 1672, 26th May 1672, 7th July 1672, 4th August 1672, 6th July 1673
34. S. Davies, 'The Courts and the Scottish legal system 1600-1747', pp. 120-54: S.R.O. CH2/537/13 Dumf.K/S, 22nd December 1648, 1st January 1649, 23rd April 1657: CH2/537/14, 25th March 1669, 1st April 1669, 8th April 1669: CH2/552/1 Jed.K/S, 15th June 1673

35. There were restrictions in each area on the amount of money which could be spent per head at weddings - those who violated these restrictions were fined. Melrose reg., vol. II, p. 197, 21st December 1667: J. J. Vernon, 'The Parish and Kirk of Hassindean', pp. 32, 34: S.R.O. CH2/537/13 Dumf.K/S, 15th March 1649, 22nd March 1649, 25th April 1649, 11th October 1649, 18th May 1654: CH2/552/1 Jed.K/S, 14th April 1672, 26th May 1672, 2nd June 1672, 21st July 1672, 28th July 1672, 6th August 1672, 1st September 1672, 9th November 1673, 12th December 1674, 30th May 1675, 28th December 1679
36. Janet Tansome who was accused of wanting to strangle her husband was ordered to be carried through the town of Dumfries. S.R.O. CH2/537/13, Dumf.K/S, 6th June 1650, 15th March 1655, 2nd November 1655, 11th June 1657, 16th July 1657: CH2/553/1 Jed.K/S, 25th May 1673, 21st March 1680
37. S.R.O. CH2/552/1 Jed.K/S, 28th April 1672, 28th July 1678
38. In February 1628 the Privy Council ordered the Border Commission to support the kirk by authorising them to apprehend all excommunicated people charged with recusancy, adultery, and 'other nefarious crymes' in Annandale, who 'most obdurantly stands out aganis the ordour of the kirk', 'refusing to give obedience to the discipline thereof.' The offenders were to be delivered to the ministers for punishment. In March 1629 the moderator and presbytery of Dumfries pursued the Countess of Nithsdale, Lady Herries and Lady Kirkconnell before the Privy Council, for contempt of excommunication. R.P.C.S., ser. 1, vol. VII, p. 403, 2nd February 1607; vol. VIII, p. 198, 23rd November 1608; p. 425, 15th February 1610; ser. 2, vol. II, pp. 224, 568, 7th February 1628; vol. III, 17th March 1629
39. See the chapter on the burgh courts for a discussion of the business before those courts. See Chapters V and VI for relationship with the justices of the peace and franchise courts. Stitchill bar., p. 21
40. In December 1648 Janet Furman who committed adultery with John Haistie received a public rebuke; when she committed adultery again in 1656 she was referred to the Justice Court by Dumfries K/S. S.R.O. JC 10/4 Jed. J.C., 15th October 1679: JC 27/3 Dumf. J.C., 13th May 1656: CH2/537/13 Dumf.K/S, 22nd December 1648, 10th December 1657, 4th March 1658: CH2/552/1 Jed.K/S, 30th June 1672, 7th July 1672, 21st July 1672, 28th July 1672, 4th August 1672, 18th August 1672, 25th May 1673, 16th June 1673, 29th June 1673, 15th October 1679
41. S.R.O. JC 10/3 Dumf. J.C., 11th May 1671
42. S.R.O. CH2/537/13 Dumf.K/S, 17th May 1649, 16th August 1649, 24th November 1659, 24th May 1660, 15th June 1660, 14th March 1661: CH2/552/1 Jed.K/S, 10th August 1679

43. J. J. Vernon, 'The Parish and Kirk of Hawick', p. 38: S.R.O. CH2/537/13 Dumf.K/S, 21st December 1654
44. See also James Huggen in Caffield, indicted for the theft of livestock before the Border Commissioners, whose testificate stated that he 'wes ever hitherto of ane honest reputation, well reported of before he come amongst us' 10 years previously. He was banished rather than hanged. S.R.O. GD/123/188, Selkirk B.C.court, 23rd March 1676
45. See also James McDowell and Isobel Walker, referred back to Jedburgh K/S from the Justice Court for adultery. See also the way in which the franchise courts could refer cases to the kirk session for punishment, above p. 350 S.R.O. JC 10/4, Jedburgh J.C., 15th October 1679
46. R. Houlbrook, Church Courts and the People during the English Reformation, 1520-70 (Oxford, 1979), p. 27
47. *ibid.*, p. 32: See below pp 441-2 for discussion of Northumberland Visitation records.
48. R. A. Marchant, The Church under the Law (Cambridge, 1969), p. 14; J. Addy, The Archdeacon and Ecclesiastical Discipline in Yorkshire, 1598-1714: Clergy and the Churchwardens, St. Anthony's Hall Publications, no. 24 (York, 1963): V. C. H. Cumberland, vol. II, pp. 119-20: See note 47 above
49. Durham University, Dept. of Palaeography and Diplomatic, DR/IV/6, DR/IV/7, Durham Consistory Court Act Book
50. I am grateful to Dr. Andrew Foster and archivists at Durham University Department of Palaeography and Diplomatic for their observations on the Northumberland visitation records.
51. See the chapter on the justices of the peace for details of the duties of the church-wardens in regard to the secular courts.
52. J. Addy, The Archdeacon and Ecclesiastical Discipline in Yorkshire, pp. 19, 20, 25
53. Dur. Univ. DR/II/5, Visit., f. 93, Corbridge, 11th March 1605
54. J. Addy, The Archdeacon and Ecclesiastical Discipline in Yorkshire, p. 11
55. Dur. Univ. DR/II/5, Visit., f. 56, Newcastle, 6th February 1604; ff. 74, 75, Alnwick, 24th July 1604; f. 105, Corbridge, 17th June 1605; f. 128, Alnwick, 5th November 1605. See above p. 32.
56. Dur. Univ. DR/II/5, Visit., f. 134, Corbridge, undated [November 1605]
57. Canon Eric Kemp, quoted in R. A. Marchant, The Church under the Law, p. 1
58. Dur. Univ. DR/II/5, Visit., f. 65, unplaced, 15th April 1604; f. 76, Morpeth, 15th July 1604; f. 109, Newcastle, 18th July 1605; f. 134, Corbridge, undated [November 1605]: DR/VIII/2 Archdeacon Acts, f. 66, 4th November 1619: DR/VIII/3, f. 78, July 1620

59. Dur. Univ. DR/IV/7 Dur. Consist. court, f. 182, undated
60. Dur. Univ. DR/II/5, Visit., f. 56, Newcastle, 6th February 1604; f. 74, Alnwick, 24th July 1604; DR/VIII/2 Archdeacon Acts, f. 67, undated.
61. Dur. Univ. DR/II/5 Visit., f. 65, unplaced, 15th April 1604, ff. 69, 70, Bamburgh, 23rd July 1604; ff. 73-4, Alnwick, 24th July 1604; f. 79, Corbridge 30th July 1603 (sic.) [means 1604]; f. 134, Corbridge, undated [November 1605]
62. Dur. Univ. DR/II/5 Visit., f. 80, Newcastle, 30th July 1604; DR/IV/7 Dur. Consist. court, 1st July 1609: N.R.O. QS/I/1 f. 106, Morpeth Q/S court, 3rd April 1611: 1/DE/7 no. 16, 22nd December 1608; no. 35 undated [1609-10]; no. 62, 21st October 1618; no. 63, 20th October 1618
63. Dur. Univ. DR/II/5 Visit., f. 106, Corbridge, 17th June 1605; f. 132 Morpeth, 6th November 1605. See also Henry Musgrave and Agnes Harrison who were convicted of adultery at Corbridge in June 1605, who were to perform their penance for 2 days in church and a further 2 days in the market place at Haltwhistle
64. Dur. Univ., DR/II/5 Visit., f. 63, Berwick 17th May 1604; f. 108, Newcastle, 18th June 1605; f. 113, Alnwick, 20th June 1605; f. 136, Corbridge undated [November 1605]
65. Dur. Univ. DR/II/5, Visit., f. 64, unplaced, 15th April 1604; f. 77, Corbridge, 30th August 1603 (sic.) [means 1604]; f. 108, Newcastle, 18th June 1605; f. 113, Alnwick, 20th June 1605; DR/VIII/2 Archdeacon Acts, ff. 66, 70; DR/VIII/3, f. 2, 5th October 1622: R. A. Marchant, The Church Under the Law, p. 227
66. Dur. Univ., DR/II/5 Visit., f. 74, Alnwick, 24th July 1604; f. 77, Corbridge, 30th August 1603 (sic.) [means 1604]; f. 91, Corbridge, 11th March 1605; f. 94, Newcastle, 12th March 1604; f. 105, Corbridge, 17th June 1605; f. 131, Morpeth, 6th November 1605. See below for description of High Commission and influential offenders.
67. J. Addy, The Archdeacon and Ecclesiastical Discipline in Yorkshire, pp. 10-11: R. A. Marchant, The Church under the Law, pp. 141-5
68. J. P. Kenyon, The Stuart Constitution, pp. 176-80, 181-5
69. R. A. Marchant, The Church under the Law, pp. 33-4: J. P. Kenyon, The Stuart Constitution, p. 178
70. The difference in the figures for cases of non-conformity between the visitation courts and the High Commission, is possibly a reflection of the two different political and religious situations in 1604-5 and the 1620's and 30's, as much as of the courts. The concentration of such cases in the period 1633-7 would seem to indicate that this could be the case, although most of the prosecutions were against very powerful people.

71. The Acts of the High Commission Court in the Diocese of Durham, Surtees Society, vol. XXXIV (1858), p. 33, court 25th October 1632
72. See the chapter on the Border Commissioners for Sir William Selby and Henry Widdrington and William Fenwick: the chapter on the sheriff courts for Robert Brandling.
73. The Acts of the High Commission, pp. 53-68, court 9th August 1633
74. J. P. Kenyon, The Stuart Constitution, p. 179: Acts of the High Commission, pp. 53-68, court 1st April 1634
75. Acts of the High Commission, pp. 26-7, courts 1st July 1630, 12th January 1632, 10th January 1633, 25th June 1635, 30th July 1635
76. *ibid.*, p. 18, courts 12th February 1629, 12th April 1632; p. 27, courts 1st July 1630, 12th January 1632, 10th January 1633, 25th June 1635, 30th July 1635; p. 29, court 12th January 1632; pp. 53-68, courts, 9th August 1633, 5th September 1633, 26th September 1633, 28th November 1633, 1st April 1634

NOTES TO CONCLUSION

1. See tables 21 and 22 on pages 186 and 187 in the chapter on the Border Commissioners, also pp. 204-5.
2. Between Sark and Eden there were 34 tenants, of whom 29 were Grahams. At Solport, 6 out of 7 tenements were held by Grahams. Between the Black and the White Leven, 20 out of the 36 tenants were Routledges and in Crew, in Bewcastle, 17 out of the 21 tenants were called Nixon. G. P. Jones, 'King James and the Western Border', T.C.W.A.A.S., new series, vol. LXIX (1969), p. 138
3. That is not to say that those of gentlemanly status and above did not commit offences. The records of Star Chamber show that this was not the case, see above p. 34 and table 8. But the records do show that the type of offence most common to the upper orders of society were mainly, miscarriage of justice and land disputes. P.R.O. SP/14/97 no. 60 I, 8th May 1618: C.R.O. Munc. MSS, ff. 89-90, 27th March 1606; f. 105, 19th April 1606: (Crawf. MSS ff. 102-3, 118)
4. Alexander Jardine of Apilgarth, John Carruthers of Holmendis, sent to St. Andrews; William Maxwell, apparent of Tynwall, Robert Carlile of Brydekirk, sent to Montrose: R.P.C.S., ser. 1, vol. VII, p. 719 17th May 1606; vol. VIII, pp. 7-8, 26th November 1607
5. See the chapter on the Border Commissioners, above p. 100 for career of Walter Scott of Buccleugh. See also the Elliots of Dunlaybyre, who in the early seventeenth century were thieves: William Elliot of Dunlaybyre was a notorious thief executed by the Earl of Dunbar at Berwick in February 1607 although his descendant of the same name was a Border Commissioner and justice of the peace. R.P.C.S., ser. 1, vol. XIII, p. 17, 18th July 1622: P.R.O. SP/14/63 no. 99I 28th May 1611: S.R.O. GD/123/211 p. 1, Jed. B.C. Court, 22nd July 1674: C.R.O. Munc. MSS. f. 175, 15th February 1607 (Crawf. MSS. ff. 202-3)
6. C.R.O. Munc. MSS f. 61, undated (Crawf. MSS f. 65): R.P.C.S., ser. 1, vol. VII, p. 347, 9th April 1607; p. 382, 4th June 1607; p. 398, 25th June 1607; vol. VIII, p. 343, 4th August 1609; vol. X, pp. 393, 398, 15th September 1615; vol. XI, p. 216, 26th August 1617; vol. XIII, p. 261, 17th June 1623: P.R.O. SP/14/6 no. 43, January 1604
7. N.C.A. 540/39 Newcastle Q/S Recog., p. 44, 16th January 1651
8. See for example, Henry Graham, a horse thief from Carlisle, 1606; Alexander Armstrong, a sheep thief from Carlisle, 1670's. N.R.O. QS/I/1 f. 62, Newcastle ass. court, 28th August 1606: P.R.O. ASSI/44/22 Carlisle, ass. court, August 1674. Graphs 6 and 7 would seem to show that yeomen committed the most offences in the early part of the century, but that labourers committed most after the Restoration. These figures are drawn from two sets of documents and are likely to reflect the different methods of categorisation by the clerks of the

court as much as any intrinsic change in the type of person committing the offences. This may, of course, not be the case, but it would seem to be the safest conclusion.

9. See the chapter on the Border Commissioners for the complex theft patterns of post-Restoration thieves, above pp. 168-70.

10. The position of the clans on the Anglo-Scottish Border was similar to that of the march warriors on the borders of the Ottoman state. Like the Grahams, these men had been a source of strength in the early years of the state, but later they became an embarrassment. They were, to a considerable extent, their own masters, living according to their own rules and codes of conduct. The raids they carried out were, like those of the Anglo-Scottish clans, not important military expeditions, but were important economic exercises whose main purpose was to collect booty, usually in the form of livestock. P. F. Sugar, 'The Ottoman Professional Prisoner on the Western Borders of the Empire in the sixteenth and seventeenth centuries', Etude Balkanique, vol. VII, (1) (1971), pp. 82-91; P.R.O. SP/14/6 no. 43, January 1604; SP/14/97 no. 60, 8th May 1618; P.R.O. SP/14/90 no. 157, March 1617; SP/14/97 no. 60I, 8th May 1618; ASSI/44/11, Newcastle ass. court, 19th August 1663; ASSI/44/15 Morpeth B.C. court, 17th January 1667; ASSI/42/2 pp. 4, 6, Morpeth B.C. Court, 3rd October 1666; p. 11, Morpeth B.C. court, 17th January 1667; p. 22, Carlisle B.C. court, 10th October 1667; p. 25, Morpeth B.C. court, 16th January 1668; ASSI/45/6/3 nos. 46-50, 20th April 1663, 21st April 1663, 30th May 1663, 29th June 1663, 1st August 1663; N.R.O. 1/DE/7 no. 105, undated: R.P.C.S., ser. 1, vol. IX, p. 712, Dumf. B.C. court, 16th-21st October 1611; S.R.O. GD/123/188 Jed. B.C. court, 15th February 1681; GD/123/196 Jed. B.C. court, 23rd April 1677; GD/123/201 Jed. B.C. court, 14th December 1674; GD/123/207 Jed. B.C. court, 23rd April 1677, Morpeth B.C. court, 13th January 1677; GD/123/210 p. 112, Jed. B.C. court, 23rd April 1677; p. 119, Jed. B.C. court, 25th June 1677; p. 140, Jed. B.C. court, 10th October 1677

12. See above p. 521 note 186.

13. C.R.O., Munc. MSS f. 59, undated; f. 74, 26th February 1606; f. 76, 27th February 1606; f. 137, 10th September 1606; f. 158 22nd November 1606; f. 167 8th January 1607; f. 170, 29th January 1607; ff. 183-4, Carlisle B.C. court, 24th April 1606 (Crawf. MSS ff. 62-3, 85, 87, 153-4, 177, 189, 194, 214): P.R.O. SP/14/63 no. 99I, 28th May 1611: R.P.C.S., ser. 1, vol. IX, p. 707, Jed. B.C. court, 28th October 1611; vol. XIV, pp. 702, 704, 713, Jed. B.C. court, 16-19th April 1623

14. N.R.O. 1/DE/7 no. 109, undated: QS/I/1, Morpeth Q/S court, 1st July 1607: R.P.C.S., ser. 2, vol. VI, p. 408, Jed. B.C. court, 23rd February 1637

15. R.P.C.S., ser. 1, vol. XI, p. 327, 10th March 1618: P.R.O. SP/14/63 no. 99I

- 28th May 1611: C.R.O. Munc. MSS, ff. 89-90, 27th March 1606 (Crawf. MSS f. 10)
16. Notable Scottish exceptions were the Johnstones of Earshag and the McClamerocks of Midorchard. It is interesting that neither of these families came from the areas very close to the actual frontier: Earshag is in the hills near Beattock, close to the Lanarkshire border and Midorchard is in Galloway. Perhaps this accounts for the fact that their family as thieves were kept intact and not broken up as those closer to the actual border were.
17. See the chapter on the Border Commissioners for details of how the thieves disposed of their goods, pp. 168-70; See also p. 166 for details of the Commissioners 'house to house enquiries'.
18. T. Rymer, Foedera, vol. XVI, p. 609
19. See above, Introduction.
20. S. J. Watts, From Border to Middle Shire, p. 41. See above, Introduction p. for details on the economic types on the Borders.
21. J. Samaha, Law and Order in Historical Perspective: the Case of Elizabethan Essex (New York and London, 1974), pp. 22, 36
22. See above, Introduction.
23. J. S. Cockburn stated that over the period 1560-1714, around 10 per cent of those convicted by the assize judges were executed. Allowing for difficulties in what exactly he meant by 'convicted' and thus, taking it in its widest possible sense to mean everyone who was not found not guilty, acquitted, discharged or ignoramus, the chapter on the assizes shows that this was a similar figure to that of the Borders in the post-Restoration period and also for the Border Commissioners. The early seventeenth century Border Commissioners records reveal that 36 per cent of those 'convicted' were executed. But the 1627-8 gaol calendars reveal only 20 per cent were executed. If the Commissioners were executing at the same rate as the assizes (as they were in the period after the Restoration) then it would seem to indicate that their attitude to offenders had started to change before 1627-8.

BIBLIOGRAPHY

I Manuscript Sources

(A) National Repositories

(i) England

(ii) Scotland

(B) Local Repositories

(i) England

(ii) Scotland

II Printed Sources

(A) Primary Sources

(B) Secondary Sources

I. Manuscript Sources

(A) National Repositories

(i) England

British Library, Department of Western Manuscripts, London

Additional MSS 34011 (Kings MSS 810) 'List of suspected persons in the northern counties of England, 1655'

36913 'Articles for easing the county of Northumberland, bishoprick and town of Newcastle ... the 16th October 1640'

Harleian MSS 7581 'Serjeant Davis's charge at York assizes, lent 1620'

Sloane MSS 1856 'Causes of disorder in the Scottish Commonwealth, c. 1603'

Public Record Office, Chancery Lane, LondonAssizes

ASSI/42/2 Gaol Book of the Border Commissioners, 1665-76
 ASSI/44/1-44 Northern Assize Circuit Indictments, 1607-99
 ASSI/45/1-18 Northern Assize Circuit Depositions, 1613-1730
 ASSI/47/20 Northern Circuit Miscellaneous collection, 1605-1760

Crown Office

C 181/1-7 Crown Office Entry Book of Commissions, 1601-73

State Papers

SP 14 - SP 34

State Papers Domestic, James I - Anne I

Star Chamber

STA/8/3-308

Star Chamber Index James I

STA/9/1/35

Star Chamber Index Charles I

(ii) Scotland

Scottish Record Office, Register House, EdinburghHigh Court of Justiciary

JC 6/4-14	High Court minute books, 1652-1701
JC 10/1	Court Book of the Border Commissioners, 1622-3 (now PC 8/5)
JC 10/2	Minutes of the southern circuit justiciary courts, 1658-9
JC 10/3	Minutes of the southern circuit justiciary courts, 1671
JC 10/4	Minutes of the southern circuit justiciary courts, 1679-84
JC 26/4-80	Small papers, main series, 1601-99
JC 27/3	Small papers, supplementary series: southern circuit justiciary courts, 1643, 1656
JC 27/4	Small papers, supplementary series; southern circuit justiciary court, 1652

Erskine of Dum Muniments, Riddle of Hayning Papers (series mainly relates to the activities of the Scottish Border Commission)

GD/123/155	Miscellaneous financial legal papers
GD/123/157	Miscellaneous legal papers, including gaolers accounts to the Border Commissioners, 1675
GD/123/175	Miscellaneous legal papers, 1660-77
GD/123/182	Legal papers relating to the burgh of Selkirk, 1656-88
GD/123/183	Sederunt of the Town Council of Selkirk, 1687-8
GD/123/184	Papers relating to the burgh of Selkirk, 1634-1767
GD/123/185	Border legal papers, 1622-89: including material from the sheriff of Selkirkshire, 1680's
GD/123/187	Border legal papers, 1632-84
GD/123/188	Border legal papers, 1633-99: including material from the sheriff of Selkirkshire, 1680's
GD/123/189	Border legal papers, 1643-89: including material from the sheriff of Selkirkshire, 1680's

- GD/123/190 Border legal papers, 1649-1702: including material from the sheriff of Selkirkshire, 1680's
- GD/123/191 Border legal papers, 1652-1683: including material from the sheriff of Selkirkshire, 1680's
- GD/123/192 Papers concerning the justiciary circuit courts held in the Borders, 1656-9 and the Border Commissioners' courts held in 1657, 1658
- GD/123/193 Border legal papers, 1658-80: including porteous rolls of the justiciary courts held in 1658
- GD/123/194 Border legal papers, 1660-1705
- GD/123/195 Border legal papers, 1662-1689: including material from the sheriff of Selkirkshire, 1680's
- GD/123/196 Border legal papers, 1663-1680: including material from the sheriff of Selkirkshire, 1680's
- GD/123/197 Border legal papers, 1664-92: including material from the sheriff of Selkirkshire, 1680's
- GD/123/198 Border legal papers, 1637-1707: including material from the J.P.s of Selkirkshire, 1681, 1707
- GD/123/199 Border legal papers, 1667-79
- GD/123/200 Border legal papers, 1661-86: including material from the sheriff of Selkirkshire, 1680's
- GD/123/201 Border legal papers, 1671-9
- GD/123/202 Border legal papers, 1676-93: including material from the sheriff of Selkirkshire, 1680's
- GD/123/203 Border legal papers, 1676-7
- GD/123/204 Border legal papers, 1676-7
- GD/123/205 Border legal papers, 1669-87: including material from the J.P.s and sheriff of Selkirkshire, 1680's
- GD/123/206 Border legal papers, 1676-93
- GD/123/207 Border legal papers, 1677-86
- GD/123/208 Justiciary court book of the proceedings of the Scottish Border Commissioners, 1674-5
- GD/123/209 Justiciary court book of the proceedings of the Scottish Border Commissioners, 1676
- GD/123/210 Justiciary court book of the proceedings of the Scottish Border Commissioners, 1676-80
- GD/123/211 Justiciary court book of the proceedings of the Scottish Border Commissioners, 1674-5
- GD/123/212 Border legal papers, 1619-99

Franchise Courts

GD/111/1/17 nos. 1-15 Regality of Jedforest: loose papers relating to courts held in the early seventeenth century

GD/111/1/30 nos. 1-12 Regality of Jedforest: miscellaneous loose legal papers, 1660-1747

GD/1/35 Baron courts of Godscroft, Horndean and Wedderburn: minutes, 1629-1720

RH/11/42/1 Baillie court of Kelso: court book, 1623-1682

RH/11/69/1 Baron court of Wamphray: two cases, 1684, 1687

RH/15/1 Baron court of Cockburnspath: loose papers of minutes of the courts, 1638-56

RH/15/2256 (or CS/96/2256) Baron court of Elshieshields: court book, 1656-80

Stewart Courts

RH/11/46/1 Stewart court of Kirkcudbright: 1 item (extracted), 1625

Synod Courts

CH 2/98/1 Synod of Dumfries: minutes, 1691-1707

CH 2/252/2-7 Synod of Lothian and Tweeddale: minutes, 1640-1710

Presbytery Courts

CH 2/198/1-6 Presbytery of Jedburgh and Kelso: minutes, 1606-1708

Kirk Sessions

CH 2/537/13-15 Dumfries kirk session: minutes, 1648-1712

CH 2/552/1 Jedburgh kirk session: minutes, 1672-1707

Scottish Record Office, West Register House, EdinburghSheriff Courts

SC 15/10/1-2 Dumfries sheriff court: boxes of processes, 1674-1707

SC 42/1/1-4 Peebles sheriff court: minute and diet books, 1652-1735

SC 62/2/3-8 Jedburgh sheriff court: diet books, 1601-1687

SC 62/2/10 Jedburgh sheriff court: index and diet book, 1631-9

SC 62/2/11 Jedburgh sheriff court: diet book of criminal processes, 1665-8

SC 62/2/12 Jedburgh sheriff court: diet book, 1669-71

Justices of the Peace

JP 3/2/1-3 Peeblesshire justices: minute books, 1656-78

National Library of Scotland, George IV Bridge, Edinburgh

Advocates' MS 5439 Roxburghshire justices: minutes, 1656-9

(B) Local Repositories

(i) England

Berwick-upon Tweed Record Office, Berwick-upon-Tweed

C/8/1 Berwick-upon-Tweed quarter sessions book, 1694-1726

Cumberland Record Office, Carlisle Castle, Carlisle

QS/I/1-2 Cumberland quarter sessions: minute books, 1668-1707

D/Lons./L. Shrievalty 'Memoires for the assizes at Carlisle, 22nd August 1661'
'Preparation against the assizes, 1662'

D/Lons./Council of North 'A Historical and Legal Record of His Majesties Council
in the North Parts, 1594-1637' compiled by Sir John Lowther
'Instructions to Viscount Wentworth, the Lord President
of the Council in the North Parts, 1637'

D/Pen/216 MSS of Lord Muncaster, the records of the Border
Commissioners, 1605-7

D/Lec/103, 105, 299A Cockermouth court leet records, 1639, 1640, 1641, 1654-76
Ca/3/21-45 Carlisle court leet records, 1619-1703

Durham University Library, Durham

Mickleton and Spearman MSS 9/1-2, Sheriff Books of Thomas Swinburne 1628-45

Durham University, Department of Palaeography and Diplomatic, Durham

DR II/5-7 Chancellor's Visitation of Northumberland Archdeaconry:
visitation books, 1601-18

DR III/6-16 Consistory court act books, 1606-78

DR IV/6-7 Consistory court act books 'ex officio', 1603-18

DR VIII/2-3 Act books of the archdeacons, 1619-24

Howard of Naworth Documents

C/178/a books 1-10, Gilsland baron court records, 1611-52

C/180 Morpeth manor court books, 1698-1707

John Rylands Library, Deansgate, Manchester

Crawford MSS 59/1/7 Records of the Border Commissioners, 1605-7

Lancashire Record Office, Preston

QSP/140/7 Lancashire petty sessions, Epiphany 1657
 QSR/40-53 Lancashire quarter sessions minutes, 1646-59

Newcastle City Archive, Newcastle-upon-Tyne

540/39 Newcastle quarter sessions recognizances, 1649-51
 540/49 Newcastle quarter sessions recognizances, 1656-7 (See source notes, Chapter VII)

Northumberland Record Office, Gosforth, Northumberland

QS/I/1 'Vetera Indictamenta', collection of indictments from Northumberland quarter sessions, assizes and Border Commissioners' courts, 1597-1630
 QS/I/2/1-65 Northumberland quarter sessions indictments, 1675-1705
 QS Order Books I & II Northumberland quarter sessions order books, 1684-1697
 Allendale MSS Hexham manor: court of pleas, court rolls, 1624-1707
 Hexham manor: jury presentments and inquiries, 1606-1707
 ZAL/14/2/2-10 Simonburn manor: court rolls, 1672-96
 ZHG/II/1, 3 Goswick manor: court rolls, 1645, 1666
 ZTR/XII/1-2 Netherwitton manor: loose papers and court rolls, 1618-86
 ZAN/M16 B27 Morpeth manor: court rolls, 1632-1668
 PC(D) 1 Berwick-upon-Tweed 'Land Court Book', 1603-37
 PC(D) 2 Berwick-upon-Tweed Court Book, 1639-79
 1/DE/7 nos. 1-108 Papers of the Delaval family, 1603-1625

Westmorland Record Office, County Hall, Kendal, Westmorland

Q/S Westmorland Westmorland quarter sessions records:
 Kendal division, indictment book, 1656-67
 Kendal division, indictment book, 1669-91
 Appleby division, indictment book, 1661-85
 Kendal and Appleby division, indictment book, 1692-1724
 Kendal division, order book, 1669-96
 Kendal division, order book, 1696-1724
 Appleby division, order book, 1675-99
 Appleby division, order book, 1699-1724

(ii) Scotland

Dumfries Municipal Chambers, Dumfries

1/1/1 Dumfries Burgh Council: minutes, 1643-71
 1/3/1 Dumfries Burgh Court: diet books, 1658-62

Hawick Museum, Wilton Lodge Hawick

1/1/1-4 Jedburgh Burgh Council: minutes, 1618-1704

II. Printed Sources

(A) Primary Sources

- Acts of the High Commission in the Diocese of Durham, Surtees Society,
vol. XXXIV (1858)
- Acts of the Parliament of Scotland
- Acts of the Privy Council of England
- Adamson, D. (ed.), 'The Hearth Tax of Dumfriesshire', parts i, ii, iii,
D.G.N.H.A.S., ser. 3, vols. XLVII (1970), XLVIII (1971),
XLIX (1972)
- Avon Clyde, J. (ed.) Hope's Major Practicks, 1608-33, Stair Society, vol. V
(1937)
- Bain, J. (ed.) Calendar of Letters and Papers relating to the Affairs
of the Borders of England and Scotland, 2 vols.
(Edinburgh, 1894-6)
- 'Black Book of Taymouth', Bannatyne Club (1855)
- Bodin, J. Six Books of the Commonwealth (ed. M. Tooley), (Oxford 1955)
- Browne, A. L. (ed.) 'King James the Seconds Proposed Repeal of the Penal
Laws and Test Act in 1688: His Questions to the
Magistrates of Cumberland With their Answers thereto'.
T.C.W.A.A.S., vol. XXVIII (1938)
- Bute, Marquis of, and Arnet, C. J. (eds.) Kirkcudbright Town Council Records,
1606-58, 2 vols. (Edinburgh, 1958)
- Calendar of State Papers, Domestic
- Chambers, R. (ed.) Domestic Annals of Scotland from the Reformation to the
Revolution, 2 vols. (Edinburgh, 1859)
- 'Charters and Documents relating to the burgh of Peebles: with extracts from
the records of the Burgh', Scottish Burgh Record Society,
(1872)
- Croft Dickinson, W. (ed.) The Sheriff Court Book of Fife, Scottish History
Society, ser. 3, vol. XII (1928)
- Dalton, Michael The countrey justice, containing the practices of the
Justices of the Peace out of their Sessions (London, 1661)
- Extracts from the Newcastle upon Tyne Council Minute Book, 1639-56, Newcastle
upon Tyne Records Committee (1926)
- Ferguson, R.S. (ed.) A Boke off Recorde or register of Kirkby Kendall,
T.C.W.A.A.S., extra series, (1892)
- Ferguson, R.S. and Nanson, W. (eds.) Some Municipal Records of the City of
Carlisle, T.C.W.A.A.S., extra series (1887)
- Firth, C. H. (ed.) Scotland and the Protectorate, Scottish History Society,
vol. XXX (1898)

- Ford, T. Reformation Sure and Steadfast, (1641)
- Gardiner, S. R. (ed.) Charles II and Scotland, Scottish History Society, vol. XVII (1894)
- Gillon, S.A. (ed.) Selected Justiciary Cases, I; Stair Society, vol. XVI (1953)
- Grainger F. and Collingwood, W. G. (eds.) Register and Records of Holm Cultram, T.C.W.A.A.S., record series, vol. VII (1929)
- Gunn, C. B. (ed.) The Baron Court of Stitchill, 1655-1807, Scottish History Society, vol. L (1905)
- Historical Manuscripts Commission, 9th Report, Calendar of the Manuscripts of the Marquis of Salisbury, parts xv-xxiv, (1923-76)
- Historical Manuscripts Commission, 10th Report, Appendix part iv (1885), Manuscripts of Lord Muncaster
- Historical Manuscripts Commission, 13th Report, Appendix part vii, Manuscripts of the Earl of Lonsdale
- Hodgson, J. C. (ed.) 'An account of the customs of the court leet and court baron of Morpeth', Archaeologia Aeliana, new series, vol. XVI (1894)
- Hodgson, J. C. (ed.) 'Calendar of the Prisoners confined in the High Castle in Newcastle upon Tyne at the assizes for Northumberland, in the years 1628 and 1629', Archaeologia Aeliana, vol. I (1822)
- Hunt, R. D. (ed.) 'Henry Townshend's Notes of the Office of a Justice of Peace 1661-3', Worcestershire Historical Society Miscellany, vol. II (1967)
- Lambarde, W. Eirenarcha, or, of the office of the Justices of Peace, (1607)
- Lowther, C., Fallow, R., Mauson, P. Our Journall into Scotland, 1629 (Edinburgh, 1894)
- Luders, A. et al (eds.) Statutes of the Realm, 4 vols. (London, 1810-28)
- Malcolm, C. A. (ed.) The Minutes of the Justices of the Peace for Lanarkshire, 1707-23, Scottish History Society, ser. 3, vol. XVII (1931)
- Marvell, A. The Complete Poems (Harmondsworth, 1978)
- McNeil, P. G. B. (ed.) The Practicks of Sir James Balfour of Pittendreich, Stair Society, vol. XXI (1962)
- Nicoll, J. A Diary of Public Transactions and Other Occurrences chiefly relating to Scotland, from January 1650 to June 1667 (ed. D. Laing), Bannatyne Club (1836)
- North, Roger The Lives of ... Francis North, ... Sir Dudley North: and ... John North (ed. A. Jessop), 3 vols. (London 1890)

- Ornsby, G. (ed.) Selections from the Household Book of Lord William Howard of Naworth, Surtees Society, vol. LXVIII (1877)
- 'Papers relative to the Plot in the North in 1663', Archaeologia Aeliana, vol. I, (1822)
- Parish Register of Elswick Hall, 1592-1742, typescript by J. Welford, 1975
- Pryde, G. S. (ed.) Court Book of the Burgh of Kirkintilloch, 1658-94, Scottish History Society, ser. 3, vol. LIII (1963)
- Register of the Privy Council of Scotland
- Romanes, C. S. (ed.) Selections from the Records of the Regality of Melrose, Scottish History Society, ser. 2, vols. VI, (1914), VIII (1915), XIII (1917)
- Ruffhead, O. (ed.) Statutes at Large, vol. III (London, 1763)
- Rymer, T., Foedera, 20 vols. (London 1704-35)
- Sanderson, R.P. (ed.) Survey of the Debateable and Border Lands Adjoining the Realm of Scotland and Belonging to the Crown of England, 1604, (Almwick, 1891)
- Scott Moncrieff, W. (ed.) The Records of the Proceedings of the Justiciary Court, Edinburgh, 1661-78, Scottish History Society, vols. XLVIII, XLIX (1905)
- Smith, J. I. (ed.) Selected Justiciary Cases, II, III, Stair Society vols. XXVII (1972), XXVIII (1973)
- Tanner, J.R. (ed.) Constitutional Documents of the Reign of James I (Cambridge, 1966)

(B) Secondary Sources

- Addy, J. The Archdeacon and Ecclesiastical Discipline in Yorkshire, 1598-1714: Clergy and the Churchwardens, St. Anthony's Hall Publication, no. 24, (York, 1963)
- Aiken, W. A. and Henning, B. D. Conflict in Stuart England, (London, 1960)
- Appleby, A. 'Disease or Famine? Mortality in Cumberland and Westmorland, 1580-1640', Economic History Review, ser. 2, vol. XXVI (1973)
- : Famine in Tudor and Stuart England, (Liverpool, 1978)
- Archbold, J. F. The Jurisdiction and Practice of the Court of Quarter Session (London, 1836)
- Armstrong; W. A. The Armstrong Borderland - a reassessment of certain aspects of Border History (Galashiels, 1960)

- Axon, E. 'Life of John Angier', Chetham Society, new series, vol. XCVII (1937)
- Aylmer, G. E. The King's Servants: the civil service of Charles I, 1625-42 (London, 1961)
- : The State's Servants: the civil service of the English republic (London, 1973)
- : The Struggle for the Constitution, 1603-89 (London, 1975)
- Barnes, T. G. 'Examination before a Justice in the Seventeenth Century', Somerset and Dorset Notes and Queries, vol. XXVII (1955)
- : Somerset, 1625-40: A County's Government during the Personal Rule (Cambridge Mass., 1961)
- Barnes, T. G. and Smith, A. H., 'Justices of the Peace, 1558-1688: a revised list of sources', Bulletin of the Institute of Historical Research, vol. XXXII (1959)
- Beckett, J. V. 'Westmorland's Book of Rates', T.C.W.A.A.S., new series, vol. LXXVII (1977)
- Bell, H. E. and Ollard, R. L. (eds.) Historical Essays, 1600-1750, presented to David Ogg, (London 1963)
- Beresford, M. 'The Common Informer, the Penal Statutes and Economic Regulation', Economic History Review, ser. 2, vol. X (1957-8)
- Blackstone, W. Commentaries on the Laws of England, 4 vols. (Oxford 1765-9)
- Blatcher, Marjorie The Court of King's Bench, 1450-1550: a study in self help (London, 1978)
- Brewer, J. and Styles, J. (eds.) An Ungovernable People (London, 1980)
- Brooks, F. W. York and the Council of the North, St. Anthony's Hall Publications, no. 5 (York, 1954)
- Buckatsch, E. J. 'The geographical distribution of wealth in England, 1086-1843', Economic History Review, ser. 2, vol. II (1950-1)
- Chambers, J. D. Population, Economy and Society in Pre-Industrial England (Oxford, 1972)
- Christie, I. R. (ed.) Essays in Modern History, (London, 1968)
- Cockburn, J. S. 'The Northern Assize Circuit', Northern History, vol. III (1968)
- : A History of English Assizes, 1558-1714 (Cambridge, 1974)
- : 'Early Modern Assize Records as Historical Evidence', Journal of the Society of Archivists, vol. V, no. 4 (October 1975)
- : (ed.) Crime in England, 1560-1850 (London, 1977)

- Croft Dickinson, W. and Donaldson, G. Source Book of Scottish History
(Edinburgh, 1961)
- Davies, S. J. 'The courts and the Scottish legal system, 1600-1747: the case of Stirlingshire', in Gattrell, V.A.C., Lenman, B., Parker, G. (eds.), Crime and the Law: The Social History of Crime in Western Europe since 1500 (London, 1980)
- Devine, T. M. and Lythe, S.G.E. 'The economy of Scotland under James VI', Scottish History Review, vol. L (1971)
- Dilley, R. S. 'The Cumberland Court Leet and the use of the Common Lands', T.C.W.A.A.S., new series, vol. LXVII (1967)
- Dixon, P. 'Shielings and Bastles: A Reconsideration of Some Problems', Archaeologia Aeliana, ser. 4, vol. L (1972)
- Dodgshon, R. A. 'Farming in Roxburghshire and Berwickshire on the eve of Improvement', Scottish History Review, vol. LIV (1975)
- Donaldson, Gordon 'The Church Courts', in, various authors, Introduction to Scottish Legal History, Stair Society, vol. XX (1958)
- : Scotland: James V to James VII (Edinburgh 1976)
- Drake, M. 'An elementary exercise in parish register demography', Economic History Review, ser. 2, vol. XIV (1961)
- Elton, G. R. Star Chamber Stories (London, 1958)
- : England under the Tudors (London, 1971)
- Ferguson, W. Scotland's Relations with England: a survey to 1707
(Edinburgh, 1977)
- Flinn, M. (ed.) Scottish Population History from the Seventeenth Century to the 1930's (Cambridge, 1977)
- Forster, G. C. F. The East Riding Justices of the Peace in the Seventeenth Century, East Yorkshire Local History Society Booklet
(Guisborough, 1973)
- : 'The North Riding Justices and their Sessions, 1603-25', Northern History, vol. X (1975)
- Foster, W. Roland 'The Operation of Presbyteries in Scotland, 1600-38', Scottish Church History Society, vol. XV (1963-5)
- : The Church Before the Covenants: The Church of Scotland, 1596-1638 (Edinburgh, 1975)
- Fuller, J. History of Berwick-upon-Tweed (Newcastle, 1973)
- Gavin, J. B. 'The Bishop of Durham, the West March Border Negotiations and the Treaty of Carlise, 1597', T.C.W.A.A.S., new series, vol. LXXIII (1973)
- Glasse, L. K. J. Politics and the Appointment of Justices of the Peace 1675-1720 (Oxford, 1979)

- Gleason, J. H. The Justices of the Peace in England, 1558-1640
(Oxford, 1969)
- Graham, J. The Condition of the Border at the Union (London, 1906)
- Graham, T. H. B. 'The Debateable Land', T.C.W.A.A.S., new series, vols. XII
(1912), XIV (1914)
- Greenhalgh, C. M. F. 'The Impact of the Civil War and Interregnum on Bury,
Lancashire', unpublished thesis for M.A., St. Andrew's
University, 1977
- Groome, F. H. Ordnance Gazeteer of Scotland, 6 vols. (Edinburgh, 1882-5)
- Haldane, A. R. B. The Drove Roads of Scotland (Edinburgh, 1952)
- Hamilton Greirson, P.J. 'The Sheriff Court of Dumfries', D.G.N.H.A.S., ser. 3,
vol. V, (1916-18)
- Harrison, J. V. 'Five Bewcastle Wills, 1597-1617', T.C.W.A.A.S., new
series, vol. LXVII (1967)
- Hay, D. 'England, Scotland and Europe: the problem of the frontier',
Transactions of the Royal Historical Society, ser. 5,
vol. XXV (1975)
- Hay, D., Linebaugh, P., Rule, J.G., Thompson, E. P., Winslow, C., Albion's Fatal
Tree: Crime and Society in Eighteenth Century England
(Harmondsworth, 1977)
- Hill, Christopher
-----: The Century of Revolution, 1603-1714 (London 1975)
The World Turned Upside Down: Radical ideas during the
English Revolution (Harmondsworth, 1974)
- Hodgson, J. A History of Northumberland, 3 parts in 7 vols.
(Newcastle, 1820-28)
- Holdsworth, W. A History of English Law, 16 vols. (London, 1922-64)
- Hone, N. J. The Manor and Manorial Court Records (London, 1925)
- Houlbrook, R. Church Courts and the People during the English Reformation,
1520-70 (Oxford, 1979)
- Howell, Roger, jnr. Newcastle upon Tyne and the Puritan Revolution (Oxford, 1967)
- Hugill, R. Borderland Castles and Peles (Newcastle, 1970)
- Hunter Blair, C. H. 'The Sheriffs of Northumberland', Archaeologia Aeliana,
ser. 4, vol. XXI (1943)
- Hurstfield, J. 'County Government, c. 1530 - c. 1660', V.C.H., Wiltshire,
vol. V (Oxford, 1957)
- James, M. E. Family, Lineage and Civil Society: a study of society,
politics and mentality in the Durham region, 1500-1640
(Oxford, 1974)
- Jones, G. P. 'King James I and the Western Border', T.C.W.A.A.S., new
series, vol. LXIX (1969)

- Karraker, C. H. The Seventeenth Century Sheriff: A Comparative Study of the Sheriff in England and the Chesapeake Colonies, 1607-1689 (Carolina, 1930)
- Kenny, C. S. Outlines of Criminal Law (Cambridge, 1922)
- Kenyon, J. P. The Stuart Constitution, 1603-1688 (Cambridge, 1976)
- : Stuart England (Harmondsworth, 1978)
- Kirkby, J. L. 'Border Service, 1662-1757', T.C.W.A.A.S., new series, vol. XLVIII (1948)
- Laslett, P. The World we have Lost (London, 1973)
- Laslett, P., Oosterveen, K. and Smith, R. M. (eds.) Bastardy and its comparative history (London, 1980)
- Lee, M. 'James VI's government of Scotland after 1603', Scottish History Review, vol. LV, part i, no. 159 (April 1976)
- Levack, B. P. 'The Proposed Union of English and Scots Law in the Seventeenth Century', Juridical Review (1974)
- Lythe, S. G. E. The Economy of Scotland in its European Setting, 1550-1625 (Edinburgh, 1960)
- McDowall, W. History of the Burgh of Dumfries (Dumfries, 1906)
- McLaren, D. 'The Marriage Act of 1653: its influence on parish registers', Population Studies, vol. XXVIII, part ii (1974)
- Makey, W. H. The Church of the Covenant, 1637-51: revolution and social change in Scotland (Edinburgh, 1979)
- Manley, Gordon 'Sir Daniel Fleming's Meteorological Observations at Rydal, 1689-93', T.C.W.A.A.S., new series, vol. LXXVII (1977)
- Marchant, R. A. The Church under the Law: Justice, Administration and Discipline in the Diocese of York, 1560-1640 (Cambridge, 1969)
- Martin, T. A. 'Church and Social Life in Lauder during the latter half of the Seventeenth century', Transactions of the Hawick Archaeological Society (1902)
- Mathew, D. Scotland under Charles II (London 1955)
- Middlebrook, S. Newcastle upon Tyne: its Growth and Achievement (Newcastle, 1950)
- Morrill, J. S. Cheshire 1630-1660: county government and society during the English Revolution (London, 1974)
- : 'The Northern Gentry and the Great Rebellion', Northern History, vol. XV (1979)

- Morris, V. A. 'The Frankpledge System', Harvard Historical Studies, vol. XIV (1910)
- Nicholson, J. and Burn, R. The History and Antiquities of the Counties of Westmorland and Cumberland, 2 vols. (London, 1777)
- Osborne, Bertram Justices of the Peace, 1361-1848 (Shaftsbury, 1960)
- Parker, G. and Smith, L. M. (eds.) The General Crisis of the Seventeenth Century (London, 1978)
- Pevsner, N. The Buildings of Northumberland (Harmondsworth, 1974)
- Phillips, C. B. 'County Committees and Local Government in Cumberland and Westmorland, 1642-60', Northern History, vol. V (1970)
- Phillips, H. 'The Last Years of the Court of Star Chamber, 1630-41' in Christie, J. R. (ed.), Essays in Modern History (London, 1968)
- Pryde, G. S. 'The Burgh Courts and allied Jurisdictions' in various authors, Introduction to Scottish Legal History, Stair Society, vol. XX (1958)
- Purvis, J. S. The Records of the Admiralty Court of York, St. Anthony's Hall Publications, no. 22 (York 1962)
- Rae, T. I. The Administration of the Scottish Frontier, 1513-1603 (Edinburgh, 1966)
- : The Union of 1707 (Glasgow, 1974)
- Rayner, P., Lenman, B., and Parker, G. 'Handlist of Sources for the Study of Crime in Early Modern Scotland to 1747' (typescript in S.R.O.)
- Reid, R. R. The King's Council in the North (London, 1921)
- Reinmuth, H. S. 'Border Society in Transition' in Reinmuth, H. S. (ed.) Early Stuart Studies: Essays in Honour of D.H. Willson (Minneapolis, 1970)
- Ridpath, G. The Border History of England and Scotland (London, 1776)
- Samaha, J. Law and Order in Historical Perspective: the Case of Elizabethan Essex (New York and London, 1974)
- Saunders, J. B. (ed.) Mozley and Whiteley's Law Dictionary (London 1977)
- Simpson, H. B. 'The Office of Constable', English Historical Review, vol. X (1895)
- Slack, P. 'Vagrants and Vagrancy, 1598-1664', Economic History Review ser. 2, vol. XXVII (1974)
- : 'Books of Orders: The making of English Social Policy, 1577-1631', Transactions of the Royal Historical Society, ser. 5, vol. XXX (1980)
- Smith, Alan G. R. (ed.) The Reign of James VI and I (London, 1979)

- Smith, L. M. 'Scotland and Cromwell: a study in early modern government', unpublished D.Phil thesis, Brasenose College, Oxford, 1979
- Smout, T. C. A History of the Scottish People, 1560-1830 (Fontana edn., 1973)
- Spence, R. T. 'The pacifying of the Cumberland Border, 1593-1628', Northern History, vol. XIII (1977)
- : 'The Graham Clans and Lands on the eve of the Jacobean Pacification', T.C.W.A.A.S., new series, vol. LXXX (1980)
- Steel, D. J. Sources of Scottish Genealogy and Family History, National Index Parish Register Society, vol. XII (1970)
- Stenton, D. M. English Society in the Early Middle Ages (Harmondsworth, 1974)
- Stephen, J. F. A History of the Criminal Law of England, 3 vols. (1883)
- Stevenson, David Revolution and Counter-Revolution in Scotland, 1644-1651 (London, 1977)
- Stone, Lawrence The Crisis of the Aristocracy, 1558-1641 (Oxford, 1965).
- Sugar, P. F. 'The Ottoman Professional Prisoner on the Western Border of the Empire in the sixteenth and seventeenth centuries', Etude Balkanique, vol. VII, part i (1971)
- Sykes, J. Local Records or Historical Records of Northumberland, Durham and Newcastle-upon-Tyne and Berwick-upon-Tweed (1833)
- Tate, G. The History of Alnwick, 2 vols. (Alnwick, 1866-68)
- Terry, C. S. The Pentland Rising (Glasgow, 1905)
- Tough, D. L. W. The Last Years of a Frontier: a History of the Borders during the Reign of Elizabeth (Oxford, 1928)
- Trevelyan, G. M. England in the Age of Wycliffe (London, 1972)
- Vernon, J. J. 'The Parish and Kirk of Hassindean', Transactions of the Hawick Archaeological Society (1879)
- : 'The Parish and Kirk of Hawick, 1711-25', Transactions of the Hawick Archaeological Society (1900)
- : 'The Reverend Alexander Orrock, Hawick', Transactions of the Hawick Archaeological Society, (1909)
- Victoria County History of Cumberland, vol. II (Haymarket, 1905)
- Victoria County History of Northumberland (London 1893)
- Victoria County History of Wiltshire, vol. V (Oxford, 1957)
- Watts, S. J. From Border to Middle Shire (Leicester, 1975)
- Webb, S. and B. English Local Government: The Manor and the Borough, 2 parts (London, 1929)

- Webb, Stephen Saunders The Governors-General: The English Army and the Definition of the Empire, 1569-1681 (Carolina, 1979)
- Wedgwood, C. V. 'Anglo-Scottish relations, 1550-1625', Transactions of the Royal Historical Society, ser. 4, vol. XXXII (1950)
- Whyte, I. Agriculture and Society in Seventeenth Century Scotland (Edinburgh, 1979)
- Williams, P. 'The Northern Borderland under the Early Stuarts', in Bell, H. E. and Ollard, R. L. (eds.), Historical Essays, 1600-1750 presented to David Ogg (London, 1963)
- Willson, D. H. 'Relations between Scotland and England in the Early Seventeenth Century', Scottish Colloquium Proceedings, vol. I (1968)
- Wilson, C. and Parker, G. (eds.) An Introduction to the Sources of European Economic History, 1500-1800: Western Europe (London, 1977)
- Worden, B. The Rump Parliament (Oxford, 1977)
- Wrightson, K. E. 'The Puritan Reformation of Manners, 1640-60', unpublished Ph.D. thesis, Cambridge, 1974
- _____: 'Two Concepts of Order: justices, constables and jurymen in seventeenth century England' in Brewer, J. and Styles, J. (eds.), An Ungovernable People (London, 1980)