

**The Scottish Inquisition?: Perceptions of Authority and the Law in  
Late Restoration Scotland**

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## Abstract

This thesis explores the practices and representations of the Scottish criminal justice system from 1678-1688. Using several case studies, this thesis examines the legal principles and political motives behind the Scottish government's policies, and how people were able to navigate this system. The traditional—and very often Anglo-centric— narrative of Restoration Scotland (1660-1688) has customarily been that of a despotic kingdom due to the government's severe and often persecutory policies toward religious dissenters. Interestingly, the Restoration government was acutely aware of its image problem, and continually sought to counter narratives of its severity through speeches, publications and proclamations focusing on the law. However, 'necessity of state' often trumped religious niceties, creating a terrible image problem for the government—that of the despotic and persecutory "Scottish Inquisition." Each chapter of this thesis examines how the Restoration regime utilized the law to maintain and promote its authority, and how this policy sometimes only served to exacerbate ongoing tensions. Chapter One examines the legal polemics promoting the government's policies during this period using the Lord Advocate, Sir George Mackenzie of Rosehaugh, as a case study. Chapter Two investigates the imposition of the Test Act and the Earl of Argyll's subsequent treason trial. Chapter Three analyzes the Privy Council's legal right to judicial torture. Chapter Four explores the increase in cases against ressetters (harbourers of rebels) during this period. Lastly, Chapter Five discusses the ramifications of the Argyll Rebellion in 1685.

## Resumé

Cette thèse explore les pratiques et les représentations du système de justice pénale écossais dans la période 1678-1688. À l'aide de nombreuses études de cas, cette thèse examine les motivations politiques et les principes juridiques derrière les politiques du gouvernement écossais, et comment les gens naviguaient ce système. Le récit historique traditionnel portant sur la Restauration écossaise (1660-1688), très souvent influencé par les événements contemporains en Angleterre, est habituellement celui d'un royaume despotique en raison de ses politiques sévères et souvent persécutrices envers les dissidents religieux. En réalité, le gouvernement écossais de la Restauration était conscient de sa mauvaise réputation et cherchait continuellement à rectifier celle-ci à l'aide de discours, de publications, et de proclamations portant sur la loi. Cependant, la « nécessité de l'État » prit souvent le pas sur la tolérance religieuse, ce qui contribua renforcer l'image d'un gouvernement despotique et persécuteur, à la tête d'une « Inquisition écossaise ». Chaque chapitre de cette thèse examine comment le régime de la Restauration a utilisé la loi pour maintenir et augmenter son autorité, et comment cette politique juridique ne fit parfois qu'exacerber les tensions actuelles. Le premier chapitre explore les polémiques juridiques qui jouèrent en faveur des politiques du gouvernement au cours de la période en examinant le cas de la carrière du « Lord Advocate », Sir George Mackenzie of Rosehaugh. Le deuxième chapitre examine la mise en place du « Test Act » et le procès suivant de l'Earl of Argyll pour haute trahison. Le troisième chapitre analyse le droit légal à la torture judiciaire dont jouissait le Conseil privé écossais. Le quatrième chapitre explore l'augmentation du nombre de poursuites judiciaires portées contre des « ressetters » (individus accusés d'avoir donné asile aux rebelles) pendant la période. Enfin, le cinquième chapitre traite des ramifications de la rébellion d'Argyll en 1685.

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It can sometimes be tough studying a European topic in Canada, especially during a pandemic. As such, I want to give a shout out to all the nineteenth and early twentieth century historians and antiquarians who edited and published collections of primary sources, such as the *Register of the Privy Council of Scotland* and so forth. These sources are indispensable, and I am truly grateful for all the editors' hard work. Additionally, I feel the need to thank the Lord Advocate himself, Sir George Mackenzie of Rosehaugh. Reading his *Vindications* was what prompted me to pursue the line of inquiry I follow throughout this thesis.

I also want to thank my family for all their support and assistance throughout the years. In particular, I want to thank my Mom, and I dedicate this thesis to her. Thank you for instilling in me a love of history, and for encouraging me to pursue my passions.

Lastly, I want to thank Daisy, who unbeknownst to her, has been my emotional support dog from afar.

### **Author's Declaration**

I declare that this thesis is the result of original scholarship, and that I am the sole author.

Carleigh Nicholls  
December 2021

## Abbreviations

CSPD	Calendar of State Papers, Domestic Series
HMC	Historical Manuscripts Commission
NLS	National Library of Scotland, Edinburgh
NRS	National Records of Scotland, Edinburgh
<i>RPS</i>	Brown, K. M. et al, eds. <i>The Records of the Parliaments of Scotland to 1707</i> . St Andrews: 2007.
<i>RPCS</i>	Brown, P. H. et al, eds. <i>Register of the Privy Council of Scotland Third Series, 1661-1691</i> . 16 volumes. Edinburgh: HM General Register House, 1908-70.
SAUL	St Andrews University Library Special Collections

**NOTE:** Original spellings from manuscripts and documents have been retained.

## Introduction

*Next to our Laws, our Judges are arraigned, and though all Nations presume, that Judges understand, and that we should presume them Just, being ordinarily men of Integrity, who are ingadg'd upon Oath, and have both Soul and Reputation at Stake; And who know their Children are to be Judg'd by the preparatives they make. Yet our Phamphleters, who neither understand matter of Law, nor matter of Fact, stick most sovereignly to decyde, that our Sentences, even in Criminals (in which men canot Err wilfully, without murdering deliberately) are absurd, ridiculous and inhumane.*

Sir George Mackenzie of Rosehaugh, 1683<sup>1</sup>

In 1689 shortly after the Revolution, an anonymous<sup>2</sup> pamphlet was published entitled *The Scottish Inquisition; Or, A Short Account of the Proceedings of the Scottish Privy-Counsel, Justiciary Court, and those Commisionated by them...* The pamphlet complained that “the Consciences of good Men have been Tortured, the Peace of the Nation these several Years past exceedingly Disturbed, and Multitudes of Innocent people cruelly Oppressed, and inhumanely Murdered.” The author then went on to list several grievances including a lack of *habeas corpus*, large fines, torture and unfair judicial procedures.<sup>3</sup> The post-Revolution period saw a flurry of publications accusing the Scottish authorities of similar crimes during the Restoration. For instance, in 1689, James Welwood wrote that “If one were to draw the Scheme of one of the most Despotick Governments in the World...Scotland alone might sufficiently furnish him with

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<sup>1</sup> Sir George Mackenzie of Rosehaugh, *A vindication of His Majesties government and judicatures, in Scotland from some aspersions thrown on them by scandalous pamphlets and news-books, and especially, with relation to the late Earl of Argyle's process*, (Edinburgh: 1683): 18.

<sup>2</sup> Although the pamphlet was published anonymously in 1689, it was later attributed to the militant Covenanter Alexander Shields, and it was subsequently re-printed under his name in 1745. See Alasdair Raffae, *The Culture of Controversy: Religious Arguments in Scotland, 1660-1714*, (Woodbridge, Suffolk: Boydell Press, 2012): 107, n. 96.

<sup>3</sup> *The Scottish inquisition, or, A short account of the proceedings of the Scottish Privy-Counsel, Justiciary Court...* (London: Printed and sold by Richard Janeway, 1689): 1.



all the Idea's of Oppression, Injustice and Tyranny concentred for the space of Twenty Years and upwards in that Kingdom.”<sup>4</sup>

Throughout the 1680s, Covenanters had drawn comparisons between the Spanish Inquisition and the Scottish Privy Council. In *A Hind Let Loose* published in 1687, Alexander Shields, a militant Covenanter, wrote of the actions of the Privy Council and Justiciary Court, describing “the inhumanity & illegality of their Proceedings, having no other Precedent save that of the *French Conversions*, or *Spanish Inquisition*, out done by many stages in respect of Illegality by the *Scotish Inquisition*.”<sup>5</sup> Likewise, in 1688, Shields complained of the local circuit courts implemented throughout the mid-1680s, describing them as “Circuit-Courts of Spanish Inquisitions.”<sup>6</sup> This comparison continued to be popular, as the eighteenth-century Presbyterian writer Robert Wodrow described the Council’s interrogations as those that “followed the Measures of the *Spanish Inquisition*.”<sup>7</sup> It was not only Covenanters who used this language, however. In his memoirs, the Whig Bishop Gilbert Burnet frequently referred to the “inquisitorial” practices of the Scottish government. Describing Robert Baillie of Jerviswood’s trial and execution in 1684, Burnet remarked that the procedure was “of the spirit and practice of

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<sup>4</sup> James Welwood, *Reasons why the Parliament of Scotland cannot comply with the late K. James's proclamation sent lately to that kingdom, and prosecuted by the late Viscount Dundee : containing an answer to every paragraph of the said proclamation, and vindicating the said Parliament their present proceedings against him : published by authority*, (London: 1689): 1.

<sup>5</sup> Alexander Shields, *A hind let loose, or, An historical representation of the testimonies of the Church of Scotland for the interest of Christ with the true state thereof in all its periods...* (Edinburgh: 1687): 203. Throughout this entire work, Shields drew numerous comparisons to the Spanish Inquisition. For instance, in the introduction, he described the “*Scotish-Spanish-Inquisition*, that will rack the Purse, the Body, & Conscience, and all,” (unnumbered page).

<sup>6</sup> Alexander Shields, *An elegie, upon the death, of that famous and faithfull minister and martyr, Mr. James Renwick Composed immediately after his execution at Edinburgh, 17. Feb. 1688*, (Glasgow: 1688): unnumbered page.

<sup>7</sup> Robert Wodrow, *The history of the sufferings of the Church of Scotland, from the Restauration to the Revolution*, Vol. 2, (Edinburgh: 1721-22):136.

the Courts of Inquisition, that one is tempted to think that the methods taken in it were suggested by one well studied, if not practised in them.”<sup>8</sup>

This conflation of the Scottish Crown with the Spanish Inquisition was strategic. With the ever-present concerns over the growth of popery and arbitrary government, comparisons to the continental courts proved to be both effective and visceral. As Pauline Croft explains, the propagandic image of the Spanish Inquisition as that “dreadful engine of tyranny” was used as a “major weapon” by opponents to Spain in the sixteenth century.<sup>9</sup> Undoubtedly, this comparison proved fruitful in seventeenth-century Covenanter and Whig circles as well. As Alasdair Raffe explains, by comparing the Scottish procedures to the Spanish Inquisition, the Covenanters were able to parallel their own persecution with that of the Reformation martyrs. Furthermore, by drawing parallels with the Spanish Inquisition, the Covenanters brought “attention to the inquisitorial procedures of the privy council and other courts depending on the crown.”<sup>10</sup> The Covenanters’ image of the violent and persecutory Restoration regime worked. As Clare Jackson notes, succeeding narratives and traditional historiographies have tended to denigrate the Scottish Restoration, and “[identify] that era as the ‘darkness before the dawn’ of happy civilisation.”<sup>11</sup>

Significantly, this picture of the Scottish Inquisition was exactly the image that the late Restoration government had pushed so hard against throughout the period. Indeed, the government was acutely aware of being perceived as arbitrary and severe, and attempted to counter this perception through speeches, explanations and proclamations focusing on the law.

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<sup>8</sup> Gilbert Burnet, *Bishop Burnet's History of His Own Time. From the Restoration of King Charles II. To the Settlement of King William and Queen Mary at the Revolution...* Vol. 1 (London: Printed for Thomas Ward in the Inner-Temple Lane: 1724): 587.

<sup>9</sup> Pauline Croft, “Englishmen and the Spanish Inquisition, 1558-1625,” *English Historical Review* 87:343 (1972): 249.

<sup>10</sup> Alasdair Raffe, *Culture of Controversy*, 105.

<sup>11</sup> Clare Jackson, “Judicial torture, the liberties of the subject and Anglo-Scottish relations, 1660-1690” in T. C. Smout, ed., ‘Anglo-Scottish relations 1603-1914’, *Proceedings of the British Academy*, 127 (2005): 75-76.

How was it that the Scottish government had failed so magnificently in controlling its public persona? This thesis is in part an examination of that failure. Both before and after the Revolution, the leading figures of the Scottish Restoration were keen to point out that they had been acting entirely legally, and within the purview of the law. This claim was not lost on the Covenanters, for as Shields noted, the Council found “their means and motions under colour of Law.”<sup>12</sup> How was it that there were such differing interpretations of Scottish legal events?

Because concepts of the law were so critical to the late Restoration story in Scotland, this thesis explores the practices and representations of the Scottish criminal justice system from 1678-1688. Using several case studies, this thesis examines the legal principles of the Scottish government’s actions, and how people were able to navigate this system. As noted, the Scottish government was acutely aware of its image problem, and continually sought to counter narratives of its severity. However, necessity of state frequently trumped religious niceties. While the Scottish government’s policies were severe, the authorities often punished a few rebels harshly to intimidate the rest of the Covenanters into compliance, generally releasing the majority of offenders who accepted the King’s authority. However, these examples worked too well, making extremists more resolute in their beliefs, and creating a terrible image problem for the government—that of the despotic and persecutory “Scottish Inquisition.” The government achieved some success in maintaining and promoting its authority, but its policies often did more harm than good in the long run. Examining several trials and legal cases, each chapter of this thesis examines how the Restoration regime utilized the law to maintain and promote its authority, and how this policy exacerbated ongoing tensions. Indeed, as Tim Harris and Stephen Taylor explain, while governments often attempted to use the legal system to take out political

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<sup>12</sup> *The Scottish Inquisition*, 2.

opponents and dissidents, the legal system did not always work in their favour. Arguably, the Scottish government had more tools in its arsenal than England—such as a lack of *habeas corpus* that allowed it to imprison political opponents indefinitely—but as this thesis shows, the Scottish courts did not always rule in favour of the prosecution. As Harris and Taylor note, sometimes “instead of enforcing law and order, the proceedings actually served to create further disorder” as cases could “[inflamm]e opinion” and prompt different responses.<sup>13</sup> Certainly, many such cases prompted much opposition in Scotland. In fact, the Privy Council itself was often divided on its policies. While this thesis often refers to the Council as a whole, it is important to remember that it was made up of various individuals with different opinions. Just because a Councillor went along with a group decision, that did not mean that he agreed with it.

Throughout this thesis, there are three recurring themes that point toward a failure in policy throughout this period greatly hampering the government’s image. Firstly, at the forefront of the government’s religious agenda was the very real problem of Erastianism—secular magistrates overseeing religious affairs— which proved crucial to the government’s failure to implement real religious authority. As Tim Harris notes, the Stuarts’ main religious goal in Scotland since 1603 had been one of “convergence” to obtain conformity within the Three Kingdoms.<sup>14</sup> Re-establishing the Episcopal church in Presbyterian Scotland after the Civil Wars and Interregnum, the Scottish authorities failed to create a lasting theological rationale for their religious program, and instead relied on the opinions of legal writers. As Clare Jackson explains, because the Episcopal church was “institutionally impotent and ideologically bankrupt,” lawyers

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<sup>13</sup> Tim Harris and Stephen Taylor, “State Trials and the Rule of Law under the Later Stuarts and Early Hanoverians,” *The State Trials and the Politics of Justice in Later Stuart England*, Brian Cowan and Scott Sowerby, eds., (Woodbridge, Suffolk: Boydell Press, 2021): 25.

<sup>14</sup> Tim Harris, *Revolution: The Great Crisis of the British Monarchy, 1685-1720*, (London: Penguin Books, 2007): 494.

began to “exert the greatest influence over the theory and practice of monarchy” during this period.<sup>15</sup> As such, legal theories became essential to maintaining authority. However, these writings and theories, which often had absolutist undertones, were unable to supplant the Covenant’s idea of limited monarchy. While this legal campaign helps us understand many of the Scottish Crown’s actions throughout the period, the “Erastian” understanding of religious authority posed many problems, especially when examining oaths.

State oaths proliferated throughout the period, with the Test Act being the most notorious. However, most Scots considered oaths to be sacred bonds. As such, when the government implemented the inconsistent Test Act “to make it as universall as the Covenant,” the failure of the Restoration authorities to perceive the true significance of this Act was essential.<sup>16</sup> Part of the problem lay in the fact that the government was often more concerned with shows of performative obedience, rather than displacing the Covenanters’ religious ideology. As Laura Stewart argues, the crisis of the 1630s in Scotland was a “transformative moment in which a new state was constructed around a refurbished set of legitimating principles.” Indeed, as Stewart points out, this Covenanted government reoriented the relationship between “political fundamentals” such as monarchy and parliament, community and congregation, and kirk and commonwealth.<sup>17</sup> While lawyers like Sir George Mackenzie of Rosehaugh would have some success in arguing that the King’s power was “indivisible” during

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<sup>15</sup> Clare Jackson, *Restoration Scotland, 1660-1690: Royalist Politics, Religion and Ideas*, (Woodbridge, Suffolk: Boydell Press, 2003): 220.

<sup>16</sup> Sir John Lauder of Fountainhall, *Historical notices of Scottish affairs...* Vol. 1, (Edinburgh: T. Constable, printer to Her Majesty, 1848): 443.

<sup>17</sup> Laura Stewart, *Rethinking the Revolution: Covenanted Scotland, 1637-1651*, (Oxford: Oxford University Press, 2016): 4.

the Restoration, the Covenanters' belief in shared sovereignty and contract theory was deep-rooted, going as far back as the Reformation.<sup>18</sup>

Another recurring issue that is discussed throughout this thesis is the divergence of local and central governance, which greatly discredited the Scottish Crown's authority and image. As this thesis discusses, the criminal justice system was decentralized, with the Privy Council having to rely on local courts and magistrates to uphold justice. Although the High Court of the Justiciary was established in 1672, and the Council tried to accrue more powers during this period,<sup>19</sup> there remained issues in controlling local governance. Indeed, many of the most severe cases of injustice during this period were often implemented on a local level without approval from the central courts. For instance, torture was one of the most controversial issues during this period. While judicial torture was a highly regulated legal procedure, as discussed in Chapter Three, many cases of torture were done illegally at the local level, without the Council's knowledge or approval.<sup>20</sup> The reliance on local authorities to police dissent became a nuisance for the Crown, and the government came to rely more heavily on militias and military forces, as well as individuals and neighbourhoods to inform and police each other's actions.

Perhaps the simplest mistake, but also the most significant in terms of bad publicity was the fact that the Scottish authorities continually chose the worst examples of rebels to prosecute. The general criminal policy during the Restoration was to give out a few harsh punishments as examples to deter others from doing like crimes. For example, citing the few who were executed

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<sup>18</sup> Clare Jackson, "Natural Law and the Construction of Political Sovereignty in Scotland, 1660-1690," *Natural Law and Civil Sovereignty: Moral Right and State Authority in Early Modern Political Thought*, Ian Hunter and David Saunders, eds., (New York: Palgrave, 2002): 165.

<sup>19</sup> Allan Kennedy, "State Formation, Criminal Prosecution and the Privy Council in Restoration Scotland," *English Historical Review* CXXXV: 572 (March 2020): 30, 38, 31. For more information on this divide in local/central government in the Highland context, see Allan Kennedy, *Governing Gaeldom: The Scottish Highlands and the Restoration State, 1660-1688*, (Leiden: Brill, 2014).

<sup>20</sup> For the context of illegal torturing of witches, see Brian P. Levack, "Judicial Torture in Scotland during the Age of Mackenzie," *Miscellany Four*, Hector L. MacQueen, ed., (Edinburgh: Stair Society, 2002).

for their involvement in the Argyll Rebellion, the Lord Advocate noted they had “to die for the example and terrour of others.”<sup>21</sup> Likewise, John Lauder of Fountainhall wrote that after the Edinburgh Riot of 1682, the Lord Advocate “resolved to get [three of them] hanged for examples as ringleaders.”<sup>22</sup> This was a policy that was in keeping with the Restoration’s oscillating toleration and repression throughout the period. While the harshest punishments were in fact few in number, these examples perhaps worked too well in creating the image of the Scottish Inquisition. As Richard L. Greaves notes, “the policy of selective punishment coupled with widespread leniency failed to break the militant wing of the Covenanters.”<sup>23</sup> While the precedents set at these trials would be important for furthering the Scottish Crown’s political agenda, as this thesis will show, the authorities constantly chose the wrong men and women to serve as their examples.

Unquestionably, the King and Council were much concerned throughout the Restoration to proceed “under colour of Law.” For Tim Harris, however, the argument about whether or not the authorities behaved legally or not is a “moot point.” As he argues, what was important was that the law in Scotland gave the King and his Councillors great discretionary powers, which allowed them to sidestep traditional authorities, use armed forces, and give out harsh punishments. Unlike in England where the government had to work within a specific set of laws, Scotland could continually innovate, with new Acts of Parliament or proclamations in Council passed to deal with rebels and dissenters. As such, he argues that England could look to Scotland

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<sup>21</sup> Sir George Mackenzie of Rosehaugh, *A vindication of the government in Scotland during the reign of King Charles II against mis-representations made in several scandalous pamphlets to which is added the method of proceeding against criminals, as also some of the phanatical covenants, as they were printed and published by themselves in that reign*, (London: 1691): 35.

<sup>22</sup> John Lauder of Fountainhall, *Historical Observes of Memorable Occurrents in Church and State, from October 1680 to April 1686*, (Edinburgh: T. Constable, printer to Her Majesty, 1840): 67.

<sup>23</sup> Richard L. Greaves, *Secrets of the Kingdom: British Radicals from the Popish Plot to the Revolution of 1688-1689*, (Stanford: Stanford University Press, 1992): 67.

as an example of arbitrary government.<sup>24</sup> Harris concedes, however, that Charles II and his government could justify their actions by claiming they were only pursuing a minority of dissenters who were threatening the establishment, which the authorities did in fact argue.<sup>25</sup> While Harris has a point, and the Scottish Restoration government was indeed persecutory and severe, the fact that the authorities believed that they *must* behave legally was of utmost importance. Acting within the law was very much not a moot point for them. Certainly, as Julian Goodare argues, just because seventeenth-century Scotland was an “absolutist state” that does not mean that it was arbitrary or tyrannical. While it could be tyrannical at times, he argues that it was no more so than other polities, and that most generally believed that the monarchs were governing “legitimately in the interest of the political nation.”<sup>26</sup> Describing the English context, Harris and Taylor explain that “one of the key battles in this period” was “over how the law was applied,” rather than questioning whether the Stuart monarchs were governing according to the rule of law or not.<sup>27</sup> This is perhaps a better frame of analysis for understanding the legal debates in Scotland as well. Indeed, Howard Nenner explains how the law was both an instrument to be used and a prize to be won in seventeenth-century England, but its fundamental existence was never questioned. Nenner describes the seventeenth century conflicts between King and Parliament not as a struggle to preserve the law, but as a battle to win back control of it.<sup>28</sup> Thinking about the law in Scotland in these terms can illuminate the significance of the Council’s legal campaign in the last decade of the Restoration, as well as the seriousness of any accusations of illegality.

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<sup>24</sup> Tim Harris, *Restoration: Charles II and His Kingdoms, 1660-1685*, (London: Allen Lane, 2005): 374, 372.

<sup>25</sup> *Ibid.*, 425.

<sup>26</sup> Julian Goodare, *State and Society in Early Modern Scotland*, (Oxford: Oxford University Press, 1999): 7.

<sup>27</sup> Harris and Taylor, “State Trials and the Rule of Law,” 45.

<sup>28</sup> Howard Nenner, *By Colour of Law: Legal Culture and Constitutional Politics in England, 1660-1689*, (Chicago: University of Chicago Press, 1977): ix, xii.



While this thesis argues that the description of the “Scottish Inquisition” is a hyperbole, it is neither a defence nor a vindication of the Scottish authorities’ actions during this period, but rather an attempt to illuminate the rationale behind their beliefs. With Scotland’s civil system of law and the Lords of Articles in Parliament, the King did have more ‘absolute’ powers than in England. However, this thesis seeks to examine the legal justifications and arguments underpinning the Crown’s authority. It was no coincidence that at the same time that the Crown sought new arguments for its fundamental sovereignty that the study and evolution of Scots law flourished. In fact, works by lawyers such as Sir George Mackenzie of Rosehaugh and Sir James Stair, Viscount Stair remained important for centuries to come. As this thesis shows, the Scottish Crown, as harsh and persecutory as it was, could also be fair. The true failure of the Scottish government was perhaps the fact that the authorities failed to supplant the image their opponents painted them as.

### **Context, Scope and Historiography**

In 1660, the monarchy was officially restored in Britain and Ireland with the accession of Charles II in London. For Scotland, the Restoration meant more than the mere restoration of the monarch. Indeed, Charles had been proclaimed King of Scotland since his father’s death in 1649. On March 28, 1661, however, the Scottish Parliament passed the “Act rescinding and annulling the pretendit parliaments in the yeers 1640, 1641 etc.” Elaborating on this action, the “Act concerning religion and church government” stated “as to the government of the church, his majestie will make it his care to satle and secure the same in such a frame as shall be most agreeable to the word of God, most suteable to monarchicall government and most complying with the publict peace and quyet of the kingdome.”<sup>29</sup> For the King and government, episcopacy

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<sup>29</sup> *The Records of the Parliaments of Scotland to 1707 (RPS)*, K.M. Brown et al, eds., (St Andrews, 2007-2021), 1661/1/158.

was the way to go in the largely Presbyterian nation.<sup>30</sup> Writing years later, Gilbert Burnet argued that these acts “laid down a most pernicious precedent” and “[took] away all the security that law can give.”<sup>31</sup> With these actions, we can see how a competing narrative of the Restoration was established right from the get-go, one where the government was attempting to create stability and peace through legal measures, and another where the government was persecutory and arbitrary, disregarding the laws of the land.<sup>32</sup>

Writing in 1684, the future Earl of Melfort noted, the “mater of the greatest import that has bein in agitation hear since the King’s restauratione... is hou to keep uhat is gained, and hou to proceed in this work.”<sup>33</sup> Certainly, Melfort’s description of the period is apt. Throughout the Restoration, further Acts against Covenanters were passed with differing levels of severity, from merely outlawing field-Conventicles to requiring lords to sign bonds making them responsible for their tenants’ actions, to the notorious decision to allow immediate executions following the publication of the *Apologetical Declaration* in 1684.<sup>34</sup> As the 1670 “Act against Conventicles” stated, the government believed these meetings to be “rendezvous of rebellion” meeting under “the false pretences of religion” to “[alienate] the hearts and affections of the subjects from that duty and obedience they owe to his majesty and the public laws of the kingdom.”<sup>35</sup> For the government, repression was not about religious doctrine or differences in belief, at least

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<sup>30</sup> As Allan Kennedy notes, however, the Scottish Parliament kept some of the procedural innovations created during the 1640s. See Allan Kennedy, “The Legacy of the Covenants and the Shaping of the Restoration State,” *The National Covenant in Scotland, 1638-1689*, Chris R. Langley, ed., (Woodbridge, Suffolk: Boydell Press, 2020). For more information on these early Parliaments, see Gillian H. MacIntosh, *The Scottish Parliament under Charles II, 1660-1685*, (Edinburgh: Edinburgh University Press, 2007).

<sup>31</sup> Burnet, *Bishop Burnet's History of His Own Time*, Vol. 1, 119.

<sup>32</sup> For a detailed description of the creation of this ecclesiastical policy, see Julia Buckroyd, *Church and State in Scotland, 1660-1681*, (Edinburgh: John Donald Publishers Ltd., 1980).

<sup>33</sup> HMC, *Report on the Manuscripts of His Grace the Duke of Buccleuch and Queensbury, Preserved at Drumlanrig Castle* (HMC Drumlanrig), Vol. 2, (London: Printed for H.M. Stationery Off., by Eyre and Spottiswoode, 1897-1903): 197.

<sup>34</sup> *Register of the Privy Council of Scotland (RPCS)* 3<sup>rd</sup> series, Vol. 10, (Edinburgh: HM General Register House, 1927): 33.

<sup>35</sup> *RPS*, 1670/7/11.

outwardly. They believed the Covenanters to be dangerous because they were potential rebels, questioning the King's authority over the church and state. The threat of the 1640s and 1650s was ever present in the authorities' minds, with the fear of those uncertain days returning. The question of religious authority could easily be broken down to mere semantics for some, but for others it represented something much bigger, and highlighted the divide between governmental and Covenanter ideologies. Indeed, in what he has termed a "culture of controversy," Alasdair Raffe points out how it must be remembered that religious controversies were about "transcendental truths" which made compromises undesirable, if not impossible for some, and these disagreements between Presbyterians and Episcopalians involved all ranks of Scottish society.<sup>36</sup>

Rather than examining the whole Restoration in its entirety from 1660, this thesis will focus on the later period roughly between 1678-1688. Throughout the Restoration, the government oscillated between toleration and repression, and this latter period was largely more repressive, with some of the most severe policies implemented during this time. While this thesis touches upon cases up until 1688, there is more of a focus on the legal innovations of the early 1680s. By the time James VII came to the throne, his brother had dissipated much of the dissenting threat through these legal policies. Furthermore, as James' priority was to remove the penal laws, a number of the rebels condemned during his brother's reign were released or reprieved. It is interesting to note that James' 'absolutist' Indulgence went hand in hand with the emptying of prisons.<sup>37</sup> As Raffe points out, James' understanding of monarchical authority drew

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<sup>36</sup> Raffe, *The Culture of Controversy*, 14-19.

<sup>37</sup> For statistics on who was released and when, see: Helen Findlay, "The Later Covenanting Movement: A Legal Reappraisal," Master's Thesis, (University of Strathclyde, 2012): 49.

from the statutes passed by Charles II and the royalist discourse produced during his reign. Nonetheless, James pushed that discourse to the extreme.<sup>38</sup>

In her analysis of ecclesiastical policy from 1660-1681, Julia Buckroyd argues that the final years of the Restoration were merely a continuation of the severe policies that the Duke of Lauderdale had been forced to implement during his tenure as *de facto* leader of Scotland.<sup>39</sup> However, as this thesis shows, there was a significant legal campaign during the latter part of the Restoration, with the government attempting to court public opinion. As Nenner points out, after 1678 in England, the language of the law became the most important vocabulary in political debates—be it between Whigs and Tories, King and Parliament, or Protestants and Catholics.<sup>40</sup> This was certainly the case in Scotland as well. Furthermore, in the late 1660s and 1670s, many advocates had several grievances against Lauderdale, which were generally resolved by the next decade. For instance, they complained of Lauderdale appointing men with no legal training to serve as judges in civil cases. As Clare Jackson notes, however, by 1677, “any remaining pretensions to integrity on the judicial bench vanished completely” when appointments were no longer for life, but at the King’s pleasure.<sup>41</sup> Additionally, this later period not only encompasses post-Lauderdale Scotland, but the decade also largely corresponds with Sir George Mackenzie of Rosehaugh’s tenure as Lord Advocate. Both Sir George Mackenzie and Archibald Campbell, the ninth Earl of Argyll, are two figures that recur throughout this thesis due to their opposing navigation of post-Restoration law and politics, and they will be subsequently introduced in Chapter One and Chapter Two. While Mackenzie became a government mouthpiece justifying

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<sup>38</sup> Alasdair Raffe, *Scotland in Revolution, 1685-1690*, (Edinburgh: Edinburgh University Press, 2018): 7. See also Chapter 1.

<sup>39</sup> Julia Buckroyd, *Church and State in Scotland, 1660-1681*, (Edinburgh: John Donald Publishers Ltd., 1980): 135.

<sup>40</sup> Nenner, *By Colour of Law*, 198.

<sup>41</sup> Jackson, *Restoration Scotland*, 84, 86. For a description of the Advocate’s Strike, see pages 84-85.

the Crown's authority under the law, Argyll attempted to be a representative of civil liberties and the Protestant religion.<sup>42</sup>

The last decade of the Restoration saw two rebellions, and multiple conspiracies and plots. In 1679, James Sharp, the Archbishop of St Andrews was assassinated by radical Covenanters. The ramifications of his assassination affected multiple facets of Restoration policy. While Julia Buckroyd has shown that Sharp's influence on religious affairs was overstated,<sup>43</sup> following his death, there was a void in visible Episcopal leadership, as subsequent Archbishops kept quieter on political affairs. The year 1679 also saw the breakout of the Bothwell Rebellion. In response to increasingly repressive laws, radicalization after the Archbishop's murder, and complaints about religious Indulgences, thousands of dissidents rebelled against the government. Although the Covenanters won major battles, the Duke of Monmouth decisively defeated them. This thesis does not deal with the rebellion itself, but many Bothwell rebels appear throughout this work.<sup>44</sup>

Following the failure of the Bothwell Rebellion, a small but radical group of militant Presbyterians formed. Sometimes known as the Cameronians, named after Richard Cameron, this "secretive lay network of militant Presbyterians" formed the United Societies in 1681. This group denounced the authority of the King and Council and strictly adhered to the Covenant. They would eventually excommunicate the King and call for targeted assassinations.<sup>45</sup> The

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<sup>42</sup> These are the only full biographies of both figures: Andrew Lang, *Sir George Mackenzie, king's advocate, of Rosehaugh: his life and times 1636 -1691*, (London, New York: Longmans, Green, 1909); John Willcock, *A Scots Earl in Covenanting Times: Being Life and Times of Archibald, 9th Earl of Argyll (1629-1685)*, (Edinburgh: A. Eliot, 1907).

<sup>43</sup> Julia Buckroyd, *The Life of Archbishop Sharp, Archbishop of St. Andrews, 1618-1679*, (Edinburgh: John Donald Publishers, 1987).

<sup>44</sup> Laura Doak is undergoing a project examining 400 extant depositions of Bothwell rebels. For more information, see: Laura Doak, *Reading Rebel Voices*, (2021), <<https://readingrebelvoices.wordpress.com/>>. Last accessed December 2021.

<sup>45</sup> Jardine, "The United Societies: Militancy, Martyrdom and the Presbyterian Movement in Late-Restoration Scotland, 1679-1688," PhD Thesis, (University of Edinburgh, 2009): 2.

government's most severe policies, including summary executions, were reserved for these militants, and the period between 1684 and 1685 subsequently became known as "the Killing Time."<sup>46</sup>

Affairs in England also had direct impacts on Scotland. Due to the political pressure of the Popish Plot and Exclusion debates in England,<sup>47</sup> Charles II sent his brother James, Duke of York and Albany to Scotland in 1679. This was the first time a monarchical figure had been resident in Scotland for decades. While James arguably had a moderating influence on affairs,<sup>48</sup> his presence in the Scottish Parliament in 1681 helped to secure his succession to both thrones.<sup>49</sup> Scottish conspirators also came to be involved in Whig schemes, and the discovery of the Rye House Plot in 1683 proved to be consequential, involving the Scottish Privy Council in some of the most controversial cases of judicial torture to date. Although the Rye House Plot failed, the Earl of Argyll and Duke of Monmouth conspired in 1685 to lead subsequent rebellions in the two kingdoms. Argyll's rebellion will be discussed in detail in Chapter Five.<sup>50</sup>

Sitting between two Revolutions,<sup>51</sup> the Scottish Restoration has typically been understudied with Whiggish and Covenanter historiographies depicting it as a tyrannical and

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<sup>46</sup> For more information, see: David S. Ross, *The Killing Time: Fanaticism, Liberty and the Birth of Britain*, (Edinburgh: Luath Press Limited, 2010).

<sup>47</sup> For more information see: Greaves, *Secrets of the Kingdom*; J. R. Jones, *The First Whigs: The Politics of the Exclusion Crisis, 1678-1683*, (London: Oxford University Press, 1961); Tim Harris, *London Crowds in the Reign of Charles II: Propaganda and politics from the Restoration until the exclusion crisis*, (Cambridge: Cambridge University Press, 1987); Jonathan Scott, *Algernon Sidney and the Restoration Crisis, 1677-1683* (Cambridge: Cambridge University Press, 1991); Mark Knights, *Politics and Opinion in Crisis, 1678-81*, (Cambridge: Cambridge University Press, 1994); Mark Knights, *Representation and Misrepresentation in later Stuart Britain: partisanship and political culture*, (Oxford: Oxford University Press, 2006).

<sup>48</sup> Kirsty McAlister, "James VII and the Conduct of Scottish Politics, c. 1679 to c. 1686," PhD Thesis, (University of Strathclyde, 2003): 139.

<sup>49</sup> For more information on James' time in Scotland, see Hugh Ouston, "'From Thames to Tweed Departed': The Court of James, Duke of York in Scotland, 1679-82," *The Stuart Courts*, ed., Eveline Cruickshanks, (New York: The History Press, 2012).

<sup>50</sup> For more information on this rebellion, see Allan Kennedy, "Rebellion, Government and the Scottish Response to Argyll's Rising of 1685," *Journal of Scottish Historical Studies* 36:1 (2016): 40-59.

<sup>51</sup> Much work has been done on the mid-century Covenanters within the context of the War of Three Kingdoms and the Interregnum. For instance, see David Stevenson, *The Scottish Revolution, 1637-1644: The Triumph of the Covenanters*, (Newton Abbot: David & Charles, 1973); Allan I. MacInnes, *The British Revolution, 1629-1660*,

barbarous kingdom just waiting to be liberated.<sup>52</sup> However, more recently, historians have begun to re-evaluate the period providing a more balanced view. For instance, Clare Jackson examines the much-neglected intellectual culture of the Scottish Restoration, highlighting how it was both “eclectic and extensive.” While the main concern of royalist thinkers was generally on political obedience, as Jackson points out, there was a wide range of Scottish legal discourse. As she aptly notes, these ideas “produced a unique mental world which placed allegiance to the divinely-endowed, hereditary monarch, whose ancestors had ruled Scotland for two millennia, alongside Catholic and compromising desires to remove the pernicious effects of theological and philosophical doctrines deemed to induce faction, strife and civil war.”<sup>53</sup> Likewise, Kelsey Jackson Williams challenges the traditional, and very often Whiggish narratives, about the Scottish Enlightenment, arguing that Scotland had multiple moments of “Enlightenment.” He argues that the 1680s saw the formation of an early Scottish Enlightenment made up of Episcopalians, Catholics and Jacobites. Examining both James VII’s patronage, and the foundation of various institutions of learning in the 1680s, Williams highlights the vigorous intellectual culture that emerged during this period. Indeed, as he points out, “religious conflicts are not, by any means, inherent stiflers of intellectual activity.”<sup>54</sup> This thesis builds on these works, highlighting the legal and intellectual debates that both informed the government’s agenda, and helped form its public persona.

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(New York: Palgrave Macmillan, 2005); Laura A. M. Stewart, *Rethinking the Scottish Revolution: Covenanted Scotland, 1637-1651*, (Oxford: Oxford University Press, 2016); Andrew Lind, “‘Bad and Evil Patriots’? Royalism in Scotland during the British Civil Wars, c. 1638-1651,” PhD Thesis, (University of Glasgow, 2020).

<sup>52</sup> See for instance, Wodrow, *History of the Sufferings*; John Howie, *The Scots Worthies*, (Edinburgh and London: Oliphant, Anderson & Ferrier, 1870); Thomas Babington Macaulay, *The History of England from the Accession of James*, (London: Longmans, Green and Co., 1887).

<sup>53</sup> Clare Jackson, *Restoration Scotland*, 217.

<sup>54</sup> Kelsey Jackson Williams, *The First Scottish Enlightenment: Rebels, Priests and History*, (Oxford: Oxford University Press, 2020): 2, 3, 11.

While Restoration Scotland was a centre of diverse intellectual activity, there are still debates on how governmental policies were implemented. Alastair J. Mann argues against Steven Pincus' argument that James II and VII was a Catholic modernizer.<sup>55</sup> He instead contends that James was a traditionalist following the medieval concept of kingship, and that James attempted to re-catholicize Scotland "using the authority he felt he already possessed" backed up by "the royalist interpretation of Scots Law, as seen in Mackenzie of Rosehaugh's *Jus Regium*."<sup>56</sup> Arguments such as Mackenzie's were more than just abstract legal constructs, but rather, these works served as important tools outlining the ideals of the Restoration ideology and policies.

Along with Scottish intellectual thought, the late Restoration Covenanters have also until recently been overlooked in contrast to their earlier counterparts. Ian B. Cowan's *The Scottish Covenanters: 1660-1688* remains the sole book devoted to them. Cowan traces how the "high ideals" of the National Covenant eventually came to be "perpetuated only in the tenets of a small and insignificant sect," describing the rise of the Cameronians and how the "ideals of the covenant became decreasingly attractive to the Scottish people" in the later seventeenth and early eighteenth centuries.<sup>57</sup> Building on this, more work has gone into highlighting the fact that Covenanters and Presbyterians were not a monolithic group. For instance, Alasdair Raffe proposes limiting the use of "Covenanter" completely in the post-1660 period. As he argues, many ordinary Scots experienced "little disruption" following the Restoration of Charles II, even after their religious leaders lost power. As he argues, many Scots did not deem it necessary to dissent from the Episcopal church to "remain true to the Covenants." He also points out that the

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<sup>55</sup> Steve Pincus, *1688: The First Modern Revolution*, (New Haven & London: Yale University Press, 2009).

<sup>56</sup> Alastair Mann, *James VII, Duke and King of Scots, 1633-1701*, (Edinburgh: John Donald Short Run Press, 2014): 231.

<sup>57</sup> Ian B. Cowan, *The Scottish Covenanters, 1660-1688*, (London: V. Gollancz, 1976): 146.



United Societies were a minority, and their appropriation of the Covenanter title is misleading.<sup>58</sup> While this thesis often uses the term “Covenanter” as a label to classify religious dissidents for simplicity’s sake, it is important to keep in mind that not all Presbyterians necessarily viewed themselves as such. However, it is also worth pointing out that the authorities tended to lump all dissidents as followers of the Covenanting principles, which in and of itself says something. Like Raffe, Jamie McDougall argues that Covenanting should not be viewed as a single, “coherent” movement but rather, as a “broad spectrum” of Covenanting positions. For instance, he points out that some Covenanters partially conformed to the Episcopal church in the 1660s, highlighting the “middle ground of opinion in Restoration Scotland.”<sup>59</sup>

Neil McIntyre examines Covenanting ideology using an intellectual history approach. The Covenants influenced every rank of society, and “politicised Scottish society by their uncompromising demand for nationwide conformity.” Irrespective of whether one supported the Covenants genuinely or not, “everyone was involved in the struggle, one way or another.” As he explains, this mid-century Covenanting language was used by later Covenanters to justify popular resistance during the Restoration.<sup>60</sup> Examining the later Covenanters, Caroline Erskine notes the similarities in political thought between the English Whigs and the Scottish Covenanters. However, while the Scottish Covenanters argued in favour of resistance to tyranny, they were not supporters of religious tolerance. As Erskine notes, during the Restoration, Covenanting thought became more extreme, “but of a weakening intellectual standard,” and unlike John Locke and Algernon Sidney, writers like Alexander Shields failed to “integrate the

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<sup>58</sup> Alasdair Raffe, “Who were the later Covenanters?,” *The National Covenant in Scotland, 1638-1689*, Chris R. Langley, ed., (Woodbridge, Suffolk: Boydell Press, 2020): 197.

<sup>59</sup> Jamie McDougall, “Covenants and Covenanters in Scotland, 1638-1679,” PhD Thesis, (University of Glasgow, 2017): 2, 138, 200.

<sup>60</sup> Neil McIntyre, “Saints and Subverters: The Later Covenanters in Scotland, c. 1648-1682,” PhD Thesis, (University of Strathclyde, 2016): 2, 3, 5.

civic activism of the humanist hero with the otherworldly priorities of the Protestant would-be martyr.”<sup>61</sup> As this thesis discusses, the Scottish government saw radical Covenanting and its call for resistance as a very real threat to its authority, influencing many of its actions and policies throughout the period.

The Scottish Crown in the 1680s used the law to promote its authority and shape public opinion. While the government achieved some success, this failure in policy can perhaps be understood by examining the reception of political ideas. While historians of England have examined the ways in which ordinary people have engaged in popular politics,<sup>62</sup> as Karin Bowie argues, the English model of the public sphere does not work in the Scottish context due to Scotland’s lack of large print markets and coffee houses, among other contributing factors. Bowie shows how there are different ways to assess public opinion and engagement in political affairs. She examines four modes of engagement in the Scottish context: that of protestations, petitions, oaths, and public communications. As Bowie argues, this was a period of “rising literacy and religiosity” which made it “easier to stimulate political views among ordinary men and women and at the same time made it harder to control their opinions.”<sup>63</sup> Arguing that oaths were one of the ways in which the government tried to shape opinion and implement policy, this thesis corroborates that fact, as oaths become a recurring theme in the government’s criminal policy. Laura Doak builds on Bowie’s work, examining how ordinary men and women engaged with political debates in the Restoration through the concept of space and spectatorship. She

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<sup>61</sup> Caroline Erskine, “The Political Thought of the Restoration Covenanters,” *Scotland in the Age of Two Revolutions*, Sharon Adams and Julian Goodare, eds., (Woodbridge, Suffolk: Boydell Press, 2014): 169, 172.

<sup>62</sup> See for instance, Jason Peacey, *Print and Politics in the English Revolution*, (Cambridge: Cambridge University Press, 2013); Tim Harris, *London Crowds in the Reign of Charles II: Propaganda and Politics from the Restoration until the Exclusion Crisis*, (Cambridge: Cambridge University Press, 1987); Mark Knights, *Politics and Opinion in Crisis, 1678-81*, (Cambridge: Cambridge University Press, 1994).

<sup>63</sup> Karin Bowie, *Public Opinion in Early Modern Scotland, c. 1560-1707*, (Cambridge: Cambridge University Press, 2020): 1-4.

examines different forms of “cultural media” such as progresses, proclamations and public executions. As she argues, Scots did not need print to debate authority during this period.<sup>64</sup>

Although writing from an English perspective, Kevin Sharpe’s analysis of royal representation through visual and printed media provides some parallels with the Scottish government’s predicament during the Restoration. As Sharpe points out, the execution of the King in 1649 had profound consequences not only for the government, but for “the representation of rule” as well as criticism and counter-representation. While he argues that Charles II was successful in accommodating these changes, he notes that James II and VII had to partake in a “contest” of self-representation, and he failed to supplant his opponents’ image of him as a Popish tyrant. James was acutely aware that he had an image problem and wanted to avoid being seen as arbitrary— just like many of the Scottish Privy Councillors. As Sharpe argues, James tried to advocate with words—more than any other method— to represent himself as a man of moderation. However, his words were undermined both by his actions, as well as others’ representations of him.<sup>65</sup> As this thesis discusses, the Scottish government very much tried to promote an image of itself as moderate through its use of proclamations and legal documents, but it too failed to supplant the image of the Scottish Inquisition.

Legal trials play an important role in this thesis, as they were a way for the Scottish authorities to both punish offenders, implement policy, and represent authority. As Brian Cowan explains, political trials were an “important site for the representation of power to a larger public, and for debates about the nature of that power.” However, as he points out, these trials were

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<sup>64</sup> Laura Isobel Doak, “On Street and Scaffold: The People and Political Culture in Late Restoration Scotland, c. 1678-1685,” PhD Thesis, (University of Glasgow, 2020): 1, 208.

<sup>65</sup> Kevin Sharpe, *Rebranding Rule: The Restoration and Revolution Monarchy, 1660-1714*, (New Haven and London: Yale University Press, 2013): 1, 8, 242.

interpreted by “several different audiences at once.”<sup>66</sup> Certainly, as Melinda Zook shows, the trials and subsequent executions of the Whig conspirators and Rye House plotters in England “gave the Protestant cause its most powerful martyrs.”<sup>67</sup> Argyll’s trial in Scotland is perhaps the greatest political “show trial”<sup>68</sup> discussed in this thesis. However, his legacy was divisive. While he was portrayed as a Whig martyr in some circles, he was not as exalted in Covenanter hagiography.<sup>69</sup>

Jonathan Scott argues that the “Restoration Crisis” in England more generally was over the fear of the growth of popery and arbitrary government. He contends that the Restoration succeeded too well for it “restored not only the structures of early Stuart government, but subsequently its fears, divisions and crises.” Rather than looking forward to 1688/89, this period should be viewed from the perspective of the 1640s.<sup>70</sup> Indeed, this is apt for Scotland as well. The threat of the previous generation was constantly in the minds of the Scottish authorities. With the growing militancy of radical sects, the possibility of civil war seemed very real to Scotland’s leaders. However, as Tim Harris notes, the King could not easily deal with the threat posed by Presbyterians in Scotland, “without having recourse to measures that could make him vulnerable in England to charges of promoting arbitrary government in his northern kingdom.” Nonetheless, Charles was able to succeed because he was able to win over public opinion and

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<sup>66</sup> Brian Cowan, “The Spin Doctor: Sacheverell’s Trial Speech and Political Performance in the Divided Society,” *Parliamentary History* 31:1 (February 2012): 31.

<sup>67</sup> Melinda S. Zook, *Radical Whigs and Conspiratorial Politics in Late Stuart England*, (University Park, PA: The Pennsylvania State University Press, 1999): 116.

<sup>68</sup> For examples of these sorts of trials in the English context, see: Brian Cowan and Scott Sowerby, eds., *The State Trials and the Politics of Justice in Later Stuart England*, (Woodbridge, Suffolk: Boydell Press, 2021); Lois G. Schworer, “The Trial of Lord William Russell (1683): Judicial murder?,” *The Journal of Legal History* 9:2 (1988): 142-168.

<sup>69</sup> For an examination of representations of Covenanters in their hagiography, see Janette Currie, “History, Hagiography, and Fakestory: Representations of the Scottish Covenanters in Non-Fictional and Fictional Texts from 1638-1835,” PhD Thesis, (University of Stirling, 1999).

<sup>70</sup> Jonathan Scott, *Algernon Sidney and the Restoration Crisis, 1677-1683*, (Cambridge: Cambridge University Press, 1991): 8.

use his “multiple-kingdom inheritance” to his advantage.<sup>71</sup> On the other hand, Harris argues that James broke the image Charles had created, because he was increasingly forced to act more arbitrarily because his subjects simply refused to cooperate with him. Harris argues that James’ use of the prerogative in Scotland was undoubtedly absolutist.<sup>72</sup> However, Alasdair Raffe and Ginny Gardner have complicated these events, noting that many Presbyterians accepted James’ second Indulgence, with some even returning from exile.<sup>73</sup> As Raffe notes, there was a larger proportion of the Scottish population prepared to take advantage of religious toleration provided by the Indulgence compared to England.<sup>74</sup> Indeed, the royalist Mackenzie—who was opposed to the Indulgences—pointed out that many Presbyterians complied “with the Papists upon getting an Indulgence.” As he and Tarbat argued, the Presbyterians “magnified the dispensing Power, and we opposed it.”<sup>75</sup> Nonetheless, as Harris explains, the multiple kingdoms proved problematic to the authorities.

Building on this historiography, this thesis reframes Scottish political history with a new reading of legal sources, using a combination of archival, printed, and digitized collections. Along with the printed *Register of the Privy Council of Scotland (RPCS)*, *Records of the Parliament of Scotland (RPS)*, and *State Trials*, this thesis examines the Justiciary Records (JC39 in particular) from the National Records of Scotland (NRS) to piece together the legal process involved in trying an individual. Depositions and petitions, which can be found in both the *RPCS*

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<sup>71</sup> Harris, *Restoration*, 412-414.

<sup>72</sup> Harris, *Revolution*, 483-485.

<sup>73</sup> Ginny Gardner, *The Scottish Exile Community in the Netherlands, 1660-1690*, (East Lothian, Scotland: Tuckwell Press, 2004).

<sup>74</sup> Alasdair Raffe, “James VII’s Multiconfessional Experiment and the Scottish Revolution of 1688-1690,” *History* 100:341 (June 2015): 358. Scott Sowerby has also complicated the traditional story of the Revolution in England. See: Scott Sowerby, *Making Toleration: The Repealers and the Glorious Revolution*, (Cambridge: Harvard University Press, 2013).

<sup>75</sup> *A Memorial For His Highness the Prince of Orange in Relation to the Affairs of Scotland Together with The Address of the Presbyterian Party in that Kingdom to His Highness; and Some Observations on that Address. By two Persons of Quality*, (London: 1689): 6.

and the Justiciary Records, prove crucial to this analysis, shedding light on how governmental policies were received as well as implemented. Along with personal correspondence from the National Records of Scotland and National Library of Scotland (NLS), this thesis also makes use of printed polemical and legal tracts, such as the writings of Sir George Mackenzie of Rosehaugh, as these works proved crucial to the government's promotion of its image. Published diaries, letters and memorials are also essential. For instance, the advocate Sir John Lauder of Fountainhall provided extensive commentary on the legal activities of the day, and his analysis of events provides an illuminating comparison to governmental records. Covenanting works have also been used, including the Presbyterian Robert Wodrow's *History of the Sufferings*, in order to supplement and provide contrast to official records.<sup>76</sup>

### **Thesis Structure**

Chapter One examines the legal polemics produced during the late Restoration to defend the regime's increasingly strict policies. Legal treatises, documents and commentaries were an important tool for promoting the government's policies and defending its actions. Using the Lord Advocate, Sir George Mackenzie of Rosehaugh, as a case study, this chapter closely examines his legal and polemical writings and beliefs. Mackenzie often focused on education throughout his works, highlighting not only his, but the government's belief that Scottish men and women need only learn the law to be good subjects. Certainly, this idea of the law and secular authority bled into religious beliefs, causing tensions with Presbyterians and further emphasizing their incompatibility of beliefs. Furthermore, this chapter analyzes how the Scottish authorities used a top-down approach to shaping public opinion, focusing on the law to counter its violent and persecutory image and Mackenzie was central to this line of work. While Mackenzie's

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<sup>76</sup> Due to travel restrictions because of the COVID-19 pandemic, a final research trip to the UK had to be cancelled. As such, this thesis had to rely on more printed sources than originally anticipated.

arguments would prove to be successful in legal circles, the government's failure to adequately defend the Episcopal cause theologically, rather than legally, would prove significant.

Chapter Two examines the Test Act, and the Earl of Argyll's subsequent treason trial. Stating that he would only swear the Test "as far as it is consistent with itself and the Protestant religion," the Earl of Argyll's caveated oath reminded the Scottish authorities of the conditional loyalty espoused by Covenanters, which defeated the purpose of the Test. As such, this chapter examines the significance of Argyll's words, and looks at them in the context of Restoration loyalty, obedience and authority. While the Test Act proved to be of some success for the Scottish government in ensuring obedience and restructuring local governance, the appropriation of Argyll's case by Whiggish presses proved to be significant in undermining the Scottish government's image of itself.

Chapter Three discusses the Privy Council's legal right to judicial torture. Torture was a recurring theme in both Covenanting martyrologies and Whiggish narratives as a key component of the arbitrary nature of the Scottish Restoration government. Examining the legal foundation for judicial torture, this chapter shows that cases of torture were not so widespread as oppositional narratives would lead the public to believe. Using the cases of John Spreul and Alexander Gordon of Earlston as case studies, this chapter discusses the legal limitations and debates around judicial torture. While judicial torture was highly regulated, the Privy Council was unable to control cases of illegal torturing in the localities—be it of witches or Covenanters—further highlighting the divide between local and central governance. Regardless of the legality of judicial torture, however, the increasing debates around its uses by both governmental and oppositional parties only served to promote an inquisitorial image.

Chapter Four explores cases against resetting during the late Restoration. During the 1680s, the government increasingly began to pursue resetters—meaning harbourers of rebels. Examining the case of William of Lawrie of Blackwood in detail, this chapter shows how his case set a precedent which removed the gap between concealing criminals and conversing with a suspected neighbour. As this chapter discusses, the 1680s saw several measures with targeted local connections, and it was these attacks which proved most effective in wiping out dissent. However, because of the far-reaching implications of these types of policies, they were unpopular not only in local but elite circles.

Chapter Five discusses the ramifications of the Argyll Rebellion of 1685. Focusing on the punishments of the rebels and dissidents, this chapter shows how the government's response to the rebels did not fit into its typically violent image. In comparison to the “Bloody Assizes” in England, punishments in Scotland were rather subdued. As the chapter shows, the Council's perception and treatment of its enemies could be both flexible and strategic. Indeed, even the Council's greatest opponents noted how few executions took place following this rebellion. Nevertheless, these events did not prove to help in promoting the Crown's image of itself in the long run.



## Chapter One: Sir George Mackenzie of Rosehaugh and the Legal Narrative of the Scottish Restoration

*It being alwayes our chieff care to prevent the increase of disorders and rebellions in that our ancient kingdome, not only by maintaining forces to suppress the same but likewise by imploying learned and able judges who may discourage any such insurrections by discovering and punishing such as are guilty thereof.*

Charles II to the Privy Council, 1683<sup>1</sup>

### Introduction

In “Wandering Willie’s Tale,” written in 1824 by Sir Walter Scott, the lead character encounters a group of “ghastly revelers” seated around a table. They are the leading figures of the Scottish Restoration government, which include the “crafty” Lauderdale, the “fierce” Middleton, and the “dissolute” Rothes, and others. Amongst them, “There was the Bludy Advocate MacKenzie, who, for his worldly wit and wisdom, had been to the rest as a god.”<sup>2</sup> Sir George Mackenzie of Rosehaugh served as Lord Advocate of Scotland from 1677-1689—with a brief period during James VII’s reign when the role went to Sir John Dalrymple. From Scott’s brief comment, written over a century after Mackenzie died, we can clearly see that the Lord Advocate’s legacy was divisive.

The role of Lord Advocate was the highest legal position in the Scottish government, serving as the chief legal advisor and public prosecutor for Scotland. However, Mackenzie was not only King Charles II and James VII’s Lord Advocate, he was also a widely published writer and is credited with helping to form the foundations of modern Scottish law. Nonetheless, he is

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<sup>1</sup>*The Register of the Privy Council of Scotland (RPCS)*, 3<sup>rd</sup> series, Vol. 8, (Edinburgh: HM General Register House, 1915): 15.

<sup>2</sup> Sir Walter Scott, “Wandering Willie’s Tale,” in *The Short-Story: Specimens Illustrating Its Development*, Matthew Braner, ed., (New York: American Book Company, 1907): Bartleby.com, 2000, <<https://www.bartleby.com/195/6.html>>. Last accessed December 2021.

arguably most famous for the unfortunate moniker “Bluidy Mackenzie.” To this day, tour guides in Edinburgh bring visitors to Mackenzie’s mausoleum in Greyfriars Kirkyard, sharing alleged ghost stories, and reciting the old rhyme “Bluidy Mackenzie, come oot if ye daur!” Not many Restoration figures have such a claim to fame or infamy. Is this “Bluidy Mackenzie” persona a fair assessment of Mackenzie’s career? Serving as Lord Advocate during two rebellions, Mackenzie certainly presided over many treason cases. Nevertheless, Mackenzie believed himself to be a chief advocate of “just and merciful” law, and believed law to be a “Sanctuary to such as are afflicted.”<sup>3</sup> Is it possible to reconcile his beliefs with his persona? Mackenzie serves as an interesting case study, for as Lord Advocate, he was deeply involved in many of the grievances complained of at the Revolution. Indeed, as Mackenzie supposedly said to Sir John Lauder of Fountainhall, “no Lord Advocate had screwed the prerogative higher, or maintained it more strenuously than he, and that for his merit he deserved to have his statue placed ryding behind King Charles II in the Parliament closs.”<sup>4</sup> Certainly, Mackenzie could be a harsh and decisive person when he thought that civil order was at stake, and he defended controversial measures in the name of peace, such as holding landlords responsible for their tenants’ actions. However, he warned the King that “this power should, like dangerous medicine, never be used, save in cases of extreme necessity.”<sup>5</sup>

Throughout his tenures as Lord Advocate, Sir George Mackenzie of Rosehaugh wrote several defences and vindications of the Scottish government’s actions, and he became a key

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<sup>3</sup> Sir George Mackenzie of Rosehaugh, *The works of that eminent and learned lawyer, Sir George Mackenzie Of Rosehaugh, advocate to King Charles II. and King James VII. With Many Learned Treatises of His, never before Printed*, (Edinburgh: 1716-22): 35

<sup>4</sup> James Dennistoun, ed., *The Coltness Collections, M.DC.VIII.-M.DCCC.XL*, (Edinburgh: 1842): 81.

<sup>5</sup> Sir George Mackenzie of Rosehaugh quoted in Clare Jackson, “Compassing Allegiance: Sir George Mackenzie and Restoration Scottish Royalism,” *Politics, Religion and Ideas in Seventeenth- and Eighteenth-Century Britain: Essays in Honour of Mark Goldie*. Justin Champion, John Coffey, Tim Harris and John Marshall, eds., (Woodbridge, Suffolk: Boydell Press, 2019): 124. Trip to BL to see this document myself in person was cancelled due to COVID-19.

player in trying to create a better image of the Scottish justice system through knowledge and learning. Historians have described him as emblematic of seventeenth-century Scottish royalism, so his writings are significant, not only for their legal nuances, but also, because they show how the government used him to justify its actions.<sup>6</sup> Indeed, Mackenzie used both his writing skills and his charismatic oratory to ensure compliance. For instance, while on circuit, the Lords of the Justiciary wrote to the Privy Council to give an account of the Lord Advocate's "carriage in his Majestie's service," noting he "outdoe himself in a very eloquent loyall discourse to the people, in the presence of the Court: which, wee think, with great reason, had, and will have extraordinarie good effects upon the hearts of both gentlemen and commons, in bringing them back to their dutie."<sup>7</sup> Nonetheless, the fact that he is more commonly remembered as "Bluidy Mackenzie" is perhaps indicative of the Restoration regime's failure as a whole in selling its political and legal justifications, and in maintaining its good image.

While Mackenzie did much to promote and defend the authorities' strict measures, the bigoted view of Mackenzie blindly following the government's orders is not necessarily a fair or just one. Mackenzie was a chief proponent of the law, and often the royal prerogative, but he failed to support the removal of the penal acts during James VII's reign, briefly losing his position as Lord Advocate because of this defiance. When James was in Scotland, Mackenzie presented a paper directly to his Royal Highness against the scheme to deprive the Earl of Argyll of his hereditary jurisdictions in Scotland. As Mackenzie noted, this "displeasd him very much, bot I alwys tell my opinion & if it please not I serv others according to their inclination."<sup>8</sup> Indeed, the future Earl of Melfort claimed that James "has so bad ane opinion of him that it is a

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<sup>6</sup> Jackson, "Compassing Allegiance," 121.

<sup>7</sup> J. Dunn, ed, *Letters Illustrative of Public Affairs in Scotland Addressed by Contemporary Statesmen to George, Earl of Aberdeen, Lord High Chancellor of Scotland*, (Aberdeen: 1851): 129-130.

<sup>8</sup> Osmund Airy, ed., *The Lauderdale Papers*, Vol. III, (Westminster: 1884-5): 195.

under he lets him stay in.”<sup>9</sup> Furthermore, he was far from universally liked in the Privy Council. The Drummond brothers in particular were often at odds with him. Writing in 1683, Melfort declared Mackenzie “the oddest man in the world” and “as humorsome as the winde.” He continued, “we encourage him, and holds him up as far as safely we can, but he has projects to trouble twenty people.” While not specifying what these projects were, he could be referring to a number of reforms and regulations that Mackenzie pushed through during the period, such as the regulation of witnesses, etc.<sup>10</sup> Melfort concluded, “But we take no notice of him but to laugh at him; and therefore I hope your lordship will say nothing of these matters till he is past doing harm.”<sup>11</sup> Certainly, Mackenzie frustrated Melfort because he was not easily controllable. Melfort often wrote to Queensbury complaining about the Lord Advocate and his attempts to manage him “in case he turne, as its hundred to one he will.” Yet, he admitted “we must use him.”<sup>12</sup>

Due to both Mackenzie’s political, and legal significance, this chapter will examine Mackenzie’s printed defences and vindications of the government’s actions, as well as his polemical and legal works, and use them as examples of the complicated nature of late Restoration politics, law and propaganda. While Mackenzie’s reputation has been repaired in more recent intellectual and legal historiographies, his attempts to influence public opinion

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<sup>9</sup> HMC, *Report on the Manuscripts of His Grace the Duke of Buccleuch and Queensbury, Preserved at Drumlanrig Castle* (HMC Drumlanrig), Vol. 2, (London: Printed for H.M. Stationery Off., by Eyre and Spottiswoode, 1897-1903): 165.

<sup>10</sup> Sir George Mackenzie of Rosehaugh, *A vindication of the government in Scotland during the reign of King Charles II against mis-representations made in several scandalous pamphlets to which is added the method of proceeding against criminals, as also some of the phanatical covenants, as they were printed and published by themselves in that reign*, (London: 1691): 18. For instance, Mackenzie wrote that he changed the policy wherein the Lord Advocate would previously examine witnesses. Instead, judges would now take the witnesses’ depositions. Additionally, witnesses were then allowed to correct or pass their former depositions. Furthermore, while there were sometimes accusations thrown at the Justiciary for packed assizes, Mackenzie did also examine them thoroughly. For instance, in January 1686, he excused a gentleman from being a member of the assize on account of his deafness. See NRS, JC26/68 (unnumbered).

<sup>11</sup> HMC Drumlanrig, Vol. 2, 144.

<sup>12</sup> *Ibid.*, 132, 141, 142.

through legal education remains an understudied facet of Restoration political propaganda.<sup>13</sup>

Mackenzie worked hard to promote an image of a just and fair judicial system in Scotland, and it is worth looking at these arguments. Rather than looking at specific trials and legal cases as later chapters do, this chapter will focus on Mackenzie's various writings, as they serve as an intriguing case study of the legal ideology that Mackenzie espoused—one where statutes reigned supreme. Certainly, this abstract legal belief had important policy implications. As Clare Jackson has noted, Mackenzie was prone to legal positivism, in that laws were considered valid because they were enacted by a sovereign body. As such, concerns of morality could not impact a law's validity or reach.<sup>14</sup> This legal ideology was significant, as it not only informed Mackenzie's actions as Lord Advocate, but it also helps us understand the Justiciary and Privy Council's actions throughout the late Restoration.

Because Mackenzie not only served as a judicial officer, but also as an executive member of the Privy Council, and often as a mouthpiece for its policies, it is important to understand how his beliefs influenced his actions. As Julian Goodare explains, the legal sovereignty of the state was a powerful concept, and "the law of the supreme human authority" was considered to be statute law. All statutes were believed to be "consonant with divine law and with natural law."<sup>15</sup> As such, the law was more than a mere ideology to some. Indeed, as Hugh Ouston explains, for

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<sup>13</sup> Clare Jackson, *Restoration Scotland, 1660-1690: Royalist Politics, Religion and Ideas*, (Woodbridge, Suffolk: Boydell Press, 2003). For the only full-length biography of Sir George Mackenzie of Rosehaugh, see: Andrew Lang, *Sir George Mackenzie, king's advocate, of Rosehaugh: his life and times 1636 -1691*, (London, New York: Longmans, Green, 1909). For more recent work on him, see: Alp Rodoplu, "The 'King's Bloody Advocate' or 'Noble Wit of Scotland'? Restoration Scotland and the Case of Sir George Mackenzie of Rosehaugh, 1636/38-1691: Neostoicism, Politics and the Origins of the Scottish Enlightenment," Master's Thesis, (İhsan Doğramacı Bilkent University, 2017); Jackson, "Compassing Allegiance,"; Kelsey Jackson Williams, *The First Scottish Enlightenment: Rebels, Priests and History*, (Oxford: Oxford University Press, 2020).

<sup>14</sup> Clare Jackson, "Natural Law and the Construction of Political Sovereignty in Scotland, 1660-1690," *Natural Law and Civil Sovereignty: Moral Right and State Authority in Early Modern Political Thought*, Ian Hunter and David Saunders, eds., (New York: Palgrave, 2002): 155; for the definition see: "positivism, n.," *OED Online*, (Oxford: Oxford University Press, 2001). Last accessed December 2021.

<sup>15</sup> Julian Goodare, *State and Society in Early Modern Scotland*, (Oxford: Oxford University Press, 1999): 18.

Mackenzie, the “present positive law was the expression of [God’s] divine intention” with stability and property being the main features of this “divine model of a hierarchical society under an absolute monarchy.”<sup>16</sup> Therefore, this chapter will serve as an introduction to a theme that underpins the remaining chapters throughout this thesis: the law and the necessity of state.

With the shadow of the Civil Wars and Interregnum looming throughout the Restoration, the Scottish government focused on the Presbyterians’ disobedience to the law as the justification for its strict legislation. As Jackson discusses, following the Interregnum, “theories of indivisible, illimitable and inalienable sovereignty” gained popularity, as the new leaders sought to refute mid-century Covenanting polemics on “shared sovereignty.” However, with political pressures mounting due to an increase in radical Presbyterianism in the 1670s and 1680s, the government “urgently required theoretical legitimisation” in contrast to the growing and present repercussions of resistance theory. As Jackson argues, the administration of Charles II was “obliged to construct a theoretical defence of [its] actions which eliminated the scope for the language of natural rights to become a legitimating lexicon of resistance.” Instead, the preservation of order became the chief priority of the government and the most important duty of a subject.<sup>17</sup> Legal treatises and commentaries became essential for promoting the government’s policy and defending its actions.

During the Restoration, lawyers gained an increasingly significant role in politics and governance.<sup>18</sup> For instance, in 1661, two lawyers were appointed to the Privy Council for the first time, and lawyers continued to have a considerable presence on the Council throughout the

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<sup>16</sup> Hugh Ouston, “York in Edinburgh: James VII and the Patronage of Learning in Scotland, 1679-1688,” *New Perspectives on the Politics and Culture of Early Modern Scotland*, John Dwyer, Roger A. Mason and Alexander Murdoch, eds., (Edinburgh: John Donald Publishers Ltd., 1982): 135.

<sup>17</sup> Clare Jackson, “Natural Law and the Construction of Political Sovereignty in Scotland,” 157, 161-162.

<sup>18</sup> Jackson, *Restoration Scotland*, 220.

period. Legal expertise, although not essential, became an important component to its membership.<sup>19</sup> Indeed, Lord Haddo, the future Earl of Aberdeen, became the first lawyer to become Chancellor in Scotland—although his lack of peerage would prove to be a controversy.<sup>20</sup> As Jackson argues, the Episcopal church was “both institutionally impotent and ideologically bankrupt,” so lawyers, like Mackenzie and Viscount Stair came to “exert the greatest influence over the theory and practice of monarchy” during the Restoration, in their attempts to “establish the ultimate sources of political sovereignty in order to deduce the rights and duties mutually incumbent on monarchs and subjects alike.”<sup>21</sup> Certainly, Charles II was correct when he wrote to the Privy Council in 1683 explaining that his chief care was not only to prevent and suppress rebellions by maintaining forces but also “by imploying learned and able judges.”<sup>22</sup>

Along with the increasing importance of advocates on the Council, it is important to remember that the High Court of the Justiciary—the supreme criminal court in Scotland—was only established in 1672. As Allan Kennedy notes, criminal prosecution in Scotland was “unusually diverse and decentralised” with church courts and local courts holding prominent places. Nonetheless, the formation of the High Court of the Justiciary, “as an unambiguously supreme criminal court” was indeed a clear symbol of the authority and “theoretical supremacy of royal justice.” The Privy Council also held its own judicial powers, and as Kennedy argues, the Privy Council often exploited criminal justice “in explicit service of the state” in order to enforce policy decisions or enhance the powers of the central government. This attempt to centralize criminal law was significant, and as Kennedy notes, the Council “calculatedly

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<sup>19</sup> Ronald Arthur Lee, “Government and Politics in Scotland, 1661-1681,” PhD Thesis, (University of Glasgow, 1995): 80.

<sup>20</sup> John Lauder of Fountainhall, *Historical Observes of Memorable Occurrents in Church and State, from October 1680 to April 1686*, (Edinburgh: T. Constable, printer to Her Majesty, 1840): 128-129.

<sup>21</sup> Jackson, *Restoration Scotland*, 220.

<sup>22</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 8, 15.

exploited its judicial role in an effort to forge and sustain the authority of a state with quasi-absolutist ambitions.”<sup>23</sup> The Privy Council and Justiciary were intrinsically connected, with Mackenzie, amongst others, being members of both. Indeed, Mackenzie promoted the central government, both through his role in prosecuting, as well as through his polemical and legal writings supporting the Crown’s authority. As Laura Doak notes, the Privy Council was able to “augment its reach” through the appointment of members to overlapping judicial and executive positions, such as Mackenzie.<sup>24</sup>

Much has been written about the Tory reaction to the Exclusion Crisis and Rye House Plot in England,<sup>25</sup> yet there has been less work done on the Scottish government’s attempts to bolster popular opinion during this time.<sup>26</sup> Karin Bowie, however, has shown how the Scottish government attempted to shape public opinion through oaths, bonds, and proclamations.<sup>27</sup> Along with these methods, this chapter will show how the Scottish authorities used a top-down approach to shaping public opinion by attempting to educate through numerous legal tracts and narratives, and Mackenzie was central to this line of work. While at times controversial, the

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<sup>23</sup> Allan Kennedy, “State Formation, Criminal Prosecution and the Privy Council in Restoration Scotland,” *English Historical Review* CXXXV:572 (March 2020): 30, 38, 31. As Kennedy notes, much less has been written about the role of criminal prosecution in state formation in the Scottish context. However, comparisons can be made to England. See for instance: Steve Hindle, *The State and Social Change in Early Modern England, c. 1550-1640*, (New York: St. Martin’s Press, 2000).

<sup>24</sup> Laura Isobel Doak, “On Street and Scaffold: The People and Political Culture in Late Restoration Scotland, c. 1678-1685,” PhD Thesis, (University of Glasgow, 2020): 39.

<sup>25</sup> For example: Richard L. Greaves, *Secrets of the Kingdom: British Radicals from the Popish Plot to the Revolution of 1688-1689*, (Stanford: Stanford University Press, 1992); Tim Harris, *London Crowds in the Reign of Charles II: Propaganda and politics from the Restoration until the exclusion crisis*, (Cambridge: Cambridge University Press, 1987); Mark Knights, *Politics and Opinion in Crisis, 1678-81*, (Cambridge: Cambridge University Press, 1994); Peter Hinds, *‘The Horrid Popish Plot’: Roger L’Estrange and the Circulation of Political Discourse in Late Seventeenth-Century London*, (Oxford: Oxford University Press, 2010).

<sup>26</sup> Clare Jackson, however, discusses the political and intellectual discourse produced by royalists throughout the period, highlighting their nuanced arguments in *Restoration Scotland*.

<sup>27</sup> Karin Bowie, *Public Opinion in Early Modern Scotland, c. 1560-1707*, (Cambridge: Cambridge University Press, 2020).



Scottish government arguably did have the law on its side for many of its cases, and it is worth considering the legal arguments supporting those cases, and how they were advertised.

While Scottish print culture may have been less developed than in England at this time, this chapter argues that the Scottish government employed a coherent and unified propaganda strategy, focusing on the law in order to counter its violent and persecutory image, and Sir George Mackenzie of Rosehaugh was a leading figure in this movement. Mackenzie's role in promoting the government's image was rather unique, and unlike previous Lord Advocates, Mackenzie was much more involved in promoting a specific image of the government. Unlike his predecessor, Sir John Nisbet, Mackenzie was constantly reviewing legal materials for publication, be it printed trials, or written defences and treatises to be shared with the public.<sup>28</sup> Likewise, Mackenzie's successor, Sir John Dalrymple of Stair, while actively involved in politics, was less concerned with addressing the public and shaping public opinion through his writings. Mackenzie's counterpart in England, Baron George Jeffreys perhaps is a more suitable point of comparison due to his comparable legacy in Whig narratives. Serving as Lord Chief Justice from 1683-1685, and presiding over the notorious "Bloody Assizes," he has gone down in history as the "hanging judge." Nevertheless, while he was promoted to Lord Chancellor and had influence on political policies, he was uninvolved with the Tory publications promoting and defending the King and government, and he did not write any legal treatises. Unlike Jeffreys, Mackenzie chose to defend and explain controversial cases to the public.<sup>29</sup> Because Mackenzie was so involved with promoting the Restoration government, and the fact that his tenure as Lord

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<sup>28</sup> Sir John Nisbet's sole published work was published posthumously. See: Sir John Nisbet, *Some doubts & questions in the law, especially of Scotland as also, some decisions of the lords of council and session / collected & observ'd by Sir John Nisbet of Dirleton, advocate to King Charles II ; to which is added an index for finding the principal matters in the said decisions*, (Edinburgh: 1698).

<sup>29</sup> For more information on George Jeffreys, see Paul D. Halliday "Jeffreys, George, first Baron Jeffreys (1645–1689), judge," *Oxford Dictionary of National Biography*, (23 Sep. 2004).

Advocate coincided with almost the entirety of the post-Lauderdale regime, his legal and political views can be understood as a representation of the late Restoration regime more fully. He is significant because the Restoration leaders saw him as a good tool for promoting their policies and defending their actions, and he was put to good use.

This chapter will begin with a brief introduction of Mackenzie himself, and then will examine Mackenzie's influence on Scottish legal education, his legal writings and how that larger ideology not only informed the Lord Advocate's behaviour but influenced government propaganda. It will then briefly examine the authorities' perceived differences between the Presbyterian and Episcopal religions, and the points of contention between them—according to Mackenzie and other government figures. “Bluidy Mackenzie” became synonymous with later depictions of the arbitrary government of Scotland, so a balanced analysis of the Lord Advocate is justified. Certainly, Mackenzie was not only an important legal figure in the growth of Scots law, but also a significant political tool for the Restoration administrators.

### **Sir George Mackenzie of Rosehaugh, Lord Advocate**

Born in Dundee in the late 1630s, Mackenzie was first educated at Aberdeen and St Andrews before going to France to complete his legal studies. Mackenzie was then appointed a Justice Depute in 1661. In this role, he not only served as defence council for the Marquess of Argyll, but he became involved in some witchcraft trials, leading to his scepticism of the procedures. As part of the Mackenzie clan, he was proud of his heritage, and he had a variety of interests and wrote on many subjects, including law, religion, and history. In 1660, he published *Aretina*, often credited with being the first Scottish novel. Elected to Parliament in 1669, he continued to serve throughout the 1670s. While he initially clashed with Lauderdale, he gradually came to support him, and in August 1677, he took over the office of Lord Advocate

from Sir John Nisbet.<sup>30</sup> As Kelsey Jackson Williams notes, Mackenzie was “paradigmatic of the learned legal culture which figured so largely in the intellectual life of Restoration Edinburgh.” He both made his fortune supporting the Stuart monarchy, while his educational and literary pursuits “reflect the flowering of Scottish culture towards the end of the seventeenth century.”<sup>31</sup>

Mackenzie’s unique role in the government, as both an enforcer and a reformer, highlights the tensions within the Scottish government throughout this period. The Restoration government oscillated between reconciliation and repression,<sup>32</sup> and Mackenzie’s tenure fell mostly within the repressive side. However, while he is mostly remembered for his role presiding over numerous treason trials, he also attempted to regulate and make the legal system more efficient. Mackenzie is an interesting case study of the period because his career has been so divisive, much like the Restoration as a whole. Not long after his death, he was already being used to promote competing narratives of the period. Bishop Burnet described Mackenzie as “a man of much life and wit, but he was neither equal nor correct in it: he has published many books, some of law, but all full of faults; for he was a slight and superficial man.”<sup>33</sup> Considering the opinion of legal scholars, one should probably take Burnet’s opinion with a grain of salt. In 1716, a collection of Mackenzie’s works was posthumously published. The compiler noted: “Now Sir George being Advocate during these two last Rebellions, it was no wonder that the Rebels had a particular Spite and Malice against him, who by his Office was oblig’d to prosecute them for their Lives; and therefore they call’d him, ‘The Blood-thirsty Advocate, and the

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<sup>30</sup> For more information, see: Clare Jackson, “Mackenzie, Sir George, of Rosehaugh (1636/1638–1691), lawyer and politician,” *Oxford Dictionary of National Biography*, (23 Sep. 2004).

<sup>31</sup> Jackson Williams, *The First Scottish Enlightenment*, 26.

<sup>32</sup> For detailed look at the period from 1660-1681, see Julia Buckroyd, *Church and State in Scotland, 1660-81*, (Edinburgh: J. Donald, 1980).

<sup>33</sup> Gilbert Burnet, *Bishop Burnet's History of His Own Time. From the Restoration of King Charles II. To the Settlement of King William and Queen Mary at the Revolution...* Vol. 1 (London: Printed for Thomas Ward in the Inner-Temple Lane: 1724): 414.

Persecutor of the Saints of God’ but how much they were in the Wrong to him, as I have said will appear from the great care he took in regulating the Forms used in Pursuits of Treason....”<sup>34</sup>

While this biographer is overly complimentary to him, he does bring up interesting points.

Mackenzie’s priority was always first and foremost the law, and Mackenzie did much work to regulate the legal process for those involved. According to the Presbyterian Robert Wodrow, however, Mackenzie “was a very great Instrument in the After-severities against Presbyterians and was scarce ever guilty of moderating any harsh Proceedings against them.”<sup>35</sup>

Much has been written about Mackenzie after his death. However, what did people think of him while he lived? The lawyer Sir John Lauder of Fountainhall was quick to point out Mackenzie’s bad temper, and he was not afraid to critique his decisions. Certainly, when recalling Mackenzie’s inauguration as Lord Advocate, he noted Mackenzie “resolving to give the world an experiment of his justice, and that he would purge the prisons of these his predecessor had left him,” hurried long-term prisoners to assizes.<sup>36</sup> Yet, Fountainhall still would later describe him as “the brightest man in the nation.”<sup>37</sup> The radical Covenanter Alexander Shields noted how he was told that Mackenzie was “a man that could give advice” when he was encouraged to take the Oath of Allegiance, and that Mackenzie had agreed to conference with him upon it should he decide to do so.<sup>38</sup> Interestingly, a prisoner in the Tolbooth, William Thomson, in a personal petition to Mackenzie— not the Justiciary or Council— noted he was “sensible of your [lordship’s] gracious kindness and goodness” and requested he contact the

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<sup>34</sup> Mackenzie, *Works*, V.

<sup>35</sup> Robert Wodrow, *The history of the sufferings of the Church of Scotland, from the Restauration to the Revolution*, Vol. 1 (Edinburgh: 1721-22): 438.

<sup>36</sup> Sir John Lauder of Fountainhall, *Historical notices of Scottish affairs...* Vol. 1, (Edinburgh: T. Constable, printer to Her Majesty, 1848): 180.

<sup>37</sup> Sir John Lauder of Fountainhall, *Chronological Notes of Scottish Affairs, from 1680 till 1701; Being Chiefly Taken from the Diary of Lord Fountainhall*, (Edinburgh: 1822): 161.

<sup>38</sup> Jackson, “Compassing Allegiance,” 132; National Records of Scotland (NRS), JC39/73/1.

Lords of Justiciary on his behalf. While petitions were often written deferentially, it is notable that Thomson chose to write to Mackenzie personally. Whatever the case, the personal petition worked, and Mackenzie wrote them on his behalf “from a principal of justice to get this poor man relax.”<sup>39</sup>

The English poet John Dryden referred to Mackenzie as “that noble wit of Scotland,”<sup>40</sup> and even Melfort, who quite openly shared his dislike of the Lord Advocate in his letters, wrote “he is a good tool if rightly used at any time,” noting “he has mor influence on men’s myndes that uill hear him then can be imagined.”<sup>41</sup> Indeed, Mackenzie’s written works would prove useful to the government. Nonetheless, Mackenzie’s profession created many enemies, and he was acutely aware of this, having been assaulted by political dissidents in the late 1670s who broke his leg. This injury caused a permanent limp, earning him the nickname “Vulcan” after the similarly injured Roman deity.<sup>42</sup> As Mackenzie wrote to Lauderdale, “the Advocat is in a singular conditione becawse all whom he pursues turne his adversaries.”<sup>43</sup>

Indeed, when the militant Covenanter Donald Cargill excommunicated seven leading figures of government including the King, and Duke of Albany and York at Torwood in 1680, he included Mackenzie in the list, accusing him of several misconducts:

I do...Excommunicate, cast out of the True Church, and deliver up to Satan George Mackenzie the King’s Advocat, for his Apostacie, in turning unto a profligateness of Conversation, after he had begun a profession of Holiness: For his constant Pleading against, and Persecuting to Death, the People of GOD, and alledging and laying to their Charge, things which in his Conscience, he knew to be against the Word of GOD, Truth; Reason, and the Ancient laws of this Kingdom: And his Pleading for Sorcerers, Murderers and other Criminals, that before GOD, and by the Laws of the Land, ought to die....<sup>44</sup>

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<sup>39</sup> NRS, JC26/69 (unnumbered).

<sup>40</sup> Lang, *Sir George Mackenzie*, 181.

<sup>41</sup> HMC Drumlanrig, Vol. 2, 156.

<sup>42</sup> Clare Jackson, “Mackenzie, Sir George, of Rosehaugh (1636/1638–1691), lawyer and politician,” *Oxford Dictionary of National Biography*, (23 Sep. 2004).

<sup>43</sup> Airy, *Lauderdale Papers*, III, 219

<sup>44</sup> *A Cloud of Witnesses for the Prerogative of Jesus Christ, or the last speeches and testimonies of those who have suffered for the truth in Scotland since 1680*, (1714): 311.

Many of these accusations will be dealt with in more detail throughout this chapter. However, a brief discussion on Mackenzie's skepticism of witchcraft trials, and his pleadings in defence of witches will be discussed in Chapter 3, and these cases are likely what Cargill referred to in reference to Mackenzie pleading for sorcerers. Nonetheless, many of Cargill's accusations against Mackenzie can be understood within the context of his ideology, which informed not only his behaviour as a private individual, but his public persona and attitude toward Presbyterians. Mackenzie's ideology emphasized both the supremacy of statutes, as well as the constitutional authority of the monarch. Certainly, Mackenzie's polemical, legal, and political works served the Scottish monarchy in a variety of ways.

### **The Supremacy of Statutes and the Importance of Education**

It is impossible to separate Mackenzie the political figure, with Mackenzie the legal figure. While his reputation is generally poor in traditional political histories of Scotland, he has fared better in legal circles. Indeed, the study and evolution of Scottish law flourished during the Restoration, thanks in part to Mackenzie as well as James Dalrymple, Viscount of Stair. For instance, during the Restoration, institutional writing became a new form and genre of legal literature, and both Mackenzie and Stair helped create it.<sup>45</sup> As John D. Ford notes, early modern lawyers played an important role in shaping and creating the law of Scotland.<sup>46</sup> Interestingly, Ouston argues that James as both Duke and King helped to promote this culture of learning in Scotland by responding to the growing demands from the professional classes such as lawyers and doctors.<sup>47</sup> Indeed, Ouston points out the significance placed on "institutions" during the

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<sup>45</sup> Andrew R. C. Simpson and Adelyn L. M. Wilson, *Scottish Legal History. Volume 1. 1000-1707*, (Edinburgh: Edinburgh University Press, 2017): 286.

<sup>46</sup> J. D. Ford, *Law and Opinion in Scotland During the Seventeenth Century*, (Portland, OR: Hart Publishing, 2007): ix.

<sup>47</sup> Ouston, "James VII and the Patronage of Learning in Scotland," 134.

1680s —such as the Royal College of Physicians and the Faculty of Advocates. As he notes, “the professional organizations expressing loyalty to the King” could be used as a symbolic image representing the authority of the Crown.<sup>48</sup> While Ouston argues that Mackenzie hoped to serve his country and promote his profession “by enhancing the role of the Virtuoso in national life,”<sup>49</sup> regardless of his motivation, one of Mackenzie’s goals as an advocate was to educate as many people as possible in the study of law. While the target readership of his legal texts was certainly fellow lawyers, Mackenzie’s hope was to educate all Scots on their legal system, and by doing so, to create a fair and just society.

Mackenzie published a number of works in the 1660s. However, his first legal publication arrived in 1672—his *Pleadings*. As Ford notes, Mackenzie modelled his work on the French custom of advocates publishing their “plaidoyers,” and Mackenzie was the only Scottish advocate to publish his pleadings in this style.<sup>50</sup> Mackenzie argued that the Scots tongue was more fit for pleading than English or French, with its “fiery, abrupt, sprightly, and bold” pronunciations. He also argued that Scottish law favoured pleading more than English law, which he argued allowed for fewer opportunities.<sup>51</sup> He explained that he chose to publish his pleadings so that strangers would know how advocates pleaded in Scotland.<sup>52</sup> In addition, he had further education purposes in mind. He noted that advocates must be eloquent to “conciliate favour to his client’s cause.” Arguing against empty and ornamental language, he explained that instead an advocate should know how to “enliven his Discourse with Expressions suitable to the Subject he treats.”<sup>53</sup> He believed his *Pleadings* could be used as examples for other lawyers to

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<sup>48</sup> Ibid., 136.

<sup>49</sup> Ibid., 151.

<sup>50</sup> Ford, *Law and Opinion in Scotland*, 289-90.

<sup>51</sup> Mackenzie, *Works*, 17.

<sup>52</sup> Ibid., 10.

<sup>53</sup> Ibid., 11-12.

follow suit. As Mackenzie argued, it was the lawyer's great duty to do the best he could, for "what is so desirable as to be a Sanctuary to such as are afflicted, to pull the Innocent from the Claws of his Accuser, to gain Bread for the Hungry, and to bring the Guilty to Scaffold?"<sup>54</sup>

Mackenzie published many legal works throughout his life. Indeed, Mackenzie was a great promoter of legal education, and he wrote several works intended as student textbooks.<sup>55</sup> In 1678, he published the first legal textbook of Scottish criminal law, *The Laws and Customes of Scotland, in matters criminal*... In the dedication to the Duke of Lauderdale, he noted that he wrote this "Book to inform my Countrey-men, and to illuminat our Law." He went further, explaining the design of his textbook:

The great concerns of men, are their Lives, Fortunes, and Reputation, and these three suffering at once in Crimes, it is the great interest of mankind, to know how to evite such accusations, and how to defend themselves, when accused: And yet none of our Lawyers have been so kind to their Countrey, as to write one Sheet upon this pleasant and advantageous Subject, which made it a task both necessary and difficult to me.<sup>56</sup>

While the textbook was likely to have been read mostly by lawyers, Mackenzie's purpose was further reaching. He thought that all people should have knowledge of the law. Mackenzie wrote the majority of this work prior to becoming Lord Advocate, yet even then he noted: "There are but too many who endeavour now to make all whom they hate, pass for such as love Arbitrary Government" yet, he noted, in "this Book I endeavour to oppose Arbitrariness, where it is most dreadful, and that is, in matters Criminal, in which Life and Fortune are equally expos'd."<sup>57</sup> Indeed, by learning about the law and its processes, Mackenzie argued that it took away the

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<sup>54</sup> Ibid., 11.

<sup>55</sup> Simpson and Wilson, *Scottish Legal History*, 279.

<sup>56</sup> Sir George Mackenzie of Rosehaugh, *The laws and customes of Scotland, in matters criminal : Wherein is to be seen how the civil law, and the laws and customs of other nations do agree with, and supply ours*, (Edinburgh: 1678): preface.

<sup>57</sup> Ibid.



“power of being Arbitrary.” He truly believed that knowledge of the law should be accessible to all and written as clearly as possible. Indeed, he wished “that nothing were a Cryme which is not declared to be so, by a Statute; for this would make Subjects inexcuseable, and prevent the arbitrariness of Judges.”<sup>58</sup> Statutes not only better informed lawyers and judges, but also provided ordinary people with the knowledge of what was right and wrong. Indeed, he explained that “the essence of a crime consists in its being forbidden, and not in having its punishment stated by an express Statute, though I wish it were otherwise.”<sup>59</sup> Explaining Mackenzie’s legal positivism, O. F. Robinson notes that Mackenzie wanted “the avoidance of arbitrariness in the imposition of penalties” and “not the forbidding of deeds.”<sup>60</sup>

Mackenzie was not the only one concerned with making statutes accessible during this period. In 1678, the Privy Council gave warrant to Sir Thomas Murray of Glendook to re-print the Acts of Parliament with an index. The Council noted that the current edition was so far out of print that it was never bought and that “leidges cannot come to knowledge thereof... to their very great hurt and prejudice.” As such, they thought it “very necessary and expedient for the good and advantage of the whole kingdome” to have these acts and laws reprinted, so that “leidges may the better come to the knowledge of the said laws” and that “none pretend ignorance.”<sup>61</sup>

Throughout the 1670s and 1680s, there were numerous attempts to reform Scots law.<sup>62</sup> In 1681, the Scottish Parliament voted to set up a “Commission for revising the laws.” The Act

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<sup>58</sup> Ibid., 3.

<sup>59</sup> Ibid., 24.

<sup>60</sup> O. F. Robinson, “Law, Morality and Sir George Mackenzie,” *Miscellany Six*, Hector L. MacQueen, ed., (Edinburgh: The Stair Society, 2009): 23.

<sup>61</sup> *The Register of the Privy Council of Scotland (RPCS)*, 3<sup>rd</sup> series, Vol. 5, (Edinburgh: HM General Register House, 1912): 481; Sir Thomas Murray of Glendook, ed., *The laws and acts of Parliament made by King James the First, Second, Third, Fourth, Fifth, Queen Mary, King James the Sixth, King Charles the First, King Charles the Second who now presently reigns, Kings and Queen of Scotland collected and extracted from the publick records of the said kingdom, by Sir Thomas Murray...* (Edinburgh: 1681); Jackson, “Natural Law and Construction of Political Sovereignty,” 158.

<sup>62</sup> For a discussion of these reforms during the 1670s, see Ford, *Law and Opinion*, 374-375.

stated that there are a “great number of useless, indistinct and undigested laws” in Scotland, and it would be the “greatest advantages to the people” to have Scotland’s laws be “not only just in themselves but consonant to one another... and reduced into a free and plaine method, thereby to establish constant and clear rules for directing all his judges, supream and subaltern.”<sup>63</sup> As such, the Parliament voted to set up a committee to consider “the whole laws, statuts and acts of parliament” to “collect and digest” them “into such order and methods as shall seem most fit” but also to “determine the tru sense, meaning and interpretation of all such laws, acts and praticks as are unclear or doubtfull in themselves, or have or may receive divers senses or interpretations.”<sup>64</sup> Fountainhall commented on the Commission, noting it “may be useful if it take effect, and those conjoined agree.” He pointed out that “it has been oft on foot,” noting that “it cannot be denied that there are some of our old acts scarce worth the reading.”<sup>65</sup> Bishop Burnet noted that the Act was passed to “draw out of them all such as might be fit not only to be confirmed, but to be executed by better and properer methods,” noting that “some of them seemed unreasonably severe, as past in the first heat of the Reformation.” However, as he stated, the Act was passed, but “this motion was not hearkened to.”<sup>66</sup> Ford argues that Stair may have published his *Institutions* in 1681 to confirm that there was no need for the King to nominate Commissioners to systemize the law and provide interpretations. Certainly, it would have been a worry if the King had appointed Commissioners who did not understand the law, and Stair was likely skeptical who would have been appointed. In the end, Charles II never appointed any

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<sup>63</sup> *The Records of the Parliaments of Scotland to 1707 (RPS)*, K.M. Brown et al, eds., (St Andrews, 2007-2021), 1681/7/52.

<sup>64</sup> *Ibid.*

<sup>65</sup> Sir John Lauder of Fountainhall, *The decisions of the Lords of Council and Session, from June 6th, 1678, to July 30th, 1712. Collected by the Honourable Sir John Lauder of Fountainhall, One of the Senators of the College of Justice. ... . Containing also the Transactions of the Privy Council, of the Criminal Court, and Court of Exchequer, and interspersed with a Variety of Historical Facts, and many curious Anecdotes. Published from the original Manuscript, in the Library of the Faculty of Advocates, at their Desire*, Vol. 1, (Edinburgh: 1759-61): 155.

<sup>66</sup> Burnet, *Bishop Burnet's History of His Own Time*, Vol. 1, 513.

Commissioners.<sup>67</sup> However, it is significant that Parliament felt the need to reform old laws and make them clearer.

Although Stair's work has had a long legal legacy, Ford notes that Mackenzie did not seem to find Stair's 1681 *Institutions* satisfactory, and that is likely why he wrote his own version in 1684.<sup>68</sup> Furthermore, as Jackson discusses, Mackenzie likely had issues with Stair's criticism of "the rigidity of statutory law," and his preference for case law.<sup>69</sup> Certainly, as John W. Cairns notes, Mackenzie used his *Institutions* to further his political theory, with its emphasis on the role of statutes and their relation to the monarch.<sup>70</sup> Interestingly, however, as Wilson and Simpson note, Mackenzie's *Institutions of the Law of Scotland* was written much more concisely than Stair's, and he clearly intended it to be an introduction for those who wanted to learn Scots law.<sup>71</sup> In the introduction to Mackenzie's *Institutions*, he noted that many legal works often assume previous knowledge without explaining terms. As such, he wrote his book "building always one Principle upon another." Indeed, as he argued, "I have often observed, that moe [sic] *Lawyers* are ignorant for not understanding the first Principles, than for not having read many Books."<sup>72</sup> Mackenzie was true to his principle, starting his work with laws in general, and becoming more specific throughout the work. Mackenzie continued to edit the work with subsequent reprintings. In 1687, Fountainhall recorded that on the occasion of its reprinting, Mackenzie posed some queries, asking the opinion of lawyers on certain points of law.<sup>73</sup> In contrast to Stair, Mackenzie was less interested in debates about natural law, due to "his

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<sup>67</sup> Ford, *Law and Opinion in Scotland*, 377-378.

<sup>68</sup> *Ibid.*, 400.

<sup>69</sup> Jackson, "Natural Law and the Construction of Political Sovereignty," 158-159.

<sup>70</sup> John W. Cairns, *Law, Lawyers and Humanism: Selected Essays on the History of Scots Law*, Vol. 1, (Edinburgh: Edinburgh University Press, 2015): 500.

<sup>71</sup> Simpson and Wilson, *Scottish Legal History*, 288.

<sup>72</sup> Sir George Mackenzie of Rosehaugh, *The Institutions of the Law of Scotland by Sir George Mackenzie, of Rosehaugh, His Majesties Advocate*, (Edinburgh: 1684): Preface.

<sup>73</sup> Fountainhall, *Historical Notices*, Vol. 2, 828.

instinctive attachment to legislation as a source of legal authority” rather than ideas of “independent natural morality.”<sup>74</sup> While Mackenzie discussed natural law throughout his works, and he constructed his own definition, his general focus tended toward the law’s more practical and applicable uses. Indeed, Mackenzie’s *Institutions* acted as the primary textbook for Scots law in universities until the mid-eighteenth century, further highlighting his concern with improving Scots legal education.<sup>75</sup>

This accessibility to understanding the law was important, because for Mackenzie, statutes were of the utmost importance, which helps us understand why he was so confident in his defences of the government’s actions. Mackenzie saw statutes as the most authoritative source. In his 1686 *Observations on the Acts of Parliament*, he wrote “One of the reasons which mov’d me to undertake this work, was, that even after I was a Lawyer, I found that I understood not our Statutes, though these be the chief Pillars of our Law, and I wisht often then such an Interpreter, as now I hope this Book will be.” Indeed, he further noted, he “sincerely endeavour’d to preserve honest men from falling into snares by their ignorance, and to instruct my younger Brothers in a Science, by which I wish them to rise, for the service of their Countrey.”<sup>76</sup> Mackenzie’s purposes were two-fold: he not only wanted to educate lawyers properly, but he also wanted layfolk to understand laws, and in turn follow them. Accessibility continued to be a key feature of Mackenzie’s work. Indeed, he later helped found the Advocate’s Library (now the National Library of Scotland). In his opening address, he called forth to his fellow lawyers asking them to donate books. Concluding his speech, he noted “we at least have to the best of our

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<sup>74</sup> Jackson, “Natural Law and the Construction of Political Sovereignty,” 159.

<sup>75</sup> Cairns, *Law, Lawyers and Humanism*, 499.

<sup>76</sup> Sir George Mackenzie of Rosehaugh, *Observations on the acts of Parliament, made by King James the First, King James the Second, King James the Third, King James the Fourth, King James the Fifth, Queen Mary, King James the Sixth, King Charles the First, King Charles the Second...*, (Edinburgh: 1686): preface.

powers advanced the study of law and have time and again expressed our opinion concerning the desirability of having professors of law with a view to lessening for parents the cost of their sons' education...."<sup>77</sup> For Mackenzie, accessibility and education were important factors in contributing to the legal stability of the nation. Certainly, the Faculty of Advocates hoped that once a library was set up, they could then set up a law degree at the University of Edinburgh to compete with foreign universities, as there were no domestic law degrees available. While a Professorship of Law was not established until 1707, as Williams points out, the Advocates were lobbying for it as early as 1684.<sup>78</sup>

Even after Mackenzie lost his position as Lord Advocate following the Revolution, he was concerned with the education of his fellow lawyers. Writing to Lord Melville in mid-1689, he complained "I see not why lawyers of my standing (especially when I only remain of the old stock) [should] be forced to leav." He noted that when he had last been removed, Sir George Lockhart had told him that "the Lords could not understand the pleadings." Considering Lockhart was now dead, and Mackenzie was no longer working, "what will they now"? As he explained, "I seek no public employment, and so am no rival to no man; but the libertie of informing judges (who, to my great regrat, need it) is a cheap and innocent favour, and yet it will oblige mee sufficiently."<sup>79</sup> Unfortunately for Mackenzie, this was not to be. The political climate in Scotland was too dangerous for him, and he soon moved to Oxford.

Mackenzie's belief in the rigidity of statutes explains some of Cargill's accusations against him in his excommunication, including his accusation that Mackenzie had abandoned his

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<sup>77</sup> Sir George Mackenzie of Rosehaugh, "Sir George Mackenzie's Speech at the Formal Opening of the Advocate's Library Edinburgh, 15 March 1689," Translated from the Latin by J. H. Loudon, 284, 283.

<sup>78</sup> Jackson Williams, *The First Scottish Enlightenment*, 26-27.

<sup>79</sup> *Leven and Melville Papers; Letters and State Papers Chiefly Addressed to George Earl of Melville, Secretary of State for Scotland, 1689-1691*, (Edinburgh: Bannatyne Club, 1843): 128.

beliefs. Arguably, this accusation could apply to all leading Scottish nobles and officials. After the Restoration, most Covenanted nobles and gentry conformed to the established church, including Lauderdale and Sharp. Prior to becoming Lord Advocate, Mackenzie was seen to have “popular” tendencies, even declining the position of Justice General. Indeed, when “the Act concerning the forfeiture of persons in the late rebellion and protest”<sup>80</sup> was debated and eventually passed in 1669, Mackenzie was vehemently against it. Along with giving detailed justifications against it, he argued that “God Himself would not condemn Adam, till he heard him; and tho he knew the sins of Sodom and Gomorrah, He would not pronounce Sentence against them, till he went down and saw their Abominations. Let us not then make Snares in place of Laws, and whilst we study only to punish such as are Traitors, let us not hazard the Innocence of such as are loyal Subjects.”<sup>81</sup> However, the Act passed, and as Lord Advocate, he partook in *absentia* cases. Mackenzie was able to reconcile his beliefs because for him, the Acts of Parliament were central components of the law.<sup>82</sup> Indeed, Ford notes that Mackenzie likely stressed the importance of statutes so much because his primary focus was public law.<sup>83</sup>

While it was preferable that all crimes be statutes by law, Mackenzie admitted that there were certain crimes that could be punished arbitrarily even if not prohibited by express statute, such as crimes “whereby the public peace is immediately disquieted” or where the law of nature is violated.<sup>84</sup> It was this belief which would be the most controversial throughout the Restoration. In his post-Revolution vindication of the Restoration government, Mackenzie argued “the *Necessity of State* is that Supereminent Law to which upon occasion all particular Acts must

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<sup>80</sup> *RPS*, 1669/10/30.

<sup>81</sup> Mackenzie, *Works*, 79.

<sup>82</sup> David Allan, however, argues that it was the influence of neo-stoicism and its emphasis on order that influenced him (255). See David Allan, “‘In the Bosome of a Shaddowie Grove’: Sir George Mackenzie and the Consolations of Retirement,” *History of European Ideas* 25:5 (1999): 251-273.

<sup>83</sup> Ford, *Law an Opinion in Scotland*, 570.

<sup>84</sup> Mackenzie, *Matters Criminal*, 3, 4.

bow.”<sup>85</sup> As Jackson notes, as Lord Advocate, Mackenzie had to reconcile his “theoretical conviction” in the necessity of state with his practice, as he was involved in a number of cases with questionable extra-judicial procedures.<sup>86</sup> While Mackenzie indeed partook in controversial cases, he took care to follow procedure as much as possible, especially when he had “scruples.” In cases like this, Mackenzie confessed that he spoke with the Officers of State before processing criminals, in order “to represent to them his *own scruples*.” However, if the Officers of State continued to be “of Opinion *that a Process was to be rais’d*, or the Party accused to be proceeded against,” then Mackenzie would call upon “the ablest Advocats of the Nation” to confer with him, and should they agree, he would ignore his scruples and follow orders. Indeed, he pointed out that he conferred with different lawyers for Jerviswood and Argyll’s cases before prosecuting them.<sup>87</sup> While it was perhaps easy for Mackenzie to defend his actions after the fact, it is noteworthy that Mackenzie took measures to ensure proper procedures were in place before prosecuting.

Mackenzie took his job as a lawyer seriously and was infuriated when people discussed legal matters without understanding them, especially when it was done by English authors. In his 1683 *Vindication* defending Argyll’s trial, Mackenzie cried “All wise and sober men in Scotland do with a just mixture of pity and contempt Read those Infamous pamphlets, wherein this Kingdom is so maliciously traduced by some in our neighbour Nation.”<sup>88</sup> It especially angered Mackenzie that “Pamphleteers, who neither understand matter of law, nor matter of Fact, stick not most sovereignly to decide, that our Sentences, even in Criminals are absurd, ridiculous and

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<sup>85</sup> Mackenzie, *Vindication*, 1691, 25.

<sup>86</sup> Jackson, *Restoration Scotland*, 140.

<sup>87</sup> Mackenzie, *Vindication*, 1691, 28.

<sup>88</sup> Sir George Mackenzie of Rosehaugh, *A vindication of His Majesties government and judicatures, in Scotland from some aspersions thrown on them by scandalous pamphlets and news-books, and especially, with relation to the late Earl of Argyle's process*, (Edinburgh: 1683): 1. This pamphlet was also re-printed in London.

inhumane.”<sup>89</sup> In vindications such as this one, he clearly delineated the process of Scots law so that readers would understand his and the Justiciary’s actions. He continued “It is much to be admired, That such as never read our Law, revis’d our Records, nor were ever employ’d as Judges or Advocates in our Criminal Courts, should adventure to condemn the Proceedings of those, who for many Years have made that Part of our Law their constant Study, who were upon Oath, and knew that their Posterity should be judged by their Decisions.”<sup>90</sup> While these works were intended to vindicate the government’s actions on a whole, and were likely written for propaganda purposes, Mackenzie chose to point out the legal procedures, and how they were followed in various cases. While his 1683 pamphlet focused on the controversial case of the Earl of Argyll which will be discussed in Chapter Two, his 1691 pamphlet took on specific charges against the whole Restoration government, and he attempted to refute or explain cases head on. Jackson points out that in the “field of judicial biography,” there are debates about whether or not judges should be seen as “disinterested oracles” separated from their personal lives and interests, which was an argument Mackenzie tried to promote. However, she also notes that he also emphasized how in his profession as Lord Advocate, he personally offered greater professional regulation, which mitigated the government’s severity.<sup>91</sup> For instance, in the case of John Hamilton, Lord Bargany who had been falsely accused of treason, Thomas Cunningham explained how “they all except the Advocat offered to pay mee” for providing false testimony against Bargany.<sup>92</sup> Indeed, as Paul Hopkins notes, even though Mackenzie took every “legal advantage” for his case against Bargany, he still urged the witnesses to speak the truth. Bargany was eventually released, and Mackenzie provided him with advice to collect evidence against his

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<sup>89</sup> Ibid., 10.

<sup>90</sup> Mackenzie, *Vindication*, 1691, 27.

<sup>91</sup> Jackson, “Compassing Allegiance,” 131-132.

<sup>92</sup> NRS, GD6/1000.



perjurers.<sup>93</sup> It is also worth pointing out that when Mackenzie was briefly dismissed from being Lord Advocate in 1687, he worked as defence council for several Covenanters—ones he would have previously prosecuted. Indeed, Fountainhall recorded an incident where Mackenzie defended twenty-three panelists who were accused of being at Bothwell, rendezvousing, and harbouring rebels. Mackenzie was able to prove that “rendevouzing without armes was not relevant to infer treason” and additionally proved that their meeting was “meerly accidentall” allowing them to go free.<sup>94</sup> His actions as defence council reinforce the fact that he took his profession seriously, and he considered his actions as Lord Advocate to be professional, not personal.

### **Monarchy and the Prerogative**

Although Mackenzie had hopes that his legal works would direct dissidents toward truth and law, his primary purpose in publishing these works was not to indoctrinate, but to educate—at least in his eyes. Indeed, even his more polemical works continued to have this educational framework. Mackenzie’s greatest argument in favour of absolute monarchy was his work *Jus Regium*, which refuted concepts of contract theory between the monarch and people. This work has often been simply seen as a blind defence of absolutism, highlighting once again the arbitrary nature of the Scottish government. While Mackenzie’s treatise did defend absolute monarchy, he in no way argued for arbitrary government. His purpose in writing the piece was to show that monarchy was enshrined in Scottish law. He explained that he wrote this work because George Buchanan’s *De Jure Regni* had lately been translated and dispersed, and he wanted to correct people who were “like to be poyson’d” by it. He explained that previous answers to

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<sup>93</sup> Paul Hopkins, “Hamilton, John, second Lord Bargany (c. 1640–1693), nobleman and accused traitor,” *Oxford Dictionary of National Biography*, (23 Sep. 2004).

<sup>94</sup> Fountainhall, *Historical Notices*, Vol. 2, 794-5.

Buchanan had previously been written in Latin, “and so not useful to the People.”<sup>95</sup> As such, he wrote a detailed defence of the right of the monarchy and the legal succession through two arguments: an account of Scotland’s “present positive law” and an explanation of how its law was enshrined with monarchical government.<sup>96</sup> Citing one of his biggest grievances, he pointed out that he admired how Buchanan and others “should have adventur’d upon a debate in Law, not being themselves Lawyers; and should have written Books upon that Subject, without citing one Law.”<sup>97</sup> As Julian Goodare notes, resistance theory, such as that espoused by Buchanan, may have drawn on divine and natural law, but it was “influential not as law, but as ideology.” Indeed, as he points out, resistance theory “might legitimize revolution, but that is never a *legal* act.” While they may have been considered superior by some, divine law and natural law were considered to be moral claims rather than legal facts.<sup>98</sup> Interestingly, as Jackson notes, Mackenzie’s discussion of the prerogative powers signifies an ideological shift that occurred from the early-seventeenth century, as James VI once wrote that the prerogative should not be a subject for lawyers to discuss.<sup>99</sup>

In *Jus Regium*, Mackenzie admitted that some of the statutes he was going to discuss were not extant in Buchanan’s time, and thus could not have been refuted by him. However, Mackenzie argued that his purpose in writing was to show that Buchanan’s “Principles are not our Law, but are inconsistent with it.”<sup>100</sup> Mackenzie went on to provide detailed explanations for

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<sup>95</sup> Sir George Mackenzie of Rosehaugh, *Jus regium, or, The just and solid foundations of monarchy in general, and more especially of the monarchy of Scotland : maintain'd against Buchannan, Naphtali, Dolman, Milton, &c*, (Edinburgh: 1684): preface.

<sup>96</sup> Mackenzie, *Jus Regium*, 5.

<sup>97</sup> *Ibid.*, 6.

<sup>98</sup> Goodare, *State and Society in Early Modern Scotland*, 19.

<sup>99</sup> Jackson, “Natural Law and the Construction of Political Sovereignty,” 157. Interestingly, in 1686, Melfort wrote Sir George Lockhart, the Lord President of the Session, stating “how derogatory it will be from you if any prerogative should be lost in your time for I look on you My Lord President as the guard of it.” Needless to say, lawyers were heavily involved in upholding the prerogative powers in the Restoration. See NRS, GD406/1/9185.

<sup>100</sup> Mackenzie, *Jus Regium*, 7.

why the monarchy derived its power from God, not the people. Indeed, he noted “Parliaments never give Prerogatives to our Kings, but only declare what have been their Prerogatives” only acknowledging “what was Originally his Right and Prerogative from the beginning.”<sup>101</sup> He went further nothing, “It was fit for the People that their Kings should be above Law, because the severity of Law will not comply with that useful, tho illegal Justice which is requisit in special cases.” Indeed, he argued that absolute monarchy was necessary “to protect the guilty innocent by Remissions, to break Laws justly, in a Court of Chancery...,” and that “strict and rigid Law is a greater Tyrant, than absolute Monarchy.”<sup>102</sup> While Scotland had an absolute monarchy, he wrote, there were still safeguards because “no Monarch whosoever can take from any man what is due to him, by the Law of God, Nature, and Nations: For being himself inferior to these, he cannot overturn their Statutes.”<sup>103</sup> Once again, statutes were supreme for Mackenzie. As he would later write, “None are so much obliged to Laws as Monarchs.”<sup>104</sup> *Jus Regium* was published both as a whole and in parts. The second half of his work was also published as a separate piece, entitled *That the Lawful Successor Cannot be Debarred from Succeeding the Crown*.<sup>105</sup> In 1681 in response to the Exclusion Crisis in England, the Scottish Parliament passed the “Act acknowledging and asserting the right of succession to the imperial crown of Scotland.” In the Act, it stated that the Kings of Scotland derived “their royal power from God Almighty alone,” and that the succession could not be “interrupted, suspended or diverted by any act or statute whatsoever.”<sup>106</sup> As such, it was unsurprising that Mackenzie would devote such a large portion of his work to defending the successor.

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<sup>101</sup> Ibid., 7-8.

<sup>102</sup> Ibid., 47.

<sup>103</sup> Ibid., 155.

<sup>104</sup> Mackenzie, *Observations on the acts of Parliament*, Preface.

<sup>105</sup> Mackenzie, *That the lawful successor cannot be debarr'd from succeeding to the crown maintain'd against Dolman, Buchannan, and others*, (Edinburgh: 1684).

<sup>106</sup> RPS, 1681/7/18.

While Mackenzie defended the King's prerogative powers—if the King respected statutes—he also understood the negative perceptions of the prerogative. In 1680, Mackenzie had published *Observations Upon the Laws and Customs of Nations as to Precedency*, which as the title suggests, provided a breakdown of the different legal precedents and customs. In the dedication to the King, he noted to Charles “You are the best lov'd, though not the best obey'd King in Christendom; the one being the effect of our Conviction, and the other of Your admired Clemency.” He explained that what he admired the most about the King was “to find your Majesty always more concern'd for Your Peoples Security, than for your own Prerogative: So that if any Kingdom be happier than we, it is because they understand better their own Interest and not because they have a better King.” Briefly writing about the divine origin of Kings, he noted that it was King's “great interest to maintain that Law, which makes so many thousands obey You.” Closing the dedication, he reminded his readers to be just and “to remember the last Age” in order to prevent civil disorder. Significantly, however, he called to the King's ministers to be “careful to maintain but not to stretch Your Prerogative.”<sup>107</sup>

Mackenzie understood the need to counter images of arbitrary government. Writing in 1680 to Lauderdale, Mackenzie noted that it would be unsafe to bring criminal processes to the Council, for it would make Lauderdale and his friends look bad, as “it is a stretch against Law.” He also noted how James, who was present in Scotland at this time, thought it “unsafe for him & that all wold be imputed to his arbitrary inclinations.”<sup>108</sup> Likewise, he wrote to Lord Haddo in October 1682, remarking that “ther is an imfamous lybell com down against the Councell's severity in a Protestant Mercurie.” He noted that they had ordered the Clerks of the Council to

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<sup>107</sup> Sir George Mackenzie of Rosehaugh, *Observations Upon the Laws and Customs of Nations, As to Precedency*. By Sir George Mackenzie of Rosehaugh, *His Majesty's Advocat in the Kingdom of Scotland*, (Edinburgh: 1680): preface.

<sup>108</sup> Airy, *Lauderdale Papers*, III, 192.

publish a reply to have printed.<sup>109</sup> Mackenzie often addressed the public in order to explain detailed legal procedures and defend controversial cases. As mentioned, following the case against the Earl of Argyll (See Chapter 2), Mackenzie published a detailed defence of the case and the Justiciary's actions. Likewise, in 1691, he wrote a vindication of Charles II's government, explaining controversial legal actions in detail.<sup>110</sup> Even after he had lost his position, he thought if he could merely educate Scots men and women on the law, he could sway them.

*Jus Regium* was undoubtedly a success, at the very least in academic circles outside of Scotland. Mackenzie dedicated the work to the University of Oxford, and the University wrote a letter of thanks directed to the Lord Advocate "for the service he had done his majesty in writing and publishing his learned piece."<sup>111</sup> *Jus Regium* was certainly published at a strategic time. With the militant Covenanters, the United Societies, having recently excommunicated the King, and declaring war, the Privy Council had enacted some of its most severe punishments against them. Mackenzie's work could help defend their actions. As Jackson also points out, Mackenzie's simultaneous publication of both *Jus Regium* and his *Institutions* in 1684 "represented a considerable contribution towards the royalist ideological enterprise."<sup>112</sup>

By 1684, the Scottish government had partaken in a number of controversial cases, with questionable extra-judicial procedures taking place. Just recently, the Privy Council had been involved in the trials, torture, and indictments of several Rye House plotters. The cases of William Spence, William Carstares, and Baillie of Jerviswood were especially legally

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<sup>109</sup> *Letters Illustrative of Public Affairs in Scotland*, 88. It is unclear which libel this is referring to, as it does not appear in the *RPCS*.

<sup>110</sup> See Mackenzie's *Vindications* (1683 and 1691).

<sup>111</sup> *The Life and Times of Anthony Wood, antiquary, of Oxford, 1632-1695, described by Himself. Collected from His Diaries and Other Papers*, Vol. 3, Andrew Clark, ed., (Oxford: Clarendon Press, 1894): 96.

<sup>112</sup> Jackson, "Natural Law and the Construction of Political Sovereignty," 165.

questionable. As such, Mackenzie's works could be useful tools to defend the prerogative powers that allowed for extra-judicial procedures. As Jackson notes, while arguments like Mackenzie's on the necessity of state were originally developed in order to counter resistance theories, throughout the late Restoration, these theoretical arguments increasingly came to "assume practical prominence."<sup>113</sup> While the government believed it had a theoretical justification for its actions, it also felt the need to go a step further, printing justifications and evidence to prove the cases' legality in order to appease skeptics.

### **Printing Trials**

The late 1670s and early 1680s witnessed a brief explosion of printed pamphlets in England. With the lapse of the Licencing Act in 1679, English pamphlets on both sides of the Exclusion debates proliferated. However, printing was much more restricted in Scotland. While printers from London would sometimes send up copies of their works, and many pamphlets were printed in the Netherlands, there were still fewer printed documents available in Scotland. Unlike in England, which had a more "centralised mechanism for press regulation," the Scottish Privy Council in association with the burghs had the greatest control over printed communications, with legislation against unlicensed printing quite strict. In 1680, the Scottish Privy Council began to crackdown on imported books and pamphlets from places such as Holland, imprisoning Edinburgh bookseller John Calderwood in the process.<sup>114</sup> Additionally, the Scottish printing trade was monopolized by the Anderson family, lasting until 1712.<sup>115</sup> As Alastair Mann points out, the Scottish book trade in Restoration Scotland was a royally sponsored activity, with very few printing licences granted. While Mann argues that the government's book regulation trade

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<sup>113</sup> Jackson, *Restoration Scotland*, 131.

<sup>114</sup> James Wallace, "Printers, News and Networks: The Cheap Press in Scotland, 1680-1820," PhD Thesis, (McGill University, 2015): 60.

<sup>115</sup> Jackson, *Restoration Scotland*, 41-43.

was generally reactive, in regard to propaganda and state publishing, the Scottish government was proactive, with printed declarations, acts and proclamations becoming “the main and continuous arm of government propaganda.”<sup>116</sup> While England essentially had paid propagandists such as Roger L’Estrange, the Scottish government often had a different approach to propaganda with its focus on the law, and Mackenzie was central to this line of work. Indeed, Mackenzie praised Scotland’s strict printing regulations, explaining the “happy Effects of discharging all Printing without Licence by an express *Statute*.”<sup>117</sup>

Likewise, Jackson agrees that the Scottish government not only had a restrictive practice to print, but also a proactive policy. In 1680, Charles II ordered that the Covenanters’ *Sanquhar Declaration* be officially printed so that people could see the abhorrent principles of those figures involved. Additionally, other extremist and subversive Covenanter texts were also printed to tarnish Presbyterian ideologies.<sup>118</sup> In addition to publishing these documents, the government also published legal texts in order to proactively defend itself. For instance, following the trials of notorious figures such as the Earl of Argyll and the murderers of Archbishop Sharp, Charles II wrote to the Privy Council stating that “Wee have thought fit for the good of our service that the tryalls of some of the late notorious Rebels in Scotland be published.” He requested that “true and exact Copies of all the ... Depositions of witnesses, examinations, confessions, declarations, interrogations, verdicts and sentences of death and forfeiture, relating to the criminal tryalls and processes.... Be digested into method and order and published for the satisfaction of all our good and loyall subjects.”<sup>119</sup>

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<sup>116</sup> Alastair Mann, *The Scottish Book Trade, 1500-1720: Print Commerce and Print Control in Early Modern Scotland*, (East Linton: Tuckwell, 2000): 127, 148.

<sup>117</sup> Mackenzie, *Vindication*, 1683, 4.

<sup>118</sup> Jackson, *Restoration Scotland*, 42.

<sup>119</sup> NRS, JC39/114, JC39/115.

These printed documents were dense, and not necessarily the easiest to read, but they showed readers that the rebels were being tried legally. As Julia Buckroyd notes, “it is a tribute to the sophistication and respect for law of seventeenth-century Scotland that” a man could be taken to a fair trial after he “had renounced the authority of the law and done his best to overturn contemporary society.”<sup>120</sup> That is not to say that the Privy Council never stretched the law, as can be seen in the cases of James Mitchell, William Carstares and Robert Baillie of Jerviswood for instance.<sup>121</sup> However, the Council published these cases to show the public that procedures were indeed followed, if sometimes questionably, and that the rule of law was always at play at these trials. It is significant that the Council felt the need to publish these in anticipation of possible pushback from dissidents. It is also significant that they believed this legal narrative would suffice against the perceived narrative of arbitrary government.

A comparison of the Justiciary records to the printed documents dispersed to the public shows that the government followed Charles’ instructions.<sup>122</sup> A good example of this is the printed package containing the trial of Robert Baillie of Jerviswood, who had been executed due to his involvement in the plotting colloquially known as the Rye House Plot. His case was particularly controversial for a number of reasons, including the problematic use of William Carstares’ deposition. Jerviswood had been sick and likely to die in prison, so the government speedily tried and condemned him in order to use him as an example. As Greaves notes, with many alleging that the conspiracy was manufactured by the government to wipe out its enemies,

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<sup>120</sup> Julia Buckroyd, *The Life of James Sharp, Archbishop of St. Andrews, 1618-1679: A Political Biography*, (Edinburgh: J. Donald, 1987): 115.

<sup>121</sup> For a look at Mitchell’s trial, see Clare Jackson, “Judicial torture, the liberties of the subject and Anglo-Scottish relations, 1660-1690” in T. C. Smout, ed., ‘Anglo-Scottish relations 1603-1914’, *Proceedings of the British Academy*, 127 (2005). The other cases will be discussed in later chapters.

<sup>122</sup> NRS, JC39/44 contains the official Justiciary documents. The printed version was as follows: *THE TRYAL AND PROCESS OF High-Treason AND Doom of Forfaulture AGAINST Mr. Robert Baillie of Jerviswood TRAITOR. By His Majesties special Command, As a further proof of the late Fanatical Conspiracy*, (Edinburgh: 1685).



Baillie's trial was more a "carefully orchestrated object lesson designed as much to shore up the government's tattered credibility as to convict a conspirator."<sup>123</sup> However, the execution of the sick man was probably more of a disservice to the government's propaganda pitch.<sup>124</sup> As such, it is not surprising that the government chose to publish this trial. The Privy Council provided a warrant to publish Jerviswood's trial, after it had been "first seen and perused by the Lords Register and Advocat."<sup>125</sup> The package was indeed published, but there may have been no need, or perhaps the government's plan had worked. As Andrew Steven Campbell notes, there seems to have been little protest or response in the wake of his trial.<sup>126</sup> Nonetheless, Mann argues that publishing this case, in the government's eyes, perhaps "[counteracted] the unease of contemporaries at the irregular judicial procedure" involved in Baillie's case.<sup>127</sup>

### **The Role of the Law in Episcopal Defences**

While Mackenzie's legal works had some success, it was impossible for him not to get involved in religious debates, as so many of his trials involved religious dissidents. Competing ideologies about religious authority and persecution continued to flourish throughout the Restoration, and these arguments were both implicitly and explicitly tied to the political and legal reality of the day. To understand the case studies throughout this thesis, it is necessary to briefly examine the general opinion of the governmental authorities regarding Presbyterianism. Mackenzie and others had legal arguments for why Episcopal government was justified, yet it was these religious arguments that Covenanters were unable to swallow, and ultimately proved to be least successful. Many of the Covenanter complaints against the Episcopal government

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<sup>123</sup> Greaves, *Secrets of the Kingdom*, 245.

<sup>124</sup> Ross, *The Killing Time*, 185.

<sup>125</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 10, 138.

<sup>126</sup> Andrew Steven Campbell, "Beware the 'Hive of Presbytery': The Scottish Presbyterian as Folk Devil in Restoration Britain," Master's Thesis, (Brown University, 2018): 152.

<sup>127</sup> Mann, *The Scottish Book Trade*, 149.

stemmed from the fact that it was Erastian, and indeed it was. Secular authorities rather than religious leaders oversaw the general religious policies, and this greatly affected policies toward the Covenanters. Indeed, as Andrew Carter explains, following the 1669 Act of Supremacy, which gave the King complete control over the Church, Episcopal leaders had even less influence on religious policy than previously.<sup>128</sup> Because of the secular influence on religious policies, those in charge perhaps lacked the nuance that was needed to understand Presbyterians' actions, and they just saw the Covenanters as unwilling to compromise. Interestingly, as Jackson has pointed out, there was a "virtual absence of any theocratic high church defences of episcopacy being articulated in Scotland" during the Restoration. Indeed, lacking "a convincing *iure divino* case for episcopacy" and surrounded by dissent, Jackson argues that moderate Episcopalian writers adopted a "combination of ecclesiastical erastianism, latitudinarian theology and ethical naturalism," increasingly supporting the right of the secular magistrate to enforce outward forms of worship.<sup>129</sup> Writing in 1689, the Englishman John Evelyn noted that the Scottish bishops "were indeed little worthy of that character, and had done much mischief in that Church."<sup>130</sup> The bishops had done little to maintain and promote their own cause. As such, it is unsurprising that it was secular figures like Mackenzie who were tasked with discussing religion and defending the Crown's religious actions. Legalistic arguments in favour of religious conformity were indeed Erastian.

Mark Goldie has pointed out how Restoration England was a "persecuting society," and this description applies to Restoration Scotland as well. However, the theories behind religious

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<sup>128</sup> Andrew Carter, "The Episcopal Church, the Roman Empire and the Royal Supremacy in Restoration Scotland," *Studies in Church History* 54 (2018): 176–89.

<sup>129</sup> Jackson, *Restoration Scotland*, 164, 169.

<sup>130</sup> John Evelyn, *The Diary of John Evelyn*, Vol. III, Austin Dobson, ed., (London: Macmillan and Col., Limited, 1906): 250.

intolerance were not simple. Goldie explains how there were three strands of belief justifying religious intolerance in Restoration England: political, ecclesiological, and theological, with the latter perhaps being most refined, yet little discussed. In Scotland, the political and ecclesiological arguments were most prominent: the first being that dissenters must be suppressed because they were rebels, and the second that it was the duty of the secular magistrate to impose rites without objection. As Goldie explains, these arguments both tended to be Erastian in tone and nature. However, a third theological argument helped to remedy this Erastian “strain,” as it dwelt less on order, but more on persuasion. The emphasis was on the pastoral activity of clerical teachers to persuade dissenters into believing orthodox truths, with coercion seen as an “effective instrument of education and persuasion.” As Goldie notes, by 1675, this argument had taken hold in England, especially following the failure of the King’s Indulgence of 1672, proving that “Erastian arguments seemed poor tools for building an Anglican polity.”<sup>131</sup>

However, the story was different in Scotland, and the political and “ecclesiological” arguments for religious intolerance continued to hold sway. This was likely because of how closely secular authorities were involved in religious policies, especially as the Restoration years wore on. That is not to say that there were not committed Scottish Episcopal clergy who truly believed in the righteousness of their way of worship. The problem was that rather than promoting a nuanced theological breakdown of the Episcopal church to persuade Presbyterians to their cause, the governmental authorities continued to approach religion in a top-down manner, publishing legalistic and authoritarian proclamations and defences. The political argument that Conventicles were “nursery of rebellion” was always chief in the Crown’s mind.

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<sup>131</sup> Mark Goldie, “The Theory of Religious Intolerance in Restoration England,” *From Persecution to Toleration: The Glorious Revolution and Religion in England*, Ole Peter Grell, Jonathan Irsael, and Nicholas Tyacke, eds., (Oxford: Clarendon Press, 1991): 332-334.

As Clare Jackson points out, unlike in Restoration England, the Scottish church continued to support the Episcopal system of governance due to “Erastian pragmatism” rather than a “dogmatic commitment to Scriptural or primitive episcopacy.”<sup>132</sup> Furthermore, Jackson argues that while there were nuanced theories of non-resistance and passive obedience during this period these beliefs rested on the belief in the divine right of Kings, with the implication that the King’s law was also God’s law.<sup>133</sup>

Many of the ensuing issues throughout Restoration Scotland could be pared down to differing viewpoints on religious governance and authority, rather than theological differences. With the monarchy officially restored in 1660, the government quickly concluded that episcopacy would be the most suitable to monarchical authority and stability. Indeed, episcopacy was seen as a way that monarchical authority could reach the furthest localities, for authority descended from the King to the appointed bishops, and from them to the parish ministers, and so forth.<sup>134</sup> The ever-opinionated Bishop Burnet wrote that Charles II “thought government was a much safer and easier thing where the authority was believed infallible, and the faith and submission of the people was implicate.”<sup>135</sup> However, the Episcopal Burnet himself agreed that episcopacy “tends much to the good and peace of a land.”<sup>136</sup>

In order to re-establish episcopacy, Parliament had to first revoke the legislation passed during the Civil War and Interregnum years. For lawyers such as Mackenzie who believed in the

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<sup>132</sup> Jackson, *Restoration Scotland*, 217.

<sup>133</sup> Clare Jackson, “The Political Theory of Non-Resistance in Restoration Scotland 1660-1688,” *Widerstandsrecht in der frühen Neuzeit: Ertäge und Perspektiven er Forschung im Deutsch-Britischen Vergleich*, Robert von Friedeburg, ed., (Berlin: Duncker & Humblot, 2001): 310.

<sup>134</sup> Goodare, *State and Society in Early Modern Scotland*, 179.

<sup>135</sup> Burnet, *Bishop Burnet's History of His Own Time*, Vol. 1, 93.

<sup>136</sup> Gilbert Burnet, *A vindication of the authority, constitution, and laws of the church and state of Scotland In four conferences. Wherein the answer to the dialogues betwixt the Conformist and Non-conformist is examined*, (Glasgow: 1673): 260; Alasdair Raffe, *The Culture of Controversy: Religious Arguments in Scotland, 1660-1714*, (Woodbridge, Suffolk: Boydell Press, 2012): 37.

supremacy of statutes, how was this to be reconciled? Rather easily, in fact. For indeed, as Mackenzie wrote in his post-Revolution vindication, the Covenant was passed “without the King’s authority.”<sup>137</sup> As such, the Covenant was an illegal oath, and the legislation passed during these years was also illegal. This belief in the legality of the Covenant would continue to affect the entire Restoration, often being the root of most religious and political disputes throughout the period. As Alasdair Raffe notes, to Covenanters these oaths could not be broken for they were a symbol of Scotland’s direct relationship with God. For Episcopal worshippers however, they were seen as illegal oaths imposed on them without the King’s approval.<sup>138</sup> For people like Mackenzie, the unlawful Covenant had led to war, regicide and the Interregnum. Indeed, writing in 1683, he addressed Presbyterians asking them to consider that “the Reason why Monarchy has always preferred Episcopacy to Presbyterian Government proceeds not only from an aversion to Presbytery, as neither Establisht by Scripture, us’d in the Primitive Church, nor recommended by the Holy Fathers; but because it has been observed, that your Government being founded on Equality, amongst Presbyters, resembles more a Common-wealth.” The negative associations of the Interregnum period would not be lost on contemporary readers. Mackenzie further pointed out that the Presbyterians had continually “Interwove with your Religion, Principles opposite to Monarchical Government, resolving to balance Establisht Authority, with pretences of Religion, from which necessity has at last forced many of you to oppose all Government. And it is still observable, that whatever opposes the Government of the Countrey where we live, must at last end in Anarchy and Confusion.”<sup>139</sup> Mackenzie clearly laid out why he believed the Presbyterian form of church governance to be incompatible with monarchical authority. As Mackenzie noted,

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<sup>137</sup> Mackenzie, *Vindication*, 1691, 4.

<sup>138</sup> Raffe, *Culture of Controversy*, 65.

<sup>139</sup> Mackenzie, *Vindication*, 1683, 7-8.

since their services were not authorized, they were a “certain inlet to all Sedition and Heresy: since every man might preach what he pleased,” which could lead to rebellion and rising and arms.<sup>140</sup> Certainly, it must be pointed out that some people did bring arms to field meetings; although, this was likely the minority. Most significantly, however, Mackenzie explained that “Episcopacy had been established by Law.” Parliament had voted and restored Episcopacy. As he argued, the government had “in *no age nor place forced* its way into State by the *Sword*... without ever thrusting it self in by Violence.”<sup>141</sup> Covenanters who faced repressive laws throughout the period would have disagreed that the Episcopal government had not been forced upon them, yet Mackenzie had a valid legal point. Parliament had voted and brought back episcopacy, with the King’s authority.

As Raffe notes, it was not the clergy in 1660 that favoured episcopacy, but rather secular forces such as the nobility and the King, as well as English courtiers. It was the conservatism of the Scottish nobility and hostility to Presbyterian ministers that ensured the dominance of episcopacy.<sup>142</sup> Indeed, as Julia Buckroyd also points out, following the Restoration, ecclesiastical policy was decided by an “entirely secular assembly,” whose legislation implied “Erastian bishops living in the old prelatie manner,” and “resuming their role as the first estate on which the king could rely absolutely.”<sup>143</sup> Over two thirds of the Scottish clergy, and most of the laity, conformed to the Episcopalian Church, but others, including a large portion in the south west, continued to dissent.<sup>144</sup> Ideologically, firm Presbyterians could not conform to the re-established church primarily because of their stance on Church government. Presbyterians argued that since

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<sup>140</sup> Ibid., 11.

<sup>141</sup> Mackenzie, *Vindication*, 1691, 6.

<sup>142</sup> Raffe, *Culture of Controversy*, 29, 32.

<sup>143</sup> Julia Buckroyd, *Church and State in Scotland, 1660-81*, (Edinburgh: J. Donald, 1980): 2.

<sup>144</sup> Raffe, *Culture of Controversy*, 33.

Christ alone had founded the church, he alone was the head and “the Law-giver of his own Church.” As Raffe notes, figures such as the Presbyterian John Brown and John Livingston were upset because claiming that the King was supreme in all things ecclesiastical stepped on Christ’s prerogatives.<sup>145</sup> At least initially, the main struggle between Episcopalians and Presbyterians was on the form and structure of church governance and authority, rather than specific religious ceremonies and beliefs. While Raffe notes that independent Episcopal and Presbyterian identities and cultures gradually grew throughout the Restoration, the differences between the two forms of religion were few at first.<sup>146</sup> As Margaret Steele argues, the government’s main goal was to “instill allegiance to legal authority in church and state.” However, the harsh measures the government used to implement conformity often resulted in further disobedience and resistance.<sup>147</sup>

Writing in 1691, Mackenzie noted “The Reader will be astonished, when we inform him; that the way of Worship in our Church, differed nothing from what the Presbyterians themselves practiced, (except only, that we used the Doxologie, the Lord’s Prayer, and in Baptism, the Creed, all which they rejected). We had no Ceremonies, Surplice, Altars, Cross in Baptisms, nor the meanest of those things which would be allowed in England by the Dissenters.”<sup>148</sup> As Raymond Campbell Paterson discusses, while the episcopacy was restored to Scotland in the 1660s, gone were the innovations that Charles I and Archbishop Laud tried to implement which led to the riots of 1637. The government was seeking purely an organizational change.<sup>149</sup> The theological differences between Episcopalians and Presbyterians were few, with both containing

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<sup>145</sup> Ibid., 35

<sup>146</sup> Ibid., 30.

<sup>147</sup> Margaret Steele, “Covenanting Political Propaganda, 1638-89,” PhD Thesis, (University of Glasgow, 1995): 340.

<sup>148</sup> Mackenzie, *Vindication*, 1691, 9.

<sup>149</sup> Raymond Campbell Paterson, *King Lauderdale: The Corruption of Power*, (Edinburgh: John Donald, 2003): 148.

Calvinist origins. As Mackenzie wrote, “the Differences betwixt our Episcopacy and Presbytery, which have occasioned all these dangerous Disorders, are founded upon no express Text or Scripture, else Forraign Churches would not acknowledge ours to be a True Church, as they universally do.”<sup>150</sup>

In 1689, Mackenzie and George Mackenzie of Tarbat wrote to the Prince of Orange prior to him accepting the throne, encouraging him to support episcopacy. They noted, even then, that their church “as it is now established by law” has “no Ceremonies at all, no not so much any form of Prayer, no Musick but singing in the Churches, the Doctrine and Discipline is the same both in the Church and Conventicle.” The only difference was in its Episcopal leadership, at least according to them.<sup>151</sup> While there were more subtle differences between the sects, not to mention the firm ideological difference in authority, it is significant that leading figures in the government did not believe that the two religions were that dissimilar. This belief helps illuminate some of the government’s actions. If they believed the religions between the two sects were not that different, then it is easy to see why they would view the Covenanters’ unwillingness to compromise on small matters as rebellious. If their sticking point was authority, the notion of rebellion was intrinsically intertwined with it. Additionally, the fact that the Covenanters were given so many opportunities to support the King in exchange for freedom would have further bolstered the government’s ideological belief that religion was not at the heart of the matter between them. Indeed, Mackenzie and Tarbat argued that the Presbyterians valued “their Church Government more than the Protestant Religion,” pointing out how many

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<sup>150</sup> Mackenzie, *Vindication*, 1683, 7.

<sup>151</sup> *A Memorial For His Highness the Prince of Orange in Relation to the Affairs of Scotland Together with The Address of the Presbyterian Party in that Kingdom to His Highness; and Some Observations on that Address. By two Persons of Quality*, (London: 1689): 8. The pamphlet has been attributed to Sir George Mackenzie of Rosehaugh and George Mackenzie of Tarbat.



Presbyterians had accepted James' Indulgence which had allowed Catholics freedom of worship as well.<sup>152</sup> This belief brings up an interesting perspective on the question of religious persecution and tolerance. In Cargill's excommunication, he accused Mackenzie of pleading against and persecuting God's people to death, all against his conscience. Persecution was something that would recur throughout Covenanter martyrologies. However, in Mackenzie's eyes, "It cannot be said that they were Persecuted and forced to joyn with an Unsound, much less Heretical Church, as the French Protestants are."<sup>153</sup> The "Erastian" view that shaped the government's religious policy could not comprehend that the small differences between the two sects were in fact significant to the Presbyterians.

The government used varying methods to enforce uniformity throughout the period. It oscillated between repression with fines and violence, to reconciliation with Indulgences. In 1669, the first Indulgence was granted, allowing specific Presbyterian ministers, who were "peaceable and loyal," to preach in vacant parishes if they were licenced. This move shows that the government was not necessarily as concerned with the religious doctrine that the ministers were preaching. As long as they accepted the authority of the Crown by obtaining their licence, that was enough. As Burnet notes, this move was not popular. Many "Presbyterians look'd on this, as the King's hire to be silent, and not do their duty: and none of them would accept it." Some Presbyterians called them "the King's Curates" and considered them of a "worse character of dumb dogs, that could not bark."<sup>154</sup> As Mackenzie wrote, the Indulgences "did not satisfie these People because the Ministers so Indulged acknowledged the King and Council's Authority."<sup>155</sup> In 1672, another Indulgence was granted. Not all Presbyterians viewed these

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<sup>152</sup> Ibid., 6.

<sup>153</sup> Mackenzie, *Vindication*, 1683, 9.

<sup>154</sup> Burnet, *Bishop Burnet's History of His Own Time*, Vol. 1, 281-2.

<sup>155</sup> Mackenzie, *Vindication*, 1691, 6.

Indulgences as incompatible with their ministries, however. At least 80 minsters complied with the government's conditions, arguing it was better not to "[slight] the opportunity of peaceable exercise of their Ministry."<sup>156</sup> Another Indulgence would be granted in 1679. Nonetheless, the assassination of Archbishop Sharp and the defeat of the rebellion at Bothwell Bridge further divided the Presbyterians over the Indulgence matter, with some joining the militant and vehemently anti-indulgence United Societies.<sup>157</sup>

Following the Presbyterians' failed rebellion, Mackenzie continued to be adamant that differences in religion should not matter because they were tangential compared to the real issue at hand, which was the law. The crux of Mackenzie's arguments centred on external conformity and obedience to the law in order to prevent civil disorders, and worst of all civil war. He wrote: "If the Differences amongst us, upon which all those Rebellions were founded, were Material and did proceed from Conscience; somewhat might be said to lessen, though not to justify the Guilt, for Conscience should neither be a Cryme, nor a defence for Crymes." But he argued that it was "contempt of the Law," and "not from Conscience" which caused them to go to arms.<sup>158</sup> Indeed, writing to the magistrates of Aberdeen, Mackenzie noted in 1679 that "the King is not inclined that the Quakers be troubled" if they committed no public mischief against the magistrates or ministry.<sup>159</sup> While the Quakers were a different case in and of themselves, it is worth pointing out the parameters and conditions for their toleration in the government's eyes.

Mackenzie was a strong proponent of the Protestant church, and he was eager to protect it. However, the differences in opinion between the sects were of lesser importance to him.

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<sup>156</sup> Raffé, *Culture of Controversy*, 76.

<sup>157</sup> For more on the Bothwell Rebellion, see Ian Borthwick Cowan, *The Scottish Covenanters, 1660-1688*, (London: V. Gollancz, 1976). For more on Sharpe, see Buckroyd, *The Life of James Sharp*.

<sup>158</sup> Mackenzie, *Vindication*, 1683, 14.

<sup>159</sup> NRS, GD244/1/84.

While Mackenzie was a strict defender of Episcopal governance, he had Latitudinarian tendencies.<sup>160</sup> Indeed, Sir John Erskine of Carnock noted that Mackenzie stated when speaking of religion that “he loved not to stand on pin points with God.”<sup>161</sup> Mackenzie had expanded on his religious beliefs in one of his earlier polemical works, *Religio Stoici*. First published in 1663, this work would be re-published throughout the Restoration, and again in 1685. While he wrote this work within a specific context, it is significant that his arguments were deemed useful enough to republish during the peak of the Killing Time. Writing primarily against religious fanaticism and in favour of religious latitude and tolerance, he argued that this was all at the discretion of the secular authorities.<sup>162</sup> He argued “as every private Christian should be tolerated by his Fellow-Subjects, to worship God inwardly according to his Conscience; so all should conspire in that Exterior Uniformity of Worship which the Laws of his Country enjoin.”<sup>163</sup> He continued, “What is once statuted by a Law, we all consent to, in chusing Commissioners to Represent us in these Parliaments where the Laws are made.... or to leave the Nation if we conform not; we cannot say, when that Law is put to Execution, that we are oppress’d.”<sup>164</sup> For Mackenzie, statutes and the law superseded any religious scruples. In a private letter to his nephew in the 1680s, Mackenzie wrote “I am rather too much blamd for favoring Dissenters” than being severe to them as of late, yet he explained that “if the King think them good subjects my quarrel is at ane end.” As explained, he was never involved “in matters of religion but when any wer enimies” to society for it was then his “duty to terrifie them.”<sup>165</sup>

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<sup>160</sup> Jackson, “Compassing Allegiance,” 128.

<sup>161</sup> John Erskine of Carnock, *Journal of John Erskine of Carnock, 1683-1687*, Walter Macleod, ed., (Edinburgh: Printed at University Press by T. and A. Constable for the Scottish History Society, 1893): 24.

<sup>162</sup> For a detailed discussion of Mackenzie’s religious beliefs, see Clare Jackson, “Latitudinarianism, secular theology and Sir Thomas Browne’s influence in George Mackenzie’s *Religio Stoici* (1663),” *The Seventeenth Century*, 29:1 (2014): 73-94.

<sup>163</sup> Mackenzie, *Works*, 30.

<sup>164</sup> Ibid.

<sup>165</sup> University of St Andrews Library (SAUL), msdep75/3 Bundle 3/ Letter 33.

Mackenzie was true to his principles. Following the Glorious Revolution, he disapproved of Parliament's actions in declaring that James had forfeited the Crown, even if he too disagreed with James removing the penal laws. While he had previously lobbied for the Prince of Orange to maintain the Episcopal church "as by law at present settled," for him, it was "the Duty of every good Subject, to obey the Laws of that Nation wherein he lives, since they must either obey the Magistrate or overturn him; and a Schism does breed so much Un-Christian Heat, and so many Civil Wars, that no pious or reasonable Man should Engage in it, except he be necessarily Obligated to separate from the Church."<sup>166</sup> While he voted against the forfeiture, he respected that the law had passed. Writing to Lord Yester in 1689, he explained "if I cannot be allowed to Live peaceably, I will goe to Hamburgh or goe to England which last show that I will live peaceably and with great satisfaction under the present new elected king for tho' I was not pleased not to meak a king yet I love not civill wars nor disorders."<sup>167</sup> He eventually moved to Oxford where he ended his days.

Understanding the ideology of the government's leading figures, including Mackenzie, it is easier to understand why they were so adamant that Presbyterians who failed to conform were not persecuted. The Presbyterians were not following the law in accepting the King's authority. As such, they were simply using conscience as an excuse to rebel. Lauderdale's chaplain George Hickes had similar views, noting "it hath always been the custom of Sectaries to miscall the Execution of the Laws, by the odious name of Persecution, which common People, who seldom consider, that the righteousness of the Cause, and not the sufferings of the Prosecuted make Persecution, are apt to think it really such, as often as men suffer on a pretended religious

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<sup>166</sup> Evelyn, *Diary*, 250; Mackenzie, *Vindication*, 1683, 7.

<sup>167</sup> National Library of Scotland (NLS), MS 3134/134.

account.”<sup>168</sup> As Hickes argued, persecution was when one was prosecuted for “matters of professed *Faith* or *Principles*.” However, he argued that they were not prosecuted for their principles, but rather they were prosecuted for their “reasonable, seditious and schismatic” practices, listing their crimes such as open rebellion.<sup>169</sup>

Interestingly, Hickes, an Englishman, would continue to refine his stance on religious intolerance. As Goldie explains, Hickes would later argue in England that dissenters were mistaking the “true notion” of persecution in that it had to be distinguished from “the execution of just, and sometimes necessary, and wholesome laws.” Persecution and martyrdom were only when one suffered for the true religion, whereas the Church of England was “the repository of truth.” As such, the Church of England was not persecuting dissenters.<sup>170</sup> Arguments like this would have been helpful to the Scottish Episcopal cause. However, as noted, the Church of Scotland and the Scottish authorities failed to promote its fundamental theological *raison d’être*. As such, pamphlets such as Mackenzie’s with his focus on the law and authority proved to be less persuasive. Raffie argues that the “persecution” narrative in Scotland proved popular, in part because it was intellectually accessible outside of elite circles, especially more so than intellectual and legal defences of theology.<sup>171</sup> Persecution is emotive, relatable and visceral. Mackenzie’s detailed jargon and arguments, although legally correct and often rational, failed to compete on that level, especially when faced with the encompassing narrative of persecution.

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<sup>168</sup> George Hickes, *Ravillac Redivivus, Being a Narrative of the late Tryal of Mr. James Mitchel a Conventicle-Preacher, Who was Executed the 18th of January last, for an attempt which he made on the Sacred Person of the Archbishop of St. Andrews & in a letter from a Scottish to an English Gentleman*, (London: 1678): 24. For a further discussion on Hickes’ views, see Raffie, *Culture of Controversy*, 95.

<sup>169</sup> Hickes, *Ravillac Redivivus*, 24-29.

<sup>170</sup> Goldie, “The Theory of Religious Intolerance,” 360.

<sup>171</sup> Alasdair Raffie, “Propaganda, religious controversy and the Williamite revolution in Scotland,” *Dutch Crossing*, 29 (2005): 31.

Those who dissented were able to create a shared identity for themselves, which proved to be popular for centuries to come.

### Conclusion

Mackenzie's focus on education, as well as informative legal literature during the 1680s, was not surprising considering many of the conformist attitudes toward Presbyterians. As Janette Currie has discussed, satires of Covenanters proliferated throughout the Restoration, and remained the most popular way to denigrate their movement. Often these works lumped together the beliefs of the extreme Covenanters with moderates, describing them as mad and irrational.<sup>172</sup> While working for Lauderdale, George Hickes published an account of the trial of James Mitchell. Throughout the pamphlet, he described Mitchell as "an utter *Ignoramus*." However, he also noted that "all the rest of them are full as illiterate as he, and that their insuperable ignorance in Divine and Humane Learning is the Mother of their Murdering Zeal." He went further explaining that "all the late Troubles upon the account of Episcopacy, are chiefly to be ascribed to the shameful ignorance of Protestant Divines."<sup>173</sup> Similarly, in a letter to the Earl of Linlithgow regarding proceedings following a field conventicle, the author complained that the leader stirred up "ignorant people to follow his illegal courses."<sup>174</sup>

As Raffe points out, the term "fanatic" proliferated throughout the 1680s, as a way to distinguish those whose principles were outside the boundaries of "political acceptability."<sup>175</sup> With beliefs such as these at the forefront of popular narratives, it is not surprising that figures like Mackenzie would try to induce readers to turn to a more 'rational' mode of study—

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<sup>172</sup> Janette Currie, "History, Hagiography, and Fakestory: Representations of the Scottish Covenanters in Non-Fictional and Fictional Texts from 1638-1835," PhD Thesis, (University of Stirling, 1999): 33-44.

<sup>173</sup> Hickes, *Ravillac Redivivus*, 12; For a further discussion on this pamphlet, see Currie, "History, Hagiography, and Fakestory," 35.

<sup>174</sup> NRS, RH15/12/81.

<sup>175</sup> Raffe, *Culture of Controversy*, 121-124.

that of the law. Mackenzie thought that by teaching readers statutes, legal procedures and precedents, lawyers would not only be able to do their jobs better, but ordinary people would learn to be loyal subjects. Indeed, complaining in his post-Revolution *Vindication*, Mackenzie remarked that “There is great Reason to believe that *poor People are only misled by mis-information*.”<sup>176</sup>

Many people were executed during the Restoration, and even more were fined. While dissenters would argue that they were persecuted, to the government, these were criminals and traitors. As Mackenzie argued, the necessity of state was of the utmost importance, for “In Matters of Government, we must Balance the Safety of the Whole, with the Punishment of a few. And in our Case, we must consider that a Civil War would be much more severe, then a few Executions, or Fynes can be.”<sup>177</sup> The civil wars were a constant presence in the minds of governmental officials, as well as the King, and it influenced every one of their actions. The ideological divide between the various Presbyterian and Episcopal groups was vast. Arguing against the persecution narrative in 1691, Mackenzie stated, “Generally no Man was executed in [Charles]’ Reign, who would say *God Bless the King*, or acknowledge his Authority; an unusual Clemency, never shewn in any other nation.”<sup>178</sup> While his prose simplified matters, it is true that the government gave Covenanters many opportunities to be released should they accept the authority of the King, as this thesis shows in the following chapters. However, the question of authority was no small matter for many committed Presbyterians, which many of the ‘Erastian’ officials could not wrap their heads around. Following the Revolution, the roles were reversed, and the Episcopalians became the persecuted party. They appropriated the Covenanter’s

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<sup>176</sup> Mackenzie, *Vindication*, 1691, 32.

<sup>177</sup> Mackenzie, *Vindication*, 1683, 15.

<sup>178</sup> Mackenzie, *Vindication*, 1691, 8.

language, taking on the language of the “persecuted,” arguing that they were much more mistreated than their fellow Presbyterians had ever been. Mackenzie made the pointed remark to the Presbyterian government: “I must also ask them, if any should now rise in Arms in Defence of Episcopacy, and alledge Conscience for so doing, would they sustain that as a just Defence?”<sup>179</sup> He knew the answer to that question. The key difference also being that Mackenzie viewed the laws of the land as too sacred to ever rebel.

There is no doubt that the Scottish government was persecutory toward non-conformists, in the modern understanding of the word. However, as the Scottish government continued to maintain throughout and after the Restoration period, everything they did was legal and for the security of the nation. This fact does not excuse the government officials’ behaviour, but it does allow us to understand the nuances of the period. For the government, the question of religion came down to authority, not doctrine. Thus, Mackenzie was able to confidently state: “And not one died for any Principle in Religion unless it be thought a religious Principle to die for actual Rebellion.”<sup>180</sup> Yet, this question of authority would continue to reverberate in multiple debates across the period, as we shall see in Chapter Two when Argyll dared to question the authority of the Test Act with his caveated oath.

Writing as early as May 1689, Mackenzie noted with frustration that “som tak great pains to mak Scotland and this reigne very odious and terrible,” yet he argued “I punisht crimes, but committed non.” He acknowledged “my bigotrie for the royall familie and monarchie is, and has been, very troublsom to mee; but though I hav been tuyce layd asyde from being Kings Advocat, I will still continow firmly in both, and regrat deeply to see our just, noble and antient

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<sup>179</sup> Ibid.

<sup>180</sup> Mackenzie, *Vindication*, 1691, 17.



government pulld to peeces.”<sup>181</sup> Throughout his career, Mackenzie had been consistently aware of the importance of maintaining the government’s reputation, and countering images of arbitrary government. Even in the early months during the establishment of the post-Revolution government, Mackenzie could see the narratives that were forming in order to justify the new regime. His only hope was that “the King will find all true that I fortold him.”<sup>182</sup> While the Williamite government would utilize many of the same persecutory tools as the Restoration authorities, the new government was able to distance itself by distinguishing itself as a defender of the “Protestant” cause.<sup>183</sup>

Mackenzie’s legal and polemical works throughout his tenure as Lord Advocate played an important role in promoting a certain image of the government—one which was not arbitrary—and his works were used as a way to combat the persecutory narrative being thrown in the government’s direction. While many of his works were written for intellectual circles with legal education in mind, Mackenzie also argued that the law was for everyone. As such, he believed that a proper understanding of the law would allow for peace and good government. As noted, Mackenzie was not universally popular in government, with the Drummond brothers in particular having issues with his “scruples.” However, Melfort still believed that Mackenzie was “a good tool if rightly used,” and the Restoration government took full advantage of him.<sup>184</sup> Certainly, Mackenzie’s and other works like his proved to have some success for the Restoration regime. Writing after the Revolution, an anonymous pamphleteer complained of the royalist arguments that were espoused by the Restoration authorities, which argued that the King was

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<sup>181</sup> *Leven and Melville Papers*, 32.

<sup>182</sup> *Ibid.*

<sup>183</sup> For example, see: Tony Claydon, *William III and the Godly Revolution*, (Cambridge: Cambridge University Press, 1996); Julie Ferguson, *Visualising Protestant Monarchy: Ceremony, Art and Politics after the Glorious Revolution (1689-1714)*, (Woodbridge, Suffolk: Boydell Press, 2021).

<sup>184</sup> HMC Drumlanrig, Vol. 2, 156.

“*Jure-Divino*” and that it was a subject’s duty to obey him. He noted, “This Doctrine, in this last Age has been so importunately obtrude upon People both from the Pulpit and Press, that the most part believed it to be a Truth, without ever examining it.”<sup>185</sup> Contrary to Covenanter or Whiggish reports, many Scots had indeed bought what Mackenzie and others like him had been selling.

In 1691, an anonymous broadside was published in Edinburgh entitled *An Elogie On the Death of the Learned and Honourable Sir George McKenzie of Rosehaugh*. The elegy proclaimed that Mackenzie was “like a Marble Pillar of the Law” who “Upheld the Nation.” Significantly, the author noted “from him did draw/As from a Fountain, new refreshing Streams,/ For Youths Instruction, who like radiant Beams/ Enlighten’d, and Enliven’d this Our Land.” Even after death, Mackenzie’s focus on education was a significant factor in his memory, and perhaps shows that his publication campaign had some success. The author noted that “His Works shall keep his Fame in Memory,/ From Age to Age, and each Posterity/ Shall recommend his Worth.” Unfortunately, however, “Bluidy Mackenzie” became a more popular remembrance. Even in 1691, the author alluded to the fact that “the vulgar” dare contend something else with regard to Mackenzie, yet “who like to him may promote Publick Peace.”<sup>186</sup> The duelling narratives of the Restoration continued to inspire conflict.

Interestingly, in 1712, over two decades after it was written, Mackenzie’s post-Revolution *Vindication* was re-published.<sup>187</sup> Mackenzie’s arguments continued to be relevant and appropriated by eighteenth-century Episcopalian parties, arguably to some success. Indeed, Robert Wodrow began compiling his mammoth collection, *History of the Sufferings*, in part because of the renewed popularity of Mackenzie’s legal arguments. Writing in his preface,

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<sup>185</sup> *A Vindication of the Proceedings of the Convention of the Estates in Scotland...*, (London: 1689): 15.

<sup>186</sup> *An Elogie On the Death of the Learned and Honourable Sir George McKenzie of Rosehaugh, Knight &c. Late King’s Advocate*, (Edinburgh: 1691).

<sup>187</sup> The pamphlet was re-printed in 1712 in Edinburgh by James Watson.

Wodrow quoted Mackenzie and stated “it is boldly asserted, and published to the World *That no Man in Scotland ever suffered for his Religion*. Libels have been printed, and carefully handed about, containing these glaring Untruths; and no small Pains is taken, and any Artifices used, to impress the *English Nation* with them.”<sup>188</sup> Twenty-one years after his death, Mackenzie’s legal propaganda was still being used, and much to Wodrow’s chagrin, Mackenzie continued to be a “good tool” to help promote a different vision of the Scottish government: one that was indeed not arbitrary.

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<sup>188</sup> Robert Wodrow, *Sufferings*, 1.

## Chapter Two: The Test Act and the Case of the Earl of Argyll

*For if he be bound no farther than he himself can obey, or so far as this oath is consistent with the Protestant religion or itself, quomodo constat, to whom or what is he bound? And who can determine that? Or against what alteration is the government secured, since he is judge of his own alteration? So that that oath, that was to be taken without any evasion, is evaded in every single word or letter; and the government as insecure as before the act was made, because the taker is no farther bound than he pleases.*

The Lord Advocate's Plea against the Earl of Argyll at his trial in 1681<sup>1</sup>

### Introduction

In 1681, amidst fears of a Popish successor and the Exclusion Crisis in England, in addition to the growing threat of militant Presbyterianism, the Parliament of Scotland passed the “Act anent religion and the Test,” an oath to be sworn by all officeholders to “cut off all hopes from papists and phanaticks of their being imployed in offices and places of publick trust.” The takers had to swear that they would own “the true Protestant religion contained in the Confession of Faith recorded in the first parliament of King James the sixth,” they would denounce “popish and phanaticall” doctrines, and they had to affirm “that the king’s majesty is the only supream governour of this realme, over all persons and in all causes, as weill ecclesiastical as civill.” They also had to swear allegiance to the king and his “heirs and lawfull successors,” along with disowning the National Covenant and Solemn League and Covenant. The Act concluded that the taker had to swear the oath “in the plain genuine sense, and meaning of the words, without any equivocation, mental reservation, or any manner of evasion whatsoever.”<sup>2</sup> Presided over by

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<sup>1</sup> *A Complete Collection of State Trials and Proceedings for High Treason and Other Crimes and Misdemeanors from the Earliest Period to the Year 1783 (State Trials)*, Vol. 8, T. B. Howell et al, eds., (London: Printed by T. C. Hansard, 1816): 924.

<sup>2</sup> *The Records of the Parliaments of Scotland to 1707, (RPS)* K.M. Brown et al, eds., (St Andrews, 2007-2021), 1681/7/29.

James, Duke of Albany and York, the Parliament had covered all its bases— or so it thought. The Test Act was supposed to be the ultimate performance of loyalty, decisively enshrining the religious authority of the Crown into statute law. While this chapter shows that the Test Act had some successes, it caused much more harm to the government's image in the long run, helping to contribute to the arbitrary perceptions of the Crown and Council.

Throughout the Restoration, there had been a series of state oaths, such as the Oath of Allegiance and Abjuration Oath, yet the Test Act would arguably prove to be one of the most controversial, not only in Scotland, but also abroad.<sup>3</sup> If read closely, inherent to the Test Act were a series of inconsistencies due to its invocation of the Confession of Faith, and many subjects refused to swear such an oath. As discussed in Chapter One, this oath brought the debate over religious authority to the forefront once more. For instance, how could one swear that the King was the Supreme Governor of the Church when the Confession of Faith declared Jesus Christ to be so? The most notorious case involving the Test Act was that of Archibald Campbell, the ninth Earl of Argyll's refusal to swear the oath without a caveat due to its contradictions, of which he declared: "I take [the oath] as far as it is consistent with itself and the Protestant religion." Due to these words, he was tried for treason, and condemned to much uproar.

The Earl of Argyll's treason trial has often been noted by both contemporaries and historians as an example of the arbitrary nature of the Scottish Restoration government, highlighting its unfair and strict procedures.<sup>4</sup> As Gillian H. MacIntosh states, Argyll's trial and subsequent forfeiture "is perhaps one of the better known events of the Restoration."<sup>5</sup>

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<sup>3</sup> As Laura Doak discusses, the Test Act "constantly appears as both a target and catalyst for opposition sentiment" throughout the 1680s in "On Street and Scaffold: The People and Political Culture in Late Restoration Scotland, c. 1678-1685," PhD Thesis, (University of Glasgow, 2020): 36.

<sup>4</sup> For example, see John Willcock, *A Scots Earl in Covenanting Times: Being Life and Times of Archibald, 9th Earl of Argyll (1629-1685)*, (Edinburgh: A. Eliot, 1907): 259-283.

<sup>5</sup> Gillian H. MacIntosh, *The Scottish Parliament under Charles II, 1660-1685*, (Edinburgh: Edinburgh University Press, 2007): 196.

However, while there has been much discussion on the Test Act in British historiography,<sup>6</sup> Argyll's trial itself is often only mentioned in passing, with the legal debates surrounding his case being neglected in historiography. John Willcock encapsulates the traditional mentality surrounding the trial: "so ludicrous were the circumstances of the trial that we think it would be absurd to occupy time with any discussion of the merits of the case."<sup>7</sup> While Argyll's case was indeed controversial, his trial provoked serious legal discussion amongst lawyers both in print and in the courtroom, and there were certainly a few merits to the prosecution's arguments. Regardless of the merits of the trial, however, focusing on the slender grounds for Argyll's condemnation fails to consider the significance of Argyll's words themselves. There was a reason *why* Argyll's caveated oath provoked such a response by the government.

This episode underpins a greater ideological issue at play in late Restoration Scotland, highlighting not only debates about religious authority, but also legal interpretations of statutes, obedience, and the law. As Sir George Mackenzie of Rosehaugh, the Lord Advocate, argued at the trial, Argyll's words were dangerous for they made the oath obsolete, explaining "the taker is no farther bound than he pleases."<sup>8</sup> Argyll's guilty verdict was certainly controversial, yet some of the best lawyers had worked on the case, and they had a deep understanding of the law. This chapter suggests that the reason Argyll's words provoked such a response from the Scottish authorities was that his words devalued and threatened the ideological and legal foundation of the Crown's authority. Indeed, Argyll's words were too reminiscent of the conditional loyalty to the Crown espoused by those loyal to the Covenant, which the Test Act was supposed to defend

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<sup>6</sup> For a detailed description of the creation and implementation of the Test Act, see Kirsty McAlister, "James VII and the Conduct of Scottish Politics, c. 1679 to c. 1686," PhD Thesis, (University of Strathclyde, 2003). Likewise, Tim Harris, *Restoration: Charles II and His Kingdoms, 1660-1685*, (London: Allen Lane, 2005): 347-359.

<sup>7</sup> Willcock, *A Scots Earl in Covenanting Times*, 273.

<sup>8</sup> *State Trials*, Vol. 8, 924.

against. While many argued that Argyll was tried on “slender” grounds, and that is most definitely true, his words cut deeper than intended, and were more disruptive than the government’s critics would point out. Solely focusing on the “slender” grounds for treason to illuminate the arbitrariness of the Scottish government downplays the significance of Argyll’s words. While he certainly did not deserve to be executed for what he said, and even the King very likely agreed on that fact, his words were an overt form of resistance to the authority of the monarchy and Council. As such, this chapter examines the legal arguments made directly at Argyll’s trial, as well as those made in contemporary printed responses, analyzing them within the context of debates about conscience, oaths, and leasing-making to highlight the differing views on legal authority in Scotland at this time. Interestingly, while Argyll’s case was indeed controversial, it was perhaps his later connection with the English Whigs that caused more harm to the Scottish government’s image in the long run. Following an examination of the English responses to Argyll’s case, this chapter will then examine the Scottish government’s expansion of the Test Oath and show how it was used as a test of loyalty in exchange for indemnity during the circuit court session in 1683. Examining the case of William Bogue, one can see how the Test Act both worked as a tool of indoctrination and a rallying cry for opposition.

### **The Test Act in Parliament**

The Test Act was passed at an especially contentious time in Scotland and Great Britain as a whole, with the government cracking down on dissent in multiple circles. Indeed, just days before the opening of Parliament on July 28, 1681, multiple examples of this clampdown occurred. On July 25, an Assize of Error was sustained, which was a “symbolic achievement in confirming that the verdicts of criminal juries remained subject to judicial scrutiny.”<sup>9</sup> Likewise,

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<sup>9</sup> Clare Jackson, “‘Assize of Error’ and the Independence of the Criminal Jury in Restoration Scotland,” *Scottish Archives* 10 (2004): 14.

on July 26, the extremist Presbyterian Donald Cargill and four of his followers were convicted and executed the next day.<sup>10</sup> With the onslaught of radical Presbyterianism in Scotland, the presence of the Duke of Albany and York in Edinburgh, in addition to Exclusion events occurring in England, the Scottish Parliament was keen to not only secure the succession and protect the Protestant religion, but also to enact an oath that would ensure an outward display of obedience on the part of its subjects.

State oaths were a common occurrence in Restoration Scotland. As Clare Jackson has argued, the “extent to which the administration became concerned to ascertain the loyal disposition of all its subjects was reflected in the growing number of state oaths imposed on the population.”<sup>11</sup> As Margaret Steele discusses, state oaths were used to ensure “national stability and unity in the midst of political disorder.”<sup>12</sup> Indeed, as Alasdair Raffe explains, oaths were a good political tool, as they were used to determine people’s loyalty, bind people’s consciences, and guarantee obedience. In a deeply religious society, however, state oaths sometimes could strain an individuals’ conscience creating a conflict between human and divine laws.<sup>13</sup> Nonetheless, oaths were useful as they could ascertain loyalty on an individual basis. Indeed, as Karin Bowie explains, oaths and bonds became a “significant tool of indoctrination and engagement” for authorities in the seventeenth century, as they could be a means of controlling opinion throughout entire communities. However, as she further argues, over time, the multitude of oaths made it “easier to imagine the nation as a body of individuals holding opinions” and it

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<sup>10</sup> Sir John Lauder of Fountainhall, *Historical notices of Scottish affairs...* Vol. 1, (Edinburgh: T. Constable, printer to Her Majesty, 1848): 305.

<sup>11</sup> Clare Jackson, *Restoration Scotland, 1660-1690: Royalist Politics, Religion and Ideas*, (Woodbridge, Suffolk: Boydell Press, 2003): 147.

<sup>12</sup> Margaret Steele, “Covenanting Political Propaganda, 1638-89,” PhD Thesis, (University of Glasgow, 1995): 358.

<sup>13</sup> Alasdair Raffe, “Scottish State Oaths and the Revolution of 1688-1690,” *Scotland in the Age of Two Revolutions*, Sharon Adams and Julian Goodare, eds., (Woodbridge, Suffolk: Boydell Press, 2014): 174-175.



became more difficult to ignore those committed individuals.<sup>14</sup> Certainly, as Nicole Greenspan notes, Charles II's failure in the 1650s could partially be attributed to the conditional loyalty of his Scottish subjects. As she explains, throughout the seventeenth century, "multiple allegiances" be it to God, the church, or monarchy, often conflicted, and had to be reordered and re-prioritized. State oaths, in principle, were supposed to supersede these conflicts, binding subjects to the monarch both secularly and religiously.<sup>15</sup> However, the Test Act emphasized the limitations of this principle. Interestingly, as Allan Kennedy argues, the Restoration regime's increasing use of oaths to secure obedience could be seen as a "nebulous legacy" from the Covenanting era, as the Covenants— along with allowing resistance against the King— were "a test of political acceptability and fitness for office."<sup>16</sup>

The Test Oath, as the name implied was used as a test of people's ideological principles, to ensure loyalty to the Crown and Protestant religion. However, in a society where many viewed oaths as a sacred covenant between God and man, it is unsurprising that so many would take issue with the inconsistencies present in the Test Act. What was in the Test Act that was contradictory? As noted, the Test Act was an oath designed to be taken by all office holders to root out both Presbyterianism and Catholicism. The taker had to swear to uphold the Protestant religion, as stated by the Confession of Faith, as well as uphold the Royal Supremacy. Here is where the controversy came in. The Confession of Faith, ratified by the 1567 Parliament, stated that Jesus Christ was the "supreme governor" and head of the Church. Additionally, the Confession stated that the King's duty was to maintain the true religion. As such, it hinted that

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<sup>14</sup> Karin Bowie, *Public Opinion in Early Modern Scotland, c. 1560-1707*, (Cambridge: Cambridge University Press, 2020), 90-93.

<sup>15</sup> Nicole Greenspan, "Charles II, Exile, and the Problem of Allegiance," *The Historical Journal* 54:1 (2011): 74.

<sup>16</sup> Allan Kennedy, "The Legacy of the Covenants and the Shaping of the Restoration State," *The National Covenant in Scotland, 1638-1689*, Chris R. Langley, ed., (Woodbridge, Suffolk: Boydell Press, 2020): 179.

those who did not “vigilantly travail in execution of their office” were resisting God’s ordinance. As such, “[repressing] tyranny” was considered a good work before God. Significantly, this Act had been passed after the dethroning of Mary, Queen of Scots.<sup>17</sup> To the scrupulous, the Confession contradicted the other parts of the Test Act which stated that the King was the Supreme Governor, and one must uphold his authority and never rise in arms against him. How was this contradictory oath able to be passed?

When the Act was debated in Parliament, members were initially uncertain how they were to define the “Protestant Religion.” Sir James Dalrymple of Stair suggested the 1567 Confession of Faith be used as the definition, as it was the only confession to have the “sanction of a law.” In all likelihood, Stair was trying to sabotage the Act. As Bishop Gilbert Burnet noted, “this book was so worn out of use, that scarce any one in the whole Parliament had ever read it,” including the bishops.<sup>18</sup> Stair’s proposition was accepted, and the Act was passed, despite the fact that many opposed it.<sup>19</sup> According to Burnet, it only passed by seven votes.<sup>20</sup> As discussed in the previous chapter, the Scottish government’s “Erastian” nature, and lack of theological knowledge on religious affairs proved to be problematic on multiple occasions, this being one of them.

Once the Act had passed, officeholders had until January 1 to swear the oath. On September 20, 1681, however, it was resolved that the whole Council should sign the Test “upon Thursday nixt.”<sup>21</sup> Fountainhall recorded that some condemned this order “as a great stretch in the

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<sup>17</sup> RPS, A1567/12/3.

<sup>18</sup> Gilbert Burnet, *Bishop Burnet's History of His Own Time. From the Restoration of King Charles II. To the Settlement of King William and Queen Mary at the Revolution...* Vol. 1 (London: Printed for Thomas Ward in the Inner-Temple Lane: 1724): 516.

<sup>19</sup> *Calendar of State Papers, Domestic Series of the reign of Charles II (CSPD)*, Vol. 22, F. H. Blackburne Daniell, Ed., (London: His Majesty’s Stationary Office, 1921): 440.

<sup>20</sup> Burnet, *Bishop Burnet's History of His Own Time*, Vol. 1, 517.

<sup>21</sup> *Register of the Privy Council of Scotland (RPCS)* 3<sup>rd</sup> series, Vol. 7, (Edinburgh: HM General Register House, 1915): 196.

Counsell, to attempt to abridge and shorten the tyme granted by the act of Parliament it selfe for taking it, viz. the 1<sup>st</sup> of Januar nixt.”<sup>22</sup> Nevertheless, the majority of Privy Councillors proceeded to take the Test by November. However, several leading figures of the government, along with a several clergy, had scruples with taking the Test, including the Duke of Hamilton and the Earl of Queensberry.<sup>23</sup> While the Council Records simply record that Queensberry took the Test, there are several accounts that note that Queensberry provided a caveat to his oath—something that would prove to be consequential to Argyll.

Queensberry explained “that by that part of the *Test*, *That there lyes no obligation - - - to endeavour any change, or alteration in the Government, &c.* He did not understand himself to be obliged against *Alterations*, In case it should please His Majestie to make alterations of the Government of Church or State.”<sup>24</sup> As Wodrow argued, “no Body challenged this as Treason, tho’ it was as much an Explication as that the Earl of Argyle offered; but the One was a Friend, and the other a Foe.”<sup>25</sup> However, there was a key difference. As Kirsty McAlister notes, the difference was that Queensberry “actually accorded support to Charles’s right to make alterations in the realm of religion,” although his caveat did highlight the fact that the Test was problematic.<sup>26</sup> However, it should be noted that Queensberry also signed the Test in his role as a Lord of the Justiciary with no caveat attached.<sup>27</sup>

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<sup>22</sup> Fountainhall, *Historical notices*, Vol. 1, 328.

<sup>23</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 7, 238.

<sup>24</sup> *The Case of the Earl of Argyle, or, An Exact and full account of his trial, escape, and sentence wherein are insert the act of Parliament injoining the test, the confession of faith, the old act of the king's oath to be given at his coronation...* (1683): 38.

<sup>25</sup> Robert Wodrow, *The history of the sufferings of the Church of Scotland, from the Restauration to the Revolution: collected from the publick records, ...*, Vol. 2, (Edinburgh: 1721): 216.

<sup>26</sup> Kirsty McAlister, “James VII and the Conduct of Scottish Politics,” 100.

<sup>27</sup> National Records of Scotland (NRS), JC39/36 “The Test signed by the Lords of Justiciary & other members of court.”

### The Case of the Earl of Argyll

Archibald Campbell, the Ninth Earl of Argyll, had a tumultuous start to his political career. Born in 1629, his father, the Marquess of Argyll, would be tried for treason and executed in 1661 for his involvement with the Commonwealth authorities during the 1650s. Being tried and condemned himself in 1662, he was eventually released, and his father's estates and titles—excluding Marquess—were restored to him. He soon after became a member of the Privy Council and recovered the sheriffdom of Argyll, gaining more power both politically and locally. As the head of the powerful Campbell clan in the western Highlands, Argyll created many enemies with his harsh measures, and attempts at accruing more and more influence over rival clans. While Argyll and the Duke of York and Albany, were initially on good terms, the Test Act would soon change things.<sup>28</sup>

The Earl of Argyll had opposed the Test Act throughout the debate in Parliament, and he chose to absent himself from Council following the order to have all Councillors swear it early, leading many to “conjecture” that he was not willing to take it.<sup>29</sup> However, on November 3, Argyll appeared in Council during which he first swore his caveated oath. He stated:

I have considered the Test and am very desirous to give obedience as far as I can. I am confident the Parliament never intended to impose contradictory oathes, and therefore I think no body can explain it bot for himselfe and reconcile it as it is genuine and agrees in its owne sense. I take it as far as it is consistent with itselfe and the Protestant religion, and I doe declare that I mean not to bind up myselfe in my station and in a lafull way to wish and endeavour any alteration I think to the advantage of church or state not repugnant to the Protestant religion and my loyaltie, and this I understand as part of my oath.<sup>30</sup>

Interestingly, the *Register of the Privy Council* makes no mention of this explanation. As his first occasion for swearing the oath would prove to be an important factor in the defence's case, it is

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<sup>28</sup> For more information on Argyll, see David Stevenson, “Campbell, Archibald, ninth earl of Argyll (1629–1685), politician and clan leader,” *Oxford Dictionary of National Biography*, (23 Sep. 2004).

<sup>29</sup> *CSPD Charles II*, Vol. 22, 477.

<sup>30</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 7, 242.

worth noting that the *Register of the Privy Council* records state: “The Earle of Argyle, having been called in and taken and signed the Test appointed by the late act of Parliament upon his knees and by repeating the words, did take his place as a Privy Councillour.”<sup>31</sup> There is no mention of his explanation. The semi-autobiographical work, *The Life of James the Second*, states “the other Lords of the privy Council not attending too [his words], it had pass’d upon them.”<sup>32</sup>

Various advocates and pamphleteers would later argue that the fact that Argyll was able to swear the oath and then sit in Council was proof that the Privy Council had accepted his caveat, and there were no grounds for punishment. Indeed, the author of the English pamphlet, *The Scotch Mist*, would later note that “it is strange [his words] should grow Treason in twenty four hours.”<sup>33</sup> In his printed vindication of the case, Sir George Mackenzie of Rosehaugh explained that Argyll “coming in abruptly to the Council, he spoke something with so slow [sic] a Voice, that none say they heard him, and then clapping down-on his Knees, took the Test.”<sup>34</sup> However, according to the pamphlet, *The Case of the Earl of Argyle*, the Duke of Albany had been informed ahead of time that Argyll was prepared to swear the oath with an explanation, and Argyll was told “it would be very kindly accepted.” Having sworn the oath “so loud, and audible, that some in the furthest corner of the room acknowledged they heard it,” the Duke “with a well satisfied Countenance, and the honour of a smile, *Commanded* him to take his

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<sup>31</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 7, 238.

<sup>32</sup> James Stanier Clarke, *The life of James the Second, King of England, &c., collected out of memoirs writ of his own hand. Together with the King's advice to his son, and His Majesty's will*, Vol. 1, (London: 1816): 708.

<sup>33</sup> *The Scotch Mist Cleared Up, to prevent Englishmen from being wet to the skin being a true account of the proceedings against Archibald Earl of Argyle, for high-treason...* (London: 1681/2): 28.

<sup>34</sup> Sir George Mackenzie of Rosehaugh, *A vindication of His Majesties government and judicatures, in Scotland from some aspersions thrown on them by scandalous pamphlets and news-books, and especially, with relation to the late Earl of Argyle's process*, (Edinburgh: 1683): 21.

place.” As the author states, while the Duke was pleased, there were others in the Council who “appeared surprised, and in some confusion.”<sup>35</sup>

Based on the various accounts, it is likely that Argyll did stun at least some of the Council with his words, and that it took them time to digest the meaning of what he said. However, the optics of allowing him to continue throughout the meeting did them no favours. Indeed, some members must have been able to hear him if they were able to record what he said and discuss it amongst themselves after the fact. Fountainhall conceded that Argyll’s insinuation “if expounded of the monarchie or succession, seemes dangerous” but “this was not noticed that night” and it was the next day that Argyll’s “enemies” explained the treason to the Duke.<sup>36</sup> As Andrew Lang argues, it was likely not James himself that initially wished to pursue Argyll. Indeed, those who were “surprised” in Council would have pointed out the words to him.<sup>37</sup> Certainly, Mackenzie argued that it was after the fact when people read copies of Argyll’s words that they realized what he said was “as tending to destroy, not only the Parliaments design in the Test, but to unhing all Government.”<sup>38</sup>

Although Argyll believed that the Council and Duke had accepted his explanation, the next day, according to the pamphlet *The Case of the Earl of Argyle*, the Duke said “he was not pleased with his explanation,” explaining he had believed it was to be a “short one” like Queensberry’s. Dismissing any further conversation, James supposedly said “*well it is past with yow, but it shall pass so with no other.*” Argyll took these words as a confirmation of the Council and the Duke’s acceptance of his explanation.<sup>39</sup> Nonetheless, Argyll was requested to swear the

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<sup>35</sup> *The Case of the Earl of Argyle*, 7-8.

<sup>36</sup> Fountainhall, *Historical Notices*, Vol. 1, 335.

<sup>37</sup> Andrew Lang, *Sir George Mackenzie, king's advocate, of Rosehaugh: his life and times 1636 -1691*, (London, New York: Longmans, Green, 1909): 222.

<sup>38</sup> Mackenzie, *Vindication*, 1683, 21.

<sup>39</sup> *The Case of the Earl of Argyle*, 8.

oath again, this time for his role with the Commissioners of the Treasury. Argyll declared that he was “content to take the Test in the sense and meaning he had taken it the day before.” This time, however, the President of the Council declared that Argyll “had delivered himself in so low a voice that many of the Council did not hear what he said and he had taken it so suddenly without giving tyme to these of the Council who heard him to make any answer.”<sup>40</sup> As such, he was asked to explain himself. The Earl took a piece of paper from his pocket and read what he said the day before.

After Argyll publicly read the paper, the Council requested he sign it. However, he refused until he had time to consult with his lawyers. Following Argyll’s refusal to swear the oath without a caveat, he was removed from Council, upon the explanation that he had “not satisfied the law in taking the Test in the termes, sense and meaning appointed by the act of Parliament.”<sup>41</sup> The next day, the Council ordered Argyll committed to Edinburgh Castle, explaining that they had examined the paper and thought it to be “of dangerous consequence reflecting upon his Majesties authority and government, and particularly upon the late act of Parliament enjoying the Test.”<sup>42</sup> Interestingly, as Willcock points out, the usual words “in sure firmance,” (ie. “strict confinement”) were omitted.<sup>43</sup> The Council then proceeded to issue a warrant to the Lord Advocate to pursue a process of treason against the Earl of Argyll.

The Council wrote to the King explaining what they were doing. They explained that Argyll was:

...depraving your Majesties laws, misrepresenting your Parliament and teaching your subjects to evacuat and disappoint all laws and securities that can be enacted for the preservation of government, suteable to which his Lordship declares in that paper that he meanes not to bind up himself from making any alterations he shall think fit for the

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<sup>40</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 7, 242.

<sup>41</sup> *Ibid.*, 243.

<sup>42</sup> *Ibid.*

<sup>43</sup> Willcock, *A Scots Earl in Covenanting Times*, 263-264.

advantage of church or state, and which paper he desires may be looked upon as a part of his oath, as if he were the legislator and able to add a part to the act of Parliament.<sup>44</sup>

The King responded to the letter agreeing that Argyll had included “gross and scandalous Reflections” upon the Test Act and approved of the Council’s pursuit against him. However, he ordered them to contact him before sentencing, should Argyll be found guilty, indicating that the King likely had no intention for them to go through with an execution.<sup>45</sup> Indeed, prior to the trial, the Duke had supposedly been told that it was a “hard measure” to threaten a person’s life and fortune on such grounds, to which he responded “Life and fortune! God forbid.”<sup>46</sup> Even in England, many believed this to be the case. In an English newsletter, the writer commented that Argyll could only hope for the King’s mercy, but “most people there are of opinion he will obtain it, for he has always been loyal.”<sup>47</sup> Argyll was only to be tried as an example, but not executed. As Alastair Mann notes, however, this “was a marked failure of policy by James and Charles” as even the most loyal ministers in England found the trial “distasteful.”<sup>48</sup>

Much has been spoken about Argyll’s tenuous position at this time, and many speculated, including Burnet, that the Test Act was used as merely an excuse to bring Argyll down.<sup>49</sup> As Burnet noted, “The Duke seeing how a great man the Earl of Argyle was in Scotland, concluded it was necessary for him either to gain him or to ruin him.”<sup>50</sup> Burnet argued that “some officious people” suggested to the Duke that “great advantage might be taken against him from these words.”<sup>51</sup> Additionally, Burnet pointed out that some believed “all this was done only

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<sup>44</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 7, 244.

<sup>45</sup> *The Case of the Earl of Argyle*, 52.

<sup>46</sup> *The Case of the Earl of Argyle*, 12.

<sup>47</sup> *CSPD Charles II*, Vol. 22, 606.

<sup>48</sup> Alastair J. Mann, *James VII, Duke and King of Scots, 1633-1701*, (Edinburgh: John Donald Short Run Press, 2014): 145.

<sup>49</sup> For a detailed discussion of Argyll’s enemies and debts in the Highlands, including his affair with the MacLeans, see Lang, *Sir George Mackenzie*, 204-216.

<sup>50</sup> Burnet, *Bishop Burnet's History of His Own Time*, Vol. 1, 512.

<sup>51</sup> *Ibid.*, 520.



to affright him to a more absolute submission, and to surrender up some of those great jurisdictions over the *Highlands*.”<sup>52</sup> Indeed, *The Life of James II* explained that it was neither the King nor the Duke’s intention to execute Argyll, but to “make use of this occasion to get him more into their power, and forfeit certain Jurisdictions and superiorities which he and his predecessors had surreptitiously acquir’d, and most tyrannically exercised.”<sup>53</sup> Lang argues that Lord Haddo and Tarbat were the likely culprits who persuaded the Duke that Argyll’s words imported treason, as they had previously moved against him on behalf of his creditors.<sup>54</sup> Furthermore, McAlister points out that several men who were involved in Argyll’s prosecution benefitted from his refusal to swear the Test, so it can be “reasonably claimed” that he was prosecuted for more mercenary rather than legal grounds.<sup>55</sup> As Alastair Mann explains, however, James had three duties as his brother’s representative in Scotland: ensuring “political harmony” that broadened royal support; “[engineering] circumstances” where subjects swore personal allegiance to the Crown to help ensure the succession; and lastly, providing security against Presbyterian threats. Argyll was beginning to be seen as a “liability” for each of these duties. James wanted to foster more good will in the Highlands, yet Argyll continued to refuse to compromise with his rivals and abused his hereditary privileges. Likewise, his caveated oath could position him as a potential leader for the Presbyterian cause.<sup>56</sup>

While these arguments are strong, and they certainly affected the process against Argyll, they do not explain *how* Argyll’s words provoked such an initial response. There had to be something in Argyll’s explanation which allowed for his enemies to be able to prosecute him.

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<sup>52</sup> Ibid.

<sup>53</sup> Clarke, *Life of James II*, Vol. 1, 709.

<sup>54</sup> Lang, *Sir George Mackenzie*, 225.

<sup>55</sup> McAlister, “James VII and the Conduct of Scottish Politics,” 116-117.

<sup>56</sup> Mann, *James VII*, 144-145.

It was significant that the Test Act included a provision that it had to be sworn in the genuine sense with no equivocation, and this statement would prove to be important at Argyll's trial. As Greenspan explains, the mid-seventeenth century saw the rise of "casuists" in both England and Scotland debating the "possibilities of equivocation or mental reservation" in swearing oaths, which caused anxieties amongst authorities.<sup>57</sup> As Edward Vallance notes, the Covenant itself "presented the subject's duty of allegiance in highly equivocal terms." As he explains, adherents of the Covenant only swore to obey the King on the condition that he upheld the Protestant religion and the kingdom's liberties. As such, those who believed the King failed to uphold these values could forego their oaths to him.<sup>58</sup> Certainly, as Mackenzie stated at Argyll's trial, this provision was included so "that the old juggling principles of the covenant might not be renewed, wherein they still swore to serve the king in their own way."<sup>59</sup> Argyll's caveat that he would follow the oath only so far as it was consistent with itself and the Protestant religion was too reminiscent of the conditional loyalty presented by the Covenanters during the mid-century. Furthermore, his oath undermined the ideological basis of the Crown's authority with its allusion to contract and resistance theories. As discussed in Chapter One, throughout the Restoration, the Scottish authorities partook in a campaign to establish the Crown's natural rights and "inalienable" sovereignty,<sup>60</sup> which was in part why Mackenzie's legal positivism and love of statutes was so useful to the Crown's agenda. Argyll's words not only undermined the sanctity of a parliamentary statute, but also questioned the authority of the King.

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<sup>57</sup> Greenspan, "Charles II, Exile, and the Problem of Allegiance," 76.

<sup>58</sup> Edward Vallance, "Oaths, Casuistry, and Equivocation: Anglican Responses to the Engagement Controversy," *The Historical Journal* 44:1 (2001): 66. For more on this type of casuistry, see Barbara Donagan, "Casuistry and Allegiance in the English Civil War," *Writing and Political Engagement in Seventeenth-Century England*, ed., Derek Hirst, (Cambridge: Cambridge University Press, 1999): 89-111.

<sup>59</sup> *State Trials*, Vol. 8, 924.

<sup>60</sup> Clare Jackson, "Natural Law and the Construction of Political Sovereignty in Scotland, 1660-1690," *Natural Law and Civil Sovereignty: Moral Right and State Authority in Early Modern Political Thought*, Ian Hunter and David Saunders, eds., (New York: Palgrave, 2002): 157, 161-162.

Argyll was no stranger to resistance theory. As Clare Jackson notes, the Inveraray inventory—the seat of the house of Campbell—contains a contemporary manuscript on monarchical power, possibly written by Argyll himself. Whether or not it was written by him, it was something he would have read, and considering his actions, it is perhaps indicative of his views on monarchical authority. She notes that the author of the manuscript complained that monarchs were now generally shunning “all limitations as much as they can,” declaring they were “subject to no law or limitation at all either in Authority life [sic] or succession.” As Jackson points out, the author denied the precedence of hereditary succession, and justified rising in arms against monarchs who failed to do their duties.<sup>61</sup> The implications behind Argyll’s caveat were clear. Should the swearer of the oath deem that it was no longer consistent with itself, he was free to abandon it. As Mackenzie would argue, the “greatest Fantaicks in Scotland, owned they would take [the Test Act] in that Sense; without prejudice to their Principles... which made the Oath no Oath, and the Test, no Test.”<sup>62</sup>

### **Indictment against Argyll**

In the indictment against him, Argyll was charged with leasing-making and leasing-telling, as well as interpreting a statute otherwise than the makers’ intent.<sup>63</sup> He was also charged with perjury, but that charge was later dropped at his trial. A leasing-maker was one who spread false or slanderous accusations “whereby hatred and discord may be raised betwixt the King and his people.”<sup>64</sup> As Mackenzie wrote in his criminal law treatise, spreading “evil

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<sup>61</sup> Clare Jackson, *Restoration Scotland*, 72.

<sup>62</sup> Mackenzie, *Vindication*, 1683, 21.

<sup>63</sup> *A True Copy of the Indictment which is preferred against Archibald Earl of Argyle, for High-Treason, who is to be Tried on Monday the 12<sup>th</sup>. Day of this instant December 1681 as it was taken from the Original Records. Published for the satisfaction of the People*, (Edinburgh: 1681): 1.

<sup>64</sup> Sir George Mackenzie of Rosehaugh, *The laws and customes of Scotland, in matters criminal : Wherein is to be seen how the civil law, and the laws and customs of other nations do agree with, and supply ours*, (Edinburgh: 1678): 308

information, as our Law calls it” or misrepresentations of the King to his people was punishable as treason. While Argyll may not have intended to spread “evil information” with his words, it was argued that his words could spread discord between the King and his people.<sup>65</sup> Considering the fact that the Test Act was in place in part to protect the authority of the King, his qualified words did not engender the strongest proof of obedience. The most significant statute to Argyll’s case was perhaps the statute which forbade “any man interpret his statutes otherwise than the statutes bear, and to the intent and effect that they were previously made, and as the maker of the understood.”<sup>66</sup> The prosecution had the strongest case on these grounds, as the Test Act explicitly required those to swear the oath “in the plain genuine sense, and meaning of the words, without any equivocation, mental reservation, or any manner of evasion whatsoever,” which Argyll clearly did not do.<sup>67</sup>

While Mackenzie was able to cite nine Parliamentary statutes to back his case, he still had many scruples in proceeding against Argyll. As he wrote in his post-Revolution *Vindication*, he “scrupled to prosecute him from a Principle of Personal Kindness to the Earl.” However, he had been “assured by one of the best Lawyers in the Nation, that the Paper imported Treason,” so Mackenzie did his duty and prosecuted him.<sup>68</sup> Indeed, the Lord Advocate was not the only one who had scruples with getting involved in the case. Argyll wrote two petitions to the Council, noting that “no advocate will readily plead for the petitioner, unless they have your royal highness and lordships special license and warrant to that to that effect.” As such, Argyll

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<sup>65</sup> Ibid., 303.

<sup>66</sup> RPS, 1428/3/12 [107 Act of Parl. 7 Jac I as referenced in *Indictment and Case of Earl of Argyle*].

<sup>67</sup> RPS, 1681/7/29.

<sup>68</sup> Sir George Mackenzie of Rosehaugh, *A vindication of the government in Scotland during the reign of King Charles II against mis-representations made in several scandalous pamphlets to which is added the method of proceeding against criminals, as also some of the phanatical covenants, as they were printed and published by themselves in that reign*, (London: 1691): 21-22. Lang argues that it was likely Tarbat or Haddo to whom Mackenzie was referring. See: Lang, *Sir George Mackenzie*, 226.

requested a warrant for his “ordinary advocate” Sir George Lockhart to plead for him. The Privy Council responded telling him he was allowed to employ any lawyer to plead for him. However, Argyll had to petition again requesting a special warrant as Lockhart had refused to plead on his behalf. The Council once again told him he could hire whoever he wanted. Lockhart had pleaded as defence council in many cases, so it is significant he did not want to get involved unless he had to. Argyll eventually had to use Alexander Dunbar as his procurator (i.e., legal agent) to force Lockhart to plead for him.<sup>69</sup> The lawyers were likely afraid of the King or Duke’s displeasure should they plead for Argyll. However, it was Argyll’s statutory right to hire whoever he wished to defend him. Lockhart, along with Sir John Dalrymple, did eventually plead for him.

Regardless of Lockhart’s initial scruples about getting involved with the case, he and a group of lawyers—including Dalrymple and Fountainhall—wrote a letter a week before the trial with their thoughts on the case. The advocates argued that Argyll’s words “doth not at all import any of the Crimes libelled against him.” They noted the significance of the Council’s initial acceptance of his words, as well as the fact that others had objected to the oath previously. Noting that the explanation was “for the clearing of his own Conscience, and upon no factious or seditious design,” the Earl’s words were not treasonous. Indeed, they were misconstruing the Earl’s “true design, and the sincerity of his meaning and intention.”<sup>70</sup> Following Argyll’s trial, Fountainhall noted that the lawyers who wrote this letter were later questioned by the Council, and they were told that it was “a bad preparative” to sign opinions in criminal cases involving treason. While Fountainhall stated that some members wanted to punish them for their letter, the Duke of Albany was pleased to let it go. However, he said that he would blame them should their

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<sup>69</sup> *State Trials*, Vol. 8, 905-906; *RPCS*, 3<sup>rd</sup> series, Vol. 7, 262, 264.

<sup>70</sup> *The Case of the Earl of Argyle*, 60.

letter be shared abroad in England to “reproach the Duke or Judges.” The letter was indeed printed in English newspapers and pamphlets.<sup>71</sup>

### **The Trial of Argyll**

Before proceeding with an examination of the trial, it is necessary to note that in Scots law there were two stages to the trial: the first being to determine the relevancy of the libel, i.e., could the defendant’s alleged actions be defined as leasing-making. This first portion where the judges decided on the relevancy was called the Interlocutor. Next, there was the Probation where an assize —trial by jury—determined if the defendant committed these actions or not.<sup>72</sup> Witnesses were brought in during this portion. The verdict would then be read, and if the defendant was found guilty, the sentence would be pronounced.

Argyll was brought to trial in December. In his opening speech, he explained that his words were “benign” and were “spoken in absolute innocence.” He argued that his words were “stretched to imaginary insinuations” contrary to his sense and principles.<sup>73</sup> Following Argyll’s speech, letters were read in support of Argyll, and then the advocates proceeded to plead. As Burnet recorded, Lockhart, Argyll’s defence, pleaded for three hours for Argyll.<sup>74</sup> He began his plea, explaining that all criminal libels needed to be founded upon “clear, positive and express acts of parliament” and not “by way of implications and inferences.”<sup>75</sup> Explaining that leasing-making was based upon “tending to sedition” and begetting discord between the King and his subject, he questioned whether Argyll’s words could be described this way.<sup>76</sup> Furthermore, Lockhart argued that when a party had any scruples or “unclearness in his conscience” regarding

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<sup>71</sup> Fountainhall, *Historical Notices*, Vol. 1, 342-343.

<sup>72</sup> Willcock, *A Scots Earl in Covenanting Times*, 270-271.

<sup>73</sup> *The Case of the Earl of Argyle*, 60-63.

<sup>74</sup> Burnet, *Bishop Burnet's History of His Own Time*, Vol. 1, 521.

<sup>75</sup> *State Trials*, Vol. 8, 914.

<sup>76</sup> *Ibid.*, 915.

an oath, he *should* declare his meaning or sense in which he swears it. Whether or not the man's sense was right or wrong, that "it does not in the least import any matter of reproach or reflection upon the judice or prudence of the parliament in imposing the said oath."<sup>77</sup> As such, he argued that an exoneration of one's conscience could not be construed as leasing-making. Indeed, Lockhart explained that Argyll's words that he was ready "to give obedience as far as he could" did not mean that parliament had imposed an unlawful oath, but that Argyll had an unclearness in matter of conscience, which was an entirely different matter than alleged.<sup>78</sup> Lockhart dissected Argyll's oath, explaining where he believed Argyll had been misconstrued. He explained that Argyll's reference to alterations implied he supported the church and state's "perpetuity, stability and security." Furthermore, the implication that Argyll's words "I understand as a part of my oath" assumed legislative powers was, according to Lockhart, "unwarrantable."<sup>79</sup>

Much of Lockhart's defence leaned on the fact that the Privy Council had misinterpreted Argyll's words and had in turn overreacted. The trial—and ensuing printed debates—became a dissection of words, a parsing of sentences and an examination of connotations. Indeed, both parties were guilty of insinuating different meanings with his words. Therein lay where the problem was. Argyll may not have intended his words to be treasonous, but his words *could* be interpreted in a more dangerous way than he intended. If the Test Oath was supposed to protect the King's authority, and provide stability, how could the government accept a meaning that could potentially undermine that?

The prosecution's arguments centred on the purpose of oaths, and what constituted authority. Mackenzie as Lord Advocate began his plea, noting that the foundation of the debate

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<sup>77</sup> Ibid., 917.

<sup>78</sup> Ibid., 919-920.

<sup>79</sup> Ibid., 922-924.

rested on the fact that the King and Parliament had passed the Test to “secure the government from the rebellious principles of the last age” as well as to secure the Protestant religion. As Mackenzie pointed out, Argyll’s explanation made the oath obsolete, not binding anyone to it, for “if every man will only obey it as far as he can, and as far as he conceives it consistent with the Protestant religion,” then to what can Argyll or any man be bound by the Test? If one is to take an oath, and follow it only so far, then “the government [is] as insecure as before the act was made, because the taker is no farther bound than he pleases.” As Mackenzie argued, this was more than insinuation, it could not be denied that his interpretation “destroys not only this act, but all government, since it takes away the security of all the government, and makes every man’s conscience, under which name there goes ordinarily in this age humour and interest, to be the rule of the taker’s obedience.”<sup>80</sup>

As discussed in Chapter One, Mackenzie argued that while conscience was not a crime, it was also not a defence for crimes.<sup>81</sup> Conscience could not be the judge of the law. Indeed, Mackenzie argued that if it was against Argyll’s conscience to take the oath, he should not have taken it at all. As he argued, it was not required that all subjects take it, and the only penalty for not taking it was loss of employment.<sup>82</sup> Mackenzie reiterated that there was “no danger to any tender conscience” because Argyll could have abstained from taking it, but “he took it for his own advantage.”<sup>83</sup> This fact is substantiated by the Duke of York himself. Writing to the Prince of Orange, he stated “if [Argyll] had either frankly taken it, or positively refused it, nothing would have been sayd to him.”<sup>84</sup>

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<sup>80</sup> Ibid., 924.

<sup>81</sup> Mackenzie, *Vindication*, 1683, 106.

<sup>82</sup> Ibid., 30.

<sup>83</sup> *State Trials*, Vol. 8, 925.

<sup>84</sup> *Archives ou correspondance inédite de la maison d'Orange-Nassau*, 2<sup>nd</sup> series, Vol. 5, G. Groen van Prinsterer, ed., (Utrecht: Kemink et Fils, 1861): 533.



As Mackenzie argued, if Argyll's interpretation was to be accepted, what was the purpose of these oaths? Citing the statute "that no man interpret the statutes other wise than the maker understood," Mackenzie fought against Lockhart's claim of irrelevancy, stating "for what can be more contrary to the taking of them in the maker's sense, than that every man should obey as far as he can..." As he noted, these reservations "make the rule of obedience in the taker." The oath would be meaningless for if the taker were accused of perjuring later, "he might easily answer, that he "took this oath only so far as it was consistent..." and that he "might make any alteration he thought consistent with his loyalty." Accepting the oath in this manner makes the taker the judge, which was the opposite of the oath's intent. Indeed, all the authority would then be with the oath taker, rather than the maker. As Mackenzie exclaimed, "and this indeed were a fine security for any government." Should the government lose the Test Oath, it would risk "losing all oaths and obedience: and consequently strikes at the root of all laws."<sup>85</sup>

As Mackenzie claimed, whatever the Earl's intentions, the law must consider the effect his words might have on people. Mackenzie never argued that the oath was consistent. Rather, he argued that Argyll's words showed that he thought "the parliament has made a very ridiculous oath."<sup>86</sup> Ever present in the minds of the authorities, Mackenzie once again brought up the Covenant and the preceding age, noting that "did not all who rebelled against [the king] in the last age declare, that they thought themselves bound in duty to obey him but still as far as that could consist with their respect to the protestant religion, and the laws and liberties, which made all the rest ineffectual?"<sup>87</sup>

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<sup>85</sup> *State Trials*, Vol. 8, 925.

<sup>86</sup> *Ibid.*, 926.

<sup>87</sup> *Ibid.*, 927.

In response to Lockhart's argument that others had provided concerns and explanations about the Test previously—including the Council, which will be discussed below—Mackenzie argued “that if this paper be leasing-making, or misconstruing his majesty's proceedings, and treasonable, as is contended, then a thousand of the like offences cannot excuse it.” Those other explanations were irrelevant. The point was not that Argyll had made an explanation, the point was that his explanation could spread discord between the King and his people.<sup>88</sup> Furthermore, Mackenzie argued that Argyll's “sense is a thousand times more doubtful than the Test, and as in effect nothing but what the taker pleases himself.” Mackenzie then parsed Argyll's words that he would endeavour any alteration he thought fit. As Mackenzie pointed out, Argyll's restriction was not “all alterations that the king shall think fit, or are consistent with the laws and acts of parliament.” Instead, he argued, Argyll claimed “he is still to be judge of this, and loyalty is to be the standard.”<sup>89</sup> Mackenzie pointed out that an oath like this was a “great diminution of the power of parliament” because it made all their acts and oaths insignificant and ineffectual if all oaths were to be taken in this matter.<sup>90</sup>

Sir John Dalrymple was the next to plead on behalf of Argyll. Dalrymple pointed out that Argyll had not shared his explanation or provided copies to other people before he took the Test in Council, so it could not be argued that “many scruples that have been moved concerning the test” did occur because of Argyll's explication. He pointed out that the “apprehensions and scruples” about the Test by both clergymen and nobles “were on foot, and agitated long before the pannel's explanation.” Argyll's concerns were not the first to be publicly shared, so how could it be argued that he was spreading discord?<sup>91</sup> In in his final plea, Lockhart reiterated that

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<sup>88</sup> Ibid., 928.

<sup>89</sup> Ibid., 929.

<sup>90</sup> Ibid., 929-930.

<sup>91</sup> Ibid., 931-932.

one should not be prosecuted upon inferences and consequences, which would create a “dangerous foundation” for the “security and protection of the subjects” as well as the government. Lockhart asked, how could one who refused to take the oath be guilty of no crime, while Argyll, who took the oath, albeit with an explanation, be guilty of treason? Lockhart concluded that “if such stretches and inferences can make men guilty of treason, no man can be secure.”<sup>92</sup>

In Mackenzie’s final plea, he reiterated once again that if Argyll had simply refused to take the Test, “the government had been in no more hazard.” However, Argyll was now in a worse condition for he had misrepresented, misconstrued and defamed the law. In response to Lockhart’s point that the Privy Council had issued a proclamation explaining the true sense of the Test, Mackenzie argued that it was designed for those who were not members of Parliament, for members, like Argyll who had attended the debates, should have known the sense already. The security of the government was what was at risk. Although Argyll proclaimed in his explanation to be “lawful,” Mackenzie pointed out “the word [lawful] is still subjected to himself, and as subjoined to it, ‘as he should think fit.’” He explained that in that sense, “the greatest rebel in Scotland will subscribe that explanation.” He once again reminded the judges of the Covenanters, arguing that they have both rose in arms and opposed the lawful successor, stating that they believed “defensive arms are lawful, and that no popish successor should succeed,” i.e. following the law as they saw fit.<sup>93</sup>

In essence, the defence’s main argument was that it was impossible to prosecute someone merely on insinuations and interpretations of words. However, as the prosecution pointed out, Argyll’s words could very clearly be misinterpreted regardless of his intent. As such, his oath

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<sup>92</sup> Ibid., 939-940.

<sup>93</sup> Ibid., 943-944.

was no oath at all, and no proof of loyalty to the government. As Fountainhall explained, the treason was believed to be that Argyll had placed himself above the King, for his explanation did not say that he should endeavour alterations to the better “with his Majesty’s consent,” but “without any regard whither his Majesty dissented or not, he made himself sole judge.”<sup>94</sup>

The next day, the Lords of the Justiciary sustained the libels against Argyll, save the charge of perjury which they remitted as irrelevant. The Court consisted of the Justice General, Justice Clerk and five judges. The Justice General did not vote unless the Court was equally divided. Queensberry, who himself had given an explanation, acted as Justice General, while the five judges were Lords Nairn, Collington, Forret, Newtoun and Kirkhouse.<sup>95</sup> According to both Wodrow and Burnet, Lord Nairn was old and infirm, and did not stay for the whole trial. The other four judges debated late into the night, with Lord Collingtoun and Lord Kirkhouse against the relevancy of the libel, and Lord Newtoun and Lord Forret for it. Queensberry would not cast the deciding vote, “nor have the Odium of it lying upon him.” As such, Lord Nairn was awoken in the night and brought back, where he “knew how to vote” and thus the Interlocutor carried the relevancy.<sup>96</sup>

The next day during the Probation, the Lord Advocate and defence then brought in witnesses to prove the points in the indictment. The author of *The Case of the Earl of Argyle* noted that the fact that the Interlocutor had already accepted the majority of the libels against Argyll meant that the defence’s case was already lost. As such, the Earl’s advocates did not say anything against the witnesses.<sup>97</sup> As Fountainhall noted, it being proven that the explanation was

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<sup>94</sup> Fountainhall, *Historical Notices*, Vol. 1, 341.

<sup>95</sup> Wodrow, *Sufferings*, Vol. 2, 211.

<sup>96</sup> Ibid., 211-12; Burnet, *Bishop Burnet's History of His Own Time*, Vol. 1, 521. Interestingly, in April 1683, Charles II excused Nairn as judge due to his “infirmity and age” which “provoked” him. He died six weeks later. See: Fountainhall, *Historical Notices*, Vol. 1, 435.

<sup>97</sup> *The Case of the Earl of Argyle*, 86.

found treasonable, the assize could not “but find him guilty of treason and leasing-making.” As such, the assize voted and found Argyll guilty of treason, leasing-making and leasing-telling.<sup>98</sup> Following the King’s instructions, the Council wrote to the King of this news, asking for his advice before Argyll was sentenced.<sup>99</sup>

Argyll’s verdict caused a great outcry. As Fountainhall recorded, Lockhart called it “lucrative treason, to the advantage of Church and State.”<sup>100</sup> Nonetheless, it seemed that everyone knew that Argyll was not in danger of his life. He just had to wait and hear what the King would say. Indeed, writing to the Prince of Orange after Argyll’s escape from the Castle, the Duke of Albany noted “it had been better for him he had not gone away; for, tho he was found guilty by the jury, his life was in no danger, which he and his friends knew very well, and they and all the world blame him, for having made his escape.”<sup>101</sup> Although Fountainhall believed the sentence to be unjust, and that Argyll’s words in no way were treasonous, he did concede that they “deserved some lesser punishment.” Fountainhall believed that “the designe was to low [Argyll], that he might never be the head of a Protestant party, and to annex his jurisdictions to the Crowne.” While he thought Argyll was “unworthily and unjustly dealt with heir,” he speculated that it was perhaps “God’s secret hand punishing him for his cruelty to his oune and his father’s creditors and vassals, sundry of whom were starving.”<sup>102</sup>

While there is much evidence that the government and King did indeed want to lower Argyll’s standing, there were much easier ways of going about this. As Francis Charles Turner points out, the Council need only to have declared that Argyll had not taken the oath as it was

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<sup>98</sup> As *The Case of the Earl of Argyle* notes, courts usually found those sentenced “proven” or “not proven” rather than guilty or not guilty, 89.

<sup>99</sup> *The Case of the Earl of Argyle*, 87.

<sup>100</sup> Fountainhall, *Historical Notices*, Vol. 1, 341.

<sup>101</sup> *Archives ou correspondance inédite de la maison d'Orange-Nassau*, 538.

<sup>102</sup> Fountainhall, *Historical Notices*, Vol. 1, 341-342.

intended, and he would have been deprived of his jurisdictions automatically, which was the case with twenty-two other jurisdictions whose leaders refused the Test.<sup>103</sup> Additionally, some of Argyll's jurisdictions had already been annexed to the Crown previously.<sup>104</sup> As Mackenzie argued in his *Vindication*, "what Temptation could the King, or any who Service him have to stretch Law in that case for that, as to his Life there was no design, is clear from the express Order his Royal Highness Gave."<sup>105</sup> Furthermore, the argument that James wanted to use the Test to further a tyrannical agenda is also lacking. As McCalister acknowledges, although James oversaw the implementation of the Test Act in Parliament, the oath was fundamentally against Catholicism which would have likely been distasteful to him.<sup>106</sup> While these factors influenced the vehemence in which his opponents went after him, the trial highlighted why Argyll's words were so subversive. His words not only undermined the utility of oaths, but also subtly subverted the authority of the Crown, reminding the Scottish authorities of the ever-present threat of the Covenanters.

While his contemporaries and later historians agree that Argyll's life was not in danger, the Earl did not take the risk. Before the Council received the King's response, Argyll escaped from the castle with the help of his daughter-in-law, Lady Lindsay, where he proceeded first to England and then Holland. A few days after Argyll's escape, the King's response came. He allowed the judges to pronounce a sentence, but "to take care, that all execution of the Sentence be stopped, until we shall think fit to declare our further pleasure in this affair."<sup>107</sup> Hearing that the Justiciary was going to sentence Argyll without his presence, his wife, Anna, Countess of

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<sup>103</sup> Francis Charles Turner, *James II*, (London: Eyre & Spottiswoode, 1948): 192.

<sup>104</sup> Willcock, *A Scots Earl in Covenanting Times*, 252.

<sup>105</sup> Mackenzie, *Vindication*, 1683, 20.

<sup>106</sup> McAlister, "James VII and the Conduct of Scottish Politics," 127.

<sup>107</sup> *The Case of the Earl of Argyle*, 116; *CSPD Charles II*, Vol. 22, 631.

Argyll sent a petition to the Justiciary on behalf of herself and her husband. She argued that no sentence of forfeiture could be legally pronounced on him in his absence. As such, the Justiciary could only declare him a fugitive and outlaw. She requested the Justiciary take “serious consideration” the arguments and practices she cited in her petition.<sup>108</sup> Nevertheless, the Justiciary forefaulted and sentenced Argyll to be executed.<sup>109</sup> The Countess of Argyll was correct in that sentencing Argyll *in absentia* was legally questionable. As she pointed out, the “Act concerning the forfeiture of persons in the late rebellion” stated that the only people who could be sentenced *in absentia* were those who partook in “treasonable rising in arms and open and manifest rebellion against his majestie”<sup>110</sup> As Fountainhall pointed out, this “was not the species of my Lord Argyle’s crime.” However, he believed the Judges would have the next Parliament ratify their actions. Nonetheless, Fountainhall did point out that Argyll “could not be esteemed altogether absent, seeing he was present at the debate, interlocutor, closing the assise, and reading the verdict, and only escaped before sentence pronounced.”<sup>111</sup> Nevertheless, the Council still proceeded to sentence Argyll without first informing the King of Argyll’s escape.

Was Argyll a leasing-maker? Did he misconstrue the King and Parliament’s statutes? The Court believed so at least. As discussed in Chapter One, Mackenzie, and others, believed in the supremacy of statutes. They were the “chief Pillars of our Law.”<sup>112</sup> Statutes not only informed lawyers and judges, but taught subjects how to behave. Statutes were considered the nation’s safeguard. In deciding to explicate his oath, Argyll was overstepping his duty as a subject and government officer. The Restoration administration’s chief duty was maintaining order, and if

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<sup>108</sup> NRS, RH9/2/151.

<sup>109</sup> *The Case of the Earl of Argyle*, 118.

<sup>110</sup> *RPS*, 1669/10/30.

<sup>111</sup> Fountainhall, *Historical Notices*, Vol. 1, 344.

<sup>112</sup> Sir George Mackenzie of Rosehaugh, *Observations on the acts of Parliament, made by King James the First, King James the Second, King James the Third, King James the Fourth, King James the Fifth, Queen Mary, King James the Sixth, King Charles the First, King Charles the Second...*, (Edinburgh: 1686): preface.

one of the leading nobles of the realm chose to subvert one of the nation's safeguards, how safe could the realm really be? Instead of obeying the law like his duty entailed, Argyll chose to circumvent his obligation as a state officer in order to reconcile his conscience, which should have been irrelevant. It is interesting that in the debate, Mackenzie did not focus on the content of the oath. He did not debate whether it actually was inconsistent or not. For him, that was a moot point. The Test Act was a statute, voted and passed by Parliament and approved by the King. As such, all loyal subjects had to swear the oath. The fact that the content was of lesser importance to the leading officials once again shows the problems with the "Erastian" involvement of government officials over religious policy.

As Mackenzie wrote in his *Vindication*, citing "Parliamentary Infallibility," did not Parliament pass laws for the "necessary Defence of the Kingdom"? He argued "are they not promoters of *Arbitrary Government*, who think that Judges and Magistrats of the Nation, should dispense with such Laws?" Indeed, he explained "whoever thinks he may dispense with the Law, must certainly think, that he is ty'd by no Law; and that is to be truly *Arbitrary*."<sup>113</sup> As discussed, Mackenzie did have scruples with trying Argyll. He too perhaps thought the Council was exaggerating, and that Argyll's words were misinterpreted. However, Argyll's words undoubtedly *could* be misinterpreted, and indeed, there *were* dangers in them. As McCalister points out, "any person who unilaterally decided to alter the tenor of the Oath would have essentially displayed that he thought the laws of the kingdom either not applicable to himself, or worthless in itself." His words could be seen as "fundamentally subversive" showing that he believed himself to be his own arbiter of the law.<sup>114</sup> Yes, the charges against Argyll were slender, and he was most definitely charged on insinuations and possibilities, rather than clear facts, as

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<sup>113</sup> Mackenzie, *Vindication*, 1683, 9-12.

<sup>114</sup> McAlister, "James VII and the Conduct of Scottish Politics," 126-127.



his defence argued. However, those insinuations were in fact clear. There was a good case against Argyll that he had misconstrued the King's statute, as the Test Act did clearly state that the Oath was to be sworn in its genuine sense. Did Argyll slander and spread discord amongst the king and his subjects though? In a way, it was the aftermath of his trial and the proceedings that surrounded it that caused the discord. Had the Council simply accepted his oath, would it have been as widely read? Presumably not, and Argyll would not have been able to be co-opted into the Whiggish cause. Focusing on the authorities' overreaction, and the slender case for treason, however, overlooks the fact that Argyll's words were intrinsically subversive, undermining the legal foundation of the Restoration's ideology, which focused on authority and the inviolability of statutes. There was a reason that the authorities were so provoked. Argyll's words struck a nerve.

### **Responses to Argyll's Trial**

James' role as Charles II's representative in Scotland was arguably a success. Regardless of the Test Act, the government still tended toward greater moderation, largely due to James' influence. Furthermore, James' restructuring of the Highland commissions was both efficient and popular. Indeed, as Mann notes, James' reputation was enhanced in Tory circles in England following his stay in Scotland.<sup>115</sup> However, in some ways, Argyll's trial served to overshadow the good works that James had done in Scotland. Whig propagandists in England grasped onto Argyll using his case as an example of a Catholic monarch's potential tyranny. However, the case in Scotland was slightly more complicated, perhaps because Argyll had so many personal enemies there. As Fountainhall explained, although Argyll "was formerly hated enough" what caused anxiety was the worry that "he suffered for being Protestant." He stated, although James

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<sup>115</sup> Mann, *James VII*, 146.

allowed them all to remain Protestants for the time being, Argyll's case showed the Scots that "whoever appears zealously for it are suspected as factious, as if under that pretence they were republicans, and aimed at a change of the government." Certainly, Fountainhall believed it would have been better for James to accept the caveat, for then "it would have broken Argile's credit and reputation with the Presbyterian faction totally." However, Fountainhall believed that "persecuting him on that head buoyed up his credit with them again."<sup>116</sup> This is where he was perhaps somewhat wrong. Argyll was not the ideal Presbyterian martyr, and he was unable to garner much of their support, as can be seen in Chapter Five with the discussion of the Argyll Rebellion. Indeed, Argyll's rebellion in part helped to justify the government's interpretation of his oath. While the trial caused general anxiety in Scotland, subsequent trials discussed in the following chapters proved to be more significant in the long run in harming the Scottish government's image of itself. In England, however, pamphleteers attempted to embrace Argyll as a Whig martyr, and this has clouded contemporary views of him.

According to Burnet, "no sentence in our age was more universally cried out on than this."<sup>117</sup> In England, the Earl of Halifax was to have said to the King that "he knew not the Scots law, but by the law of England that Explanation could not hang his dog."<sup>118</sup> Indeed, Fountainhall recorded a strange incidence involving the children of Heriot's Hospital in Edinburgh and the dog which kept the yards there. As the dog "had a publick charge and office," they ordered him to take the Test. The children gave him a paper, but the dog ignored it. They then rubbed it with butter, "which they called ane Explication of the Test in imitation of Argile." The dog licked the butter but spat out the paper, for which they sentenced him and found him guilty of treason, "and

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<sup>116</sup> Fountainhall, *Historical Observes*, 54.

<sup>117</sup> Burnet, *Bishop Burnet's History of His Own Time*, Vol. 1, 521.

<sup>118</sup> Fountainhall, *Historical Observes*, 55.

actually hanged him.”<sup>119</sup> This horrific incident was also recorded in the London press. Significantly, however, the dog fled in that version of the story, paralleling Argyll’s own escape.<sup>120</sup> Laura Doak discusses this case study in the context of public protest against the Test Act, noting its theatrical parallels with the Pope Burning ceremonies which also took place against the Test. She argues how these events transformed “passive witnesses into active spectators.”<sup>121</sup> Interestingly, this event also emphasized the legal implications of Argyll’s explication. The fact that the children not only formed a mock trial, but proceeded to condemn and execute the poor dog, highlights the litigious context surrounding the events. As discussed in Chapter One, the Scottish press was much more regulated, and stricter than its English counterpart, so it is unsurprising that Argyll’s case circulated more in English prints.

The details of Argyll’s case were slow to spread into English circles, however. Indeed, the English, and especially Whiggish, presses were initially much more pre-occupied with the Earl of Shaftesbury’s case. In May 1681, the Whig Anthony Ashley Cooper, the first Earl of Shaftesbury, had been arrested for high treason and attempting to plot against the King. His case only finally came before the grand jury in late November 1681, where it was then thrown out, prompting much celebration throughout London.<sup>122</sup> The timing of Argyll’s arrest coincided with much of these events. As the author of the English pamphlet *The Scotch Mist* explained, only the general news of the Earl’s “horrid treason” came to England before a true copy of his

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<sup>119</sup> Ibid., 55-56.

<sup>120</sup> *An account of the arraignment, tryal, escape, and condemnation, of the dog of Heriot's Hospital in Scotland, that was supposed to have been hang'd, but did at last slip the halter*, (London: 1682).

<sup>121</sup> Doak, “On Street and Scaffold,” 121-123.

<sup>122</sup> For more information on Shaftesbury, see: Tim Harris, “Cooper, Anthony Ashley, first earl of Shaftesbury (1621–1683), politician,” *Oxford Dictionary of National Biography*, (23 Sep. 2004); Tim Harris and Stephen Taylor, “State Trials and the Rule of Law under the Later Stuarts and Early Hanoverians,” *The State Trials and the Politics of Justice in Later Stuart England*, Brian Cowan and Scott Sowerby, eds., (Woodbridge, Suffolk: Boydell Press, 2021): 24-49.

explanation appeared in print.<sup>123</sup> It was over a full month after Argyll had first sworn his caveated oath when the words first appeared in the London presses. The Whiggish newspaper, *The Protestant Mercury or Occurrences Foreign and Domestic*, printed his explanation in full in the December 7-10 issue. As the newspaper recorded, they heard from Scotland that the Earl had refused to take the Test Act, and he had owned and spread his “Defamatory Libel, against the Act and Test.” It explained that by saying he would only give obedience as far as he could, it “[insinuated] that he was not able to give full obedience.”<sup>124</sup> Interestingly, this initial record of events very neatly aligned with the governmental interpretation of events. According to the *Scotch Mist* author, however, after reading Argyll’s words, there was “grand surprize, not knowing, nor able for to Divine wherein the venom and poison of his pestilent Treason should lurk.”<sup>125</sup> Throughout December, *The True Protestant Mercury* continued to publish brief reports of the trial, presenting a more sympathetic account of Argyll’s cause, with the opinion of the advocates and Argyll’s speeches being subsequently published.<sup>126</sup> Following Argyll’s escape, discussion of Argyll dwindled in newspapers. However, the case would continue to be much discussed in pamphlets.

One of the most controversial pamphlets printed about the case was *The Scotch Mist* which was published in early 1682. In this work, the author went point by point through various discussions of law and religion. The work was considered subversive enough that Sir George Mackenzie of Rosehaugh wrote a response to this pamphlet, citing the author’s bad knowledge of law for his weak interpretation. However, Mackenzie’s response was not to be the end of the

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<sup>123</sup> *The Scotch Mist*, 14.

<sup>124</sup> Langley Curtiss, ed., *True Protestant Mercury or Occurrences Foreign and Domestic*, Issue 97 (Dec. 7-10, 1681): 4.

<sup>125</sup> *The Scotch Mist*, 14.

<sup>126</sup> See *True Protestant Mercury* Issues 100 (Dec. 17-21, 1681) and 101 (Dec. 21-24).

matter. Following these two works, *The Case of the Earl of Argyle* was published, containing extracts from the trial, and statutes, as well as a direct response to Mackenzie's *Vindication*. In September 1683, Sir Richard Newdigate recorded how five hundred copies of this "seditious and treasonable" book, sent from Rotterdam, were seized in Wapping, and the booksellers were questioned.<sup>127</sup> While this pamphlet contains the most details of Argyll's case, there was never any direct response. Mackenzie read it and intended to write his observations on it, but he argued that it was better that the pamphlet be burned.<sup>128</sup>

Many of the arguments that played out in the trial were once again played out in the press. The author of *The Scotch Mist* focused on the oath's inconsistencies, and then delved into the nature of oaths in general, explaining how oaths were a "solemn Appeal to God." As such, the author argued that "in all *Imposed Oaths*" if the words be "unhappily penned" that they are liable to different senses, then it is up to the imposer of the oath to explain and interpret the meaning clearly. He argued should the imposer not explain the oath, nor allow the receiver to interpret it himself, the oath was invalid.<sup>129</sup> Moving on from the nature of oaths, the author proceeded to examine the legal charges, citing once again the defence council's main arguments that "it is an unusual thing to have his *insinuations* (though fancied never so clear) screwed up to High Treason."<sup>130</sup> Indeed, the author accused "crafty Lawyers" of making treason where there was no treason to be found.<sup>131</sup>

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<sup>127</sup> *The Newdigate newsletters transcribed and edited by Philip Hines, Jr. Numbers 1 through 2100* (13 January 1673/4 through 11 June 1692).

<sup>128</sup> *CSPD Charles II*, Vol. 25, 360.

<sup>129</sup> *The Scotch Mist*, 11-12.

<sup>130</sup> *Ibid.*, 27.

<sup>131</sup> *Ibid.*, 31.

It is no wonder that Mackenzie found this pamphlet worthy of a detailed response. As has been discussed, Mackenzie was infuriated when those who did not understand the law presumed to tell authorities they were wrong. He, who saw the law as supreme, complained:

Next to our Laws, our Judges are arraigned, and though all Nations presume, that Judges understand, and that we should presume them Just, being ordinarily men of Integrity, who are ingadg'd upon Oath, and have both Soul and Reputation at Stake; And who know their Children are to be Judg'd by the preparatives they make.<sup>132</sup>

Mackenzie argued that the author of the *Mist* had written “weak Reflections in Law” and had took “pains to make it appear an unanswerable Instance of the Arbitrariness of our Judges.”

Mackenzie pointed out that Argyll’s process had been founded upon “Points *in jure*, and consequently not so obvious to the consideration of every Unlearn’d Man.” Before reiterating many of the arguments he shared at the trial, he answered specific accusations. The author had accused the judges of being in a “*Packt Commission*” but as Mackenzie pointed out they were “*the learn’d and Ordinary Judges of the Nation*.” Mackenzie was correct in this argument.

However, it likely would not have mattered had Argyll’s enemies been present as judges anyway.<sup>133</sup> Once again, Mackenzie chose not to address the matter of the inconsistencies in the oath, because that was irrelevant to the case.

Unfortunately for Mackenzie, the story did not end there. Attached to *The Case of the Earl of Argyle* was an answer to his pamphlet. In response to Mackenzie’s contention that the judges were not “packt,” the author contended “doth it not aggravate their injustice?”<sup>134</sup>

Regarding Mackenzie’s observation that Argyll’s life was likely not in danger, the author asked “if the Earl was truly guilty of these worst crimes, *Leasing-making, Depraving, and Treason*,

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<sup>132</sup> Mackenzie, *Vindication*, 1683, 18.

<sup>133</sup> Mackenzie, *Vindication*, 1683, 21.

<sup>134</sup> *The Case of the Earl of Argyle*, 128.

why should he not have died?”<sup>135</sup> Mackenzie may have had points *in jure* on his side as he contended, but that did not change the optics. Further to this document, it contained a postscript and used Mackenzie’s own words against him. The author cited Mackenzie’s own work, *The Laws and Customes of Scotland, in Matters Criminal*, and these arguments were likely the most offensive of all. The author had done what Mackenzie had been imploring people to do for years: learn the law.

Citing the “advocate’s authority,” the author first noted that Mackenzie had declared in the introduction to his great work that “it was at first the designe of Law-givers, only to punish such Acts as were designedly malicious.”<sup>136</sup> Indeed, Lang postulates that Mackenzie’s scruples over trying Argyll likely stemmed from this very fact, arguing that Argyll’s words were not “designedly malicious.”<sup>137</sup> The author of *The Case* then went further, pointing out Mackenzie’s discussion of the very statute for which Argyll would later be charged: that one cannot misconstrue his majesty’s government etc. In his work, Mackenzie asked “whether then may not papers, as tending to misconstrue his *Majesties* proceedings and Government, or bearing insinuations, which may raise in the people jealousie against the Government be punished by that Law?” This was indeed the question, and significantly, Mackenzie argued that “*insinuations* and *tendencies* are not punishable criminally.”<sup>138</sup> Twisting Mackenzie’s own words against him, it is no wonder that Mackenzie preferred the pamphlet be burned.

While Argyll was good fodder for Whig presses in England, the Tory Sir Roger L’Estrange also briefly commented on the case in his *Observer in Dialogue* in February 1682,

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<sup>135</sup> Ibid., 128.

<sup>136</sup> Ibid., 124; Mackenzie, *Matters Criminal*, 8.

<sup>137</sup> Lang, *Sir George Mackenzie*, 226.

<sup>138</sup> Mackenzie, *Matters Criminal*, 11-12.

responding to an unnamed Whiggish pamphlet.<sup>139</sup> In his conversation between a Whig and Tory, the Whig questioned “Is not the Earle of Argyles *Entertainment Severe, in calling that Treason, which the Common reason of Mankind, and all the Law of the World Justifies?*” To which the Tory responded, “Not half so severe, as the calling of the *Covenanting Rebellion a War for Religion*: But how comes this *Bold Pamphleteer, to Justify*, that which the *King and the State call Treason?*”<sup>140</sup> Argyll’s case was not the centre of this debate. However, both the Tories and Whigs in England saw how his case was significant in the context of the Three Kingdoms. Indeed, in Robert Ferguson’s account of the indictment against the Earl of Shaftesbury, he included a brief account of Argyll’s case at its conclusion. As Ferguson wrote, “I shall chuse to give the world some further light concerning the affair of the Earl of *Argyle*, his Case being a pattern of what our own may come to be, if the Counsels of a certain Gentleman in the *North* do prevail.”<sup>141</sup>

Interestingly, while Argyll was appropriated in the English presses to support the Whig cause, he did not become a Covenanting hero in Scotland. As will be discussed in Chapter Five, his rebellion failed to gain significant support when he returned in 1685. Chapter Four shows how his plotting and quest for Scottish contributions also failed. While most Scots were willing to consider his case as unjust, they were not willing to consider him a martyr. While discussing the Marquess of Argyll, Caroline Erskine notes the Covenanters only half-heartedly attempted to portray him as a hero, as their “resolutely localised, Lowland and plebian ideology struggled to accommodate the high-born Highlander.” Certainly, the Marquess’ son suffered a similar

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<sup>139</sup> Unfortunately, it is unclear which pamphlet L’Estrange is responding to, but he claims the author was attempting to “*expose his Majesty for Misgovernment throughout his Dominions, and to Embroil the Three Kingdoms.*” See below.

<sup>140</sup> Sir Roger L’Estrange, *The Observator in Dialogue*, Issue 102 (Wednesday, February 22, 1681/2): 1.

<sup>141</sup> Robert Ferguson, *The Third Part of No Protestant Plot with Observations on the Proceedings upon the Bill of Indictment against E. of Shaftesbury: and a brief account of the case of the Earl of Argyle*, (London: 1682): 144.



treatment. As Erskine points out, the militant Covenanter Alexander Shields described Argyll's case in *A Hind Let Loose*. However, his case was described in conjunction with the English Rye House Plotters. Rather than a Covenanter martyr, he was placed alongside the Whig heroes. As Erskine explains, he was given his due "but greater reverence was reserved for martyred preachers and ploughmen."<sup>142</sup>

While Argyll's case was indeed controversial in Scotland, it was the Whiggish appropriation of him in England that made the case so much more impactful in tarnishing the Scottish government's image of itself. Argyll's case highlighted the ever-growing divide in the government's program of authority. The Test Act was supposed to be a performative act of authority and obedience, a propagandic win, ensuring the loyalty of the King's subjects. As the poet Ninian Paterson wrote in his poem praising the Test, "The *Test's* the *touchstone*, *badge* and *livery*/ And *Cognizance* of faithful Loyalty."<sup>143</sup> However, from the very beginning of its inception, it inspired resistance. Nonetheless, even though it inspired so much protest, it continued to be utilized by the authorities.

### **The Privy Council's Explanation of the Test**

The Privy Council was adamant that the Test be used as it was designed. As such, due to all the protests and complaints about the Test's inconsistencies, in November 1681, prior to Argyll's trial, the Privy Council itself issued an explanation of the Test. As the author of *The Scotch Mist* exclaimed, "it increases the wonder of all men, that the Earl of Argyle's Explanation of the Test should be found High- Treason; when the Secret Council ... did the same thing."<sup>144</sup> In its explanation, the Privy Council noted that "jealousies and prejudices" were only entertained by

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<sup>142</sup> Caroline Erskine, "The Political Thought of the Restoration Covenanters," *Scotland in the Age of Two Revolutions*, Sharon Adams and Julian Goodare, eds., (Woodbridge, Suffolk: Boydell Press, 2014): 163.

<sup>143</sup> Ninian Paterson, *A Poem on the Test Dedicated to His Royal Highness the Duke of Albanie* (Edinburgh: 1683): 3.

<sup>144</sup> *The Scotch Mist*, 18.

some because they thought they had to swear every clause in the Confession of Faith. The Council argued that this was “far from the intention or designe of the Parliaments.” As such, they authorized the archbishops and bishops to administer the Test in the sense they described. They explained that the Confession of Faith was “framed in the infancie of our reformation” so one does not need to swear every clause, “bot only to the true protestant religion founded on the word of God contained in that confession as it is opposite to poperie and phanatisme.” Secondly, the Council explained that the Test “contained no invasion or encroachment” upon the spiritual power of the church. Thirdly, they explained that the Test was without any prejudice to the Episcopal government. As such, they argued that those who refused to swear the oath in this meaning would be “esteemed persons disaffected to the protestant religion and to his Majesties government.”<sup>145</sup> Following this explanation, the Bishop of Edinburgh gave notice to the clergy that they had to take the Test before the 20<sup>th</sup>, or else their livings would be declared vacant.<sup>146</sup> As the English *True Protestant Mercury* recorded, “one of the most eminent Ministers there did say lately in his Sermon, That none ought now to refuse it with the present Explanation.”<sup>147</sup>

As such, many of the clergy who had refused to swear the oath due to their scruples were willing to swallow their objections and subscribe to the Test in this sense. Nonetheless, according to Bishop Burnet, around eighty clergy refused to swear the Test, even on these terms, and they lost their offices.<sup>148</sup> However, Tim Harris argues that the number was probably around fifty.<sup>149</sup> As McAlister points out, the Test Act expanded the number of “dissidents” in Scotland during this period with members of all levels of society refusing to swear it. Indeed, people who

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<sup>145</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 7, 239.

<sup>146</sup> *CSPD* Charles II, Vol. 22, 572.

<sup>147</sup> *True Protestant Mercury*, Issue 96, (Dec. 3-7, 1681).

<sup>148</sup> Burnet, *Bishop Burnet's History of His Own Time*, Vol. 1, 519.

<sup>149</sup> Tim Harris, *Restoration*, 354.

would have otherwise been considered moderates or loyal to the Crown were forced to strain their conscience and some would not.<sup>150</sup> The Duke of Monmouth, a member of the Privy Council, also refused to swear the oath, citing the fact that he lived in England as a reason against his having to take it.<sup>151</sup> He likely took issue with the wording of the oath which upheld “lawful” successors.

As McCalister notes, the Test Act created “the single largest purge of offices in the period.”<sup>152</sup> Certain places were more compliant than others, however. For instance, most of the Edinburgh magistrates swore the oath in October when they were called to do so, while all of the magistrates in Ayr refused to swear it.<sup>153</sup> Furthermore, along with Ayr, Peebles and Irvine lost their privileges for not taking the Test.<sup>154</sup> As Harris also points out, the Test allowed the government to gain control of the composition of local burghs and councils due to the non-compliance of so many office holders.<sup>155</sup> Fountainhall also speculated that one of the main designs of the Test was “to get elections of Commissioners in shires and burrows so packed” as it would exclude strict Presbyterians as well as Catholics.<sup>156</sup>

Significantly, as McAlister points out there was no “hard and fast rule” for how the Council enforced the Test. Some were pressed to take the Test before the deadline, others were given multiple occasions. Certainly, the Council used the Test to remove or exclude those who

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<sup>150</sup> McAlister, “James VII and the Conduct of Scottish Politics,” 136.

<sup>151</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 7, 229; *CSPD*, Charles II, Vol. 22, 494.

<sup>152</sup> McAlister, “James VII and the Conduct of Scottish Politics,” 103. For a detailed explanation of who refused, and the Council’s reaction, see pages 98-136.

<sup>153</sup> *Extracts from the Records of the Burgh of Edinburgh 1681 to 1689*, Marguerite Wood and Helen Armet, eds., (Edinburgh: Oliver and Boyd, 1954): 29; *CSPD* Charles II, Vol. 22, 517. Interestingly, in November, the Provost of Ayr sent in several subscriptions of the Test to the Council, but as many “prov[ed] to be forged,” he was committed to prison and fined, and later indicted according to *CSPD* Charles II, Vol. 22, 591. According to the *RPCS*, William Cunningham, late Provost, and others were charged with neglecting “to make due election of their successors” as well as with forging. Cunningham was later released from prison on caution. See *RPCS*, 3<sup>rd</sup> series, Vol. 7, 255-6, 285.

<sup>154</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 7, 572.

<sup>155</sup> Harris, *Restoration*, 355.

<sup>156</sup> Fountainhall, *Historical Notices*, Vol. 1, 309.

were not in its favour.<sup>157</sup> For instance, on the day that Argyll first swore his caveated oath, the Duke of Hamilton wrote to the Council noting that he “had yet some scruple to take the Test.” As such, he was willing that the Council appoint deputies to his jurisdictions in the meantime.<sup>158</sup> Hamilton proceeded to not swear the oath until March 1682, and only after James himself wrote to him requesting that he do so.<sup>159</sup> Writing to the Earl of Arran, Hamilton’s son, in April, Sir George Mackenzie of Rosehaugh noted that he had not “omitted on all occasions to assure [the Duke of Albany] of the good efforts of the Duke taking the Test.”<sup>160</sup> In May 1682, the King wrote to the Council re-instating Hamilton as a Privy Councillor, as he had now signed the Test.<sup>161</sup> Hamilton’s treatment for refusing to swear the Test perhaps indicates that James was in earnest when he wrote that Argyll would have been better off had he simply refused the Test, rather than try and put himself above the law. While the Test did prove to be useful in its capacity to control jurisdictions, it cannot be argued that it was solely designed for this intention, especially due to the fact that so many different people were involved in its creation.<sup>162</sup> While the Test proved to be a useful tool, as McAlister argues, the enforcement of the Test made the Council create “a climate of opposition to themselves and the nature of the government in Scotland which would likely never have arisen had the Test not been framed and imposed in the way in which it was.”<sup>163</sup>

Writing to the King in January 1682, the Council provided a list of all the vacancies due to those who had refused the Test with a list of recommendations for who should take over. They

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<sup>157</sup> McAlister, “James VII and the Conduct of Scottish Politics,” 93-94. Indeed, a number of ministers dismissed for not taking the Test petitioned to be admitted again after taking it. See *CSPD Charles II*, Vol. 22, 591.

<sup>158</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 7, 238.

<sup>159</sup> Robert Law, *Memorials, Or the Memorable Things that Fell Out Within this Island of Brittain from 1638 to 1684*, Charles Kirkpatrick Sharpe, ed., (Edinburgh: 1818): 222.

<sup>160</sup> NRS, GD406/8249.

<sup>161</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 7, 415.

<sup>162</sup> McAlister, “James VII and the Conduct of Scottish Politics,” 102.

<sup>163</sup> *Ibid.*, 135.

noted, “and, after serious reflexions upon the whole matter of the Test, wee may sincerely say that it has been a most happie expedient for filling all offices with persons who are well affected to the Protestant religion and your Majesties government, and from whom your Majestie and your people may expect the unanimous and firme prosecutions of your laws against all manner of irregularities.”<sup>164</sup> As Harris notes, despite all the opposition, the Test could be considered successful, as the succession had been secured, the King had been given more powers, and the Scottish example had been shared in England.<sup>165</sup> Nonetheless, as Doak points out, the Test Act became a point of opposition, and certainly displayed cracks in the Crown’s authority.<sup>166</sup> Indeed, as Mark Jardine argues, the militant Cameronian sects, reorganized themselves and formed the United Societies in part as a protest against the Test Act “to bring discipline to the fragmented militant presbyterian societies,” later transforming into a group “engaged in war with the state.”<sup>167</sup> While the Test Act provided momentary security, it perhaps caused more harm than good in the long run.

### **The Expansion of the Test and the Case of William Bogue**

By 1683, the Test Act had been expanded beyond its initial parameters. No longer would the Test be solely for officeholders. The Test became not only a test of loyalty for those serving the King, but also for his subjects, and tied to an indemnity. Amidst more radical dissent, the Privy Council ordered circuit courts to be held in the western and southern shires that summer, with instructions for how an indemnity would be provided for those who took the Test.<sup>168</sup> The

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<sup>164</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 7, 304.

<sup>165</sup> Harris, *Restoration*, 356.

<sup>166</sup> Doak, “Of Street and Scaffold,” 36.

<sup>167</sup> Mark Jardine, “The United Societies: Militancy, Martyrdom and the Presbyterian Movement in Late-Restoration Scotland, 1679-1688,” PhD Thesis, (University of Edinburgh, 2009): 52.

<sup>168</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 8, 133-8; *A proclamation allowing a further dyet to the Commons for taking the Test, and indemnifying the heretors guilty of harbouring, or resetting of rebels who have taken the Test at the late Justice-Aires, as to their lives*, (Edinburgh: 1683).

Council explained to the Commissioners that the criminal processes against commoners who took the Test were to be “deserted” unless they were rebels or resettlers [harbourers]. Those who did not take the Test were to be secured or put under caution. If rebels, resettlers and heritors [landowners] confessed to their crimes and took the Test, they would be recommended to the Council for the King’s mercy.<sup>169</sup> As Fountainhall declared, “all courses were set on foot to spread the Test, to make it as universall as the Covenant was, which it is to root out, and persuade all, ather as voluntiers or as criminals, to take it.”<sup>170</sup> While Fountainhall had qualms about the legality of this indirect measure of forcing the oath, these circuit courts proved to be successful, with many subscribing to the Test.<sup>171</sup> Even the sceptical Duke of Hamilton noted, “many more has taken the Test of the Commons then I thought. The proceedour may prove for his Majestie’s service & the good settlement of the Countrey, for as yett the great affects of that circuite is to be seen.”<sup>172</sup>

In a series of letters to Lord Haddo in 1683, who had by this time been created Lord Chancellor and Earl of Aberdeen, the Lords of the Justiciary recounted what was happening at the circuit courts. They noted that on their very first day, several gentlemen from the western shires had come to town “to observe what methods we followed here, especiallie in relation to the Test.” As such, the Lord Advocate explained, after describing the circuit’s general design, “the great adwantages arryseing from the taking of the Test.”<sup>173</sup> Providing another update, the Justiciary wrote that although they had thought that many would have been pressured by radical dissenters to not take the Test “to still keep the counterey in disquiet,” they were happy to report

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<sup>169</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 8, 180-1.

<sup>170</sup> Fountainhall, *Historical Notices*, Vol. 1, 443.

<sup>171</sup> *Ibid.*; for examples of subscribers from 1683, see *RPCS*, 3<sup>rd</sup> series, Vol. 8, 640-58.

<sup>172</sup> NRS, GD406/5891.

<sup>173</sup> *Letters, illustrative of public affairs in Scotland : addressed by contemporary statesmen to George, Earl of Aberdeen, Lord High Chancellor of Scotland, MDCXXXI-MDCLXXXIV*, (Aberdeen: Printed for the Spalding Club, 1851): 112.

that “many of the gentry of very good quality, and abundance of the small heretors and commons have taken the Test; and most of those too without any other advantage save that they might (as they publickly declared), witnes their oun loyalty, and be exemplary to others.” It would appear not only the gentry, but also the commons, had learned from previous examples, such as Argyll’s, and saw the benefit in this performative display of loyalty. The Justiciary noted that a few “desired a tyme to consider upon the Test.” As such, a surety was taken and they were to appear later at the Parliament diets.<sup>174</sup> The Justiciary had good reason to believe that “the people of these shyres where wee have been, may see that the justice of this Court is not rigorous, nor its clemencie contemptible.”<sup>175</sup>

While the majority of those summoned to the circuit courts were willing to take the Test, an interesting case appeared, which somewhat stumped the Justices. While in Stirling, the Justiciary wrote that “there is none to be executed here save one common fellow,” William Bogue. Bogue admitted that he had been at the Bothwell Rebellion, and upon providing a dodgy certificate, he refused to swear if he had taken the bond, which would have indemnified him. After many entreaties from the Commissioners, he refused to acknowledge Bothwell Bridge as a rebellion, nor would he admit that the Archbishop of St Andrews had been unjustly murdered. As such, the Lord Advocate represented his case to an inquest, and he was found guilty of high treason.<sup>176</sup> However, the case became tricky. The next day *after* Bogue had been found guilty, he offered to take the Test. The Lords of Justiciary met to discuss what to do, wondering if he might be able to free himself by taking the Test, or if it only applied to him before he was found guilty. Could Bogue still have the benefit of the Test as someone who was already condemned? The

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<sup>174</sup> Ibid., 115-116.

<sup>175</sup> Ibid., 116.

<sup>176</sup> Ibid.

Justiciary agreed that as he was already found guilty by an inquest, he could not plead the benefit of the Test. As such, he should still be executed under the law. However, “this being the first caise of this nature, and that ther is matter of prudence as weill as law,” the Lords wrote to Aberdeen, explaining that they had delayed his execution and would bring him to Glasgow with them. Indeed, they argued that “the execution wold be more terrible at Glasgow than heir” but they awaited advice from the Council.<sup>177</sup>

Interestingly, however, Aberdeen was to receive multiple letters from different members of the Justiciary, showing that the Lords were of differing opinions. Lord Maitland, the Lord Justice Clerk, wrote explaining the situation, noting that Bogue had “fell on his knees and begged pardon for his blind zeale the night before.” Maitland then outlined how Bogue had acknowledged the King’s authority, that Bothwell was a rebellion and so forth. However, significantly, he offered to “take the Test so farr as it was consistent with the Protestant religion.” It was as the Council had feared: Argyll’s words had spread. Nevertheless, upon “being prest by some that stood behind him, he said he would take it simply.” Maitland explained that this “altered” the Lords’ opinion, and that is why they had delayed the execution. They knew they were “obliged by law to condeme him, notwithstanding his seeming repentance,” but they allowed the extra time for his execution, so that they, who had “done our parts as matter of law,” might request the Council to give advice as to “state prudence.” Maitland wrote a second short letter, as he “forgot one material circumstance.” He explained that Bogue “fell on his knees a second tyme, and acknouledged he was justly condemned or found guilty, and that his blood was on his own head.”<sup>178</sup>

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<sup>177</sup> Ibid., 117.

<sup>178</sup> Ibid., 119-120.



From Maitland's account of Bogue's case, it is clear that he was insinuating to the Council that as the Justiciary had no power to remit him, the Council would be prudent to be merciful. The fact that he felt the need to emphasize the second time he fell on his knees in a separate short letter justifies this interpretation. At the very least, Maitland was torn. Interestingly, Maitland noted "this act of justice hath been so far from disheartening the people" that he believed even more had now taken the Test than would have done so initially. He explained how one fellow who had been indicted for murder but found not guilty, "seeing so many on their knees to take the Test, begged he might take it also, to show his affection for the King's service, which was allowed."<sup>179</sup> The Lord Advocate also wrote to Aberdeen, explaining that he was desirous to have his advice and would surely follow it. He explained that he was of the same opinion of Claverhouse, who was planning to write, so he would not "trouble" Aberdeen with repeating those words. However, he noted he took "all the pains I can to secur honest men, and terrifie rascals of vhat quality soever."<sup>180</sup>

Claverhouse proceeded to write to Aberdeen, explaining his thoughts on the case. He stated he would not repeat the entire story but felt the need to "mynd you of the heads" of the case. He explained, Bogue "was actually in the rebellion, continued in that state for four years, and nou comes in with a false sham certificate to fool the Judges." He "positively refused" to give his oath, he refused to declare Bothwell a rebellion, and "positively refused, in the face of the Court, the benefit of the King's Indemnity by taking the Test." As such, he was legally found guilty. Claverhouse explained that it was only after this ruling that he acknowledged his folly and offered to take the Test "with the old gloss, as far as it consisted with the Protestant religion, and glorie of God." And only after that was refused, did he offer to take it the other way. As

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<sup>179</sup> Ibid., 118-120.

<sup>180</sup> Ibid., 120.

Claverhouse explained, “by all which, it clearly appears that he would doe any thing to saive his lyf; but nothing to be reconciled to the government,” and that it cannot be thought that there were “any sourty for the government the taking of the Test by men after they ar condemned.” He argued it can be supposed, “who refused it when they had the freedom of choyse, and taks it after condemned, does it only because they think themselves not bound to keep it,” and that “in point of prudence” no man would come to the Justice and take the Test if he may be free to speak treason and then repent after condemnation.

Claverhouse was not without mercy, he argued that “great clemency has and oght to be shoen to people that ar sincerely resolved to be reclaimed; but the King’s Indemnity should not be forced on villains.” He cited what Maitland had said, explaining that more than twenty men had come and taken the Test since Bogue had been condemned, so they could not argue that executing him would defer others from coming to court. Claverhouse conceded, “I am as sorry to see a man day, even a whigue, as any of them selfs; but when on days justly for his owen faults, and may sawe a hondred to fall in the lyk, I have no scrupull.”<sup>181</sup>

Interestingly, there are some parallels with Bogue and Argyll’s cases. Firstly, Bogue directly referenced Argyll’s words “as far as it was consistent.” Certainly, Bogue’s case does show that Argyll’s words were further reaching than he may have intended, highlighting the government’s worry for the Test Act’s usefulness should his caveat have been accepted. However, the arguments that Claverhouse presented, and those Mackenzie agreed with, were also based on implications. Bogue was found guilty, and there was no controversy in that. He had declared himself as such, and he refused the benefit of the Test. Just as they worried that Argyll’s words would make the oath obsolete, Claverhouse and Mackenzie worried that taking

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<sup>181</sup> Ibid., 121-123.

the Test after the fact would make the condemnation—and in that process the entirety of the criminal law—obsolete should they remit Bogue in that way. While the Council and King offered many reprieves for cases, it could be argued that the panels in those cases were sincerely penitent, and they had not had a choice of freedom beforehand. Bogue had explicitly been given the choice to take the Test for his freedom and refused, knowing the implication of this refusal. As Claverhouse worried, should every criminal merely offer to take the Test after being condemned for execution, was this truly a good measure of loyalty? The old “juggling” principles of the Covenant were indeed ever present in the minds of the authorities.

Interestingly, Fountainhall briefly recorded the case, explaining that “the Justices would willingly have reprieved him, but they could not, but only the Privy Counsell: — yet they were near as many Counsellors at Glasgow as might have made a *quorum* of the Privy Counsell; only they would not attempt it without the Chancellor’s consent.”<sup>182</sup> It is worth noting that the Lords of the Justiciary did disagree on the matter, as can be seen by Maitland, Mackenzie and Claverhouse’s separate letters. Neither the Justiciary nor the Privy Council were one monolithic body, but full of multiple opinions.

Fountainhall seemingly laid the blame on the Chancellor rather than the Justiciary. Writing to Queensberry, Melfort corroborated this. Noting the case, he explained that the Chancellor “uld not interpose” so Bogue was to be executed.<sup>183</sup> As such, Bogue was hanged at the Mercat Cross in Glasgow, and he “dyd adhering to his wicked principles, and pretending he wes a martyr; which justified the sentence even in this humours shyre.” Presumably, hearing that he was not to receive a pardon, Bogue did away with his remorseful tone, perhaps insinuating

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<sup>182</sup> Fountainhall, *Historical Notices*, Vol. 1, 443.

<sup>183</sup> HMC, *Report on the Manuscripts of His Grace the Duke of Buccleuch and Queensbury, Preserved at Drumlanrig Castle* (HMC Drumlanrig), Vol. 2, (London: Printed for H.M. Stationery Off., by Eyre and Spottiswoode, 1897-1903): 116.

that Claverhouse's opinion was correct. The Justiciary wrote that Bogue was an example to "those who contemned authoritie should not escape the danger of refusing the King's mercy when it was offered."<sup>184</sup> Describing the case, Fountainhall explained that the "publick intimation was made in the Court" that Bogue was not executed for refusing the Test "as the rumor was, put to fright others from compearing" but for his being in the Bothwell Rebellion.<sup>185</sup> Indeed, as can be seen in the letters, the Justiciary did not condemn him because of his refusal. Certainly, it was the opposite of the rumour as they were initially frightened that his case would make others not appear. Regardless, as they recorded, they were relieved to see the benefits of his case, as many more came to swear the Test, even in Glasgow.<sup>186</sup>

The rest of the circuit proceeded rather smoothly. Two more criminals were condemned to die for having been at Bothwell, being present for the burning of the Test at Lanark, and for calling the King a tyrant.<sup>187</sup> However, most of the punishments given out were fines.<sup>188</sup> The Bishop of Edinburgh writing to the Earl of Moray also noted the success of the circuits, pointing out that very few heritors had refused to take the Test.<sup>189</sup> As McAlister argues, the circuit courts became a more common feature in the mid-1680s with the emergence of more radical dissent. The circuit courts were able to bring justice to the localities "which left little scope for dissenters

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<sup>184</sup> *Letters Illustrative*, 126.

<sup>185</sup> Fountainhall, *Historical Notices*, Vol. 1, 443.

<sup>186</sup> A list of criminals who appeared at this court can be found in NRS JC39/38. Additionally, certificates of the Test continued to come in throughout 1683, which can be seen in NRS JC39/40 and JC39/41. Whether they were frightened or inspired to take the Test is up for interpretation.

<sup>187</sup> *Letters Illustrative*, 126.

<sup>188</sup> There was indeed a brief controversy with the Provost of Stranraer. He confessed to being at the rebellion and was willing to take the Test. However, the King's instructions had only said that all commoners were to have benefit of the Test whether or not they were guilty. Heritors pursued for rebellion, on the other hand, were to take the Test, confess their crimes, renounce their estates, and then be sent to the Council, where they would perhaps receive a remission. The Provost eventually agreed to renounce his estate to the King, and Claverhouse was to provide him safe conduct to Edinburgh. See: *Letters Illustrative*, 128-129.

<sup>189</sup> *CSPD Charles II*, Vol. 25, 105.

to continue unnoticed.”<sup>190</sup> Just as the Test proved to be a useful tool, the circuit courts helped in furthering the government’s reach in the localities.

Another circuit court took place in 1684, with Melfort in charge of the Lanarkshire division, and the Test continued to be an issue for some. Melfort wrote to Queensberry that he was resolved to make all the heritors “great and small” take the Test, a feat which the Duke of Hamilton was “shiest in” explaining that there were many loyal heritors who would not wish to take it. While Melfort responded to Hamilton that he would not force them to take it, he implied they would be “unfortunate” if they did not. Following complaints from several burghs that had offered a cess [tax], rather than swearing the Test, Melfort aptly responded “the King valued not ther mony, but themselves; and that so long as they uer not his by tyes and obligation such as he might reasonably trust too, all the rest uas but a mock, and a trick to ransom ther villany and conceal ther principalls.”<sup>191</sup> It was what the Test represented—absolute loyalty and obedience—which remained most important to government officials.

### **Conclusion**

By the mid-1680s, subscriptions to the Test had become a common occurrence. Indeed, printed copies of the Test which office holders could sign, rather than writing out the entire oath, began to appear.<sup>192</sup> With the emergence of more radical dissent, and more severe governmental policies, opposition to the Test remained, but generally descended into the background. There were more pressing issues to worry about. Oaths, however, continued to play an important role in the Privy Council’s administration of justice, as will be seen in later chapters. As Raffie explains, oaths were essential to not only the Restoration government, but also the Revolution

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<sup>190</sup> McAlister, “James VII and the Conduct of Scottish Politics,” 183, 180.

<sup>191</sup> HMC Drumlanrig, Vol. 2, 178-179.

<sup>192</sup> See NRS JC39/36 for multiple examples, including a printed copy signed by the Lords of the Justiciary in 1685.

governments, as the allegiance of subjects remained in doubt. Lacking a strong military, the “government’s security would continue to depend on the promises of individuals, and ultimately, on their belief in divine justice in the afterlife.”<sup>193</sup>

It was this divine justice, however, which posed such a problem for some in taking the Test Oath. As has been discussed, it was not only religious dissidents who refused to swear the oath, but also committed Episcopalians. Even with the Council’s half-hearted explanation of the Test, there did remain inconsistencies, which some could not overcome. The fact that the members of Parliament had not realized these inconsistencies at the conception of the Test, excluding Stair, highlights the problematic nature of the Erastian church settlement. For those who were willing to conform, taking the oath was no problem. However, for the more committed Covenanters, this oath was a test too far.

The Test became another tool for the Restoration government to gauge political loyalty, as can be seen with its use during the circuit courts in the mid-1680s. While there were many benefits to the Test, and the Council was able to restructure many local councils and jurisdictions due to the vacancies from those who refused to take the oath, the Test continued to be a thorn in the Council’s side, and Argyll’s trial continued to be perceived as unjust, especially in English circles. Interestingly, however, when Argyll returned to lead a rebellion in 1685, this perceived injustice did not cause those to rally in favour of him as will be discussed in Chapter Five. Argyll was certainly tried on slender grounds, but his words were subversive with possible treasonous undertones, as became clearly apparent during his rebellion. Indeed, the government’s interpretation of Argyll’s oath appeared to have been proven correct.

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<sup>193</sup> Raffé, “State Oaths,” 191.

Following the Revolution, in August 1689, the Parliament of William and Mary passed the “Act rescinding the forfaiture of the late earle of Argyle,” explicitly condemning the previous regime. The Act stated that he was forfeited “upon stretches of old and obsolete lawes upon frivolous and weak pretences, upon lame and defective probatione” to the “scandal and reproach of the justice of the natione” which was “contrary to law.”<sup>194</sup> While he was sentenced upon “weak pretences,” as the serious legal debates that occurred during the 1680s show, it is not clear that his sentence was “contrary to law.” Nonetheless, it is not surprising that Argyll’s sentence was rescinded so early in their reign, as the joint monarchs could use his case as a beacon of the previous regime’s “arbitrary government” to highlight how they would reign differently. Later in July 1690, the Parliament passed the “Act rescinding several acts of Parliament,” which included the “Act anent religion and the Test” amongst others. These acts were seen to be “now either useless or found to be hurtful.”<sup>195</sup> What was once used as a tool to ensure obedience and project authority had been turned into an image of corruption and tyranny. In the end, rather than securing the Protestant religion and Stuart succession, in part due to the Whiggish presses, the Test Act proved to be detrimental to Scottish Crown’s reputation.

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<sup>194</sup> *RPS*, 1689/6/43.

<sup>195</sup> *RPS*, 1690/4/119.

### Chapter Three: Torture and the Restoration Regime

*Some thought our Privy Counsell would have been at some losse, and contracted some tach<sup>1</sup> by this cruall torture, had they suffered it as they did the boots..., without discovering or revealing this conspiracy; but ther confessing tends to justify the Privy Counsell's procedure.*

John Lauder of Fountainhall, 1684<sup>2</sup>

#### Introduction

The rhetoric around the Privy's Council's legal right to judicial torture became a recurring theme in Covenanter martyrologies, and torture was one of the central grievances levied against the Restoration administrators following the Revolution. Robert Wodrow described the Restoration period as “a large Harvest of Imprisonments, Finings, Confinings, Scourging, Tortures, Banishments” etc.<sup>3</sup> Likewise, the pamphlet *The Scottish Inquisition* specifically noted the “horrid Tortures and Cruelties practised upon Innocents by the Privy Council and Justiciary Courts,” stating “When any refused to give Categorical Answers, then could [the Council] extort all by Torture, with their Engines of Cruelty, the Boots, fired Matches betwixt the Fingers, and Thumbkins.” Furthermore, the pamphlet emphasized that “after torturing [they] hanged several, tho' thereby they could extort nothing.”<sup>4</sup> Torture was also at the forefront of Alexander Shields' *A Hind Let Loose*, where an image of “some tortured by boots, thumbkins and firematches” was included on the frontispiece as one of the examples of the

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<sup>1</sup> Tach was defined as an “imputation of fault or disgrace” or a dishonouring or stigma. See “Tas(c)he n.,” *Dictionary of the Scots Language*, (Scottish Language Dictionaries Ltd., 2004): <<https://www.dsl.ac.uk/entry/dost/tasche>>. Last accessed December 2021.

<sup>2</sup> Sir John Lauder of Fountainhall, *Historical notices of Scottish affairs...* Vol. 2, (Edinburgh: T. Constable, printer to Her Majesty, 1848): 557.

<sup>3</sup> Robert Wodrow, *The history of the sufferings of the Church of Scotland, from the Restauration to the Revolution: collected from the publick records, ...*, Vol. 1, (Edinburgh: 1721): 123.

<sup>4</sup> *Scottish inquisition, or, A short account of the proceedings of the Scottish Privy-Counsel, Judiciary Court...* (London: Printed and sold by Richard Janeway, 1689): 1.



“corruptions of the time.”<sup>5</sup> Interestingly, while torture was often brought up as a central example of the arbitrariness of the Scottish Restoration government, there are relatively few examples of torture specifically mentioned in these works cited above. Nonetheless, torture remained a key component in Covenanter and post-revolution Whiggish narratives.

In declaring that King James VII had forefaulted the throne, the Scottish Parliament noted the use of “inhumane tortures without any evidence and in ordinary crimes,”<sup>6</sup> and when offering the joint Crown to William and Mary, the royals had to agree to the Claim of Right which stated “That the using of torture without evidence or in ordinary crimes is contrary to law.”<sup>7</sup> This image of the arbitrary Restoration government had become so central to post-revolution narratives, that the former Lord Advocate, Sir George Mackenzie of Rosehaugh wrote in his post-Revolution *Vindication* that “those who had been in that Government were very sorry that when *Torture* was declared a Grievance in the last Convention.”<sup>8</sup> As he noted, “As to *Torture*, it is allowed not only by the Law of our Nation but of all Nations except *England*, and founded on the foremention'd Maxims, *Salus Populi, &c. Pereat unus, potius quam Vnitas.*”<sup>9</sup> As Mackenzie so often argued, the Scottish government had been acting in a completely legal manner for the necessity of state.

Was Restoration Scotland really so torture-filled, as it has often been described? The advocate Sir John Lauder of Fountainhall noted that while torture was “agriable to Roman law” it “does not sute the genius of our nation, which looks upon torture of *the boots* as a barbarous

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<sup>5</sup> Alexander Shields, *A hind let loose, or, An historical representation of the testimonies of the Church of Scotland for the interest of Christ with the true state thereof in all its periods...* (Edinburgh: 1687).

<sup>6</sup> *The Records of the Parliaments of Scotland to 1707, (RPS)* K.M. Brown et al, eds., (St Andrews, 2007-2020), 1689/3/94.

<sup>7</sup> *RPS*, 1689/3/108.

<sup>8</sup> George Mackenzie, *A vindication of the government in Scotland during the reign of King Charles II against mis-representations made in several scandalous pamphlets...*, (London: 1691): 11.

<sup>9</sup> *Ibid.* Translated roughly as “the health of the people should be the supreme law,” and “let one person perish, rather than unity.”

remedy; and yet of late it hath been frequently used amongs us.”<sup>10</sup> Indeed, a Presbyterian pamphleteer wrote in 1692 “how much soever Torture may be allowed by the Law of our Nation, yet this much is certain, that it never was so much put to practice in *Scotland* for many Hundred years, as it was during the Mild Government of King *Charles II.*”<sup>11</sup> As Brian Levack notes, there were thirty-nine torture warrants issued in Scotland between the years 1590 to 1689—thirty four conciliar and five parliamentary.<sup>12</sup> From 1679 to 1689, there were nine torture warrants issued, with two of those warrants being issued after the Revolution (see Appendix I). None were issued in James VII’s brief reign. However, as Duke of Albany, James was present during a few cases that occurred while he was in Scotland. While the number of torture warrants issued during this time was not as numerous as would be expected from Covenanter martyrologies, there was indeed a perceived growth in torture during the late-Restoration period, coinciding with the Bothwell Rebellion, the rise of the United Societies, and the discovery of the Rye House Plot. Torture was used against Covenanters relatively often compared to other criminal cases. However, the cases were still limited, and highly regulated. Nonetheless, this chapter is *not* a defence of the Council’s use of torture, nor is it condoning the Council’s actions. Rather, this chapter seeks to understand the philosophy behind the controversial procedure. While this chapter challenges some of the traditional Covenanter martyrologies, it is not denying that the Council was undoubtedly persecutory and abused its legal rights in choosing who to torture. There was a reason that torture was a grievance that the Council could not shake, even if the cases were fewer than to be expected.

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<sup>10</sup> Fountainhall, *Historical Notices*, Vol. 1, 297.

<sup>11</sup> Gilbert Rule, *A Vindication of the Presbyterians in Scotland...*, (London: Printed for Edward Golding, 1692): 22.

<sup>12</sup> Brian P. Levack, “Judicial Torture in Scotland during the Age of Mackenzie,” *Miscellany Four*, Hector L. MacQueen, ed., (Edinburgh: Stair Society, 2002): 191. For a detailed breakdown of these warrants and where to find them, see page 191, n. 41.

This chapter will examine the contemporary understandings and legal definitions of torture during the Restoration and look at the different methods employed by the Council and Justices during that time. James Mitchell, William Carstares and William Spence are often perceived as the *causes célèbres* of torture cases in the Restoration, and they are indeed controversial. However, this chapter will examine the cases of John Spreul, and Alexander Gordon of Earlston in more detail, as they bring up some interesting questions regarding the legal limitations of torture, as well as the limits of violence in the Scottish judicial system. Following an examination of these cases, this chapter will then look at the Privy Council's reaction to illegal torture, most often associated with witchcraft in local settings. It will then briefly discuss the uncertain question of torturing with firematches. Both these cases highlight the limited control the central government had in controlling justice in the localities. Certainly, the example of illegal torturing with firematches did much to harm the Council's reputation in dissenting circles. Arguments over the necessity of state continued to underpin the Privy Council's actions regarding judicial torture. However, the fact that torture became such a unifying image of persecution in Covenanting martyrologies underscores a failure in the government's control of its image. Indeed, the fact that torture was controversial within governing circles likely played a part in that failure.

### **Legal Definitions and Understandings of Torture**

For such a controversial subject, relatively little has been written about torture in Scotland. Interestingly, while Covenanters compared Scottish torture to that of the Spanish Inquisition, Brian Levack argues that Scotland's system of judicial torture shared many similarities with the English system of common law, with many of the continental similarities being only on the surface. Unlike Scotland, however, the English Privy Council ceased issuing

torture warrants in 1640 when it lost its criminal jurisdiction. Significantly, Levack argues that Scotland became associated with torture, not because it was legal, but because of how frequently it was illegally administered in local settings during witchcraft cases, underscoring the failure of the Scottish government to regulate local justice. As he argues, the results of this failure were devastating “for the integrity of the entire system of Scottish criminal justice.”<sup>13</sup> Clare Jackson also highlights the implications of this legal procedure within the Three Kingdoms, noting how descriptions of torture in Scotland were often used in England as a warning of Scotland’s arbitrary government. Jackson points out that torture was used as an extra-judicial procedure for interrogative purposes, rather than as an act of punishment, explaining that it was more effective in obtaining information, rather than supplying judicial evidence.<sup>14</sup> Significantly, she notes how there were growing political and moral anxieties increasingly becoming attached to the idea of torture,<sup>15</sup> and these debates no doubt only served to paint the Council in a poor light.

As Tim Harris notes, the rules surrounding torture in Scotland were rather vague. As such, regulations regarding its use were guided by custom and common law.<sup>16</sup> As Levack explains, since torture was not actually used on a routine basis, there was very little legal literature on the subject for contemporaries in Scotland to use.<sup>17</sup> While torture was legal, it was necessary to obtain a torture warrant from the Privy Council or Parliament. The Privy Council prohibited torture without warrant, and punished those who used it without permission. For instance, in 1678, the Council ordered David Cowane to be sent to the Tolbooth in Edinburgh “For presuming to torture or prick any person without warrant from the Council or

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<sup>13</sup> Levack, “Judicial Torture,” 194, 197, 198, 190.

<sup>14</sup> Clare Jackson, “Judicial torture, the liberties of the subject and Anglo-Scottish relations, 1660-1690” in T. C. Smout, ed., ‘Anglo-Scottish relations 1603-1914’, *Proceedings of the British Academy*, 127 (2005): 78, 100.

<sup>15</sup> *Ibid.*

<sup>16</sup> Tim Harris, *Restoration: Charles II and His Kingdoms, 1660-1685*, (London: Allen Lane, 2005): 365.

<sup>17</sup> Levack, “Judicial Torture,” 192.

Commissioners of Justiciary or those having commission from them.”<sup>18</sup> While the legal literature surrounding torture was lacking, Sir George Mackenzie of Rosehaugh did include a brief chapter on torture in *The Laws and Customes of Scotland, in Matters Criminal*. He also briefly discussed it in the context of confessions.

Mackenzie’s work was published in 1678, prior to the increase of torture cases, but he confidently wrote “torture is seldom used with us; because some obstinat persons do oft-times deny truth, whilst others who are frail, and timorous confess for fear, what is not true; and it is competent to none but to the Council, or the Justices, to use torture in any case.” Indeed, following this statement, Mackenzie proceeded to give cases where the Council refused to grant torture warrants, even though they had been pressured by soldiers or Lord Advocates in the past, noting how the Council had been “so tender in torture.”<sup>19</sup> Importantly, he noted that should a person be brought to torture, and the person still denies what was objected against him after torture, then all former presumptions should be purged, and he could not be tortured again for the same crime. However, “he may be put to the knowledge of an inquest, upon new presumptions.”<sup>20</sup> This legality would prove to be significant, especially in the case of John Spreul.

When examining confessions, he stated “confession, though extra-judicial, may be sufficient (if adminiculate) to subject the confessor to the torture, but this is rarely practised with us.” However, Mackenzie made reference to the case of James Mitchell, who was tortured after

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<sup>18</sup> *Register of the Privy Council of Scotland (RPCS)* 3<sup>rd</sup> series, Vol. 6, (Edinburgh: HM General Register House, 1914): 13.

<sup>19</sup> Sir George Mackenzie of Rosehaugh, *The laws and customes of Scotland, in matters criminal : Wherein is to be seen how the civil law, and the laws and customs of other nations do agree with, and supply ours*, (Edinburgh: 1678): 544.

<sup>20</sup> *Ibid.*

he retracted his confession, explaining that his was an unusual case.<sup>21</sup> Significantly, Mackenzie also stated, “a confession extorted by torture is in no law sufficient, so that except it be adhered to after the person tortured is removed from the rack for two or three days, it makes no faith.”<sup>22</sup> Interestingly, Mackenzie also noted a debate that took place in the Council in 1666 following the Pentland Rebellion. He explained how Councillors questioned whether or not condemned rebels could be tortured to provide information on their accomplices, and it was found then that they should not be, for a judge’s duty was complete after condemnation. However, Mackenzie continued “yet all lawyers are of opinion that, even after sentences, criminals may be tortured for knowing who were the complices.”<sup>23</sup> This detail would prove to be significant in the debate surrounding Alexander Gordon of Earlston.

Concluding his short chapter, Mackenzie then briefly noted that minors could not be subject to torture “lest the tenderness both of their age, and judgement make them fail.” Likewise, persons who were very old were not to be tortured for the same reason, in addition to women and the sick.<sup>24</sup> Finally, Mackenzie closed his chapter noting “these who torture, if the tortured person die, are punishable as murderers.”<sup>25</sup> As such, torture was not to be excessive. The case of Arthur Tacket provides an interesting example of this fear of murder, although Wodrow cited it as a source of the government’s cruelty. Tacket was ordered to be tortured by the Boot, but as Wodrow explained:

The Chirurgion present desired [the hangman] might desist a little, and taking the Advocate aside, told him, that Arthur was very young, and his Leg so small, that a few Strokes would crush it to Pieces, and seeing they were determined to take his Life, and it

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<sup>21</sup> As James Mitchell was tortured in 1676, prior to the focus of this thesis, this chapter will not discuss his case. For a closer look at the controversy surrounding Mitchell’s interrogation and trial, see Jackson, “Judicial Torture,” 80-85.

<sup>22</sup> Mackenzie, *Matters Criminal*, 266.

<sup>23</sup> *Ibid.*, 545.

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.*

was probable nothing could be extorted, he moved they would forbear. Upon this the Advocate ordered the Thumbkins to be brought.<sup>26</sup>

The fact that they followed the surgeon's advice and used the thumbkins instead of the boot, contradicts Wodrow's argument that they were intent on taking Tacket's life. Indeed, should he have died, they would have been considered murderers.<sup>27</sup> A similar example occurred in 1684 when the Council ordered a young boy of eighteen, Patrick Walker, to be banished to the plantations, as the Council did not wish "to make him infirm by putting him into the bootes or any other torture."<sup>28</sup> While their logic may be questionable to some, it does show that excessive torture was taken seriously.

While Mackenzie did not discuss the logistical methods of torturing, Bishop Gilbert Burnet summarized the events, noting "the rule about the boots in Scotland was, that upon one witness and presumptions both together, the question might be given: But it was never known to be twice given; or that any other species of torture, besides the boots, might be used at pleasure."<sup>29</sup> There had to be a strong presumption of guilt for the accused to be tortured.<sup>30</sup> Burnet, in his attempt to highlight the supposed terrible nature of the Popish Duke of York and Albany, noted that "When any are to be struck in the boots, it is done in the presence of the Council: And upon that occasion almost all offer to run a way. The sight is so dreadful, that without an order restraining such a number to stay, the board would be forsaken." However, according to him, the Duke "looked on all the while with an unmoved indifference, and with an attention, as if he had been to look on some curious experiment."<sup>31</sup> While Burnet's description of

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<sup>26</sup> Wodrow, *Sufferings*, Vol. 2, 375.

<sup>27</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 9, 58. Nonetheless, Tackett was later found guilty following his trial and condemned to die.

<sup>28</sup> *Ibid.*, 69.

<sup>29</sup> Gilbert Burnet, *Bishop Burnet's History of His Own Time. From the Restoration of King Charles II. To the Settlement of King William and Queen Mary at the Revolution...* Vol. 1 (London: Printed for Thomas Ward in the Inner-Temple Lane: 1724): 583.

<sup>30</sup> Harris, *Restoration*, 366.

<sup>31</sup> Burnet, *Bishop Burnet's History of His Own Time*, Vol. 1, 583.

the future James VII may be taken with a grain of salt, it was indeed accurate that some members of the Council had to be present for official judicial torture. To proceed with torturing a suspect, the Council had to first agree to the interrogation, and then decide on pre-approved questions to be asked.<sup>32</sup> They would then call for the presence of an Edinburgh bailie and the hangman to apply the torture. Along with the presence of the bailie and the Council members, including the Lord Advocate, it appears that a surgeon was often present during or soon after the event.<sup>33</sup>

### **Instruments of Torture**

The most common instrument of torture in Scotland was known as “the boot.” Burnet described how “they put a kind of iron boot close on the leg, and drive wedges between this and the leg,” noting “the common torture was only to drive these in the calf of the leg: But I have been told they were sometimes driven upon the shin bone.”<sup>34</sup> There are indeed instances of rather excessive torture. For instance, William Spence’s leg was said to be crushed many more times contrary to the customary six or seven times.<sup>35</sup> Likewise, in 1680, the Privy Council issued a warrant to examine some prisoners associated with the militant Covenanter Donald Cargill.<sup>36</sup> Lady Lockhart, the wife of the imminent lawyer Sir George Lockhart, wrote to her father regarding this interrogation, noting that four or five were tortured with the boots “fromm their knee to [their] heels” stating they were “broke as flatt & thin as fingers breadth” with “bloud & marrow come out of [their] toes,” yet they still “owne itt lawfull to kill [the] K[ing]” and “say itt is their duty to do itt” because their leader, Cargill, had excommunicated him for breaking the

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<sup>32</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 9, 143-144. The council unanimously agreed to twenty questions to be asked to William Carstares.

<sup>33</sup> Wodrow mentions that Spreul was cruelly not allowed the “benefit of a surgeon” following his torture. *Sufferings*, Vol. 2, 164.

<sup>34</sup> Burnet, *Bishop Burnet's History of His Own Time*, Vol. 1, 237.

<sup>35</sup> Jackson, “Judicial Torture,” 86.

<sup>36</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 6, 573.



Covenant.<sup>37</sup> While Lady Lockhart's description is rather grotesque, it is interesting to note that she does not necessarily judge the fact that they were tortured. Being married to the advocate Sir George Lockhart, future Lord President of the Session, who also acted as defence council for many Covenanters, she would presumably have some firsthand knowledge of events. She closed her letter noting that the trials would be printed shortly, and that her father should read them for the full account.

Along with the boot, a new torture device was introduced in Scotland in the 1680s: the thumbkins.<sup>38</sup> The thumbkins were little screws of steel that were crushed into the thumbs.<sup>39</sup> According to Fountainhall, this new invention was discovered by General Dalziel and Drummond while they were in Muscovy.<sup>40</sup> On July 23, 1684:

The Lords of his Majesties Privie Councill, considering that the usuall way of torture hath been formerly by the boots for expiscateing of matters relateing to the government, and that there is now a new invention and ingyne called the thumbekins, which will be very effectuall to the purpose and intent forsaid, doe therefore ordaine that when any persone shall be (by ther order) put to torture that the saids thumbekins or bootes or both be applied to them, as shall be found fit and convenient.<sup>41</sup>

Spence and Carstares were soon after tortured with the new device.<sup>42</sup> Interestingly, Fountainhall noted that thumbkins were "also used among our coilziars in Scotland, and is called the Pilliwincks."<sup>43</sup> While Andrew Lang notes that colliers were punished like witches with these devices, there is not much contemporary information available about them.<sup>44</sup>

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<sup>37</sup> Bodl. MS Carte 228 f.159 (r). Many thanks to Laura Doak for supplying me with her transcription.

<sup>38</sup> For more information on the different types of thumbkins, see Alexander J. S. Brook, "Notice of a Pair of Thumbikins. Esq. of Cartsburn. With some Notes concerning the Application of Torture in Scotland," *Proceedings of the Society of Antiquaries of Scotland*, 3<sup>rd</sup> series, 25 (1890-1): 463-475.

<sup>39</sup> Burnet, *Bishop Burnet's History of His Own Time*, Vol. 1, 584.

<sup>40</sup> Fountainhall, *Historical Notices*, Vol. 2, 548.

<sup>41</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 9, 66.

<sup>42</sup> Fountainhall, *Historical Notices*, Vol. 2, 555-556.

<sup>43</sup> *Ibid*, 557.

<sup>44</sup> Andrew Lang, *Sir George Mackenzie, king's advocate, of Rosehaugh: his life and times 1636 -1691*, (London, New York: Longmans, Green, 1909): 263.

Interestingly, Sir Daniel Wilson, notes that as late as the nineteenth-century, antiquarian Charles Kirkpatrick Sharpe

Along with these official devices, there were other ways of torturing. In instances of suspected witchcraft, the accused would often be pricked. However, there were other toolless methods. For instance, the Privy Council, rather controversially after he refused to admit anything in torture, ordered General Dalziel to watch William Spence in prison, “and not to suffer him to sleep by night or by day, and for that end to use all effectuall meanes for keeping him still awake to the effect forsaid.”<sup>45</sup> Spence’s case was particularly violent, and it is no surprise that it is often brought up in reference to the Restoration government’s horrific use of torture.

### **William Spence and William Carstares**

In 1683, several suspected conspirators were arrested in London due to their involvement with the Rye House Plot—a plan to assassinate Charles II and his brother the Duke of York—as well plans to initiate an Anglo-Scottish rebellion. William Spence was a former servant of the previously convicted Earl of Argyll, while William Carstares was a nonconformist minister. While Spence and Carstares were arrested in London, and first questioned by English Councillors, they were Scottish, and Scottish Privy Councillors, including the Lord Advocate, questioned them there.<sup>46</sup> Indeed, the Lord Advocate was given leave to speak with the arrested prisoners “as often as he shall think fit.”<sup>47</sup> However, the prisoners continued to maintain their innocence. On October 30, the King ordered that the prisoners, “subjects of Scotland... being accused or on very good grounds suspected to be guilty of high treason in Scotland” were to be sent to Scotland to be “proceeded against according to the law.” Furthermore, rather than merely

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was said to have a pair of thumbkins which had been used to punish “refractory collier-serfs in a Lothian coal-pit.” *Reminiscences of old Edinburgh*, Vol. 2, (Edinburgh: 1878): 75.

<sup>45</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 9, 73.

<sup>46</sup> For questioning of prisoners in England, see *Calendar of State Papers, Domestic Series of the reign of Charles II (CSPD)*, Vol. 24, F. H. Blackburne Daniell, Ed., (London: His Majesty’s Stationary Office, 1933): 370-371; *CSPD Charles II*, Vol. 25, 296, 302-303.

<sup>47</sup> *CSPD Charles II*, Vol. 25, 426.

“keep[ing] them in firm prison,” the Lord Advocate was required to prosecute them.<sup>48</sup> As torture was not legal in England, they were sent with the implication that they would be tortured in Scotland instead.

The Scottish Privy Councillors in London had debated bringing the prisoners to Scotland for all of September 1683, and it must be pointed out that they did not blindly accept the suggestion to transport the prisoners to Scotland. In September, the Lord Advocate had told the English Council that he had sent out a summons of treason against the prisoners, but that there would only “be further grounds” for sending the prisoners thither, should the Council of Scotland signify that the prisoners were indeed accused of treason.<sup>49</sup> John Drummond of Lundin, the future Earl of Melfort, wrote to the Marquess of Queensberry in October of 1683. He noted “since my last [letter] we hav had a Scots counsell to advise the King anent the Scots prisoners hear, and therin my Lord Advocate made a speech lyke his last, little service and nothing to the purpose; but the scope of it was to sho the King that ther was a necessarie formality to be used in it, and peapers to pass.” Melfort noted that the Marquess of Halifax agreed with Mackenzie. However, Melfort encouraged the King to use his prerogative, noting “he was free and unbounded, to tye himself to forms, and that he was free to act in it *proprio motu*.” After debate on both sides, the King and Duke agreed with Melfort, and thus Spence and Carstares were sent to Scotland “being taken in England for a crime alleadged committed in England.”<sup>50</sup> While the details do not remain, this debate is significant. Sir George Mackenzie was coming from the legal perspective of the Justiciary. While the King’s prerogative won in the end, it shows that the

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<sup>48</sup> *CSPD Charles II*, Vol. 26, 67.

<sup>49</sup> *CSPD Charles II*, Vol. 25, 347.

<sup>50</sup> HMC, *Report on the Manuscripts of His Grace the Duke of Buccleuch and Queensbury, Preserved at Drumlanrig Castle* (HMC Drumlanrig), Vol. 2, (London: Printed for H.M. Stationery Off., by Eyre and Spottiswoode, 1897-1903): 159.

Justices were not inclined to arbitrarily make decisions. There were legal intricacies to discuss and procedures to follow, and Mackenzie was not afraid of sharing his opinion.

Roger Morrice also noted this incident in his *Entr'ing Book*. While torture was indeed illegal in England, Morrice noted that “Mr. Spence a servant of the late Earl of Argyll has had heavy irons upon him and (it is said) has not put off his clothes these 3 moneth” —far from ideal conditions. Sir George Mackenzie and some other Scottish Privy Councillors questioned the men who were arrested, including Spence and Carstares. Significantly, Mackenzie “reported he found none of them less or more concerned in the Rebellion in Englan [sic], only some (who were not concerned in the Scotch Rebellion) had fled hither rather then take the Test before the Judges Itenerant in their Circuit in Scotland.” Morrice noted that Mackenzie was rebuked several times for his report, and that Carstares had actually wished to place Mackenzie’s report into his petition to the Council, but Mackenzie was against it, for as he noted, “by no meanes he was under displeasure already.”<sup>51</sup> While Mackenzie did argue against the process of transporting them, these men were still sent to Scotland, and they were indeed tortured, which does help create an image of a despotic government. However, these debates show that there were nuances involved, and personal politics at play. For instance, Melfort was by no means a fan of Mackenzie, and he often criticized him for his “scruples,” as discussed in Chapter One. Regardless of the situation, however, it is worth remembering that not only Scottish but also English officials had arguably broken the English *Habeas Corpus* Act of 1679.<sup>52</sup>

Interestingly, when Carstares wrote about his experiences, he refrained from mentioning this debate, as well as his alleged request to use Mackenzie’s report in his petition. Perhaps after

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<sup>51</sup> Roger Morrice, *The Entr'ing Book of Roger Morrice*, Vol. II, Mark Goldie, general ed., (Woodbridge, Suffolk: Boydell Press in association with the Parliamentary History Yearbook Trust, 2007-2009): 394-395.

<sup>52</sup> Jackson, “Judicial Torture,” 91.

experiencing cruel torture, he did not feel it was necessary. Nonetheless, he wrote “while I was in the Gatehouse, his Majesty’s advocate for the kingdom of Scotland came to examine me, who, not meeting with that satisfactory answer to his interrogators which he desired, told me that the Boot in Scotland should drive out of me what he alleged I refused to confess.”<sup>53</sup> While Mackenzie may have indeed threatened Carstares in order for him to confess, it is interesting that he refrained from mentioning the Advocate’s reservations. The fact that Mackenzie threatened him first is actually consistent with the concept that torture should only be used as a last resort, and as John H. Langbein discusses in the European context, it was hoped that the threat of torture alone would induce the accused to confess without the actual event.<sup>54</sup> After he was confronted with depositions from witnesses against him Carstares wrote:

Then I was asked, what Reasons I had why I should not be tortured. I answered, I did humbly judge that I could not be any ways tried there, for the Order, by which I was sent down to *Scotland*, was express, that I should be tried *for Crimes committed against the Government in that Kingdom*; and I desired to know if my Lord Advocate had any Thing to charge me with of that Nature. He declared, he had not; but that now I was in *Scotland*, and if I had been guilty of contriving against his Majesty’s Government in *Constantinople*, I might be tried for it.<sup>55</sup>

The Council asked him again whether he had anything to offer, which would have prevented him from being tortured. Carstares responded “that I did not pretend to any Skill in Law, but that I was informed, that *semplena probatio* [half-proof]<sup>56</sup> was necessary in order to Torture, which was not in my case; for neither the Depositions of these at *London*, nor what was said in my Lord *Argyle*’s Letters, did amount to any such thing.” However, the Council responded that “Presumptions were enough to warrant Torture.”<sup>57</sup> While this concept of the “half-proof” may

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<sup>53</sup> Robert Herbert Story, *William Carstares: a character and career of the revolutionary epoch, 1649-1715*, (London: Macmillan, 1874): 77.

<sup>54</sup> John H. Langbein, *Torture and the Law of Proof: Europe in the Ancien Régime*, (Chicago: University of Chicago Press, 2006): 15.

<sup>55</sup> Wodrow, *Sufferings*, Vol. 2, 389.

<sup>56</sup> Half-proof meant that there was one witness against the accused. See Harris, *Restoration*, 365.

<sup>57</sup> Wodrow, *Sufferings*, Vol. 2, 389.

have been custom under the Roman law of proof,<sup>58</sup> Mackenzie's criminal treatise makes no explicit mention of it in his discussion of torture. However, the argument that torture was allowed under new presumptions was true, however vague.<sup>59</sup>

Following Carstares' response, the Council asked once again if Carstares had nothing further to say why he should not be tortured, to which he stated that he "had only an humble Petition to them, that I might meet with no greater Severity in my own Country, than the Laws of that in which the Crimes I am accused of are said to be committed, do allow of."<sup>60</sup> It is significant that the Council gave Carstares at least three final opportunities to speak before they went ahead with the torture. As Mackenzie noted in his *Matters Criminal*, a confession from torture was not ideal.<sup>61</sup> Indeed, the Council would have preferred to have had a free confession. Nonetheless, they proceeded, and Carstares was tortured with the thumbkins, and he eventually in the words of Fountainhall, "confessed ther hes bein a current plot in Scotland these ten years past. Some ware for raising forces; others ware only for associating with the English, for holding out the Duke of York from succeeding, and to preserve the reformed religion."<sup>62</sup> He provided a formal deposition, swearing its accuracy, and was freed. Amongst the names of conspirators listed was Robert Baillie of Jarviswood, and the immoral use of Carstares' deposition in Jarviswood's trial proved to be another controversy.

While the use of Carstares' deposition was controversial, Spence's torture was arguably much more brutal. First, Spence was tortured with the boot. According to John Erskine of Carnock, he "received many strokes till his leg was quite crushed."<sup>63</sup> Since he was still

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<sup>58</sup> Langbein, *Torture and the Law of Proof*, 14.

<sup>59</sup> Mackenzie, *Matters Criminal*, 544.

<sup>60</sup> Wodrow, *Sufferings*, Vol. 2, 389.

<sup>61</sup> Mackenzie, *Matters Criminal*, 513-514.

<sup>62</sup> Fountainhall, *Historical Notices*, Vol. 2, 555-556.

<sup>63</sup> John Erskine of Carnock, *Journal of John Erskine of Carnock, 1683-1687*, Walter Macleod, ed., (Edinburgh: Printed at University Press by T. and A. Constable for the Scottish History Society, 1893): 78.

uncooperative, as mentioned, he was prohibited from sleeping. According to Fountainhall, “it was reported that by a hair-shirt and pricking (as the witches are used) he was 5 nights kept from sleip, till he was turned halfe distracted; but he eated very little, of purpose, that he might require the lesse sleip.”<sup>64</sup> In a letter to the Earl of Mar, General Dalziel who was in charge of watching Spence, wrote “I have had the physcican and chirgion with him who say if he be not eased with some sleep he will goe mad and then all hopes of confession is gone.” Even Dalziel, who the Covenanters often described as cruel, wrote “I mind to make my self quit of this employment, since they have rob’d me of a more honorable one.”<sup>65</sup> Concerned about his state of mind, Spence was taken to the Edinburgh Tolbooth and allowed to sleep, where he was then brought to the Council once more.

The Council “declared to him that what he should discover should not militat against him, as formerly they had done.” They then asked him whether he could read the ciphers of the letters between the Earl of Argyll and Major Holmes, etc. Spence refused so “the Council eftir all fair meanes and perswasiones used” decided to put him to the torture once more.<sup>66</sup> While John Erskine of Carnock wrote that he was tortured with the boot again, prior to the thumbscrews, the Council records stated that the Lords noted Spence had refused to comply with the Boot before, so they ordered “the said new engyne” the thumbkins to be used.<sup>67</sup> Following this application of torture, Spence agreed to decipher the letters, and admitted to the plans for an Anglo-Scottish rebellion. He also noted that there were three keys to the cyphers, including his, and that Mr. Carstares and Mr. Holmes had the others. Carstares was subsequently tortured.<sup>68</sup> Spence was

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<sup>64</sup> Fountainhall, *Historical Notices*, Vol. 2, 545-46.

<sup>65</sup> National Records of Scotland (NRS), GD124/15/176.

<sup>66</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 9, 98.

<sup>67</sup> Erskine, *Journal*, 78; *RPCS*, 3<sup>rd</sup> series, Vol. 9, 98.

<sup>68</sup> Fountainhall, *Historical Notices*, Vol. 2, 552.

given a remission and pardon for cooperating as promised. The Privy Council also secured Spence “against all further questions, deciphering of letters or examinations, and from any danger as to life, limb or estate, and that he shall not be further put to torture, questioned or interrogate.”<sup>69</sup> Spence had been through enough. However, he was to come under fire once again when he returned with the Earl of Argyll for his rebellion in 1685.

Was this multiple torturing legal? It is dubious. While maintaining innocence throughout torture could legally purge presumptions, it was also a continental custom that the judge was commonly permitted the repetition of torture at least a few times.<sup>70</sup> The torturing of Spence and Carstares was not without debate amongst the Privy Council. Fountainhall notes how the Duke of Hamilton “opposed thir torturings much...and alleged, that, at this rate, they might without accusers or Witnesses take any person off the streit, and torture him...and he retired, and refused to be present, on this ground, that if the party should dye in torture, the Judges were liable for murder, at least ware severely censurable.”<sup>71</sup> Fountainhall wisely noted “it was doubted, how far thir testimonies extorted *per torturam* can be probative against 3<sup>rd</sup> parties, seeing witnesses should be so far voluntar and spontaneous as to be under no impressions or terrors of fear of life or limb.”<sup>72</sup> Nonetheless, the Privy Council proceeded with using Carstares’ deposition against Baillie of Jarviswood, to much controversy. As discussed in Chapter One, the Privy Council proceeded to print Jarviswood’s trial as a justification for its proceedings. However, it did not touch upon its treatment of Spence or Carstares. Had Spence or Carstares not confessed, Fountainhall wrote that the Privy Council would have been at a loss, but “ther confessing tends to justify the Privy Counsell’s procedure.” As Fountainhall concluded, “in England they could

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<sup>69</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 9, 119.

<sup>70</sup> Langbein, *Torture and the Law of Proof*, 15.

<sup>71</sup> Fountainhall, *Historical Notices*, Vol. 2, 556-557.

<sup>72</sup> *Ibid*.



never have expiscated this plot for ther law allows no torture.”<sup>73</sup> These two cases were perhaps the most controversial cases of torturing in Restoration Scotland. However, the Privy Council got what they wanted, confessions of rebellion. The discovery of an Anglo-Scottish conspiracy provoked great anxieties for both governments. It must be remembered that the Scottish government’s main priority was to maintain order and prevent the disorders of the preceding period from returning. Torture was seen as a necessary tool by some. However, as Richard L. Greaves points out, while the plotting was certainly real, “the botched handling” of the trials in both England and Scotland and the rush to prosecute the conspirators prompted people in both nations to question the reality of the plot.<sup>74</sup> While the Privy Council may have felt justified in its actions, and both Spence and Carstares were set free, these cases would be used to help spur on the image of the despotic Scottish Inquisition. Indeed, the political payoff caused more harm than good.

### **Alexander Gordon of Earlston**

Interestingly, William Spence was not the one who was supposed to be tortured first—rather, it was supposed to be Alexander Gordon of Earlston. His case brought up more questions and debates. Was it legal to torture someone who had already been condemned to die? As Mackenzie briefly discussed in his criminal treatise, it was unusual but could happen. Having attended field conventicles in the 1670s and failing to appear at court, Earlston had been condemned as a rebel in 1679. He then fought at the Battle of Bothwell Bridge but was able to escape to the Netherlands. Having been denounced as a rebel for the second time in 1681 after failing again to appear in court, he was found guilty of treason *in absentia*, his estate was

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<sup>73</sup> Ibid.

<sup>74</sup> Richard L. Greaves, *Secrets of the Kingdom: British Radicals from the Popish Plot to the Revolution of 1688-1689*, (Stanford: Stanford University Press, 1992): 252.

forefaulted, and he was condemned to die. Following his conviction, he became associated with both the United Societies, and the Rye House plotters' Anglo-Scottish insurrection. However, the authorities caught him in Newcastle trying to board a ship while carrying incriminating papers, and he was sent to Edinburgh.<sup>75</sup> As Melfort wrote to Queensberry, "we find by Earlestone's papers, ther has bein a designe of rising in armes in England. He says it was amongst the sectaries only, and that the fanatiques would not joine with them, but it does not appear so by other papers we have of theirs, but he is not yet fully examined as to that matter."<sup>76</sup> Fountainhall recorded that Earlestone was brought before the Criminal Court in August and his previous sentences were read to him and his execution was set for September 28, 1683. However, he noted, "but there came a letter from the King, proroguing the time, and appointing him to be put in the boots against his complices, he having been hitherto very disingenuous." Fountainhall continued that "the Council wrote back to the King, that it was not very regular to torture malefactors after they were condemned to die, but only before conviction." Following this, Earlestone attempted to escape, but was quickly stopped.<sup>77</sup>

Interestingly, the version recorded in the Privy Council records differs, as the records show that the Council first wrote the Secretary of State and Lord Advocate in London asking for advice with what to do with Earlestone, realizing that he may have more information. They wrote asking the Lord Advocate "if by the laws of this kingdom in the circumstances he is now in, being under the sentence of death, he may be put to the question by torture upon such pertinent interrogatories as your Lordships and he shall think fit to draw up." They continued requesting that if it be legal that he may be questioned "in the torture" that the Lord Advocate may come

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<sup>75</sup> Richard L. Greaves, "Gordon, Alexander, of Earlestone (1650–1726), covenanter and conspirator," *Oxford Dictionary of National Biography*, (23 Sep. 2004); *CSPD Charles II*, Vol. 24, 298–299.

<sup>76</sup> HMC, Drumlanrig, Vol. 2, 118.

<sup>77</sup> Fountainhall, *Historical Notices*, Vol. 1, 452.

back to Scotland himself if “any thing shall happen to be objected against it for the part of the said Earlestoun.” The Council concluded wishing they “may doe justice in the said matter.”<sup>78</sup> Melfort wrote to Queensberry from Winchester, noting “the mater of Earlestone is past belief, that they should desire to know if a man after sentence can be tortured, and yet they prefix a day for his executione, to strick the nail to the head, (for ther was no doubt after a sentence in absence).” He concluded “This shal not want a commentary.”<sup>79</sup>

Following a petition from Earlston, during which his execution was reprieved until November, the Privy Council received a response to their letter requesting legal advice.<sup>80</sup> In the letter, Middleton shared Mackenzie’s advice that “no man can be tortured upon interrogatories relating only to the case for which he was condemned, yet he may be tortured in relation to plots, conspiracies or combinations that have emerged and happened after the time when the crimes were committed for which he was condemned.” He continued:

since it is undeniable that the said Alexander Gordon did accept a treasonable commission from rebels... that he was privy to the late horrid conspiracy against his Majesties sacred person and government, and yet refuses to give an account either of those from whom he received the said commission or such as he knos to have been accessory to the said conspiracy, and, both these points being of so great importance for the future security of his Majesties person and government, it was therefore resolved by his Majesty that the said Alexander Gordon shall be put to the torture...<sup>81</sup>

While torturing someone after conviction was unusual, this legal advice was consistent with the law, as outlined in Mackenzie’s legal treatise.

Having received the letter dated September 14, the Privy Council proceeded to appoint a committee to interrogate Earlston the following Tuesday, September 25. The committee did meet, but they did not appear so keen to torture Earlston. In their report, the committee shared

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<sup>78</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 8, 231-232.

<sup>79</sup> *HMC Drumlanrig*, Vol. 2, 132.

<sup>80</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 8, 252.

<sup>81</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 8, 259.

they “having considered the said answers, thought fit, before furdur procedure, to call the Council to meete upon the twenty nynt of September instant to take their advice as to their furdur procedure.”<sup>82</sup> They then wrote to the Secretaries of State in London stating they had decided to delay inflicting torture on Earlston, explaining that he “did judicially adhere to his former answers and declarations offering to depon upon oath he knew and remembred no more concerning the treasonabl commission and horrid conspiracy.” They recommended interrogating Earlston’s correspondent Nisbet further instead.<sup>83</sup>

Awaiting further instructions regarding the torture, the Council received a letter from the King in early November, requesting that Earlston’s execution be further delayed until December.<sup>84</sup> Finally, on November 23, the Council received another letter from the King. He wrote “wee have reason to believe he can (if he please) make much more considerable discoveries in relation to those two heads [the conspiracies] than as yet he has made in any of his examinations, it is therefore now our expresse will and pleasure, and wee doe hereby authorise and require you to cause the said Alexander Gordon to be put to the torture and interrogated...”<sup>85</sup>

Fountainhall recorded that the Privy Council received a letter from the King for both Spence and Earlston to be tortured by the boot.<sup>86</sup> Spence and the other London prisoners had recently arrived in Edinburgh for questioning, yet it is interesting that Spence was not mentioned in this letter in the Council records. Having received the warrant from the King, the Council called Earlston before them to proceed with the interrogation by torture and “conforme to his Majesty’s commands,” but another problem had emerged. As the Council recorded, he “by his

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<sup>82</sup> Ibid., 262; See also, *CSPD*, Charles II, Vol. 25, 422. They were “ready to receive the Committee’s commands for questioning him in the torture.”

<sup>83</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 8, 264.

<sup>84</sup> Ibid., 267-268.

<sup>85</sup> Ibid., 287.

<sup>86</sup> Fountainhall, *Historical Notices*, Vol. 2, 463.

behaviour seem'd to be in a fit of distraction." They called for the advocate Archibald Hope and the keepers and servants of the Tolbooth who swore that they had observed "fitts of distraction, and having the gestures and expressions of a mad man" these past few days.<sup>87</sup> As John Erskine of Carnock recorded, when questions were read to him, "he answered he wist not what they said, he would be to the hills." According to Erskine, the Council called in his uncle, who declared he had been that way for a time now.<sup>88</sup>

Fountainhall recorded some further details, noting when Earlston was brought to the Council chamber to be tortured, "he thro fear or distraction roared out like a bull and cryed and struck about him so." He then swooned, and reviving, "he told that General Dalziell and Drummond were to head that Phantick party, and Duke Hamilton was on ther syde; which improbable things made some call it revery; and others, a politique desigine to invalidate all he should say."<sup>89</sup> While these particular details of his "madness" are not in the Council records, there is a letter from Melfort to Queensberry which confirms his accusations. Melfort wrote "your lordship did ill that did not acquaint me with Earlestone's having accused General Dallyell, Drummond and others, for it has made me say things that I uould hav turned another way with mor advantage to the King's service." Melfort continued questioning "if it uer possible now that Earlestone is past hopes, to get him to aqueint you or somebody els with his prompters in that affaire, for I dar say so black a calumnies could not hav bein invented."<sup>90</sup>

Melfort, always at odds with Mackenzie, noted that the Lord Advocate "holds out hear uell, but ther is sayed to be a letter from him in favors of Earlestone, that if he be any way

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<sup>87</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 8, 287.

<sup>88</sup> Erskine, *Journal*, 23.

<sup>89</sup> Fountainhall, *Historical Notices*, Vol. 2, 465.

<sup>90</sup> HMC Drumlanrig, Vol. 2, 136. It is dated September, and Fountainhall records this event taking place in November. However, there may be some discrepancies in the HMC.

ingenuous, the torture may be spared,” to which Melfort proclaimed “I uold gladly hav that hair in the Advocate’s neck.”<sup>91</sup> Melfort concluded “I hav reason to beleiv that the accusation of Dyell and Drummond was a designed thing put into Earlestone’s head. It is therefor fit he be interrogate upon it, if it can be done, so that no body be sein in the inquire.”<sup>92</sup> It is significant to note that Melfort recorded the Lord Advocate’s supposed lenience in regard to torture. Along with the Council’s reluctance to torture Earlestone, it shows that they were not necessarily eager to take part in this violent activity. Indeed, it must be remembered that evidence from torture was far from ideal in legal circles. This also reminds us that the Privy Council was a diverse body, with many different opinions. Melfort later wrote again about Earlestone stating “I question not but he had assurances that made him so obstinate.”<sup>93</sup>

Due to his condition, the Council ordered his torture to be delayed and called for a physician and surgeon apothecary to attend him and to prescribe suitable medicine for his health. Furthermore, they ordered that he was to be kept in a dark room, and no one allowed to access him but the physician, apothecary and his keepers.<sup>94</sup> The following week, the physician and surgeon reported to the Council that they had visited with Earlestone several times and they believed him to be “affected with that sort of madness which the phisitions call ordinarily *alienatio mentis*.” They were to keep attending him and report back.<sup>95</sup> After observing his condition some more, the physicians reported that Earlestone was declared to be “truly *mente alienate, mente captus et furore latent laborans*.” As such, the Lords thought fit “for furder discovery of his condition and that it may be known whither he be feignd and counterfit” to

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<sup>91</sup> Ibid., 137

<sup>92</sup> Ibid.

<sup>93</sup> Ibid., 141.

<sup>94</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 8, 287-8.

<sup>95</sup> Ibid.

change his place of imprisonment from the Tolbooth to Edinburgh Castle, where he was to be strictly observed.<sup>96</sup>

With Earlston's execution date still set for December, the Council received a petition from him requesting a reprieve for a later date. He wrote stating that he "having been afflicted by the hand of Providence by a distemper in his judgement, and now by the mercy of that same Providence restored to a sober mynd" now requested pardon for his misbehaviour and requested a reprieve so he "may goe about these duties that may be necessary for the state of his soul which his distemper made him incapable of." He concluded stating that he concealed nothing and adhered to his innocence in the late plot. The Council considered the petition and allowed a reprieve of the execution until late January.<sup>97</sup> Fountainhall recorded that some "thought once to have given way to his execution; but being furious, others judged it cruell then to bereave a man of his life, and indanger his soul, when he could not repent." As such, Earlston received his reprieve.<sup>98</sup> Writing to Queensbury in December, the Earl of Moray recorded that it was thought best to delay any resolution concerning Earlston until the Duke of York and Albany returned to Scotland.<sup>99</sup> However, with the King's death a few months later, James was not to return. January came along, and the Privy Council continued to reprieve his execution until the end of April. They additionally removed the guard from within his room and allowed his wife to have access to him.<sup>100</sup>

April came, and upon another petition from Earlston, his execution was once again reprieved until the following December, but he was ordered to be removed from Edinburgh

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<sup>96</sup> Ibid., 289.

<sup>97</sup> Ibid., 303-304.

<sup>98</sup> Fountainhall, *Historical Notices*, Vol. 2, 471.

<sup>99</sup> HMC Drumlanrig, Vol. 2, 38.

<sup>100</sup> RPCS, 3<sup>rd</sup> series, Vol. 8, 336.

Castle back to the Tolbooth.<sup>101</sup> However, Earlston petitioned the Council requesting that he may continue his stay at Edinburgh Castle, stating “in regaird of his present indisposition he might be allowed to stay in the said castle, and have the benefite of the air out of his chamber at some tymes.” As such, he was allowed to remain. However, he was later sent back to the Tolbooth, where he once again petitioned the Council stating he was growing again sick to his great fear, “being kept so close that form sex of the clock at night till nyne of the next day he hes nether day nor any light else nor admission to any but his wife to speak with him.” He therefore requested to be returned to Edinburgh Castle. The Privy Council considered his petition and decided that he would be transported to the Isle of Bass for his health and remain there as prisoner until further order.<sup>102</sup>

The Council, having tortured Spence, who was currently set at liberty in the Castle and awaiting his remission from the King, called for Earlston to be sent for from the Bass. As Fountainhall recorded, it was “not to be execute, (as some said,) but to be tortured, and confronted with Spence.” He noted “they resolved not to admit of his madnesse for ane excuse, which they esteemed simulate; as the late Chancelor [Abderdeen] had done.”<sup>103</sup> Earlston returned to the Tolbooth, where he once again made trouble, by attempting to escape with ropes and a chisel. The Council tried to learn how he obtained these instruments, but he stated he “knew nether directly nor indirectly who sent him in the instruments, but that they wer conveyed in to him through a conduit by ane unknowen persone.”<sup>104</sup> Fountainhall recorded Earlston’s second attempted escape, noting that it was debated if for this crime they could abbreviate the term set for his execution, but it was found that “the punishment of breach of prison was not

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<sup>101</sup> Ibid., 450.

<sup>102</sup> Ibid., 513.

<sup>103</sup> Fountainhall, *Historical Notices*, Vol. 2, 553.

<sup>104</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 9, 141-142.



death, but only banishment by law.”<sup>105</sup> As such, the Privy Council ordered that he be removed to Blackness Castle, where he stayed until after the Revolution when he finally received a royal pardon.<sup>106</sup> Throughout this whole ordeal, it must be noted that the Privy Council acted rather leniently toward Earlston. They arguably had their hands full with Spence and Carstares and did not necessarily need Earlston’s forced testimony. Nonetheless, for someone who was a multiple offender condemned to die, as well as be tortured, he got away with neither.

Wodrow made a brief mention of his case. Interestingly, Wodrow recorded that the papers Earlston held when arrested had “nothing in them” save commissions and papers on “civil business.”<sup>107</sup> As Lang notes, it is “amazing” that Wodrow would state that the papers were only civil business, considering there was a long letter full of information on the conspiracy, as Earlston confessed in his interrogation.<sup>108</sup> Certainly, as Greaves discusses, Earlston was very much privy to the conspiracy.<sup>109</sup> Wodrow briefly summarized Earlston’s madness, but he did not include Earlston’s two attempted escapes, as well as the multiple debates surrounding his interrogation. Perhaps, Earlston was not the ideal martyr for Wodrow’s purposes.

While the details of Earlston’s story are interesting to relate, his case is significant because it shows that the Council could indeed act with some leniency and did not necessarily blindly follow royal orders. On multiple occasions, the Council wrote to the King and Lord Advocate requesting legal advice before they proceeded further. Following the King’s first letter proposing torture, the Council interrogated Earlston, and decided not to implement torture at that time. When Earlston petitioned for better conditions on account of his health, he received

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<sup>105</sup> Fountainhall, *Historical Notices*, Vol. 2, 555.

<sup>106</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 9, 178.

<sup>107</sup> Wodrow, *Sufferings*, Vol. 2, 310.

<sup>108</sup> Lang, *Sir George Mackenzie*, 250.

<sup>109</sup> Greaves, *Secrets of the Kingdom*, 347-349.

accommodations. Additionally, Earlston's alleged madness brings up interesting debates about lucidity and the law. Confessions in torture were legally of limited use unless the accused swore their validity after the fact. As such, how could the Council torture someone who was not of sound mind? In some of his earlier pleadings and writings, Sir George Mackenzie noted in his *Institutions* that "furious persons" or "idiots" could not do certain things in Scots law, such as marry, since they could not consent, nor create testaments and wills etc.<sup>110</sup> A person suffering from madness would not be capable of giving sound information as well.<sup>111</sup>

### John Spreul

While Carstares and Spence's cases may have been more controversial, and Earlston's case may have involved more political players, the trial of John Spreul provides a good example of the legal limitations of torture within criminal procedures, and how the Justices could get around such limitations. Interestingly, Spreul's case has not often been discussed, yet Wodrow wrote that he intended to give Spreul's case attention "at some length, both because it was after Torture, and made little Noise" and because he had detailed accounts of it.<sup>112</sup>

John Spreul was an apothecary from Glasgow— not to be confused with the multiple other John Spreuls from Glasgow mentioned in the Privy Council records. Indeed, these multiple Spreuls would later pose a problem for witnesses. In November 1680, the Lords of the Privy Council met "extraordinarily upon notice of the apprehending of some prisoners by the Generall, who were called and examined." Amongst them, was John Spreul.<sup>113</sup> As Wodrow recorded, a "severe search was made for Mr. Cargil and his followers" in November 1680, and "Mr. Spreul

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<sup>110</sup> Sir George Mackenzie, *The Institutions of the Law of Scotland by Sir George Mackenzie*, (Edinburgh: Printed by John Reid, 1684): 316, 48.

<sup>111</sup> For more information on lucidity and the law, see E. Miller and D. R. Parratt, "Classic Text No. 74 'How Fury and Lucid Intervals may be Proven' by Sir George Mackenzie of Rosehaugh," *History of Psychiatry* 19:2 (2008): 224-236.

<sup>112</sup> Wodrow, *Sufferings*, Vol. 2, 163.

<sup>113</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 6, 573.

was apprehended by major Johnstoun when in his bed, and his goods he had brought from Holland seized by the party, though none of them were prohibited.”<sup>114</sup> After his arrest, Spreul was interrogated by the Privy Council. As Wodrow noted, Spreul’s answers to the Privy Council’s interrogations are missing from the *Register*. However, Wodrow was able to interview Spreul in his advanced age, and he recorded this interview in his volume.

According to Wodrow, Spreul recalled that he was questioned on whether or not he believed the killing of the Archbishop of St Andrews to be a murder, to which he gave an inconclusive answer. He was then asked whether he was at Drumclog, to which he answered he was in Dublin at the time. He was also asked whether the rising in 1679 was a rebellion, to which he claimed it was only “self-defence.” On asking if he was at Bothwell with the rebels, he admitted to speaking with some of the men, but stated that he did not join them as a commander trooper nor soldier.<sup>115</sup> Interestingly, in his memoirs, James Ure of Shargarton who sat in the rebel camp at Hamilton wrote “of our number there was one John Spreul, apothecary in Glasgow, who owned Robert Hamilton strongly.”<sup>116</sup> As Lang notes, either Wodrow is wrong, Spreul was lying, or Ure is incorrect.<sup>117</sup> Considering the number of John Spreuls from Glasgow who did take part in Bothwell, it is not necessarily a stretch. Nonetheless, the fact that Ure stated he was an apothecary is a point in favour of him being there.

Following the interrogation, the Privy Council recorded that after being examined, John Spreul “confesses that within these eight months he hes [sic] been in company with Mr. Donald Cargill and of the tymes was in Edinburgh, bot will not confess whose house it was in nor what

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<sup>114</sup> Wodrow, *Sufferings*, Vol. 2, 163.

<sup>115</sup> Ibid, 163-164.

<sup>116</sup> William Veitch, *Memoirs of Mr. William Veitch, and George Brysson*, Thomas McCrie, ed., (Edinburgh: William Blackwood, 1825): 473.

<sup>117</sup> Lang, *Sir George Mackenzie*, 196.

effair they spoke of bot says there wes no more bot saluations amongst them.”<sup>118</sup> The fact that he admitted to being with Cargill, part of the radical Cameronian sect, is significant. Donald Cargill “to the great astonishment of all honest men” had excommunicated the King and his brother, the Duke of York, and in doing so, he preached on the “lawfulness of assassinating those who differed from them in their covenant and principles.”<sup>119</sup> Being on good terms with Cargill explicitly incriminated Spreul, as conversing with known rebels was a crime—which will be discussed in Chapter Four. Thus, the Council believed they had reason to learn more from Spreul on these treasonous matters. As such, “they ordain[ed] the said John Spreull and Robert Hamiltoun, now prisoners, to be subjected to the torture upon such interrogatours as relate to these three points.”<sup>120</sup> It is worth outlining these three points in detail, as they would become significant during Spreul’s trial.

Firstly, the committee was to ask Spreul “by what reason and meanes this murthering principle is taught and caryed on,” who was involved in the plot, and who was to be murdered. At the end, a quick question about the murderer of the Archbishop of St Andrews was added on. Secondly, they were to ask him if there were any new rebellions planned. Additionally, they were to ask who were the “contrivers and promotours of the rebellion at Bothwelbridge.” Thirdly, they were to ask Spreul and Hamilton who their correspondents were abroad and at home, particularly in London, along with what they knew about the “dispersing seditious books and pamphlets” etc. The Council then set up a specific committee to examine and torture Spreul and Hamilton. Once again, the records of Spreul’s interrogation by torture are missing in the

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<sup>118</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 6, 574.

<sup>119</sup> *Ibid.*, 582.

<sup>120</sup> *Ibid.*, 574-575.

Council records. As such, we must rely on Wodrow and his interview with Spreul, thirty years after the fact.

Interestingly, Wodrow recorded that the Duke of Albany and York was present at the torture. However, the Council records show that he was not part of the committee who were appointed to the task. Nonetheless, he could have indeed shown up, but it is telling that Wodrow would emphasize this fact. As usual, the committee told Spreul that he could be free from torture if he would freely confess ahead of time. As Wodrow wrote, he was told “if he would not make a more ample Confession than he had done, and sign it, he behoved to underly the Torture.” According to Wodrow’s account, Spreul responded that he had nothing else to confess and “that they could not subject him to Torture according to Law; but if they would go on, he protested that his Torture was without, yea, against all Law; that what was extorted from him under the Torture, against himself or any others, he would refile from it, and it ought not to mitigate against him or any others.”<sup>121</sup> Spreul’s memory of this interrogation may have been clouded by his later trial, as the rhetoric he supplied to Wodrow was similar.

Was it illegal to torture Spreul? Once again, the process was dubious. The Council did indeed have presumptions, especially as he had confessed to being in contact with Cargill. However, as Fountainhall recorded, “naked presence heir was not treasonable, without some farder concurse and accession.”<sup>122</sup> While witnesses would appear in his following trial, it is not clear that the Privy Council had the “half-proof” at this time. Interestingly, the Council wrote the King defending their use of torture, stating they had “first in full Council found by their own

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<sup>121</sup> Wodrow, *Sufferings*, Vol. 2, 164.

<sup>122</sup> Fountainhall, *Historical Notices*, Vol. 2, 296.

confessions and by sufficient proofs and presumptions that they were able to clear us in those weighty questions that were to be put to them.”<sup>123</sup>

According to Wodrow, Spreul’s interrogation was quite brutal. The hangman put Spreul’s foot in the boot and after every question, he would give him five strokes. He was asked about a plot to blow up Holyrood Abbey and the Duke of York, and he was asked if he knew where Mr. Cargill was. It is worth noting that Spreul’s account does not include all the pre-approved questions from the Privy Council, especially the questions relating to Bothwell Bridge, as this would prove to be relevant in his trial. Spreul “declared his absolute and utter Ignorance” throughout the entire interrogation. According to Wodrow, after he refused to answer these questions, the Council ordered the old Boot to be brought back, “alleging this new one used by the hangman was not so good as the old.” Spreul then proceed to be tortured a second time. Like with Spence, this incident would prove to be significant. Did it count as being tortured twice? Perhaps to some, but not to the Council. As Wodrow recorded, General Dalziel supposedly complained during the second torture that the Hangman “did not strike strongly enough upon the Wedges” to which he responded that “he struck with all his Strength, and offered the General the Mall to do it himself.” Spreul continued to maintain his innocence throughout this process. According to Wodrow, he was refused the benefit of a surgeon but “recovered pretty well.”<sup>124</sup> Interestingly, the four or five prisoners mentioned by Lady Lockhart to her father would have included John Spreul. If her letter is any indication, the hangman did not go easy on him.

Wodrow recorded that when Spreul recovered, he was sent an indictment by the Lord Advocate. This is where the case became legally interesting. Spreul had endured torture and not confessed. As such, all former presumptions were supposed to be purged. However, following

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<sup>123</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 6, 582.

<sup>124</sup> Wodrow, *Sufferings*, Vol. 2, 164.

his torture, he was still brought before the Justiciary for trial. The debates that followed between the Lord Advocate, Sir George Mackenzie, and Spreul's defence, Sir George Lockhart, are significant and should be looked at with some detail, as they highlight the limitations of torture in judicial procedures, and the ways the Scottish government could get around these matters.<sup>125</sup>

Wodrow recorded the trial at length. However, as noted in the *State Trials*, it is "very circumstantially detailed."<sup>126</sup> When Spreul received his indictment, he was "indyted and accused for rising and joining in armes with the rebells at Bothwellbridge in June 1679," and this specific charge was significant.<sup>127</sup> It must be noted that Spreul—not to mention most Covenanters who went to trial— was given some of the best defence counsel, including Sir George Lockhart and Mr. Walter Pringle. Pringle began the defence noting that Spreul:

being examind before the lords of his majesties privit council upon the same cryme, and having denyed the same, and all accession thereto, and thereafter the tortor being adhibit to him, and having endured the same two several tymes, he constantlie denyed the cryme, and consequentlie, by the lawe of this, and all other nations he cannot be impannaed nor condemned, for the same cryme upon any new probation.<sup>128</sup>

Pringle had a good case. Spreul had indeed endured torture, so the presumptions should have been purged. However, Mackenzie responded that "albeit, the pannall hade bein tortured, upon his accession to the crymes libelled, and in the tortor hade denyed the same, yet that could not infere ane absolute liberation of the panall." Indeed, he argued that with that logic, it tempted and

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<sup>125</sup> Wodrow recorded an account that is not found in the Privy Council records. Prior to Spreul's trial, a certain John Murray, who was in prison with Spreul, had heard that the Council was willing to procure him a reprieve. However, he did not want to direct any petition to the Duke of York. As such, Spreul supposedly helped him write a petition with a clause added to it. The petition was addressed to the Council, and stated that Jesus Christ was the only head of the church, and controversially, it declared "I am no *Papist*, and hate and abhor all those Jesuitical, bloody, and murdering Principles." Spreul was called before the Council and asked about this petition, and he admitted to helping write it. Spreul was then questioned some more, to which he repeated this declaration in front of the Duke of York. While this episode does not appear elsewhere, Wodrow believed "'tis probable what he spoke at this Time made his Prosecution the more violent before the Justiciary." Ibid, 165.

<sup>126</sup> *A Complete Collection of State Trials and Proceedings for High Treason and Other Crimes and Misdemeanors from the Earliest Period to the Year 1783 (State Trials)*, Vol. 10, T. B. Howell et al, eds., (London: Printed by T. C. Hansard, 1816): 726.

<sup>127</sup> Ibid.

<sup>128</sup> Ibid., 752-53.

invited all criminals to “conceal truth by ther obstinancie.”<sup>129</sup> Mackenzie then declared that “nor does the tortor import in lawe any more than a presumption of innocence.”<sup>130</sup> Mackenzie expanded on the dangers of the logic of allowing criminals to get away with crimes because of their stubbornness. Mackenzie then came to the crux of his rebuttal, declaring that indeed no man should be tried “upon the principal and chief poynts for which he was tortured.” However, he argued that Spreul was not tortured upon the same points for which he was now tried. He was tortured for being present at the King’s excommunication, and for corresponding with Cargill and with the rebels in Holland and Ireland. Spreul was now tried for being in arms with the rebels at Bothwell Bridge, Hamilton and other places, “which are point absolutlie different from these for which he was subjected to tortor.”<sup>131</sup>

In his response to Mackenzie, Sir George Lockhart brought up the legal weaknesses of torture, noting how it was *res fragilis*, and argued that “the innocent is as oft opprest as noncency discovered.” He noted that “the extremetie and violence of the tortor to confesse the cryme” could give way to false confessions. As such, it was the law that the person must verify their confession later on after torture. Additionally, Lockhart argued that Spreul was indeed “subjected to a most violent tortor twice repeited...and particularlie was interrogat in the tortor if he was not present with the rebels at Bothwelbridge, Hamilton, and Glasgowe and other places.”<sup>132</sup> Lockhart then proceeded to describe torture noting “that many tymes ther members may be torne and lacerat, and disenabled for all their lives, yea and according to the strength or weakness of ther temper may rune the hazard of their lives.”<sup>133</sup> He noted that law only allowed this as the “last and

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<sup>129</sup> Ibid., 758.

<sup>130</sup> Ibid., 760.

<sup>131</sup> Ibid., 766.

<sup>132</sup> Ibid., 767.

<sup>133</sup> Ibid.



extraordinaire reme'die."<sup>134</sup> He concluded his point stating "the law and custome of this and all other nations cannot allowe tortor to be made use of to this mean effect, that when parties have undergone the outmost extremitie and violence of the tortor they are still lyable to farder enquiries and tryalls as to the same crymes."<sup>135</sup> As such, Spreul should be purged of all manner of probation for the said crimes.

Did Mackenzie's argument that Spreul was being tried for something different than what he was tortured for hold up? First, we must return to the questions the Privy Council approved for Spreul's torture, which were divided into three sections. The first point was regarding Cargill and his excommunication. The second point asked about any new planned insurrections. Additionally, Spreul was to be questioned on who the leaders of the Bothwell Bridge rebellion were. The third section involved his correspondences abroad and at home. Going by the Privy Council's approved questions, Spreul was indeed not to be tortured on his own presence at Bothwell. Indeed, Mackenzie brought this up as evidence to show that Spreul was not tortured on this account. Returning to Spreul's own account of his torture in Wodrow's narrative, he stated he was questioned about a plot to blow up Holyrood Abbey, and the whereabouts of Donald Cargill. There is no mention of his being an accessory to the Bothwell Bridge Rebellion. It would appear that Mackenzie's arguments did have some validity— that Spreul was not tortured for what he was being currently tried for. Nonetheless, Lockhart argued that this Privy Council document was irrelevant, and that Spreul should not have to "prove any such qualifications" for he was indeed tortured by a committee, appointed by the Lords of the Privy Council and in their presence examined. As Lockhart pointed out, Spreul was "*de facto* interrogat upon the crymes

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<sup>134</sup> Ibid., 768.

<sup>135</sup> Ibid.

now lybelled.”<sup>136</sup> Lockhart may have very well been right. However, the Lords of the Justiciary considered both Mackenzie and Lockhart’s arguments and decided against the defence, “in respect the commission of the privie council did not warrand the pannall to have been putt to the question upon any of the crymes mentioned in the dittay.”<sup>137</sup> Lockhart then proceeded to argue against the use of the Privy Council’s commission as evidence, since it was possible that “it remaine in the clerk’s hands: and commissions whereupon so hye and important effects have followed as the tortor of a person, ought not to be subject to ‘ex post facto,’ to glosses and interpretations.”<sup>138</sup> Once again, Lockhart could have very well been correct, and the Privy Council may have learned its lesson from the Mitchell fiasco. However, the Lords of the Justiciary dismissed this argument.

Following these arguments, witnesses were brought in for the Probation—the trial in front of the assize after the Interlocutor— which brought more debate and questions over obtaining depositions extrajudicially. Wodrow was convinced the witnesses had either been threatened or given promises.<sup>139</sup> However, if that were the case, it would not have been worth it. As Fountainhall records, one witness:

deponed they saw one called John Spreul with the rebels at Bothwel Bridge, but they knew not if the panel was he; and there being another of that same name present in the Court, (who confessed his being at Bothwel Bridge, and had taken the benefit of the Indemnity,) to whom all the tokens and descriptions they gave agreed more then to the panel; as the cullor of his horse, his having a cap and not a hat, with a black periwig etc.<sup>140</sup>

As such, “the assyse having considered the Depositions of the whole witneysses, led and adduced against John Spreul, *una voce* finds nothing proven of the crymes contained in the

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<sup>136</sup> Ibid., 771.

<sup>137</sup> Ibid., 772.

<sup>138</sup> Ibid., 773.

<sup>139</sup> Wodrow, *Sufferings*, Vol. 2, 165.

<sup>140</sup> Fountainhall, *Historical Notices*, Vol. 2, 297.

Lybell, which may make him guilty.”<sup>141</sup> While Spreul was found not guilty, Mackenzie was able to later procure a warrant from the Council “notwithstanding of any verdict of sentence returned or to be pronounced” to detain Spreul in prison until he be examined on several other points.<sup>142</sup> According to Fountainhall, Spreul was detained for the treasonable expressions he said before Council, such as refusing to call Bothwell Bridge a rebellion, and for refusing to call the assassination of the Archbishop of St Andrews a murder, which as he said “is no treason, tho it be a very perverse opinion.”<sup>143</sup>

As the Privy Council records show, the Lord Advocate “restricted the libel against John Sprewell to the being at field conventicles.” As such, Spreul was fined 9000 merks, and was taken prisoner at the Isle of Bass where he had to stay until the fine was paid.<sup>144</sup> In 1687, however, John Spreul sent a petition to Council, and as Wodrow noted, “favours were now shown to the prisoners” at this time, and certainly, James VII offered many remissions during his brief reign.<sup>145</sup> After nearly seven years in prison, Spreul was finally released. Wodrow recorded that he gave such a detailed account of Spreul’s trial because the “debates which fell in this Case....and the Pleadings of such noted Lawiers on both Hands, will afford no small Light to the Cases of Torture, etc.”<sup>146</sup> Indeed, Spreul’s case highlights the limitations of judicial torture, and the onus put on the prosecutors to show that they were following the law. Torture was always a dubious procedure, and this case truly highlights that. Should Spreul have been purged of all presumptions? Had the Council questioned Spreul on his activities at Bothwell Bridge? As this case shows, the Council was indeed able to get around the not guilty verdict, as Spreul remained

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<sup>141</sup> *State Trials*, Vol. 10, 791.

<sup>142</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 7, 131.

<sup>143</sup> Fountainhall, *Historical Notices*, Vol. 2, 297.

<sup>144</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 7, 159. His apothecary supplies were later taken and used to pay part of his fine: *Ibid.*, 395.

<sup>145</sup> Wodrow, *Sufferings*, Vol. 2, 612.

<sup>146</sup> *Ibid.*, 171.

imprisoned regardless. However, it is significant that torture was not what brought him there. The Lord Advocate had to show that the proper regulations and orders had been followed. As Lockhart noted, torture was the last resort. As much as torture went hand in hand with the arbitrary image of the Scottish Privy Council, there were rules that had to be followed, and debates that needed to be fought.

### **Cases of Illegal Torture**

The Privy Council insisted on following the rules and regulations regarding torture, and it was strict on punishing cases of illegal torture. As noted, Levack argues that Scotland's tortuous image was in fact due to the numerous cases regarding the illegal torturing of witches in local settings, rather than the legal proceedings against Covenanters.<sup>147</sup> Likewise, Stuart Macdonald notes that judicial torture was not a motivating factor for the increased intensity of witch-hunting during the mid-century.<sup>148</sup> As early as 1662, the Council proclaimed "being certainlie informed that a great many persons in several parts of the kingdom have bein apprehendit and hurried to prisons, pricked, tortured and abused, as being suspect guilty of the horrid cryme of witchcraft, and that by such persons as have no warrand or authoritie sua to doe." As such, they reiterated that suspects could only be "apprehendit by warrand and order ordaines them to be caryed to prison and procedit agains conform to the knoune lawes of the kingdom without any pricking or tortur bot by order, and that no other unlawfull meanes be used for bringing them to a confession."<sup>149</sup>

Interestingly, Mackenzie himself was a great sceptic of witchcraft trials. Working as a Justice Depute during the witch scare of 1661-2, Mackenzie's involvement in these trials greatly

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<sup>147</sup> Levack, "Judicial Torture," 197.

<sup>148</sup> Stuart Macdonald, "Torture and the Scottish Witch-Hunt: A Re-examination," *Scottish Tradition* 27, (2002): 96.

<sup>149</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 1, 198.

affected his beliefs. While he did not deny the existence of witches, he argued that most people who were tried were innocents. In his *Matters Criminal*, he remarked “those poor persons who are ordinarily accused of this Crime, are poor ignorant creatures, and oft-times Women who understand not the nature of what they are accused of.” He continued: “These poor creatures when they are defamed become so confounded with fear and the close Prison in which they are kept and so starved for want of meat and sleep (either of which wants is enough to disorder the strongest reason) that hardly wiser and more serious people than they would escape distraction.”<sup>150</sup> Along with his larger volume, Mackenzie also published in his *Pleadings* his defence of a supposed witch named Maevia. He cried “But to burn a poor ignorant Woman, who knew not that to the evil which she used, were to make Ignorance become witchcraft, and ourselves more criminal than the Person we would condemn.”<sup>151</sup> In his chapter, he also noted that “most of these poor creatures are tortur’d by their keepers” and that “this usage was the ground of all their confession.”<sup>152</sup> When he became Lord Advocate, Mackenzie dismissed cases against witchcraft in which torture had been applied without warrants.<sup>153</sup>

The Privy Council was true to its word and punished those who implemented illegal torture. For example, in 1678, it was brought to the Council’s attention that Katherine Liddell had been illegally pricked and denied sleep. The Council proclaimed, “the imprisoning and torturing of his Majesty’s good subjects and branding their good name with the epithet of witch are crimes severely punishable.” The Privy Council first declared Katherine Liddell innocent and stated that she was not to be pursued any further. The pricker was sent to the Tolbooth and the

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<sup>150</sup> Mackenzie, *Matters Criminals*, 86.

<sup>151</sup> Sir George Mackenzie, *The works of that eminent and learned lawyer, Sir George Mackenzie Of Rosehaugh, advocate to King Charles II. and King James VII. With Many Learned Treatises of His, never before Printed* (Edinburgh: 1716-22): *Pleadings*, 87.

<sup>152</sup> Mackenzie, *Matters Criminal*, 86-87.

<sup>153</sup> Levack, “Judicial Torture,” 197.

one who detained her was given a stern warning.<sup>154</sup> In 1677, Fountainhall witnessed a similar local case and noted “I remained very unclear and dissatisfied with this way of trial, as most fallacious.” He further commented “and there is no doubt but their methods of keeping them from sleep, and pricking, are a torture *in suo genere*, which no Judge can inflict but the Secret Councell and Criminall Lords.”<sup>155</sup> As Levack notes, illegal torturing of witches was a problem in local settings, highlighting the central government’s weakness at regulating the local justice systems. As Levack remarks, perhaps this weakness was due to the fact the government did not have a large enough central judicial establishment to go on circuit, while also dealing with the cases in the courts at Edinburgh.<sup>156</sup> Nonetheless, the rules were there, and the Privy Council expected people to follow them.<sup>157</sup>

Illegal torture of Covenanters, however, is a different matter, and one that is up for debate. As has been discussed, judicial torture was limited and heavily regulated, and cases of illegal torture were punishable offences. However, stories of local officials and soldiers implementing illegal torture appear in numerous Covenanter narratives, including the cruel act of having matches lit between the fingers. Interestingly, these cases do not appear in official government records, and when there are overlapping sources, the Privy Council documents tell quite a different story. While the absence of official records does not indicate that these events did not take place, it is important to understand how the image of illegal torture fits within the Covenanters’ narrative of persecution.

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<sup>154</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 6, 13.

<sup>155</sup> Fountainhall, *Historical Notices*, Vol. 1, 146.

<sup>156</sup> Levack, “Judicial Torture,” 198.

<sup>157</sup> For more information on Scottish witches, see: Julian Goodare, ed., *The Scottish Witch Hunt in Context*, (Manchester: University of Manchester Press, 2002); Brian P. Levack, *Witch-Hunting in Scotland: Law, Politics, and Religion*, (New York: Routledge, 2008); Ciaran Jones, “Spiritual Roles in Early Modern Scotland,” PhD Thesis, (University of Edinburgh, 2021).

Many of these stories unsurprisingly come from Wodrow. Following the Bothwell Rebellion, Wodrow recorded numerous stories of cruelty coming from John Graham of Claverhouse and his men, including these incidents relating to the horrific torture of two young men in Galloway in 1679:

[Claverhouse's men] apprehended a poor harmless Youth at his Work, and pressed him to declare who of his Neighbours were said to be at Bothwel. The young man either could not or would not inform them. And when he had stood out their Threatnings, they came to put him to the Torture. Boots and Thumbkins were not at Hand, and the Way they fell on was this. A small cord was tied about his Head, and both Ends of it were wreathed about the Butt of one of their Pistols, then they twisted it about the upper Part of his Head with the Pistol so hard, that the Flesh was cut around to the Skull. The Pain was inexpressible, and his Cries were heard at a great Distance.

They caught a young Herd Boy in the same Parish, and would have him to discover where his Master was, whom they alleged to have been at Bothwel. The Boy very probably could tell them nothing about his Master: However they took him, and fastned Two small Cords to his Thumbs, and by these hung him up to the Balk of the House. The Torment he endured was very great, yet they got nothing out of him. But the other Youth, last spoken of, died within a little after he came out of their Hands.<sup>158</sup>

These forms of appalling torture were undoubtedly illegal and without warrant. While Fountainhall states that the “pilliewinks” (ie. thumbkins) had been in use by colliers prior to the Privy Council's adoption of them as an official form of torture in the mid-1680s, it is questionable that Claverhouse and his men would be looking to thumbkins as a regular instrument of torture in 1679, however. Indeed, it must be remembered that the thumbkins' official implementation in 1684 was much commented upon by Fountainhall and the Privy Council at the time. Following the Bothwell Rebellion, Claverhouse and his men were ordered to remain in the west to track down the leaders of the rebellion and to round up rebels who were still carrying arms.<sup>159</sup>

Wodrow's horrific account could very well be true. Nonetheless, there are holes in his stories.

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<sup>158</sup> Wodrow, *Sufferings*, Vol. 2, 76.

<sup>159</sup> Magnus Linklater and Christian Hesketh, *For King and Conscience: John Graham of Claverhouse, Viscount Dundee (1648-1689)*, (London: Weidenfeld and Nicolson, 1989): 55.

While Wodrow was unquestionably biased toward the Covenanter's accounts, the nineteenth-century historian and lawyer Mark Napier was perhaps just as biased toward Claverhouse. Nonetheless, he brings up some relevant points regarding these specific stories. Napier notes that it is interesting that these poor youths are both nameless, especially coming from Wodrow who is often quite detailed. Napier also points out that the "tribunal of the Privy Council was open to every equitable complaint," and that it would be shocking that there would be "none to complain that Captain Graham of Claverhouse, no less responsible to the Privy Council,—whose presence alone could legalize the use of *torture*,— a power they never dared to delegate to individuals, —had hung up by their thumbs, to the rafters of their dwellings, young and harmless herd-boys...."<sup>160</sup> Napier has a point that the Privy Council did indeed punish those who were in the wrong, and that it is questionable that not even Fountainhall recorded these supposed instances of cruel punishment that Wodrow recollected. As Napier notes, the worst of these offences took place in Hamilton and Queensberry's jurisdictions, and there are many examples, particularly from Hamilton, where the local authorities intervened on their subject's behalf, regardless of if they were Covenanters or not.<sup>161</sup> Whether or not the events occurred like Wodrow described, however, Claverhouse certainly made his presence known while searching for the rebels, no doubt inciting terror along the way.<sup>162</sup>

Nonetheless, the question of torturing with firematches remains a bigger question. Appearing at the forefront of 1687's *A Hind Let Loose*, the frontispiece showed an image stating that people had been tortured by the "firematches." This method of torture is unclear, and once again does not appear in government records, and there is indeed very little discussion on the

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<sup>160</sup> Mark Napier, *Memorials and Letters Illustrative of the Life and Times of John Graham of Claverhouse, Viscount Dundee*, Vol. 2, (Edinburgh: Thomas G. Stevenson, 1862): 240-41.

<sup>161</sup> Napier, *Memorials and Letters*, 255.

<sup>162</sup> Linklater and Hesketh, *For King and Conscience*, 55.



subject at all.<sup>163</sup> Wodrow recorded an incident which occurred in 1682. Captain Inglis, one of Claverhouse's men, was in the Parish of Kilbride searching for those who had been at Drumclog and Bothwell, where he seized three men and interrogated them:

Whereupon he caused bind them and put firey Matches 'twixt their fingers, which put them to terrible Torment, and perfectly maimed their Hands. One of them in the Extremity of his Torment, confessed somewhat or other he knew, which, afterward upon his Reflection, well nigh distracted him. This Power of Torture lodged in every Commander of a Party of Soldiers, I am of Opinion can scarce be paralleled in any other Christian or civilized Nation.<sup>164</sup>

Did the soldiers have the power of torture that Wodrow believed they had? This is a questionable statement. As Napier declares, "no such power was lodged in any commander of soldiers; nay, not even in the hands of Queensberry or Hamilton." As he noted, if one did die under torture under the watch of the Privy Council, they were held accountable for murder.<sup>165</sup> Soldiers were indeed given extreme powers, especially during the "the Killing Time." As such, it is important to look at the specific warrant Claverhouse obtained from the King at this specific time.

In 1682, the King granted Claverhouse the commission of sheriff of the shire of Wigtown to suppress religious dissidents. In the letter, he called for Claverhouse and his deputies and substitutes "to impose and exact the fines conforme to the acts of Parliament, and to doe and perform everything requisite and necessary for putting the same to due and vigorous execution." Furthermore, the King gave Claverhouse:

our full power, authority and commission, as Justice in that part, to call before him any person not being heretour who shall be apprehended for being in the late rebellion and have not in due tyme taken the benefit of our gracious Act of Indemnitie, and for that effect to fence and hold courts, create clerks, serjeants... and to call assises and witnesses as oft as need bees.

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<sup>163</sup> Dr. Mark Jardine has noted in conversation that perhaps it is referring to matchlock rifles, not lit matches.

<sup>164</sup> Wodrow, *Sufferings*, Vol. 2, 244.

<sup>165</sup> Napier, *Memorials and Letters*, 256.

In those courts, he was to “put the saids persons to the knowledge and tryall of ane assise, and according as they shall be found innocent or guilty, that he cause justice be administrat upon them conforme to the laws and acts of Parliament of this realme.”<sup>166</sup> No where in this commission does it grant Claverhouse or his men the power to torture suspects. That is not to say that overly zealous soldiers were not violent in their quest to find information, but any action they did in that matter, was indeed illegal, and not officially sanctioned by the government. Interestingly, a similar report was recounted in an English newspaper from 1682. The Whiggish newspaper recorded how a captain of the dragoons ordered the rebels to confess by torture, whereupon “fired matches were put betwixt their fingers & they kept in that crewel torment near to the space of an hour, which five of them endured without any confession.”<sup>167</sup> As Harris notes, by 1682, the Council was increasingly bypassing local authorities and relying on the military to implement justice and ensure compliance.<sup>168</sup> As such, it is not surprising these legally suspect activities were taking place. However, as seen with the case of local Justices in witchcraft cases, these instances of illegal torturing highlight the problems with the decentralized and localized mode of justice seen throughout Scotland.

Wodrow reported that by 1685, suspects “were put to the now ordinary Torture of lighted Matches betwixt their Fingers.”<sup>169</sup> In late 1684, following James Renwick’s *Apologetical Declaration* which called for targeted assassinations, the Privy Council voted in the controversial measure that those who did not disown the declaration upon oath, “whither they have armes or not, should be immediately killed before two witnesses, and the persone or persones who are to

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<sup>166</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 7, 326-7.

<sup>167</sup> *True Protestant Mercury or Occurrences Forein and Domestic*, no. 153, (June 21-24, 1682): 1.

<sup>168</sup> Harris, *Restoration*, 362.

<sup>169</sup> Wodrow, *Sufferings*, Vol. 2, 458.

have instructions from the Council to that effect.”<sup>170</sup> It is easier to believe that soldiers could get away with illegal torture with matches during this environment of violence. However, as seen with Spreul’s legal torture, it is dubious that any of the information they obtained this way would hold up in court—if they proceeded that far, and from the evidence, that was not the intent. Nonetheless, it is still somewhat suspect that almost no record of this violence appears outside of Covenanter martyrologies. Nonetheless, the Privy Council could have very well turned a blind eye to these illegal methods.

Coinciding with the Earl of Argyll’s rebellion in Scotland in 1685, the Scottish government transported prisoners and suspect persons to Dunnottar Castle to prevent them from joining the rising, as discussed in detail in Chapter Five. Wodrow recorded the inhumane treatment of some of the prisoners there, including torturing by matches:

In three different Parts of the Room they were tortured. The said William, with Peter Russel,<sup>171</sup> and Alexander Dalglish in Kilbride, were laid upon their Backs upon a Form and their Hands bound down to the Foot of the Form, and a fiery match put ‘twixt every Finger of both Hands, and Six Soldiers waiting on by Turns, one after another, to blow the Match, and keep it equal with their Fingers. This was continued for Three Hours without Intermission, by the Governor’s Order, merely for the Fault of essaying to escape at the Hazard of their Lives. By this Treatment William Niven lost one of the Fingers of his left Hand. Alexander Dalglish died of the Pain and the Wounds he got, and an Inflammation rising thereupon; and several others had their Fingers burnt, and the very Bone turned to Ashes, and some, besides the last mentioned, died of this Torture. Some Accounts of those Barbarities were sent into Edinburgh, and Methods taken to lay them before the Council. By the Influence of some there, not altogether so merciless as others, Orders were sent to the Governor to treat the Prisoners with a little more Humanity, and to accommodate them with some better Rooms.<sup>172</sup>

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<sup>170</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 10, 33.

<sup>171</sup> Peter Russell was examined in Burntisland prior to being sent to Dunnottar, where he refused to swear the oath or own the King’s authority. William Niven was also examined, and as he also refused to swear the oath, he was sentenced to be banished. *RPCS*, 3<sup>rd</sup> series, Vol. 11, 289.

<sup>172</sup> Wodrow, *Sufferings*, Vol. 2, 560.

These men do indeed show up in the Privy Council records having been sent to Dunnottar.<sup>173</sup>

However, contrary to Wodrow's belief that Alexander Dalgleish died in Dunnottar from his torture wounds, he shows up in the Privy Council records having been brought back to Leith in August 1685 with the rest of the Dunnottar prisoners, where he was sentenced to be banished for refusing to swear the Oath of Allegiance, along with his fellow sufferers Peter Russell and William Niven.<sup>174</sup>

However, John Erskine of Carnock corroborated part of Wodrow's account, writing that he heard that twenty five people had attempted to escape Dunnottar, but fifteen had been retaken, and "some of those who were reapprehended being miserably tortured by having lighted matches put betwixt their fingers until they were disabled of their hands."<sup>175</sup> It is worth noting in both accounts that the prisoners who were tortured were ones who had attempted to escape. Rather than "torture" in the judicial and interrogative sense, this was perhaps seen by the garrison as a perverse form of punishment.<sup>176</sup> It is unlikely that the Council would condone this sort of behaviour. That is not to say that it would not be willing to turn a blind eye, however.

As Wodrow mentioned, "some accounts of those barbarities" happening in Dunnottar were sent to Edinburgh. The petition that Wodrow enclosed in his work can also be found in the Privy Council records, and it is worth looking at in detail. The petition recorded the poor and cramped living conditions of the prisoners, but interestingly, made no mention of torture or death by torture. The petition was presented by Grissell Cairnes and Alison Johnston on behalf of their husbands, William McMillan and Robert Young, as well as the rest of the prisoners in the Castle

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<sup>173</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 11, 292.

<sup>174</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 11, 154, 155.

<sup>175</sup> Erskine, *Journal*, 153-154.

<sup>176</sup> Indeed, we must remember that "torture" in the judicial sense was perceived by authorities as a method of interrogation, not punishment. See Jackson, "Judicial torture...", 78.

of Dunnottar. In the letter, they mentioned that their husbands, “who are under no sentence” are “in a most lamentable condition, there being one hundredth and ten of them together in one vault, where there is little or no daylight at all, and, contrare to all modestie, men and women promiscuously together.” Additionally, there is only “bread and drink as scarce any rational creature can live upon” with extraordinary rates for each pint of ale and dusty meal. The women noted “they are not only in a starveing condition but must inevitably incur a plague or other fearfull diseases without the Council provyd a speedy remedy.” The emphasis of the petition was on the horrid conditions the prisoners faced in the vaults. That is not to say that the women could have strategically not mentioned the illegal torturing taking place. However, the absence is noteworthy.<sup>177</sup>

Having received the petition in mid-June, in the midst of the Argyll Rebellion, the Privy Council declared they would think more about their husbands’ liberty but “in the meantime gives ordor and warrant to the deputy governour of the Castle of Dunnotar to suffer and permit meat and drink and other necessars to be brought in to the petitioners by their friends or servants at the ordinary rates, and to allow the said Mr. William McMillan and Robert Young a distinct rounge from the rest, and in regaird of the heat of the season of the year that all prisoners may be so accomodate without throng that their health be endangered as little as possible.”<sup>178</sup> Having received a number of petitions throughout the realm describing the horrid conditions of the early modern prison, there is no doubt that the Council knew what Dunnottar’s conditions were like. However, the Governor’s exceedingly harsh treatment of the prisoners could be another case of local authorities acting without the permission of the central government, such as the case of illegal torturing of witches, and the Council’s reaction does show that they expected the

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<sup>177</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 11, 70.

<sup>178</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 11, 70.

prisoners to be at least given liveable, or survivable conditions. Interestingly, both McMillan and Young appear in the Privy Council having taken the Oath of Allegiance on August 18 in Leith, and they were released on bond.<sup>179</sup>

The fact that the Covenanters placed firematches front and centre alongside the boot and thumbkins as a method of torture in their works highlights the ever-present dichotomy in governmental and Covenanter ideologies. The government never once owned firematches as one of their tools, and in his detailed *Vindication*, Sir George Mackenzie does not mention this specific grievance. Firematches do not appear in official sources. Just as the central authorities had trouble regulating local Justices and the illegal torturing of witches, it is certainly possible that the firematches fell into a similar category. Based on the number of Covenanter accounts and the specificity of the method of torture, there is no doubt that this type of brutal attack did indeed occur, although its frequency is perhaps questionable.

The government viewed torture as an interrogative tool, with specific laws and regulations. Even in questionable cases, the Council was quick to gain either royal or judicial approval and ensure they had a legal redress on their side should they be questioned. There is no doubt that these cases of torture by firematches were illegal, and it is unlikely that the Council would ever own them, or indeed classify them as cases of torture. For the Covenanters, torture was torture, and this legalistic definition would hold no sway. With both groups convinced they had law and justice on their side, with such different ideologies, it is unsurprising that their narratives would be so different.

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<sup>179</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 11, 155.

## Conclusion

Although the Claim of Right prohibited the use of torture without evidence in ordinary crimes after the Revolution, torture remained legal in Scotland until 1708 after Union.<sup>180</sup> Just as the Scottish Restoration officials found torture useful, so too did King William and his Councillors, with two torture warrants approved in 1689. Furthermore, in 1690, the Williamite government decided to torture Neville Payne, an Englishman with Jacobite ties, to much controversy.<sup>181</sup> Why then was torture so synonymous with the Restoration period? Perhaps the reason the Covenanters emphasized torture so often in their narratives was the fact that even amongst government officials, the process was controversial and highly debated. The Council members knew it was a dishonourable task, and that is why they attempted to make it as regulated and legally sound as possible. Did they succeed? As the various cases in this chapter show, it is questionable. Nonetheless, while there was certainly a growth in torture warrants throughout the Restoration, the number of cases was still limited—perhaps not enough to warrant torture being featured so prominently in post-Revolution narratives. While those who were tortured were interrogated due to perceived political necessities, arguably, the majority of cases proved to be political hindrances rather than wins. Torture became emblematic of Scottish government's profound image problem—one which its legalistic *raison d'être* failed to fix.

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<sup>180</sup> Following Union, torture became illegal in Scotland as part of “the Act for Improving the Union of the Two Kingdoms,” more commonly known as the “Treason Act” of 1708.

See: *Anno regni Annae Reginae Magna Britannia, Francia, & Hibernia, septimo. At the Parliament summoned to be held at Westminster, the eighth day of July, anno dom. 1708. In the seventh year of the reign of our sovereign lady Anne, by the Grace of God, of Great Britain, France, and Ireland, Queen, Defender of the Faith, &c. And by several Writs of Prorogation Begun and Holden on the Sixteenth Day of November, 1708. being the first session of this present Parliament*, (Edinburgh: Re-printed by the heirs and successors of Andrew Anderson, 1709): 185.

<sup>181</sup> For more information on Neville Payne's case, see Jackson's “Judicial Torture...”

## Chapter Four: Resetting, Harboursing, and Conversing with Rebels

*The Rigorous pershueing of this cryme of reset hes sleiped till  
this process: But reason of State may prevaill over all this,  
where under the pretence of acts of common humanitie, they  
support and keip life in the rebellion, so it cannot be  
extinguished without punishing all. And the crooked tree most  
be bended contrare to the other side, to bring it to a  
rectitude.*

John Lauder of Fountainhall, 1683<sup>1</sup>

### Introduction

In 1683, William Lawrie of Blackwood was indicted and accused of treason before the Court of the Justiciary for the crime of resetting rebels—meaning harboursing rebels. As Fountainhall remarked, the crime of resetting rebels “had been little noticed in Scotland as treason,” for the past century, yet these cases flourished in the 1680s.<sup>2</sup> At his trial, Lawrie was accused of conversing with known rebels who participated in the 1679 Bothwell Rebellion and allowing them to remain on his lands as tenants. However, as his defence argued, these supposed rebels were untried, and should they be found and subsequently proven innocent at a trial, Lawrie’s conviction would prove false. Yet the court came to a “strange sentence” according to Bishop Burnet, arguing that the “bare suspicion” that they were rebels made it treason to harbour the suspect persons. Burnet explained that the court decided “if any person was under such a suspicion, it was presumed that all the neighbourhood knew it.”<sup>3</sup> As such, Lawrie was found guilty, and as Fountainhall noted, “promiscuous converse [was] now like to prove a snare.”<sup>4</sup>

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<sup>1</sup> Sir John Lauder of Fountainhall, *Historical notices of Scottish affairs...* Vol. 1, (Edinburgh: T. Constable, printer to Her Majesty, 1848): 414.

<sup>2</sup> *Ibid.*, 413.

<sup>3</sup> Gilbert Burnet, *Bishop Burnet's History of His Own Time. From the Restoration of King Charles II. To the Settlement of King William and Queen Mary at the Revolution...* Vol. 1 (London: Printed for Thomas Ward in the Inner-Temple Lane: 1724): 525.

<sup>4</sup> Fountainhall, *Historical Notices*, Vol. 1, 413.



This episode underpins a greater ideological issue in late Restoration Scotland, highlighting the tensions at play with the government's oscillation between repression and toleration, and local and central governance. While resetting had legal precedence, Lawrie's case was controversial, removing the gap between the concealing of criminals and "naked converse" with neighbours. However, the government argued that those local conversations and connections "kept life" in rebellion, and as Fountainhall noted, "reason of State may prevail over all this." Indeed, as he explained the Council's policy, "the crooked tree must be bended contrare to the other side, to bring it to a rectitude." This was certainly the justification used by Restoration authorities.<sup>5</sup>

The 1680s saw several measures which targeted personal and local connections, in part to gain more control over local justice. With bonds making landlords culpable for their tenants' actions, husbands being liable for their wives' absences from church, to punishing mere conversations with potential rebels, it was policies such as these, which targeted local relations, that proved to be most effective in attempting to maintain conformity and wipe out dissent. These policies impacted people of all ranks, ages, and sexes. Neighbours turned on neighbours, and even familial relationships did not guarantee protection. As a post-revolution pamphlet stated, "Informing was a Trade more encouraged than in the Reign of *Tiberius*."<sup>6</sup> While the government's targeting of resettlers may have helped hinder the more militant aspects of Presbyterianism, because of the far-reaching implications of these types of policies, they proved to be unpopular in not only local, but elite circles, and contributed to the Restoration government's poor image.

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<sup>5</sup> Ibid., 414.

<sup>6</sup> *The Scottish Inquisition: A Short Account of the Proceedings of the Scottish Privy-Counsel, Justiciary Court and those Commissionated by them...* (London: 1689): 1.

Analyzing the government's clampdown of harbouring during the early and mid-1680s, this chapter will begin with an examination of the legal principles of resetting during this period, and how the authorities were able to either circumvent or create new definitions to what constituted a harbourer. Because Lawrie's case created such an important precedent, this chapter will investigate his trial in detail and the legal arguments presented there. Indeed, his trial helped set an example for how the circuit courts were to later proceed. This chapter will then discuss the 1684 circuit court in Glasgow, and the events surrounding John Porterfield of Duchal, who became known as "Melfort's Martyr." The cases of Lawrie and Duchal illuminate the authorities' consistent mistake—they chose the wrong men to be their examples. This chapter will then conclude by examining how the United Societies' *Apologetical Declaration* fits into this context.

### **Legal Definitions of Resetting**

As noted, resetting was the legal term for someone who harboured or sheltered a lawbreaker, and several statutes supported the pursuance of resetters. In his 1678 criminal treatise, the Lord Advocate Sir George Mackenzie of Rosehaugh explained "the third species of Treason is, the resetting any who hath committed Treason, or that supplies them in *redde*, help or counsel." Indeed, those who aided rebels could be punished "under pain of death" and were to be forefaulted.<sup>7</sup> During the Restoration, the majority of guilty resetters were fined. However, the potential for worse punishment remained. As one statute noted, "if any disobey, to inforce .... against notour rebels ... when they be required and commanded, they shall be punished by the King as favourers of such Rebels."<sup>8</sup> However, as Mackenzie pointed out, it could be potentially

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<sup>7</sup> Sir George Mackenzie of Rosehaugh, *The laws and customes of Scotland, in matters criminal : Wherein is to be seen how the civil law, and the laws and customs of other nations do agree with, and supply ours*, (Edinburgh: 1678): 42-43.

<sup>8</sup> *Ibid.*, 43.

difficult to define who a “notorious” rebel was. Traditionally, the identity of rebels was shared with the localities through Letters of Intercommuning. These Letters were an “obsolete writ” that was revived in the 1670s, as offenders often refused to appear in Council or Court when called. These Letters published the names of those who refused to appear, outlawing them, and banning anyone from corresponding, aiding, providing food to them, etc.<sup>9</sup> However, Letters were not always sent out, especially after large events like the Bothwell Rebellion. Intercommuning itself was a crime—meaning that one had been in touch with a rebel. As such, accusations of intercommuning often went hand in hand with resetting.

By 1686, the government had ironed out these potential kinks through various precedents set during the previous few years. Writing that year, Mackenzie explained that there were two types of rebels: those who were “Rebells *de jure*” or “Rebells *de facto*.” Mackenzie’s experiences in resetting cases during the 1680s no doubt played a role in his new interpretation of this distinction. He noted that rebels who were denounced and registered were “Rebells *de jure*” for even if someone did not know them, “they ought to know them” as there would have been a denunciation within the shire where they lived. Furthermore, everyone should know those rebels *de jure* who had been forefaulted in Parliament “since all are oblig’d to know what is in Acts of Parliament.” Conversely, Mackenzie explained that rebels *de facto* were those who someone *knew* to be rebels or traitors, even if they were not denounced. As such, in these cases, Mackenzie noted that “Letters of Intercommoning were not necessary to infer nottor Rebellion.”<sup>10</sup>

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<sup>9</sup> Malcolm Laing, *The history of Scotland : from the union of the crowns on the accession of James VI to the throne of England : to the union of the kingdoms in the reign of Queen Anne : with a preliminary dissertation of the participation of Mary, Queen of Scots, in the murder of Darnley*, Vol. 4, (London: A. Constable and Co., 1819): 73-74.

<sup>10</sup> Sir George Mackenzie of Rosehaugh, *Observations on the acts of Parliament, made by King James the First, King James the Second, King James the Third, King James the Fourth, King James the Fifth, Queen Mary, King James the Sixth, King Charles the First, King Charles the Second...*, (Edinburgh: 1686): 14-15.

Furthermore, the definition for what constituted resetting expanded during this period. In December 1682, Fountainhall recorded a “strange” case at the Criminal Court, where the judges found that merely conversing with one who was known by others as a rebel could be treason. Fountainhall pointed out that this decision “indangered many innocent people” especially in the western shires “where such promiscuous converse has been frequent, and near inevitable.” Indeed, he pointed out that one could be a notorious rebel in one part of the country, but not in another part. However, he speculated that two of the judges had “an eye to make a preparative in their poor men’s case, to reach Blaikwood, and many others.” To mitigate some worries, the judges declared that accidental encounters in inns or on the road could not be considered resetting. Rather, resetting was “deliberate concealing them from the law, or assisting and maintaining them with meat, drink, and harbory, and keeping them as domesticks or servants” without informing the Justices.<sup>11</sup> Nonetheless, this definition could be far reaching.

### **Pursuing Resetters Before 1683**

Rather little has been written about resetting and harbouring in Scotland during the Restoration.<sup>12</sup> Interestingly, however, there was often a gendered dynamic at play, with women frequently being associated with harbouring rebels, which was perhaps why resetting was not always as actively pursued by officials.<sup>13</sup> Indeed, in her discussion on early seventeenth-century “illicit support networks,” Alice Glaze notes that women “were especially vulnerable” to being

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<sup>11</sup> Fountainhall, *Historical Notices*, Vol. 1, 386-387.

<sup>12</sup> Interestingly, Protestant Ireland had similarly severe policies as well. For instance, Sean Connolly notes that those who were found guilty of harbouring unlicensed priests or Catholic teachers would be found guilty of felony, which was subject to hanging. See S. J. Connolly, *Religion, Law, and Power: The Making of Protestant Ireland, 1660-1760*, (Oxford: Clarendon Press, 1992): 283.

<sup>13</sup> The gendered dynamic to harbouring rebels has also been discussed in the English context, with women harbouring priests and recusants. For instance, see Marie B. Rowlands, “Harbourers and Housekeepers: Catholic women in England 1570-1720,” *Catholic Communities in Protestant States: Britain and the Netherlands, 1570-1720*, Benjamin Kaplan, Bob Moore, Henk van Nierop and Judith Pollmann, eds., (Manchester: Manchester University Press, 2009): 200-215; Patrick McGrath and Joy Rowe, “The Elizabethan Priests: Their Harbourers and Helpers,” *British Catholic History* 19:3 (May 1989): 209-233.

accused of harbouring rebels, explaining how gendered roles such as providing food and drink “placed them in a risky grey area between hospitality and harbouring.” As Glaze describes, “harbouring was in itself an illicit form of neighbourly hospitality,” but “community surveillance from respectable neighbours was an impressive social force in the town that helped the kirk session prosecute harbourers.” While looking at these support networks within the context of the earlier kirk sessions, Glaze shows how neighbours often “proved very willing to monitor each other for the maintenance of the godly community,” and the Kirk relied heavily on them.<sup>14</sup> Certainly, the Restoration government also relied on local networks to help it pursue resettlers, with its use of bonds to ensure obedience, as well as the increasing severity of punishments associated with the crime.

Resetting was also often associated with Covenanting women. As will be seen in some of the depositions analyzed later in this chapter, women were very often accused, and indeed guilty, of resetting and conversing with rebels during the Restoration. Alan James McSeveney’s work on dissenting Presbyterian women also illustrates the connections between gender and harbouring. Examining the social backgrounds of various women, McSeveney shows how socially diverse women took part in various forms of Presbyterian dissent, including harbouring. However, he points out that women accused of resetting in the 1660s and 1670s were generally from the middle to lower orders, and widows were often involved. McSeveney argues that while women were often dealt with severely at first, the Council’s willingness to execute sentences against them dwindled, and women were more likely to receive reprieves from their full sentences.<sup>15</sup> Certainly, as Glaze notes, the typical punishment for harbouring in the early

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<sup>14</sup> Alice Glaze, “Sanctioned and Illicit Support Networks at the Margins of a Scottish Town in the Early Seventeenth Century,” *Social History* 54:1 (2020): 40.

<sup>15</sup> Alan James McSeveney, “Non-Conforming Presbyterian Women in Restoration Scotland,” PhD Thesis, (University of Strathclyde, 2006): 137-138.

seventeenth century was a rebuking from the Kirk, and a fine, with the threat for further punishment should a repeat offence occur.<sup>16</sup> Generally, the Privy Council followed suit and usually just fined resettlers.

Indeed, two examples from 1681 prior to the growth of resetting cases to come show the typical response to resetting. In July 1681, Adam Campbell was charged with resetting two rebels who had been at Bothwell Bridge; he provided a dwelling house for one rebel and his family on his land, and he hired another as his gardener. Campbell swore upon oath that he did not know the two men had been rebels or declared fugitives. As such, the Lords cleared him, and he was put on a bond of caution.<sup>17</sup> Considering the precedent that would be set at Lawrie's trial, Adam Campbell got off rather easily. Another example from November 1681 comes from Sir Patrick Hepburne of Blackcastle, who was charged with lodging and entertaining a "notorious ringleader of the traitors and rebels" for several days and nights, "thereby encouraging him to persist in his rebellion." Hepburne petitioned the Council and confessed to the crime. The Lords proceeded to fine him two hundred pounds sterling, and he had to remain prisoner until his payment was made or caution found.<sup>18</sup>

The Council's treatment of Dame Katherine Rigg, Lady Cavers, bolsters McSeveney's argument about the Council's gendered response to resetting. Lady Cavers was not only charged with attending conventicles, but also with hosting conventicles on her lands and in her home. While employing one rebel as her gardener, she also "constantly entertained and harboured the said rebels and vagrant preachers." Being called to the bar, the Lord Advocate declared that he restricted the crime to "ane arbitrary punishment, and declared that any confession to be made by

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<sup>16</sup> Glaze, "Sanctioned and Illicit Support Networks," 38.

<sup>17</sup> *Register of the Privy Council of Scotland (RPCS)* 3<sup>rd</sup> series, Vol. 7, (Edinburgh: HM General Register House, 1915): 150-151.

<sup>18</sup> *Ibid.*, 240-241.

the defender should not be any ground of a criminall process against her.” Considering she committed treason, this could be seen as a rather lenient act. The Council decided since “the crymes libelled were of a very high nature” they would fine her nine thousand marks, and she would remain in prison until she paid the fine and found caution for her future good behaviour. They added, if she found a cautioner, she could stay out of prison until the next Council session. While she indeed had a cautioner, Lady Cavers would not pay the fine, nor give a bond for her good behaviour. As such, she was ordered to go to Stirling Castle as prisoner—while not ideal, it was nicer than the Tolbooth.<sup>19</sup> She was eventually granted a pass to visit Wells in England on account of her health.<sup>20</sup> Her social status and gender no doubt spurred on the Council’s treatment of her, but she was dealt with rather leniently, especially as she was not penitent.

### **Targeting Local Justice**

As discussed in Chapter One, the Scottish criminal justice system was decentralized, and the Crown had to rely on the localities to keep the peace. However, prior to Lawrie’s case, the Scottish Council and Parliament had begun to implement a number of policies to target local relations. For instance, throughout the 1670s, heritors and burgh magistrates were required to obtain bonds from their tenants and dependents. For example, in 1674, the Council issued a proclamation requiring heritors [landowners] to exact bonds ensuring their tenants would not attend conventicles. As the proclamation stated, “it would prove ane effectuall meanes for suppressing of these disorders if heretours, masters of families and magistratts of burghes royeall should imploy that interest, power and authority which they have over their tenents, servants and

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<sup>19</sup> Ibid., 583-584.

<sup>20</sup> *RPCS* 3<sup>rd</sup> series, Vol. 8, 195.

inhabitants in procureing their obedience to the law.”<sup>21</sup> This proclamation was renewed in both 1677 and 1678.<sup>22</sup>

As Karin Bowie discusses, these bonds, or bands, came from the medieval precedent from which lords and their followers would establish mutual obligations and alliances. However, oaths and bonds became a more common feature during the Restoration, with the government using them as both a political and practical means of indoctrination and control.<sup>23</sup> Nevertheless, as she notes, landlords felt much pressure from these perceivably unfair obligations placed upon them. Indeed, in 1678, while discussing the bond in London with the King and several Scottish members present, the Duke of Monmouth complained that many believed it to be against the law that a master should be compelled to “bind for his tennetts.” Additionally, he pointed out that it was a hard thing for a master when he has “many off thes sort in his grounds to putt them out” for he then loses their rents. The Scottish Councillors present, including the Earl of Moray and the Lord Advocate, affirmed that the bond was not against the law and that it was “an necessitie for doing something for the countries peac.” Indeed, they concluded that “ther land sould rather ly waiste then that itt sould be a nurserie for rebels; bott iff the masters wold doe ther deutie itt wer easie to have deutifull tennentts, for the tennentts depend upon the master.”<sup>24</sup>

In 1681, the Scottish Parliament passed the “Act for secureing the peace of the countrie.” The Act specified that a list of names of tenants or servants who were found guilty of attending field conventicles or resetting be sent to their masters and landlords. The landlords were then obliged to either pay the delinquent’s fine and ensure the rebel’s future good behaviour, or they

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<sup>21</sup> *RPCS* 3<sup>rd</sup> series, Vol. 4, 198.

<sup>22</sup> *RPCS* 3<sup>rd</sup> series, Vol. 5, 196; *A proclamation, for offering the band obliging heretors and masters for their tenents and servants, in some shires*, (Edinburgh: 1678).

<sup>23</sup> Karin Bowie, *Public Opinion in Early Modern Scotland, c. 1560-1707*, (Cambridge: Cambridge University Press, 2020), 89-90.

<sup>24</sup> *Ibid.*, 126; Osmund Airy, ed., *The Lauderdale Papers*, Vol. III, (Westminster: 1884-5): 103-104.



were to remove them out of their house and lands.<sup>25</sup> The intention seeming to be that no longer could landlords and masters plead ignorance for maintaining known rebels. Furthermore, it was implied that they themselves could be considered resettlers for housing these men if they did not pay the fine and sign the bond. These bonds, however, could only do so much to maintain order throughout the shires.

Tim Harris points out that by 1682, the Council had increasingly begun to bypass civil authorities in favour of the military due to the numerous complaints about the remissness of sheriffs and local magistrates in punishing rebels.<sup>26</sup> Indeed, following the United Societies' *Lanark Declaration* in January 1682, the Lord Advocate complained of the local magistrates, and letters were written for "the neglect of their duty in not raising the town and opposing these villains" and "at the least for not pursuing after them and detecting and discovering them."<sup>27</sup> Likewise in November 1682, the Council complained of the magistrates in Linlithgow and their "remissness in discharge of their duties" by allowing rebels from the Bothwell rebellion "to live in quiet and to possess their own rents, lands and moveables, and are harboured, reset and encouraged by several persons in the countrey without being brought to justice."<sup>28</sup> As such, they gave a direct commission to the Earl of Linlithgow to pursue these rebels.

Similarly in October 1683, Will Paterson wrote to the Duke of Hamilton, explaining how a Conventicle had taken place in the Duke's shire, during which time the United Societies leader James Renwick had baptized around twenty children. As the meeting was held on the Laird of Dundas' land, a citation was issued against him and the various shire heads. Paterson informed

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<sup>25</sup> *The Records of the Parliaments of Scotland to 1707 (RPS)*, K.M. Brown et al, eds., (St Andrews, 2007-2021), 1681/7/26.

<sup>26</sup> Tim Harris, *Restoration: Charles II and His Kingdoms, 1660-1685*, (London: Allen Lane, 2005): 362.

<sup>27</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 7, 312.

<sup>28</sup> *Ibid.*, 572. For a further discussion on these methods, see Harris, *Restoration*, 359-374.

Hamilton that the Council had also issued a citation against the Duke and his deputed. He justified this to Hamilton, explaining the proclamation which required all sheriffs and magistrates “upon information of any such disorders” to search the country and “apprehend such persons” and make it known to the Justices.<sup>29</sup> Unsurprisingly, this news aggravated Hamilton, and Tarbat had to write to him defending the Council’s actions. Tarbat apologized that Hamilton did not take the news well. However, “a Conventicle was kept” and “there is a course prescribed by law.” Should Hamilton have done his duty, then there would be no worry. However, Tarbat pointed out it was “necessar to raise sumonds on this head,” so that all the “nation might know what is expected of them.”<sup>30</sup> Hamilton appeared in the Council the following month and defended himself explaining he did not hear about the meeting until fourteen days later, so “could doe no diligence.” The Council acquitted him, but they fined the heritors in the parish where the Conventicle was held.<sup>31</sup>

It is significant that the Council increasingly began to pursue ressetters around the same time that the circuit courts were appointed, and military commanders were given more judicial powers. Rather than relying on local magistrates, who had proven to be inefficient, the Council not only began to rely on the military, but on Scottish subjects themselves. By focusing on ressetters, the Council reminded Scottish men and women of their duty in maintaining order. If the local magistrates were not doing their duty, the government could rely on local neighbours to provide surveillance. Lawrie’s trial would serve to create the ideal precedent for this policy.

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<sup>29</sup> National Records of Scotland (NRS), GD406/1/9414; summaries of these letters can also be found in HMC, *Eleventh Report on The Manuscripts of the Duke of Hamilton*, K.T. Hamilton, (London: Printed for Her Majesty’s Stationary Office, 1887): 165-166.

<sup>30</sup> NRS, GD406/1/8249.

<sup>31</sup> Fountainhall, *Historical Notices*, Vol. 2, 460.

### William Lawrie of Blackwood's Trial

In November 1682, William Lawrie of Blackwood was first brought before the Council, having been accused of harbouring, resetting and conversing with rebels who had been at Bothwell Bridge. According to Fountainhall, Lawrie was the “late Chamberlain to the Marquis of Douglas, and repute a bad instrument betuen him and his Lady.”<sup>32</sup> In the letters raised in Council, it was pointed out that “it be the duty of all his Majesties good and loyall subjects to detect, discover, apprehend and present to justice any guilty of treason and rebellion who hae been their tennents and doe haunt upon their ground,” and that “the harbouring and resetting such persons and the furnishing them with meat, drink, house or harbour, and the allowing them to labour, manure and occupy their lands as if they were free persons, is severely punishable.” Yet, Lawrie, who had previously benefited from the King’s indemnity, was accused of resetting, supplying, corresponding and intercommuning with known rebels “as if they had been free leidges.” Lawrie argued that he was not a heritor, but rather, he was only an administrator for the Laird of Blackwood, his grandson. Additionally, he argued that he had not lived on the Blackwood lands for the past two years, residing in Edinburgh instead. The Council denied Lawrie’s argument that he was only an administrator on behalf of his grandchild and did not know the area. As they pointed out, he had taken rents from all throughout “the vicinity of the place” and was “presumed to know all the tennents.” While the Privy Council acknowledged that “legal diligence wes not done against” the rebels Lawrie had associated with—i.e., they were never tried or formally declared fugitives— they argued it was a known fact that they were rebels. After some further debate, the Lords agreed that “in regard the crymes lybelled are so

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<sup>32</sup> Fountainhall, *Historical Notices*, Vol. 1, 380.

high a nature and the probation so full,” they did not “think it fit and propper for them to judge therin,” and they referred his case to the Criminal Court.<sup>33</sup>

According to the anti-Episcopal pamphlet written in 1693 by George Ridpath—under the pseudonym Will Laik<sup>34</sup>—Lawrie was pursued because the Marquess of Queensberry was envious of Lawrie’s employer, the Marquess of Douglas, and wanted revenge for Douglas “refusing to take the Cross-bar out of his Arms.” He also wanted to “[swallow] Blackwood’s Estate.”<sup>35</sup> As such, according to Laik, the Lord Advocate and Queensberry “did on purpose procure an Act to make Converse with such as they were pleased to call Rebels, or Convers with any that had Converse with them, HIGH TREASON.” According to the author, since the Marquess’ estate was in the west, many of his tenants would have likely been part of the Bothwell Rebellion, so Mackenzie and Queensberry were to have thought that “Blackwood must unavoidably converse with some of them upon the Marquiss’s account, and so of necessity be catch’d.” Nonetheless, they “found it a hard matter however to prove any such thing upon him.” Laik proceeded to discuss Mackenzie’s and the Council’s “implements at work” to obtain a verdict against Lawrie.<sup>36</sup> There is no contemporary evidence to support this narrative of events. Neither Fountainhall, nor Bishop Burnet’s accounts make any mention of a Douglas feud. Indeed, as Andrew Lang remarks, “that they procured such an Act merely to avenge a heraldic

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<sup>33</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 7, 593-594.

<sup>34</sup> G. A. Aitkin and John R. Young, “Ridpath, George (d. 1726), journalist and pamphleteer,” *Oxford Dictionary of National Biography*, (23 Sep. 2004).

<sup>35</sup> Will Laik, *A Continuation of the Answer to the Scots Presbyterian Eloquence Dedicated to the Parliament of Scotland : Being a Vindication of the Acts of that August Assembly from the Clamours and Aspersions of the Scots Prelatical Clergy in their Libels Printed in England : With a Confutation of Dr. M-'s Postscript in Answer to the Former ... : As also Reflections on Sir Geo. Mackenzy's Defence of Charles the Second's Government is Scotland ... Together with the Acts of the Scots General Assembly and Present Parliament Compared with the Acts of Parliament in the Two Last Reigns Against the Presbyterians*, (London: 1693): 39, 40.

<sup>36</sup> *Ibid.*

feud with the Marquis on the steward of the Marquis is hardly a probable statement!”<sup>37</sup>

Furthermore, as Lawrie himself argued, he was not a heritor, so there was no estate for Queensberry to covet.<sup>38</sup> Laik was writing for a specific reason, however. Responding to Mackenzie’s own post-Revolution *Vindication*, he remarked “as for the Morality and Vertue of the surviving grand Patron of the Faction, and their lately deceased invincible Champion, Sir George Mackenzy, this following Instance will set it in its true Light.”<sup>39</sup> His purpose was to discredit the Episcopal writers within the Williamite context. As he argued, “we see by this Instance the Vertue, Religion and Morality of the grand Pillars of our Scots Prelacy, which our Pamphleteers do so much boast of.” The accuracy of his account is perhaps not what is significant, but rather the fact that Lawrie’s case could be used as an example of “the barbarous Prelatical Persecution” of the period almost a decade after the event.<sup>40</sup> Rather than the specific event itself, it was the image and consequences of Lawrie’s trial that were more significant.

In describing Lawrie’s trial, Robert Wodrow wrote that the process against him “hath been hinted at as illegal, and very hard.”<sup>41</sup> Like the Earl of Argyll’s trial, Lawrie’s trial was controversial in that the charges against him were based on assumptions and inferences. As the indictment against him alleged, Lawrie by aiding rebels had “given them too much encouragement to persist and continue in their disorderlie and rebellious course.” He was accused of receiving Bothwell rebels as tenants on the Blackwood lands, as well as aiding, assisting, countenancing, harbouring, maintaining, keeping company with, meeting, drinking, as

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<sup>37</sup> Andrew Lang, *Sir George Mackenzie, king's advocate, of Rosehaugh: his life and times 1636 -1691*, (London, New York: Longmans, Green, 1909), 244.

<sup>38</sup> *Ibid.*, 246.

<sup>39</sup> Laik, *The Scots Presbyterian Eloquence*, 39.

<sup>40</sup> *Ibid.*, 40.

<sup>41</sup> Robert Wodrow, *The history of the sufferings of the Church of Scotland, from the Restauration to the Revolution: collected from the publick records, ...*, Vol. 2, (Edinburgh: 1721): 293.

well as paying and feeding them.<sup>42</sup> The following indictments went into the specifics of who he assisted and how. These specifics would cause much debate and multiple Interlocutors—where the judges deemed the relevancy of the alleged crimes. Following the reading of the indictments, Sir Patrick Hume started the defence explaining that it was well known that Lawrie had always been a peaceable and loyal subject and “in no ways inclined to faction or seditions, to countenance or encourage rebels.” Hume then declared that the first indictment against Lawrie being in such “generall termes” was not relevant. He argued that unless the indictment listed the specific persons that Lawrie aided, who “were first found guilty of being in rebellion,” then it could not be insisted upon. Furthermore, Hume pointed out that Letters of Intercommuning were never sent out listing the specific people whom Lawrie was said to have conversed with and reset. If letters were not produced for these men, how was one to know they were rebels?

Lawrie’s defence council also brought up the fact that following the 1679 rebellion, there was a wide-reaching indemnity, which the majority of Bothwell rebels had benefited from. To qualify for it, however, the rebels had to have taken a bond by a subscribed time. The defence argued that one “might rationallie presume, that if the said persons had been in the rebellion that they would have taken the benefit of the Act of Indemnitie.” However, if they did not take the bond, it was not Lawrie’s fault that he had assumed that they did, considering they were not imprisoned.<sup>43</sup> Certainly, this was a point that Fountainhall remarked upon. He argued, “that pardon coming so suddenly after Bothuel-bridge rebellion, it took away the terror and apprehension of it, so that scarce any stood in aw to take home these persons for tennents or servants who had been at Bothuel-bridge, without examining more whither they had tane the

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<sup>42</sup> *A Complete Collection of State Trials and Proceedings for High Treason and Other Crimes and Misdemeanors from the Earliest Period to the Year 1783* (State Trials), Vol. 9, T. B. Howell et al, eds., (London: Printed by T. C. Hansard, 1816): 1028

<sup>43</sup> *State Trials*, Vol. 9, 1032

bond, which was the condition of that Indemnity.”<sup>44</sup> By this process, the government was placing the onus on civilians to police their fellow neighbours, tenants and family members, and ascertain whether a person had taken the bond or not.

As the prosecution argued, however, if the crime was an open rebellion and committed in the same country and shire, these names “might been easilie known by any who had done the least diligence.”<sup>45</sup> The Lord Advocate also argued against the claim that one could presume most had taken the bond. He argued that Lawrie “should have abstained till he had seen the said persons cleared, which was a thing very easie for him to have done...when he and others lived in the same shire with them.” Mackenzie argued that aiding rebels and keeping them as tenants was dangerous “nor could there be any securitie for the government if such lawlessness were allowed.” By telling authorities where rebels were, it was “reallie necessary for preserving the kingdom against rebellion.”<sup>46</sup> Once again, maintaining order and necessity of state were what mattered the most to the government.

Sir George Lockhart was the next to reply on behalf of the defence. His main point rested on the fact that it was essential that the “rebells were first convict” in order for Lawrie to have truly been guilty of resetting.<sup>47</sup> As Lockhart pointed out, this principle was integral, because one “might be condemned as accessor or accomplice of the alledged cryme of another, who when he came to be tried, might be acquit, of the same cryme.”<sup>48</sup> As Lockhart once again pointed out, there were no records that the people Lawrie conversed with were ever pursued or found guilty.<sup>49</sup> Since there were no Letters of Intercommuning issued, he argued it was absurd that “simple

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<sup>44</sup> Fountainhall, *Historical Notices*, Vol. 1, 412-413.

<sup>45</sup> *State Trials*, Vol. 9, 1033.

<sup>46</sup> *Ibid.*, 1034.

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.*, 1035.

<sup>49</sup> *Ibid.*

conversing” would make one guilty of a criminal’s crime. With regard to the bond, Lockhart argued “lawe presumes another to be justlie ignorant” and Lawrie had no reason to distrust those who returned to their dwelling places to “live peaceablie, publiclie, converse with all men, to receave no trouble, nor be under no prosecution from his majestie’s officers and soldiers.”<sup>50</sup>

In the Lord Advocate’s response, he argued “certainly all such as are declared enemies to the country and denounced for treason are in the construction of the law actuall rebels... whether they be in actuall armes or lurking.” Once again, the government was worried about maintaining its authority. Responding to Lockhart’s critique that the rebels may be later acquitted, Mackenzie noted “if this were true denunciations for treason would signifie nothing.”<sup>51</sup> Always worried about future rebellions, Mackenzie noted “all such as are declared traitors, most still be looked upon as such as are ready upon all occasions to take up arms, and want only the power, not the will.”<sup>52</sup> As Fountainhall wrote, the Judges “being overawed” found the libel relevant to infer treason in the Interlocutor. As such, the case was to be brought before an assize—trial by jury—for the Lord Advocate to prove that Lawrie had indeed reset rebels.<sup>53</sup> However, prior to the Probation, there were multiple Interlocutors and further debate.

Lawrie returned to the Criminal Court a week later, where his defence council continued to insist upon the fact that Lawrie was not a heritor, nor did he reside on the Blackwood estates. As such, he could not be “supposed to know who were repute rebels in that country.” Hume also argued that the persons libelled “were so far from being notourliek nowen or repute rebels” and they openly conversed with all their neighbours in the country and “went about their affairs, and were never challenged no troubled by any of his majestie’s forces.” He argued that they were not

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<sup>50</sup> Ibid., 1036.

<sup>51</sup> Ibid., 1038.

<sup>52</sup> Ibid.

<sup>53</sup> Fountainhall, *Historical Notices*, Vol. 1, 410; *State Trials*, Vol. 9, 1039-1040.



notorious where they lived, and most definitely not in Edinburgh where Lawrie lived, which was “sufficient to purge any cryme in the defender by his recepting, aiding or conversing” with them.<sup>54</sup> Mackenzie responded to this claim arguing that “the opinion of some of their neighbours, especially in a shyre so guiltie, which was of itself the heat and fomentor of the warr, their opinion is not to be considered, for it shewes their guilt, but not Blackwood’s innocence.” Indeed, he argued the King’s officers “not doeing diligence cannot excuse a master keeping his own tenants on his ground.” The implication was that neighbours ought to know better, as masters and people “constantlie living upon the place” should know “evil principled men enough.”<sup>55</sup>

The ensuing debate was indeed of a “high nature,” with both the prosecutor and defence breaking down statutes and precedents. Lockhart responded to Mackenzie’s accusation that Lawrie had not done due diligence in removing the men from his lands, noting that “neither heritor nor much less tutor” was not “in a capacitie to sease and make men prisoners, which is the duty of publict judges and magistrates.” Lockhart also pointed out, that these men had lived in the area for years, conversed publicly and openly at the kirk, and in the market, even “with his majestie’s officers and soldiers” and were never troubled.<sup>56</sup> While the previous Interlocutor was maintained, there continued to be further debate, with some of the alleged rebels being removed from Lawrie’s indictment.<sup>57</sup> Following all these debates, the Probation was finally held in front of the assize, and the witnesses were brought in.<sup>58</sup> With the witness testimony confirming that Lawrie had indeed spoken with the accused men, and the Interlocutor confirming that the crime

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<sup>54</sup> *State Trials*, Vol. 9, 1041-1042.

<sup>55</sup> *Ibid.*, 1043.

<sup>56</sup> *Ibid.*, 1044.

<sup>57</sup> *Ibid.*, 1045.

<sup>58</sup> *Ibid.*, 1049.

was treason, there was not much else the assize could do. The following day, the assize found Willian Lawrie of Blackwood guilty of harbouring, and conversing with rebels, and he was condemned to be executed and forefaulted.<sup>59</sup>

As Fountainhall noted, Lawrie was given twenty days to apply for a pardon from the King.<sup>60</sup> Lawrie petitioned the Council noting he “did occasion...ignorantly to fall under the censure of some lawes relating to the harbouring and conversing with rebels.” The Privy Council reprieved his execution until April and allowed him to be moved from the Tolbooth to the Laigh Council House, which was less of a “close prison.”<sup>61</sup> Following a petition from the Marquess of Douglas, who said he needed Lawrie to help him clear his accounts, Lawrie’s sentence was once again reprieved until November.<sup>62</sup> He was also allowed to have “free prison in the rooms upstairs” and his friends were allowed to have access to him following this petition.<sup>63</sup> As usual, the Council seemed less interested in punishing Lawrie the person, as their multiple reprieves show that they were not in a rush to execute him. He was useful as an example and precedent. Indeed, having previously written in August with no answer, the Council wrote to the Secretaries of State in England again in January 1684, requesting that they intercede with the King for a remission for Lawrie’s life to which the King agreed.<sup>64</sup> While the Council granted him liberty until May 1685 to clear the Marquess of Douglas’ accounts, he was to return to

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<sup>59</sup> Ibid., 1054. Interestingly, Fountainhall points out that Sir George Lockhart failed to argue on the 126 Act Parliament 12, James 6, “where only denuntiation at the mercat crosse where parties dwells, put the liedges *in mala fide* to reset, but not a denuntiation at Edinburgh; which was the case of Blaikwood’s rebels.” Fountainhall thought this was “a most important and material point.” See *Historical Notices*, Vol. 1, 412. In February 1686, the King passed Lawrie’s forefaulted liferent to the Marquess of Douglas. See HMC, *Report on the Manuscripts of His Grace the Duke of Buccleuch and Queensbury, Preserved at Drumlanrig Castle* (HMC Drumlanrig), Vol. 2, (London: Printed for H.M. Stationery Off., by Eyre and Spottiswoode, 1897-1903): 98.

<sup>60</sup> Fountainhall, *Historical Notices*, Vol. 1, 412.

<sup>61</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 8, 60-61. The King wrote the Council in February telling them how “very well pleased” he was with their conduct in the affair, and “particularly your ordering our Advocate to pursue him criminally.” He wished to give them his thanks. See *RPCS*, 3<sup>rd</sup> series, Vol. 8, 68.

<sup>62</sup> *RPCS* 3<sup>rd</sup> series, Vol. 8, 102.

<sup>63</sup> Ibid., 166-167.

<sup>64</sup> Ibid., 334, 361-362.

confinement after that date.<sup>65</sup> While his life was spared, he remained in prison until after the Revolution.<sup>66</sup>

Lawrie's trial was controversial because of the precedent it set. As Fountainhall wrote, this judgement "was of most dangerous consequence" and "frighted and allarumed many." As he argued, the decision was "a very political design... thinking this will prove the most effectuall ways to banish all thesse Rebels out of Scotland: for men being thus frightened to converse with them, they nather get harbory nor reset." He foresaw that this policy "may be of great advantage for the future peace and tranquility of our country," but if "Blaikwood's Interlocutor be designed to be made a leading practique against all concerned, the King may get forfaulted lands enough."<sup>67</sup> It is unclear why the Council decided to use Lawrie as its precedent. As Wodrow wrote, "the Reader cannot but perceive the Iniquity and Severity of this Procedure, and that nothing is chargeable upon this Gentleman, but Converse with People whom all the Country conversed and openly dealt with."<sup>68</sup> The fact that the Council reprieved Lawrie after the Marquess of Douglas' petition makes Laik's proposition that Queensberry held a grudge against him unlikely, however.

While Wodrow claimed the process against Lawrie was illegal, and Burnet noted it was a "strange sentence," as Lang points out, there was a "good deal" of evidence that Lawrie had indeed conversed with rebels.<sup>69</sup> While the courts behaved legally, Lawrie's verdict was perhaps more questionable than the controversial case of the Earl of Argyll's in some ways. Part of the problem lay in how the statutes were to be interpreted, and how one was to define a known rebel.

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<sup>65</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 8, 368-369.

<sup>66</sup> Alexander Du Toit, "Lawrie, William (fl. 1645–1699), estate steward," *Oxford Dictionary of National Biography*, (23 Sep. 2004).

<sup>67</sup> Fountainhall, *Historical Notices*, Vol. 1, 411, 412.

<sup>68</sup> Wodrow, *Sufferings*, Vol. 2, 295.

<sup>69</sup> Lang, *Sir George Mackenzie of Rosehaugh*, 246.

As noted, Mackenzie himself wrote in 1678 that it was up for debate what a notorious rebel meant. However, by 1686, he had come to clearly delineate these meanings following his involvement in cases like this. Because resetting was not a common procedure, there were few precedents for the judges to follow. According to Burnet, “all the lawyers were of opinion, that nothing could be made of this prosecution,” and Fountainhall noted that “this case of resetting Rebels is much agitat by the Doctors.” As Fountainhall pointed out, resetting was generally considered more than “a single act” and “ane abstracting [rebels] from justice and a concealling; which is a step and degree farder then naked converse.”<sup>70</sup> Lawrie had indeed spoken with rebels on more than one occasion throughout the years, but could that be considered an obstruction of justice? According to the judges, yes. As Fountainhall had discussed, the problem lay in the fact that so many men from the western shires had taken part in the 1679 rebellion. How was one to know whether or not they had taken the bond? The precedent set by the case meant it was enough for one to suspect that his neighbour was a rebel. As Burnet declared, “the bare suspicion made it treason to harbour the person suspected, whether he was guilty or not” and thus, it was supposed a whole neighbourhood should know whether one was suspicious. Burnet argued that Lawrie’s case was “constructive treason” in that it “went upon so many unreasonable suppositions,” which indeed it did. Nevertheless, the Council now had a new tool in which to impose order.<sup>71</sup>

While Lawrie’s case provided the Council with another tool, his case also led to more resistance. As Burnet noted, Lawrie’s case “put all the Gentry in a great fright: many knew they were as obnoxious as *Blakewood* was: and none could have the comfort to know that he was

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<sup>70</sup> Burnet, *Bishop Burnet's History of His Own Time*, Vol. 1, 525; Fountainhall, *Historical Notices*, Vol. 1, 413.

<sup>71</sup> Burnet, *Bishop Burnet's History of His Own Time*, Vol. 1, 525-526.

safe.” As such, the Presbyterian party planned to revive an old Carolina plantation scheme.<sup>72</sup> As Lang notes, this scheme “by an easy transition” became the Rye House conspiracy.<sup>73</sup> In Commissary Monroe’s deposition, he noted he initially met Baillie of Jarviswood and others in London to discuss the Carolina scheme. While there, Jarviswood told him he had come to London “to shun the hazard that might follow upon the sentence ag<sup>t</sup> Blackwood which he beleiued no man in the west countrey could escape.” Other men who would become involved in the Rye House conspiracy told Holme they also came to London “to shun the hazard they found themselues under by sentence against Blackwood.” Indeed, William Carstares and others met at Jarviswood’s chambers “wher ther was much discourse of the danger from Blackwoods sentence,” and “they exprest ther apprehensions that the countrey might run together to save themselues.” The meetings would eventually evolve into something more, with discussions on how to provide Argyll with the money to secure arms to send to Scotland and so forth.<sup>74</sup>

While Lawrie’s case helped spur on this plot, the subsequent discovery of the planned Anglo-Scottish insurrection caused the government to increase its pursuance of resetting. Certainly, these men’s fear of being indicted for resetting was realistic. As Fountainhall noted, Claverhouse had proposed that they cite Sir James Dalrymple of Stair for treason in resetting intercommuned ministers in his house. However, the Earl of Aberdeen opposed this measure.<sup>75</sup> Interestingly, Robert Baillie of Jarviswood was initially imprisoned on a libel for resetting rebels.<sup>76</sup> While at his trial the Lord Advocate restricted the libel to conspiracy and rebellion,

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<sup>72</sup> Burnet, *Bishop Burnet's History of His Own Time*, Vol. 1, 526.

<sup>73</sup> Lang, *Sir George Mackenzie* of Rosehaugh, 247. For more details on this scheme, see Richard L. Greaves, *Secrets of the Kingdom: British Radicals from the Popish Plot to the Revolution of 1688-1689*, (Stanford: Stanford University Press, 1992), 163-164.

<sup>74</sup> *The acts of the Parliament of Scotland*, Vol. 8, Archibald Anderson, Cosmo Innes, Thomas Thomson, eds., (London: Printed by command of His Majesty, 1820): Appendix 33, 34.

<sup>75</sup> John Lauder of Fountainhall, *Historical Observes of Memorable Occurrents in Church and State, from October 1680 to April 1686*, (Edinburgh: T. Constable, printer to Her Majesty, 1840): 129-130.

<sup>76</sup> Fountainhall, *Historical Notices*, Vol. 2, 555.

Mackenzie insisted that Jerviswood's converse and correspondence with ministers and others within the Kingdom was still relevant.<sup>77</sup> As he pointed out at in his speech at the Inquest, "knowing himself to be guiltie of treason by Blackwood's case," it was probable that "a man that's guiltie of one poynt of treason will commit another, so when a man is desperat as to his lyfe and fortune he is capable of any thing."<sup>78</sup> With the discovery of this plot, the government could indeed make the case that conversing with dissidents kept life in rebellion.

### **The Search for Resetters and Enterkin Pass**

As Burnet wrote, after the sentence against Lawrie, the "Court resolved to prosecute that farther."<sup>79</sup> In April 1683, the King wrote the Council, and subsequently a proclamation was published. In the proclamation, the King wrote that he was "now fully perswaded that it is neither difference in religion nor tendernes of conscience (as is pretended) but meerly principles of disloyalty and disaffection to us and our government that moves them." As such, he ordered several measures to suppress dissidence. Significantly, he pointed out "wee are informed that several of our subjects are so disloyall to us and inhumane to their countrey as to harbour, reset and enterain the disturbers of its peace, open and declared notour rebells and traitours." As such, he declared all such people to be found guilty of resetting, and they were to be denounced at the horn for rebellion and pursued by the justice courts to be punished as traitors. However, Lawrie's trial had influenced this proclamation, for the King stated that those who reset rebels "albeit neither forfaulted as traitours, nor denounced and registrat at the horne for rebellion" were still guilty to be punished for treason. Nevertheless, the King granted some leeway, "least any of our subjects may have fallen unhappily in that mistake because of the great number of

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<sup>77</sup> *State Trials*, Vol. 10, 648, 667.

<sup>78</sup> NRS, JC39/44/7.

<sup>79</sup> Burnet, *Bishop Burnet's History of His Own Time*, Vol. 1, 526.

rebells that for several years have haunted and frequented some parts of our western and southern shires.” As such, while the Advocate was given warrant to cite before him any such persons, they could differentiate conversations that “occasioned by chance and accident.”<sup>80</sup>

As Fountainhall explained, reseters were now classed into “three ranks and classes of delinquents”: those who willingly conversed with forefaulted and denounced rebels; those who conversed with them by chance; and those who conversed with “notourly known” rebels who had not yet been denounced nor intercommuned. While the first class of offenders were to be brought before the Justice Court, the other two classes were to be referred to the Privy Council.<sup>81</sup> Indeed, the circuit courts that were called in 1683 were in part called to target those who were guilty of resetting. As discussed in Chapter Two, an indemnity tied to the Test was granted for those who appeared in the courts.<sup>82</sup> While the government used the circuit courts to further the Test Oath’s reach to promote performative and public obedience, the circuit courts also played an important role in suppressing dissent by bringing central justice to local settings. It is not surprising that the circuit courts were to target resetting. With the precedents set in Lawrie’s trial, rebels had fewer places to hide.

As briefly noted in Chapter Two, heritors from the circuit courts were to be brought to Edinburgh to be tried or receive a remission. On November 12, 1683, a number of those heritors were finally brought to the Criminal Court. Interestingly, they were charged with harbouring and resetting. While the men requested that they be put on trial, the Lord Advocate was still not ready to pursue them. As Fountainhall noted, the Lords deliberated a long time if the reseters

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<sup>80</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 8, 120-123

<sup>81</sup> Fountainhall, *Historical Observes*, 94.

<sup>82</sup> *A proclamation allowing a further dyet to the Commons for taking the Test, and indemnifying the heretors guilty of harbouring, or resetting of rebels who have taken the Test at the late Justice-Aires, as to their lives*, (Edinburgh: 1683).

should be sent to prison again or if they should renew their caution. They decided to put them on a new caution to give the Lord Advocate time to prepare his case. As Fountainhall wrote, “this was thought hard, to keip gentlemen from tyme to tyme under ane uncertainty, and suspition of treason, without bringing them to a tryall.” Certainly, Queensberry and Aberdeen disagreed on this case.<sup>83</sup>

The reason for the delay in the trials was that many witnesses had failed to appear in Edinburgh. As such, on November 29, 1683, the Privy Council appointed several Commissioners within the shires of Roxburgh, Selkirk, Peebles and Berwick, and ordered them to interrogate the witnesses. They were to provide signed depositions and send them back to the Lord Advocate, as they wanted to bring the defendants “to a speedy tryall.”<sup>84</sup> The local sheriffs proceeded with this commission, finishing it by January. While some of the depositions provided little information, there were witnesses who indeed swore they saw some resetting taking place. Amongst the heritors who were indicted was one Sir John Riddell of Riddell, who had been indicted for resetting several men.<sup>85</sup> Riddell would eventually receive a remission from King James VII in 1687.<sup>86</sup> Nonetheless, the “Whig” fears that Lawrie’s case put all gentlemen in danger seemed to have some validity.

The following April 1684, the Privy Council issued another order for the prosecution of resetters in the western shires. As they noted, they had heard accounts of several rebels who had not appeared before the 1683 circuit courts who had been harboured, reset and “intertained by several disaffected persones” which gave “great encouragement of them to persist in ther

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<sup>83</sup> Fountainhall, *Historical Notices*, Vol. 2, 461.

<sup>84</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 8, 289-290.

<sup>85</sup> See NRS, JC39/26 for depositions sent to Edinburgh in response to this commission, including those for Riddell’s case.

<sup>86</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 13, xix.



rebellious courses.” As such, they gave a commission to several sheriffs, magistrates, and officers in the in the army to “informe themselves of the persones guilty of reset of these rebells,” and to process them. They were to search for and apprehend the guilty parties and imprison them. The heretors were to be then tried and judged by the Justices.<sup>87</sup> The following month, another proclamation was published against denounced fugitives from the Bothwell Rebellion, as well as against those who reset rebels. As the proclamation declared, the government had provided ample opportunities for them “to be legally cited before Our Justices, to the effect they might be tryed, and notwithstanding that all fair and legal opportunities of defending their own innocence, had been offered them,” yet they have refused to appear at the courts, so the government was now resolved to prosecute them. As such, they required all the King’s subjects “not only not to comfort, or harbour the said persons, but likewise to do their utmost endeavours to apprehend them, as far as in their power, and to give notice” to the Sheriffs and magistrates, and so forth. The published proclamation proceeded to provide a list of the said fugitives from each shire.<sup>88</sup> This document made it clear. It was the duty of a subject to report on suspect behaviour, and there was no excuse for not knowing if one’s neighbour was a rebel or not. Everyone was suspect.

It must be remembered that the King and Councillors were not acting without reason. Just that June, some two hundred rebels had been seen in arms in the western shires. As the King wrote in his proclamation published on July 22, “it is undeniable that for many years great numbers of armed rebells have most insolently and rebelliously gathered together, and have not only marched up and doune our westrne shyres of Cliddisdale and other shyres besouth the river

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<sup>87</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 8, 504.

<sup>88</sup> *A Proclamation Anent Persons Denounced [Sic] Fugitives, before the Justices, for their being in the Late Rebellion 1679. and for Resetting of Rebels; with the Lists of the Said Fugitives*, (Edinburgh: 1684): 1.

of Forth, but have assaulted and murdered severalls belonging to our forces, burnt our lawes and excommunicated our sacred persone.” The proclamation cited the two hundred rebels that had marched openly throughout the shires in June, “threatning the orthodox clergy and murdering our souldiers,” and are now “being certanely and undeniably harboured and resett by the inhabitants of these shyres.”<sup>89</sup> The United Societies were undoubtedly violent and a threat to the establishment. However, they by no means represented the majority of those with Presbyterian sympathies. The issue was that the authorities often conflated all “rebels” together. For them, any such meeting, be it a Conventicle or otherwise, could be seen as a “nursery of rebellion.” The King wrote that apprehending rebels and resettters was to “best secure our royall government and our innocent and peaceable subjects.” As the authorities argued, these laws were not only in place to protect the establishment, but also the country’s subjects. The King requested that the sheriffs apprehend the rebels and resettters by August 15. Otherwise, “if they faille we will, for preserveing the publict peace and our good subjects, take other effectuall courses as in our royall prudence wee shall find most fit for preventing rebellions and secureing the publict peace.”<sup>90</sup> As Fountainhall noted, and as will be discussed below, the “Counsell Justiciary-circuits” that took place in the fall were the king’s next course.<sup>91</sup>

Certainly, the government’s fears seemed justified. In July, a group of seventy armed rebels attacked a small force of government troops escorting prisoners on the way to Edinburgh, killing a few soldiers in the process.<sup>92</sup> As such, the summer months of 1684 would have been anxiety filled for many Scottish subjects, with hundreds of people interrogated to determine who

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<sup>89</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 9, 55-56.

<sup>90</sup> *Ibid.*, 46.

<sup>91</sup> Fountainhall, *Historical Notices*, Vol. 2, 544.

<sup>92</sup> For more information, see Mark Jardine, “The United Societies: Militancy, Martyrdom and the Presbyterian Movement in Late-Restoration Scotland, 1679-1688,” PhD Thesis, (University of Edinburgh, 2009): 75.

had reset the rebels, and who had been involved in the attack at Enterkin Pass. In response to the attack at Enterkin, orders were sent from the Committee of Secret Affairs to take “the exactest tryle possible for discovering the resetters and conversars with the rebells who appeared laityly at Crafoordmoor.”<sup>93</sup> People of all ages, marital status and sex were questioned. Through these measures, the government was able to infiltrate communities and homes, as husbands deponed against wives and so forth.

The argument that should a man be suspected of rebellion, the whole neighbourhood would know it seemingly proved to have merit during these processes. For instance, in Tinwald parish, multiple men and women deponed that they had seen the fugitive Peter Cowden “resorten in and about his wyfs hous.”<sup>94</sup> While the majority of the parish only named his wife as a resetter, a couple of people admitted to speaking with him. One John Thomson said he told Cowdan “that a man of his condition should not appear in publict and noe more,” while an Andrew Glover in Amisfield admitted that Cowdan came to his house and had a drink the previous May Day. Middle-aged and married men, single young men, widows, and wives, and even an eighty-four-year-old man were questioned about Cowdan.<sup>95</sup> No one was excluded from these interrogations. As Wodrow recounted, all parishioners were called in one by one, and the curate of the parish sat with the Commissioners, informing them of the characters of those who were present, and whether or not they were absenters from the church.<sup>96</sup>

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<sup>93</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 9, 218.

<sup>94</sup> *Ibid.*, 216-217.

<sup>95</sup> Interestingly, Cowdan’s name would show up again in the 1684 circuit court. John Corbett and his son were banished for resetting rebels. However, they petitioned pleading their ignorance of the fact that the people they associated with, including Cowdan, were rebels. They wrote, “if they are guilty, it arises from mere ignorance” and the malice of their neighbour who had accused them. Interestingly, this argument worked, and the Commissioner in charge, Queensberry, remitted the sentence of banishment and put them at liberty upon their finding a caution to live orderly, and for taking the Test. See: *RPCS*, 3<sup>rd</sup> series, Vol. 10, 307.

<sup>96</sup> Wodrow, *Sufferings*, Vol. 2, 449.

In searching for the rebels who had been part of the Crawford Moor skirmish, the Council questioned entire households, testing the bonds between them. For instance, Jon Hoatsone swore he knew none of the rebels involved. However, “to all uther interrogators” he gave “indirect answers,” so he was imprisoned. His wife, Agnes Menzies, was then questioned. She confirmed they did not know those specific rebels, but she admitted to having two Bothwell rebels in her house. A servant was then accordingly questioned as well.<sup>97</sup> Just from these three depositions, it is possible to see the strains put on household relations, as well as neighbourly connections. Indeed, Jon Bradfoot informed the Justices that he knew Hoatsone was resetter.<sup>98</sup> While Jon Hoatsone and his wife may not have been directly involved in the Enterkin skirmish, Jon Forsyth deponed that their children had been seen carrying a wounded person from the skirmish to be treated.<sup>99</sup> Familial relationships were also tested, as James McCubine deponed that his rebel brother was frequently reset by his wife, and Johne Henneing noted that his sister also frequently reset rebels in her home.<sup>100</sup> Edward Menzies a servant to Margaret Frizell, reported on his mistress, acknowledging that she had reset her son “several tymes” as well as other rebels.<sup>101</sup>

The anxiety induced by these interrogations is clear from people’s responses. As discussed previously, oaths were a serious matter for committed Christians. Certainly, as Wodrow pointed out, “no Man who feared an Oath could swear his own Freedom from conversing with such” as “All the Countrey was involved necessarily in Converse with such as had been at *Bothwel*.”<sup>102</sup> Accidental encounters could easily occur. For instance, Robert Hastie deponed that he was not a resetter nor did he know the rebels, but he admitted to once having

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<sup>97</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 9, 219-220.

<sup>98</sup> *Ibid.*, 221.

<sup>99</sup> *Ibid.*, 220-221.

<sup>100</sup> *Ibid.*, 242-243.

<sup>101</sup> *Ibid.*, 260.

<sup>102</sup> Wodrow, *Sufferings*, Vol. 2, 405.

Robert Smith come to his house for an hour. However, he stated he learned after the fact that the man was outlawed. Furthermore, he was not present when the man was there, implying that it was his wife who hosted him.<sup>103</sup> Additionally, neighbours turned on neighbours, regardless of resetting. For instance, Harbet Tuynholme told on his neighbour John Wilson who had been absent from the ordinances, and on Jon Stewart who had not baptized his children within the prescribed time limit.<sup>104</sup>

Many also claimed in their depositions that the rebels had threatened them not to divulge any information about them. For instance, Malcolm Bennoch explained that while he was herding, he saw four armed rebels pass, who threatened him not to say anything.<sup>105</sup> Likewise, William Hairstaines described how while he was watching his sheep, there “bein ane great rain” he went to his mother’s barn, to seek shelter. He saw three armed rebels enter it, and he was pressed to remain two hours in the barn with them. He swore that he and his mother provided “no enterteanment” for them, and the only reason he had not informed against them at the time was that they had threatened to take his life should he talk.<sup>106</sup> While some of these claims of threats might have been exaggerated by some, they do remind us that the Presbyterians were not one monolithic group, nor were all villagers Presbyterians. Certainly, these depositions also remind us of the breadth of Presbyterian opinion. Just because one conversed with a Bothwell rebel, that did not mean he or she was a supporter of the United Societies. The government may have been harsh, and its treatment of some of the former Bothwell rebels was certainly unmerited, but the United Societies members were indeed willing to get violent.

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<sup>103</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 9, 222.

<sup>104</sup> *Ibid.*, 299.

<sup>105</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 9, 227.

<sup>106</sup> *Ibid.*, 229.

The depositions taken that summer also clearly show the significant role of women in harbouring. Many women either confessed or were reported on by their neighbours. Indeed, the unmarried Margaret Litle from Walltrees initially refused to depone and was threatened with imprisonment. However, she then admitted to resetting multiple rebels and “that she knous them to be lykuays ressett by her neighbours.”<sup>107</sup> Interesting, Janett Milligane deponed that some rebels had once forcibly entered her house, and she gave them milk after being threatened. She then learned from another woman, a wife to a known rebel, that “the rebells had a particular designe to have bein in her hous to the effect they might be as guyltie as ther neighbours.”<sup>108</sup> Were the rebels intentionally making the entire neighbourhood guilty? Certainly, if one was guilty, he or she would be less likely to report on their neighbours in fear that the finger would be pointed on them in return. There is no doubt that local neighbourhoods were feeling the pressure from both the governmental forces as well as from Presbyterian dissidents.

By going after resetters, the Scottish government made everyone a suspect, and the local Justices were also aware of this fact, and worried about their own liability. Indeed, Sir Thomas Kirkpatrick of Closeburn, one of the Commissioners of the shire in charge of these interrogations, wrote to the Marquess of Queensberry, noting that Claverhouse had apprehended five or six of the rebels “near (if not) upon my grounds.” As he stated, “how far your Lordship or the Councill may construct of me in this I knou not, bot, by God, before whom I must ansuer, if any of my peopell have had correspondence with these rebells its unkouen to me, for no man in Scotland haith taken more paines than I have to maik my tenants regular and to purge the countrie of rebellion so farr as lay in my weak pouer.” As he pointed out, he found many of Queensberry’s own people guilty of resetting rebels. He conceded stating “how farr your

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<sup>107</sup> Ibid., 232.

<sup>108</sup> Ibid., 237.

Lordships commands have been neglected in this, both your Lordship and the whole countrie knous, bot, to be in short, their haith been too mutch of reset and converse with rebells in this shyre.”<sup>109</sup> Hundreds of men and women of varying ages had been questioned. While most deponed negative, those guilty of “leist resett or converse” were put under “sufficient band.”<sup>110</sup> In mid-August three of the rebels from Enterkin were tried in Edinburgh and sentenced to be executed that same day.<sup>111</sup>

### **The 1684 Commissioner Circuits and the Case of “Melfort’s Martyr”**

In August 1684, amidst the throes of interrogating the Rye House plotters, the King wrote the Privy Council concerning his dissatisfaction with the state of the western and southern shires, noting they continue in “rebellious convocations, seditions, conventicles, and other disorderly practises.” However, “before mor severe remedies be tried” he delegated senior members of the Council to various districts to prosecute the rebels “for secureing our royall power and safety of our people.” To the turbulent shires of Lanarkshire, Renfrewshire and Dumbarton, he sent the Duke of Hamilton, John Drummond—the future Earl of Melfort— and Sir James Foulis. He granted each delegation full power to act not only as Justices, but “as if a *quorum* of yow, our Council, were present.”<sup>112</sup> Each delegation was to hold courts and call in all who were guilty of conventicles, irregularities, and withdrawing from public ordinances. The king sent detailed instructions with twenty-nine points attached, requiring the Commissioners to disarm heretors who have refused to swear the Test, to seize and dispose of unauthorized preachers, to punish “according to law” all persons guilty of ecclesiastical disorders and so forth. Additionally, the Commissioners were to search for all promoters of the late rebellion, intercommuners and

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<sup>109</sup> Ibid., 288.

<sup>110</sup> Ibid., 289.

<sup>111</sup> Fountainhall, *Historical Notices*, Vol. 2, 551.

<sup>112</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 9, 154-155.

resetters. The shires were put under strict orders, with anyone travelling between them having to carry a pass. Furthermore, the Commissioners were to give the Oath of Allegiance to those persons whom they suspected, and if refused, they were to be banished, male or female.<sup>113</sup> The implications to those living in these disaffected shires were that everyone was watching.

A month after the King's letter, Letters of Intercommuning were issued against James Renwick, the militant Covenanter who would write the *Apologetical Declaration* a mere two months later. A proclamation was also published ordering none to reset or harbour him.<sup>114</sup> It must be remembered that these Commissioner courts were ordered within a specific context. The Council was in the midst of interrogating Spence and Carstares for their involvement in the Rye House Plot. Renwick had escaped the government forces the previous month, and the danger of the United Societies loomed large. The Scottish government was desperate to prevent another rebellion. However, the Presbyterian Wodrow would recall how "those ample Powers" given to these Commissioners showed "what an arbitrary and absolute Government *Scotland* was now under."<sup>115</sup> Certainly, as Wodrow pointed out, these courts were different because they had "both a Council and Justiciary Power."<sup>116</sup> However, interestingly, the Secret Committee sent out separate instructions to the Commissioners, which mitigated some severity.

As the Committee wrote, "it is not expected that multitudes should be punished, but that only such as are notoriously guilty or obstinate in their bad principles." Furthermore, they wrote that "it is not expected you should call bodies of people together for inquiry," but that they should take information from the fugitive rolls and "well affected persons" who knew the area. As such, they required the Commissioners to create lists of criminals, rebels, fugitives and

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<sup>113</sup> Ibid., 157-159.

<sup>114</sup> Ibid., 177; Fountainhall, *Historical Notices*, Vol. 2, 554.

<sup>115</sup> Wodrow, *Sufferings*, Vol. 2, 403.

<sup>116</sup> Ibid., 404.



resetters before leaving for Edinburgh, and they were to class them according to their crimes, and take notes on witnesses and so forth.<sup>117</sup> Of the “malicious and obstinat commons,” they were only to go after the “worst and most dangerous of them,” but they were not to exceed in transporting three hundred men. However, their wives and children were allowed to go with them should they have the means to send them. Significantly, the Committee wrote that the Commissioners were to proceed against widows, liferentrixs (i.e. a female who had property for life), or tenants who were found guilty of resetting “in the same manner as yow doe against men for the like crimes.” However, should they take the oaths, they were to restrict them to “ane arbitrary punishment” rather than proceed to court. While the King’s instructions stated masters were to be fined for their guilty servants, the Committee clarified that only masters who did not produce the guilty servants were to be fined. Heritors who were guilty of resetting, however, were only to be proceeded against until the pronouncing of a sentence, and the Commissioners needed to consult with the Councillors in Edinburgh first.<sup>118</sup> Once again, the Committee reiterated that capital punishments were to be restricted to arbitrary penalties. As Fountainhall noted, these “Lieutenancies” were in essence circuit courts, “but with lesse expence to the King and country.”<sup>119</sup>

As the King had written, the purpose of these courts was to suppress dissidence once and for all through prosecutions, rather than more severe measures. Indeed, the Lord Advocate provided some advice to the Lords telling them it would “be more advisable” to fine the defendants rather than take their Escheat—their property and goods. He reminded the Lords to avoid procedures that would make locals not fear the dangers of resetting.<sup>120</sup> For indeed, the

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<sup>117</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 9, 345.

<sup>118</sup> *Ibid.*, 346.

<sup>119</sup> Fountainhall, *Historical Notices*, Vol. 2, 553.

<sup>120</sup> Wodrow, *Sufferings*, Vol. 2, 404.

Committee noted that one of the main goals for the Commissioners was to “represent the evils of rebellion, the resetting and intercommuneing with rebels and of disobedience to the lawes.” They were to let the shires know that the King was “resolved to pluck up those evils by the roots.” It was expected that the inhabitants themselves were to let it be known where the “haunts and resets” of the rebels were, for not only the King and government’s safety, but also “the preservation of his people.”<sup>121</sup> Interestingly, Mackenzie also directed the Commissioners to proceed against all Sheriffs and deputies who were corrupt and dishonest, and that they “should punish them exemplarily to the Terror of others, and to the end that People may see that you are come there to protect honest Men, as well as to punish Knaves.”<sup>122</sup> As much as the law was used as justification to enforce obedience during the Restoration, it must be remembered that for men like Mackenzie, the law was also firmly in place to protect people and their liberties. While there were some harsh punishments at these Courts, with some being banished, or brought to Edinburgh for further trial, most Commissioners appeared to follow the Advocate’s advice, and most defendants were either fined or released once they took the Test.<sup>123</sup>

Not all the Commissioners were happy with the instructions and limitations instated by the Secret Committee. The ever-violent Melfort in particular had much to say complaining that the instructions were “ill uorded.” Writing from Glasgow to Queensberry, he noted that there were many female resetters in his shires, and that he was resolved “to fall upon and to take them wheruer ue can find them, and to send them auay to the plantations.” He complained that the instructions said they were not to exceed in sending three hundred men to the plantations. However, they said nothing of women in the instructions which he wrote “I interpret it that ue

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<sup>121</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 9, 347.

<sup>122</sup> Wodrow, *Sufferings*, Vol. 2, 404.

<sup>123</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 10, 237-239; 240-250; 257-260.

might send as many woemen, as ue pleased, for woemen, by another article, uer to be used as men [were] in the same fault.”<sup>124</sup> As noted, the role of women in resetting was significant, and the government was not blind to that. Melfort wrote to Queensberry that he was “resolved to free the country of fugitivs’ wives” but he knew “all most be done according to lau.” As such, he said it must come from their personal guilt or from them refusing oaths. However, he was resolved to “ridd our selves of them.”<sup>125</sup> As Wodrow wrote, while women were not made to swear the Test, they were forced to swear that they would not cohabit or converse with their husbands or children should they be declared rebels, “under the Pains of Law.”<sup>126</sup> The Lords ordered a warrant for all the wives of fugitive and forefaulted men to brought before them and have someone take caution for them. If they refused or did not attend, they would be imprisoned.<sup>127</sup> According to Wodrow, “the Prisons and Guard Houses were now every where crammed full” from those who refused to swear such oaths.<sup>128</sup> It must be pointed out, however, that different shires had different successes. For instance, the Kirkcudbrightshire Commissioners received many oaths in comparison to Lanarkshire.<sup>129</sup>

Not all Commissioners agreed with Melfort, however. Certainly, he and Hamilton had many quarrels throughout their commission. However, Melfort’s methods won out in Lanarkshire. As he wrote, “the country uer never so allarmed becaus they kno not uhat is to be done, and therefor we are resolved only to tell the hazard that they lye under, and not to propose any accommodatiione at first, but rather insinuate it, and lett the proposition come from them.”<sup>130</sup> Melfort was perhaps one of the worst Privy Councillors in promoting its public

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<sup>124</sup> HMC Drumlanrig, Vol. 2, 176.

<sup>125</sup> Ibid., 180.

<sup>126</sup> Wodrow, *Sufferings*, Vol. 2, 406.

<sup>127</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 10, 236.

<sup>128</sup> Wodrow, *Sufferings*, Vol. 2, 406.

<sup>129</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 10, 240.

<sup>130</sup> HMC Drumlanrig, Vol. 2, 175.

relations. While the government had seen first-hand how its oscillating toleration had proven to be inefficient, Melfort's severe approaches—whilst also hiding the Council's provisions— could only instill fear and promote the image of the arbitrary inquisitorial Council. Nonetheless, Melfort captured the spirit of these courts, highlighting the deep fear and uncertainty that the Scottish government's actions had instilled in all levels of society. Heritor or tenant, man or woman, no one was safe from the government's prying policies. Indeed, the depositions taken from the various Commissioners highlight the range of people affected by the government's search for resettlers.

Lanarkshire was one of the most divisive shires, with many dissenters living in the area, and Melfort was particularly strict in upholding the law. As he wrote to Queensberry, “ther is mor perverseness in this shire, then, I think, in all Scotland,” and he wrote that “I stand in admiration at stories I am told.”<sup>131</sup> As noted in Chapter Two, his disagreements with Hamilton over imposing the Test during this circuit often caused the two to come to a head, as Melfort's policy toward dissidents was “if ue get not obedience ue sho our authority, and that the King is not afrayed of them.”<sup>132</sup> He noted, “for all who hav refused the Bond ue hav in prison to teach them better maners.” Indeed, he pointed out that many of them had been indicted for resetting and conversing, and he wished to send them to Edinburgh to be tried.<sup>133</sup> Melfort's behaviour was in some ways typical of the Restoration government's policy as a whole. As seen with his arguments about the Test, and his behaviour in punishing prisoners, he required an outward performance of strict obedience to the Crown, no matter their inward belief or actions.

Unfortunately for Lanarkshire and Hamilton, Melfort was not one to compromise.

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<sup>131</sup> Ibid., 177, 178.

<sup>132</sup> Ibid., 182.

<sup>133</sup> Ibid.

One of the most controversial cases to come out of this circuit court was the case against John Porterfield of Duchal, sometimes known as “Melfort’s Martyr.” On October 7, Melfort wrote that they were to “fall upon all the considerable heritors as fast as it is possible.”<sup>134</sup> Duchal and John Maxwell of Pollok came to his attention because they refused to sign the bond to ensure their tenants behaviour, and they also refused to swear the Test. As they were also accused of resetting, he ordered them to be imprisoned, and witnesses were brought in against them.<sup>135</sup> Several witnesses reported that Duchal had often had his brother, Alexander Porterfield, who was a forefaulted person from the Pentland Rebellion, at his home. The witnesses also stated that several other rebels often dwelt on his lands. Among these witnesses was George Holme himself, a Bothwell rebel, who admitted to dwelling on Duchal’s lands.<sup>136</sup> As such, Melfort ordered the Lord Justice Clerk to proceed with indicting him.<sup>137</sup> Melfort wanted to use Duchal and Pollok as examples, as he noted “it was certainly fit to be peremptor with the first uho uer disobedient” for the shires to see.<sup>138</sup> Furthermore, he had hopes “at least the King uill be payed for his fynes.”<sup>139</sup> As such, Melfort wrote “to sho that ue are in earnest for recept, especially to sho Lanerick and Stirling ther hazard,” he and the Lord Justice Clerk had proceeded with indicting Duchal. However, he noted the instructions given by the Council that they may not sentence a heritor which he wrote “I confess I uas surprised uith.” He had previously complained that “this is the most hindersom instruction.”<sup>140</sup> However, as he was not allowed to give sentence, and the depositions against Duchal seemed decisive, he requested advice whether

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<sup>134</sup> Ibid., 182.

<sup>135</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 10, 236-237; Ibid. For a detailed look at the warrant, and list of witnesses and depositions against Duchal, see documents contained in NRS, JC39/52.

<sup>136</sup> NRS, JC39/52/3.

<sup>137</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 10, 251.

<sup>138</sup> HMC Drumlanrig, Vol. 2, 182.

<sup>139</sup> Ibid., 182-183.

<sup>140</sup> Ibid., 183-184.

he could remit the process back to Edinburgh. As he noted, “if the King intend to proceed against the heritors for converss and recept of rebells, all are guilty; and at Edinburgh he may choise out to punish whom he pleases.” As for “the gross of commons,” he wrote that they would judge them themselves.<sup>141</sup>

Melfort’s method of hiding the Council’s instructions ended up paying off for him. Throughout his dealings with Duchal and Maxwell of Pollok, he never let it be known that he in fact had no power to sentence them. The sneaky and questionable way he dealt with these prisoners perhaps sheds some light on the “Melfort’s Martyr” epitaph. Upon receiving his indictment, Duchal wrote to Melfort, throwing himself upon the King’s mercy and begging for assurance of his life and his family’s safety.<sup>142</sup> Melfort wrote that he would “giv no ansuer nor condescend to a delay of his tryall, least that might hav made others beleiv it uas not in earnest.”<sup>143</sup> He continued with Duchal’s process stating that “his esteat shal be the King’s, or it shal be remitted to Edinburgh.” As he noted, no one but the Lord Justice Clerk knew his mind.<sup>144</sup> As Melfort complained, Duchal had been seen with his fugitive brother in front of many people, yet it was so hard to prove it “that one uld uonder at it.”<sup>145</sup> However, his plan was to have Duchal confess and then to proceed to create a new indictment to be brought to Edinburgh. He assured Queensberry that he would not proceed with the current trial “tho’ it’s uhat no soul knous.”<sup>146</sup> To Melfort’s pleasure, his plan worked. As he stated, “by keeping our intentions most secret,” Duchal “confessed all judicially.” As such, the diet was to be continued in Edinburgh. As he

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<sup>141</sup> HMC Drumlanrig, Vol. 2, 183-184.

<sup>142</sup> NRS, JC39/52/4 (indictment against Duchal).

<sup>143</sup> HMC Drumlanrig, Vol. 2, 185.

<sup>144</sup> Ibid., 188.

<sup>145</sup> Ibid., 190.

<sup>146</sup> Ibid., 193.

stated, “this had many difficultys in it by reason of our instructions.” Nonetheless, Melfort got what he wanted.<sup>147</sup>

Melfort behaved just as deviously with Maxwell of Pollok who was also accused of resetting and conversing. Following his indictment, he wrote to Melfort stating he was content to leave the King’s dominions and not return without leave. Furthermore, he was willing to hand over his estate to men of loyal principles. He also offered to pay a fine of 10,000 lib. However, as Melfort wrote he thought he “uold be glead to come of for 20,000 lib.”<sup>148</sup> As Melfort confessed, however, it was impossible to get a probation against him. Nonetheless, he allowed Pollok to believe that he would be hanged.<sup>149</sup> As such, he was able to get him to confess to his resetting by assuring him of his life.<sup>150</sup> Pollok confessed to having had Alexander Porterfield in his home. However, he also confessed that Sir John Cochrane had come to his house the previous year. Cochrane had asked Pollok for money to relieve the Earl of Argyll’s distressed estate. Pollok, however, told Cochrane “that he owned no obligations to the late Earle of Argyle beyond other noblemen, and he would give no money upon that account.”<sup>151</sup> As Melfort noted, since the confession was full, they were to proceed to sentence, but then delay pronouncing it until they came back to Edinburgh “for that’s according to our instructions.”<sup>152</sup> Nonetheless, he gleefully noted that Maxwell of Pollok’s estate was secured.<sup>153</sup> Melfort was particularly ruthless, and his actions perhaps set this circuit apart from the previous one led by the Lords of the Justiciary. When discussing these cases, Fountainhall noted that the design was to “fyn them in summes

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<sup>147</sup> Ibid., 194; *RPCS*, 3<sup>rd</sup> series, Vol. 10, 292.

<sup>148</sup> HMC Drumlanrig, Vol. 2, 185.

<sup>149</sup> Ibid., 188, 190.

<sup>150</sup> Ibid., 189.

<sup>151</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 10, 278-279.

<sup>152</sup> Ibid.

<sup>153</sup> HMC Drumlanrig, Vol. 2, 194.

near aequivalent to ther estates.”<sup>154</sup> Certainly the resetting cases from these circuits brought in much revenue for the Crown. Sir John Maxwell of Pollok was subsequently brought before the Council in Edinburgh in December 1684 to receive his sentence. The Council fined him eight thousand pounds sterling.<sup>155</sup> In 1687, however, King James VII granted Maxwell of Pollok a remission with the gift of a single and liferent escheat.<sup>156</sup> While eight thousand pounds was nothing to scoff at, it was much less than the twenty thousand Melfort had hoped for.

Duchal’s process was somewhat reminiscent of William Lawrie of Blackwood’s case, with similar arguments being employed. As his case had been continued in Glasgow, he was brought before the Criminal Court in Edinburgh at the end of November. Interestingly, he was indicted upon similar crimes that Pollok had confessed to. He was charged with resetting his brother Alexander Porterfield, as well as harbouring the Bothwell rebel George Holme upon his grounds. He was also charged with not disclosing that Sir John Cochrane had requested charity for the Earl of Argyll. As Fountainhall wrote, Cochrane had asked him for money for “a poor distressed freind.” Duchal had asked if he meant Argyll, and Cochrane did not deny it.

Nonetheless, Duchal provided no monetary assistance.<sup>157</sup> As Fountainhall noted, the Council, including the Lord Advocate, found Duchal’s “qualified confession very narrow,” so Mackenzie posed a query to the Judges to confirm this charge.<sup>158</sup> As he noted, it was treason to provide supplies or comfort to declared traitors, and it was also treason to conceal treason. Therefore,

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<sup>154</sup> Fountainhall, *Historical Notices*, Vol. 2, 563.

<sup>155</sup> Duchal was brought to Edinburgh on November 1, while Pollock arrived on December 1. Both were warded in the Tolbooth. See John A. Fairly, ed., “The Old Tolbooth: Extracts from the Original,” *The Book of the Old Edinburgh Club Ninth Volume*, (Edinburgh: Printed by T. and A. Constable Ltd., 1916): 163, 169; *RPCS*, 3<sup>rd</sup> series, Vol. 10, 41; As Fountainhall recorded, if Maxwell of Pollok was able to pay six thousand pounds by January 1, he would not have to pay the whole eight thousand. See Fountainhall, *Historical Notices*, Vol. 2, 577.

<sup>156</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 13, xix.

<sup>157</sup> Wodrow, *History of the Sufferings*, Vol. 2, 420; Fountainhall, *Historical Notices*, Vol. 2, 574.

<sup>158</sup> NRS, JC39/52/23. Seventeen Lords from the Court of Session signed the document including Perth, Tarbat, and Foulis.



was it not treason that Duchal had concealed Cochrane's request to provide assistance to a condemned traitor? The Lords of the Council responded to the query and judged that the "concealing and not revealing in the case foresaid is treason," and the libel was found relevant.<sup>159</sup>

While Fountainhall noted that Duchal had concealed the seeking of money in support of a declared traitor, it was a "very remote" accusation. As he explained, Duchal was only in the "4<sup>t</sup> degree" involved in the treason. Firstly, there was the rebel himself who stood guilty. Secondly, there was the person demanding money for the traitor. Thirdly, there was the person who gave the money. Fourthly, there was the person who refused. However, Fountainhall conceded that by statute law, "if I know another man harbors a rebell on his ground, I am as guilty as the resetter is, if I do not reveal it." It is not surprising that Mackenzie requested that the Judges re-affirm the charge. As Fountainhall pointed out, Mackenzie himself had written about the crime of concealing in his legal treatise on criminal law.<sup>160</sup> In *Matters Criminal*, Mackenzie wrote that "the tenth point of Treason, is to conceal and not reveal Treason." However, "concealing in this case is not Treason, except the concealer could have proved it; for else he had by revealing and not proving made himself guilty of Treason."<sup>161</sup> As Fountainhall noted, "it was great simplicity in Ducholl to confesse, for they having no way of proving, if they had referred it to his oath, it would have restricted the hazard to ane arbitrary pain." As Duchal himself argued, he did not know for certain that Sir John Cochrane had meant Argyll. Nonetheless, as Fountainhall pointed out, he would have been forefaulted anyway for resetting, unless he took the Test, which he would not.<sup>162</sup> Melfort's duplicitous process had worked.

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<sup>159</sup> Ibid.; *State Trials*, Vol. 10, 1060.

<sup>160</sup> Fountainhall, *Historical Notices*, Vol. 2, 575-576.

<sup>161</sup> Mackenzie, *Matters Criminal*, 48.

<sup>162</sup> Fountainhall, *Historical Notices*, Vol. 2, 575.

Because Duchal had judicially confessed, there was not much to the trial.<sup>163</sup> He was interrogated in front of the assize<sup>164</sup> to acknowledge his previous confession, and he confirmed that he had conversed with and harboured his brother, and that George Holme had dwelt on his lands. He also re-confirmed John Cochrane's request for money. He "intreated the lords to represent his condition favourable, since he was most penitent."<sup>165</sup> Interestingly, Fountainhall recorded that Duchal argued that resetting his brother should not be considered a crime, as he did not conceal him from justice. As he argued, his brother had lived and openly conversed at the Kirk and Market for eighteen years, "with all ranks, of persons, even with the officers of the King's army, unquestioned by any." He argued the only reason he had not received a remission was because of "parsimony" and that he had likely "infected all the gentry in the West, by conversing with them."<sup>166</sup> However, just as this argument had not worked at Lawrie's trial, it held no sway at Duchal's either. Duchal was found guilty, and he was sentenced to be forefaulted and executed.<sup>167</sup> However, the Council left it to the King to determine the place, time, and manner of his execution.<sup>168</sup> As Fountainhall noted, the Council did not appear to be after his life, but that they "only aimed at his estate."<sup>169</sup> His forefaulture was ratified in Parliament the following year.<sup>170</sup>

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<sup>163</sup> See NRS, JC39/52/33 for his confession.

<sup>164</sup> For a list of the assize, see NRS, JC39/52/22.

<sup>165</sup> *State Trials*, Vol. 10, 1061-1062.

<sup>166</sup> Fountainhall, *Historical Notices*, Vol. 2, 574-575. Alexander Porterfield of Duchal was also imprisoned and charged at this time. He sent a petition to the Council having "received a new additionall lybell for crymes of high treason." He requested access to lawyers, which he was granted. See *RPCS*, 3<sup>rd</sup> series, Vol. 10, 30. He was later fined at the same time that Pollok was. For more of Duchal's defence, see Wodrow, *History of the Sufferings*, Vol. 2, 421-422.

<sup>167</sup> See NRS, JC39/52/38 for verdict and NRS, JC39/52/39 for the doom of forefaulture.

<sup>168</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 10, 39.

<sup>169</sup> Fountainhall, *Historical Notices*, Vol. 2, 576.

<sup>170</sup> *RPS*, 1685/4/24.

Why was Duchal forefaulted while Pollok received an arbitrary punishment for the same crimes? The evidence points in favour to Melfort's corrupt behaviour. In a petition Duchal sent to the Justiciary, he noted that he confessed about Cochrane, entirely "relying upon the assurance that your [Lordships] had then publicly given that any acknowledgement by Confession should not import forfaultor," also noting "my Neighbours who wer Interrogat & have made the same acknowledgement."<sup>171</sup> It is not clear if he received a personal promise like Pollok. Nevertheless, Duchal was not treated the same way. Not everyone agreed with the procedure against Duchal, and as Wodrow recorded "I am well assured, that even Sir *George Mackenzie* used to cast the Blame of this Procedure off himself, and term *Douchal My Lord Melford's Martyr*."<sup>172</sup> While there are no extant records on Mackenzie's thoughts on this case, Wodrow's anecdote does have some merit. Mackenzie was willing to stretch the law to its maximum perimeters when prosecuting and he was involved in some questionable cases, but, as discussed in Chapter One, Mackenzie was honest with defendants, and he tried to provide them with the best of his advice.

In 1686, Melfort was gifted Duchal's lands.<sup>173</sup> As Wodrow remarked, "and such was the Equity of those Times, that the very Person who was his Judge, had got a previous Promise of his Estate, which in due Time made good." Duchal did indeed receive a remission for his life from the King. Just like with Lawrie, it was not his life they were after. His forefaulture was later revoked after the Revolution.<sup>174</sup> Duchal had confessed to resetting, so his guilty verdict was not surprising. However, his case shows how the government was able to use resetting to target specific figures.

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<sup>171</sup> NRS, JC39/52/35.

<sup>172</sup> Wodrow, *Sufferings*, Vol. 2, 425.

<sup>173</sup> RPS, 1686/4/14; RPS, 1686/4/33.

<sup>174</sup> Wodrow, *Sufferings*, Vol. 2, 425.

## Conclusion

Just as the circuit courts ended, and Duchal's process was beginning, the United Societies went on the offence, posting the *Apologetical Declaration* on church doors on November 8, 1684. Also known as the "Declaration against Informers and Intelligencers," in it, the Societies "disowned the Authority of *Charles Stuart*," and declared war against him and his government, following in line with their previous declarations. However, as Mark Jardine points out, this declaration was much more offensive unlike their previously more defensive ones, calling for targeted assassinations.<sup>175</sup> The Societies declared that all "whosoever stretcheth forth their Hands against us"—be it the government forces such as the "bloody Counsellors," Justiciary, Generals, Dragoons, etc., or the gentlemen and commons who inform against them—would be "reputed by us" as "Enemies to God" and "punished as such, according to our Power."<sup>176</sup> As Jardine argues, this declaration was different, in that it was targeting the struggle between the Societies and government for local control. The Societies wanted to terrify the commons "into halting the flow of information and assistance to the authorities," as circuit courts and governmental military forces were greatly hampering their cause.<sup>177</sup> Rather than the declaration's focus on governmental authorities, its focus on the commons is perhaps the more significant point. The fact that the United Societies chose to become even more militant and offensive was a sign that the government's strict policies were working to curb more extreme versions of Presbyterianism. As Wodrow argued, it was the severity which took place at the circuit courts which inspired the Societies to produce their *Apologetical Declaration*. Certainly, the government's policies against resetting had made it so that "the whole country was almost sworn against them."<sup>178</sup> The United

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<sup>175</sup> Jardine, "The United Societies," 76.

<sup>176</sup> Wodrow, *Sufferings*, Vol. 2, Appendix 99, 137.

<sup>177</sup> Jardine, "The United Societies," 76-77.

<sup>178</sup> Wodrow, *Sufferings*, Vol. 2, 407-408.

Societies were getting desperate, and that is why they moved in this more violent direction. The government's infiltration into local neighbourhoods through its pursuing of resettlers was proving to be a success.

Nonetheless, the *Apologetical Declaration* greatly provoked the Scottish government, leading to one of its most controversial and shocking policies. The Council's kneejerk response was as an overreaction to the actual severity of the threat imposed by the Societies. However, with the discovery of a Scottish element to the Rye House Plot, the Council could not be too sure. Then on November 20, two of the King's Life-Guards were murdered by "some of the desperat phanatiques." As Fountainhall noted, this action was "to execute what they had threatened in ther declaration of war."<sup>179</sup> As such, on November 22, the Council voted that who ever did not disown the *Apologetical Declaration* upon oath, whether they had arms or not, should be killed before two witnesses. Only those who had a specific commission from the Council were to have this power.<sup>180</sup> On November 25, the Council then approved the Abjuration Oath, whereby all people had to swear to denounce and disown the "pretendit Declaratione of Warr" which "declares a warr against his sacred Majestie and asserts that it is lafull to kill such as serve his Majestie in church, state, army or country." They also had to swear never to assist the authors of the declaration or their emissaries or adherents in any way.<sup>181</sup> As Tim Harris notes, these events caused most of the western and south-western shires to be put under martial law.<sup>182</sup> In his post-Revolution *Vindication*, Sir George Mackenzie of Rosehaugh only briefly touched upon the controversial policy of summary executions, laying the blame on "some" who thought the policy would terrify the Society members "out of this Extravagancy." As he explained, "it

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<sup>179</sup> Fountainhall, *Historical notices*, 570-571.

<sup>180</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 10, 32-33.

<sup>181</sup> *Ibid.*, 35-36.

<sup>182</sup> Harris, *Restoration*, 371.

may plainly appear, that no more was in all this intended by the Governours, than to secure the *Publick Peace*, by terrifying those Assassines who had so manifestly invaded it.”<sup>183</sup> In order to attempt to defend the policy, Mackenzie once again reminded readers of the necessity of state and maintaining order.

This policy would become the most notorious in Covenanter martyrologies, and the period became known as the “Killing Time,” with summary executions taking place between December 1684 to July 1685.<sup>184</sup> There are debates about how many people were killed in this manner, but generally, historians argue that approximately seventy-eight to one hundred Society members were summarily executed during those months.<sup>185</sup> While the actual number of summary executions is likely fewer than depicted in Covenanter martyrologies, the number itself is not what was important. The government had created martyrs through its gruesome policy. As Ian Borthwick Cowan notes, however, these summary executions have perhaps obscured the government’s real campaign to establish conformity during this period, with its focus on fining, imprisonment, and banishment. Indeed, he argues that it was *this* persecutory campaign, rather than “those who courted martyrdom by denying the authority of the crown,” which proved to be more significant.<sup>186</sup> As horrific as the government’s overreaction to the United Societies was, this was a policy that only affected a minority of extreme dissenters— at least explicitly. Rather,

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<sup>183</sup> Sir George Mackenzie of Rosehaugh, *A vindication of the government in Scotland during the reign of King Charles II against mis-representations made in several scandalous pamphlets to which is added the method of proceeding against criminals, as also some of the phanatical covenants, as they were printed and published by themselves in that reign*, (London: 1691): 14-15.

<sup>184</sup> There is some debate about the precise dates of the “Killing Time.” For a discussion of these dates, see Jardine, “United Societies,” 116-117. In his post-Revolution *Vindication*, Mackenzie stated that “secret orders” were given that the policy should not last more than a fortnight, and that they should only kill those who were listed in publicly declared lists of rebels (15). If these orders were sent out, it is not clear that the soldiers in question followed them, especially as summary executions lasted longer than two weeks.

<sup>185</sup> Ian B. Cowan, *The Scottish Covenanters, 1660-1688*, (London: Victor Gollancz Ltd, 1976): 132; Jardine, “United Societies,” 117. Charles Sanford Terry, *John Graham of Claverhouse, Viscount of Dundee, 1648-1689*, (London: A. Constable and Company, 1905): 194; David S. Ross, *The Killing Times: Fanaticism, Liberty and the Birth of Britain*, (Edinburgh: Luath Press Limited, 2010): 193.

<sup>186</sup> Cowan, *The Scottish Covenanters*, 133.

it was the government's increasing involvement in maintaining conformity on the local level that affected the greater population

The problem, however, lay in the fact that the government's infiltration into local networks affected everyone, including those in power. Because of bonds, judicial jurisdictions, and obligations to tenants, even the elite could potentially be brought down. The 1684 circuit courts reinforced this fact, by forcing the authorities of the local districts to not only offer a cess (i.e., tax), but "to be bound for their men, tennents and servants that they shall walk regularly in time coming."<sup>187</sup> Claverhouse, who was a Commissioner for the Dumfries and Wigtown circuit court, thought this was too harsh and urged his fellow Commissioner Queensberry to reconsider. He pointed out that it was "unjust to desyr of others what we would not doe our selfs," for certainly this policy was only strategically enforced. As he wrote, "I declair I think it a thing not to be desired, that I should be forfeited and hanged, if my tenet's wife, twenty mile from me, in the midst of hilles and woods give mate or shelter a fugitive."<sup>188</sup> Nonetheless, the policy was accepted.

As discussed above, the Duke of Hamilton lived in a particularly disorderly shire, and he was often in fear of getting in trouble due to what occurred on his lands, even being cited before the Council for not informing them of a Conventicle on his lands. While Hamilton was acquitted, he and the other heritors like him were "lyable in Law Because he ought not to have kept such people on his ground who wold commit such seditions."<sup>189</sup> There was method to the Council's madness, however. As Hepburn wrote to the Earl of Linlithgow in 1680 following a Conventicle being held on his land, he had held a court and fined all those who attended, while taking bonds

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<sup>187</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 10, 252.

<sup>188</sup> *HMC Drumlanrig*, Vol. 1, 291.

<sup>189</sup> *NRS*, GD406/1/3203.

for some. However, one of the leaders had escaped by using a “grait manie of his neighbours and comrads.” He was able to travel to various locations by being harboured by persons of his own persuasion. As Hepburn warned, they must prevent their neighbours from taking part in those “field meetings who are nurseries of Rebellion.”<sup>190</sup> By targeting resetting, the government made it more difficult for dissenters and rebels to hide, for neighbours were now in serious fear for their lives.

In June 1685, the Scottish Parliament ratified the Council’s proclamation “Anent apprehending of rebels.” Resetting was now further engrained in statute law. As the Act stated, “that whoever shall intercomune with, resett, supplie, shelter or give any comfort to any declared traiters or fugitives, or who shall conceal, reset or shelter any who doe convocat in maner forsaid, that such resettars or assisters shall be proceeded against as if they were guilty of the crimes wherof these traitors and fugitives are guilty, according to the just rigor of our laws.”<sup>191</sup> As will be discussed in the following chapter, the Council’s harsh methods had worked, and when Argyll returned in rebellion, he found few willing to fight for him. Interestingly, however, with James’ focus on removing the penal laws and increasing religious toleration, resetting moved once more to the background, and he granted a number of remissions during his brief reign. Nonetheless, James continued to see the benefit of controlling the localities to maintain his authority. In preparation for his intended religious toleration, he began to intervene in the make up of the royal burghs. As Raffé notes, the impact of James’ government in the Scottish localities was significant.<sup>192</sup>

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<sup>190</sup> NRS, RH15/12/81.

<sup>191</sup> *RPS*, 1685/4/54.

<sup>192</sup> Alasdair Raffé, *Scotland in Revolution, 1685-1690*, (Edinburgh: Edinburgh University Press, 2018): 6. See also Chapter 5.



Following the Revolution, the Scottish Parliament passed an Act rescinding William Lawrie of Blackwood's forefaulture. The Act stated that seeing that the witnesses against Lawrie "at most prove simple converse, and with no persons in no way denounced," they rescinded and declared void his forefaulture, returning his lands, estate and name. Citing the Claim of Right, they argued that forefaulting people "upon frivolous and weak pretences, or upon defected and lame probation, is contrary to law."<sup>193</sup> Lawrie had indeed been harshly dealt with by the Restoration regime, and it is unclear why they chose him to set their example. Certainly, resetting had a legal precedence, and there were undoubtedly many people they could have chosen to pursue. However, as was often the case with the Council, when looking for an example to terrify others, they often chose the worst and weakest cases, adding once more to their increasingly arbitrary image.

In 1693, the Scottish Parliament passed the "Act anent resetting and intercommuning with declared traitors." The Act confirmed that these were "crymes of a high nature and punishable with the payns of treason." However, in order to prevent people from being "ensnared and innocently involved," no one was to be liable for the crime of reset unless it was proven that he knew the person he had reset or corresponded with.<sup>194</sup> Interestingly, this Act was not as progressive as it may have appeared. While it prevented someone from being accused of resetting should they converse with a stranger, the Restoration Council had also stated that accidental encounters in public places did not count as resetting. Certainly, neighbours still knew one another and could be accused of resetting quite easily. Nevertheless, the Williamite government knew a good public relations move when it saw one.

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<sup>193</sup> *RPS*, 1690/4/147.

<sup>194</sup> *RPS*, 1693/4/136.

## Chapter Five: The Argyll Rebellion

*Indeed it was much, considering the Manner of the Managers after Pentland and Bothwel, that none were executed after the Earl but worthy Mr. Archer. Whether this proceeded from the small Numbers that were taken, or from the Change of Measures and Intentions hinted at before, I do not determine.*

Robert Wodrow in *History of the Sufferings*<sup>1</sup>

### Introduction

Having fled Scotland following his participation in the Argyll Rebellion of 1685, Sir John Erskine of Carnock noted “Many noblemen and others were now gone and going to court...By their absence the country was in a greater quiet... than could have been expected after the enemies prevailing both in Scotland and England over those who had appeared against them...”<sup>2</sup> Certainly, for having squashed its third armed rebellion in less than two decades, the Scottish government’s response was rather muted, especially in comparison to its English counterpart. As Sir George Mackenzie of Rosehaugh wrote in 1691, “Nor in all Argyle’s Rebellion, was any Executed by their Sentence, except one or two, who were pitched upon as Examples to terrifie others.”<sup>3</sup> Indeed, excluding the Earl of Argyll himself, only a few rebels were formerly tried and executed for their participation in the rebellion. Considering that the government had only recently sanctioned summary executions, they treated the Argyll rebels mildly in comparison.

The short-lived revolt, led by the exiled Earl of Argyll, took place at the beginning of King James VII and II’s reign. As Erskine— a fellow exile who had joined Argyll— explained,

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<sup>1</sup> Robert Wodrow, *The history of the sufferings of the Church of Scotland, from the Restauration to the Revolution: collected from the publick records, ...*, Vol. 2, (Edinburgh: 1721): 547.

<sup>2</sup> John Erskine of Carnock, *Journal of John Erskine of Carnock, 1683-1687*, Walter Macleod, ed., (Edinburgh: Printed at University Press by T. and A. Constable for the Scottish History Society, 1893): 151.

<sup>3</sup> George Mackenzie, *A vindication of the government in Scotland during the reign of King Charles II against mis-representations made in several scandalous pamphlets...*, (London: 1691): 17.

they were fighting for “the liberties of the nation, the property of the subject and the lives of all our honest country-men and friends, being inseparably joined with that great interest...the standing or falling of the Protestant interest in Europe.”<sup>4</sup> Despite these supposedly lofty goals, Argyll was unable to garner significant support, and the Crown’s forces quickly defeated him. As Allan Kennedy reflects, the “muted reprisals” of the rebellion show “the general insignificance” of Argyll’s threat, highlighting why there has been little historiographical attention paid to these events.<sup>5</sup> However, this chapter argues that the government’s relatively “gentle” response to the rebels was significant, showcasing the tensions in the government’s policy of repression versus its execution, and highlighting differences in perceptions versus reality. While the Argyll Rebellion did affect events in both the English and Scottish parliaments, the government’s response to the rebellion could have been fertile ground to foster a new image of itself. Certainly, the government could have used the rebellion to remedy perceptions regarding Argyll’s trial in 1681. As Lord Fountainhall noted, “Argile’s first cryme was look’t on by all as a very slender ground of forfaitor; but his conspiracy and rebellion since hath expounded what he meant by his Explanation of the Test too weill.”<sup>6</sup> As discussed in Chapter Two, the meaning of Argyll’s caveated oath now appeared clear to all, and his rebellion helped justify the government’s previous sentence of forfeiture upon him.

Significantly, Argyll’s revolt was supposed to coincide with the Duke of Monmouth’s rebellion in southwest England. Due to weather and poor planning, Monmouth failed to sail to England on time, allowing government troops to defeat Argyll before focusing attention on

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<sup>4</sup> Erskine, *Journal*, 113, 114.

<sup>5</sup> Allan Kennedy, “Rebellion, Government and the Scottish Response to Argyll’s Rising of 1685,” *Journal of Scottish Historical Studies* 36: 1 (2016): 59.

<sup>6</sup> John Lauder of Fountainhall, *Historical Observes of Memorable Occurrents in Church and State, from October 1680 to April 1686*, (Edinburgh: T. Constable, printer to Her Majesty, 1840): 167.

squashing Monmouth's English counterpart. The aftermath of this English rebellion has long been touted as the "Bloody Assizes" due to the hundreds of rebels hanged and quartered in the span of weeks. These English trials and punishments, along with Chief Justice George Jeffreys the "hanging judge," have had a long legacy in Whig narratives of the Glorious Revolution, highlighting James' supposed tyranny.<sup>7</sup> As such, it is especially interesting that the supposedly 'despotic' Scottish government did not have an equivalent to the Bloody Assizes following Argyll's parallel endeavour.<sup>8</sup>

This chapter will focus on the government's actions in preparation for the rebellion and following the insurgency, focusing on its treatment of the rebels and dissidents. It will not focus on the military failings of Argyll, nor the narrative of events.<sup>9</sup> Rather, it will examine how the government's behaviour did and did not fit into its typically violent image. This chapter will briefly examine the reasons why Argyll chose to rebel, and why he failed to gain support. It will then look at the Marquess of Atholl's role in defeating the rebels, along with his unfortunate association with the "Atholl raids," highlighting the tensions once again with the central authorities' lack of control over local justice. It will then consider the punishments of the rebels brought to Edinburgh including banishments and executions, with a detailed analysis of depositions. The chapter will close off with an examination of the government's treatment of the Dunnottar prisoners. Whilst these prisoners were not involved with Argyll, their treatment was a direct consequence of his rebellion. Arguably these prisoners fared much worse than the majority of the Argyll rebels. Unlike the undoubtedly Covenanter Rebellion of 1679, the make up of

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<sup>7</sup> For instance, see Melinda Zook, "'The Bloody Assizes': Whig Martyrdom and Memory after the Glorious Revolution," *Albion: A Quarterly Journal Concerned with British Studies* 27:3 (Fall 1995): 373-396.

<sup>8</sup> "Bluidy" Mackenzie is perhaps the closest comparison to the "hanging judge," although it is an unfortunate and unrepresentative moniker of the Lord Advocate as discussed in Chapter One.

<sup>9</sup> For a summary of events, see John Willcock, *A Scots Earl in Covenanting Times: Being Life and Times of Archibald, 9<sup>th</sup> Earl of Argyll (1629-1685)*, (Edinburgh: A. Elliot, 1907); Raymond Campbell Paterson, *No Tragic Story: The Fall of the House of Campbell*, (Edinburgh: John Donald, 2001).

Argyll's men was more haphazard, and most of them were forced. As such, the government did not necessarily perceive them as direct enemies to the kingdom. This chapter shows that the Privy Council's perception and treatment of its enemies were both flexible and strategic. Indeed, issues of authority continued to be the greatest influence over the Council's actions.

### **The Rebellion**

As discussed in Chapter Two, having fled the country in 1681 after being found guilty of treason for his refusal to take the Test Act without a caveat, Argyll returned to Scotland in May 1685 with approximately three hundred men. Sailing first to Orkney where William Spence—who had previously been tortured—and Dr. William Blackadder were captured, he then proceeded to his own territories, where he attempted to recruit more men through his Highland ties of kinship. While in Campbelltown, Argyll presented his first declaration, *The Declaration and Apology of the Protestant People*. Printing approximately eight hundred copies of it, Giles Williamson, a Dutch printer who came with Argyll, noted “that Argyle himself corrected them.”<sup>10</sup> As Fountainhall summarized, the first declaration was “a very long deduction of all the grievances thir nations hes groaned under these 20 years with a specious pretence of religion, now made threadbare by all rebels.”<sup>11</sup> Interestingly, many of the points of contention that Argyll's first declaration brought up were issues that would be at the forefront in the Articles of Grievances during the Revolution. For instance, he noted “the arbitrary imprisonings & detainings of free subjects, without either bringing them to tryall, or allowing them any hearing,” “the torturing of several persones,” and “the straining, stretching & wresting of Law.”<sup>12</sup> The

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<sup>10</sup> *Register of the Privy Council of Scotland (RPCS)* 3<sup>rd</sup> series, Vol. 11 (Edinburgh: HM General Register House, 1929): 306.

<sup>11</sup> Fountainhall, *Observes*, 165.

<sup>12</sup> Earl of Argyll, *Declaration and apology of the Protestant people...*, (Campbelltown: 1685): 4, <<https://digital.nls.uk/74482434>>. Last accessed December 2021.

main focus of the declaration, however, was on religion—specifically that of the King’s popery, and the protection of the Protestant religion. Referring to James as the Duke of York throughout, Argyll had three main points: the restoring of the “true Protestant Religion, in its power and purity”; “The suppression and perpetuall exclusion of Antichristian Popery”; and “The restoring of all men to their just Rights and Liberties.”<sup>13</sup> As the Earl of Perth wrote to Colonel Douglas describing the work, Argyll spoke “bigg things” in his declaration.<sup>14</sup> Significantly, however, Argyll did not name the Covenant, nor did he proclaim an alternative monarch in this piece of work.

Argyll later produced a second declaration, which according to Fountainhall showed he only came “to recover his estate unjustly tane from him, and to vindicate them from the usurpation and tyranny of the present King.”<sup>15</sup> Nonetheless, although noting he had “suffered patiently [his] unjust Sentence and Banishment three years and a half,” Argyll argued he was not going to arms for private or personal ends. Rather, he proclaimed “The Duke of York having taken off his Mask, and having abandoned and invaded our Religion and Liberties... I think it not only Just, but my Duty to God and my Countrey, to use my outmost endeavours to oppose and repress his Usurpations and Tyranny.”<sup>16</sup> Considering James had only recently come to the throne, and most of the policies in place were still his brother’s, it is not surprising that moderates did not flock to this declaration. As Tim Harris argues, Argyll made no attempt to appeal to those of moderate opinions. As such, Argyll only received support from those who were already unhappy during the reign of Charles II.<sup>17</sup> Nonetheless, Argyll had two general

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<sup>13</sup> Ibid., 9.

<sup>14</sup> National Library of Scotland (NLS), MS 5407/151.

<sup>15</sup> Fountainhall, *Observes*, 165.

<sup>16</sup> Earl of Argyll, *The Declaration and apology of the Protestant people* [shorter version], (Edinburgh: Re-printed by the heir of Andrew Anderson, 1685): 3.

<sup>17</sup> Tim Harris, *Revolution: The Great Crisis of the British Monarchy, 1685-1720*, (London: Penguin Books, 2007): 78.

mottos: “For the Protestant Religion” and “Against Popery, Prelacy and Erastianism.”<sup>18</sup> Even with these two popular refrains, Argyll did not gain significant support. As Bishop Gilbert Burnet wrote, Argyll “had not behaved himself in his prosperity like a man that thought he might at some time or another need the affections of his people.”<sup>19</sup> Indeed, Argyll at times acted more like a landlord than a traditional clan chief.<sup>20</sup> The support from the Whiggish press after his trial had failed to make a lasting impact. However, as Erskine noted, Argyll was able to obtain about a hundred men from Islay who joined “out of principle for the Protestant cause and interest, and no otherways.”<sup>21</sup>

While Argyll focused much attention on religion, hoping to attract more hardline Covenanters, the years of persecution, repression, and recent “Killing Time” policy had taken its toll on the Scottish Presbyterians, and Argyll failed to receive support even from the militant United Societies. As Mark Jardine discusses, Argyll’s agents did tentatively approach Society members such as James Renwick. However, a Covenanted settlement was a pre-requisite to any alliance, and Argyll was not willing to go that far.<sup>22</sup> Following the unsuccessful Rye House Plot, the United Societies decided on a “wait and see” policy before committing any support toward Argyll.<sup>23</sup> While some Society members nominally decided to support Argyll, his failure to include the Covenant in his declarations was consequential. As Erskine complained, those “that were strictest that way” objected “to not naming in the declaration Presbytery, as the Church Government which they would own.” However, he explained “it was thought best to keep that in

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<sup>18</sup> Erskine, *Journal*, 119.

<sup>19</sup> Gilbert Burnet, *A supplement to Burnet's History of my own time: derived from his original memoirs, his autobiography, his letters to Admiral Herbert, and his private meditations, all hitherto unpublished*, H. C. Foxcroft, ed., (Oxford: Clarendon Press, 1902): 158.

<sup>20</sup> Paterson, *No Tragic Fall*, 137.

<sup>21</sup> Erskine, *Journal*, 118.

<sup>22</sup> Mark Jardine, “The United Societies: Militancy, Martyrdom and the Presbyterian Movement in Late-Restoration Scotland, 1679-1688,” PhD Thesis, (University of Edinburgh, 2009): 132-33.

<sup>23</sup> *Ibid.*

general, the quarrel being so clearly stated- Protestant and Papist.”<sup>24</sup> Argyll lost on both sides. His declaration was too radical for the moderates, and too moderate for the radicals. It must also be pointed out that Argyll himself was not a particularly popular figure, even excluding his traditional Highland enemies. As Fountainhall noted, the rebels in Galloway “still rail on him, as on who had brok ther Covenant and joined with the late King and his governors to oppresse them.”<sup>25</sup> Argyll was not the ideal Covenanter hero. As Caroline Erskine points out, on the face of it, Argyll should have been an excellent candidate for Covenanting hagiography. However, the United Societies’ engagement with the Campbells can be seen as representative of their “strained engagement with the role of the nobility in their resistance.” As mentioned in Chapter Two, while Shields wrote about Argyll in *A Hind Let Loose* in 1687, he was placed on a lower tier with the English Rye House plotters, rather than with the martyred Scottish preachers.<sup>26</sup>

Along with the above problems, there were multiple other forces working against Argyll. Not the least being that the Scottish government was well prepared for a rebellion. As early as April, “upon rumors of fears of Argile’s landing,” the Privy Council had ordered twelve hundred Highlanders to be sent to the Western Shires.<sup>27</sup> They were ready for an attack. As an English newsletter recorded, Argyll would “meet with a sharpe ingagment.”<sup>28</sup> Having to press most of his men, and spending too long in his own territories, Argyll failed to gain substantial support, and was soon captured near Glasgow. As Fountainhall astutely observed, Argyll “thought to have found us all alike combustible tinder, that he had no more adue then to hold the match to us, and

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<sup>24</sup> Erskine, *Journal*, 137.

<sup>25</sup> Fountainhall, *Observes*, 167.

<sup>26</sup> Caroline Erskine, “The Political Thought of the Restoration Covenanters,” *Scotland in the Age of Two Revolutions*, Sharon Adams and Julian Goodare, eds., (Woodbridge, Suffolk: Boydell Press, 2014): 163.

<sup>27</sup> Sir John Lauder of Fountainhall, *Historical notices of Scottish affairs...* Vol. 2, (Edinburgh: T. Constable, printer to Her Majesty, 1848): 636.

<sup>28</sup> *Calendar of State Papers, Domestic Series of the Reign of James II (CSPD)*, Vol. 1, (London: His Majesty’s Secretary Office, 1960): 127.



we would all blow up in rebellion” but “the tymes are altered, and the people are scalded so severely with the former insurrections.”<sup>29</sup> Even Wodrow conceded that the “Lord’s Time was not yet come” with the Presbyterians having been “sorely broken” and “scattered.”<sup>30</sup> Advertising the failure of Argyll’s rebellion in London, a pamphlet proclaimed that Argyll did not find “the people so prone to Rebellion as he imagined, although he used both Threats and Intreats.”<sup>31</sup> As Harris argues, James VII and II came to the throne in a strong position, and “the cause of radical Whiggism in 1685, whether of the Scottish or English variety, was out of tune with the mood of the country.”<sup>32</sup> Timing was perhaps Argyll’s largest failing in the end.

Rather than the repercussions of the rebellion, it could be argued that the Scottish government’s actions in preparation for it were much harsher and more violent than the rebels’ punishments. As Wodrow noted, “parties of soldiers were continually marching through the west and south” upon the first rumours of Argyll’s voyage, with “both militia and army [committing] many ravages.”<sup>33</sup> In April 1685 prior to Argyll’s landing, in line with the general “Killing Time” policies, General Drummond was given a commission to employ forces in the southern and western shires for “pursuing, suppressing and utterly destroying all such fugitive rebels as resist and disturb the peace and quiet of his Majesty’s government,” and to “immediately shoot such of them to death as yow find actually in arms.”<sup>34</sup> With restrictions such as these, it is unsurprising that men were slow to join Argyll’s cause, either radical or moderate.

As early as April 28 upon hearing the rumours of Argyll’s voyage, the Scottish government declared “Every subject be in a readiness in their best armes to concur and assist

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<sup>29</sup> Fountainhall, *Observes*, 165.

<sup>30</sup> Wodrow, *Sufferings*, Vol. 2, 530.

<sup>31</sup> *An Account of the Most Remarkable Fights and Skirmishes Between His Majesties Forces, and the Late Rebels in the Kingdom of Scotland*, (London: 1685): 3.

<sup>32</sup> Harris, *Revolution*, 67.

<sup>33</sup> Wodrow, *Sufferings*, Vol. 2, 557.

<sup>34</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 11, 26.

against any the forsaid commotions or insurrections,” and called for heritors to form militias.<sup>35</sup> Furthermore, the Marquess of Atholl’s lieutenancy of the shires of Argyll and Tarbet was renewed in April 1685, and he was to lead the government’s attack on Argyll’s forces.<sup>36</sup> Along with increased military presence in certain regions, there were strict laws in place regulating who could see who. For instance, in May, the Magistrates of Edinburgh renewed the act enforcing inhabitants to give the names of strangers lodging with them to discover and apprehend “vagrant persons.”<sup>37</sup> In part, many of these actions were a continuation of previous policies put into place to apprehend religious dissidents. Nonetheless, these policies were helpful in subduing the country and preventing potential rebels from joining. Furthermore, Argyll’s traditional allies, such as his relative the Earl of Breadalbane, sided with the government forces, and he became a key player in subduing the rebellion.

News of Argyll’s landing prompted a flow of support for the King’s cause. Breadalbane’s niece, Lady Frances Essex, wrote to him and her cousin Lord Glenorchy, encouraging her cousin to fight the rebels. Eliciting peer pressure, she told her cousin all the young Scottish noblemen she knew had gone to Scotland to oppose the rebels, and that she had no doubt he would be “impatient” to join them.<sup>38</sup> As Kennedy points out, Breadalbane’s kinship with Argyll continued to be treated with suspicion. As such, Lady Essex likely wanted to dispel any such thoughts.<sup>39</sup> Likewise, as Paul Hopkins notes, with the numerous finings throughout the period, it was unlikely that even Argyll’s potential supporters would want to appear disloyal at this time.<sup>40</sup> Due to the government’s preparation, clan levies, as well as general hostilities toward the Campbells,

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<sup>35</sup> Ibid., 29.

<sup>36</sup> Ibid., 31-32.

<sup>37</sup> Fountainhall, *Historical Notices*, Vol. 2, 640.

<sup>38</sup> NRS, GD112/39/137/24.

<sup>39</sup> Kennedy, “Rebellion, Government and the Scottish Response to Argyll’s Rising of 1685,” 47.

<sup>40</sup> Paul Hopkins, *Glencoe and the End of the Highland War*, (Edinburgh: J. Donald Publishers, 1986), 96.

Atholl was able to muster a large force to fight against Argyll— although there were numerous resource problems.<sup>41</sup> As Kennedy discusses, Atholl was cautious in his approach to engaging with Argyll, not wanting to take part in battle too soon. His slow approach angered the Council, who wrote to Atholl with “steadily rising hysteria.”<sup>42</sup> Had Atholl followed all of the Council’s initial instructions, there may well have been a “Bloody Assizes” equivalent in Scotland. However, Atholl was wiser than that, and the Council soon changed its tune.

On May 20, the Secret Committee wrote to Atholl telling him to burn Inveraray— Argyll’s traditional residence— and destroy “as much as can be” the meal and arms that could be carried off by rebels there. Additionally, “the houses, goods and persons of any who joyns with Argyle must be destroyed by all kind of Hostility.”<sup>43</sup> Increasingly worried about Atholl’s slow approach, the Council wrote again on May 31, insisting Atholl “Destroy what you can to all who joined any manner way with him” and that “All men who joined... are to be killed, or disabled ever from fighting again.” Furthermore, they ordered that all houses should be burnt except “honest men’s” and that “women and children be transported to remote isles.”<sup>44</sup> Had Atholl followed these instructions, the memory of the Argyll Rebellion would have been very different. Kennedy argues that the government’s increasingly violent instructions were due to its anxiety at Atholl’s unwillingness to engage Argyll too early in battle.<sup>45</sup> Certainly, it must be remembered that the scale of Argyll’s threat was still uncertain at this time. The government was unsure of the number of rebels, and it was frantic to stop a full-scale rebellion. The larger Bothwell Bridge Rebellion was still a recent memory. While Atholl was given very harsh instructions, he did not

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<sup>41</sup> Kennedy, “Rebellion, Government and the Scottish Response to Argyll’s Rising of 1685,” 56.

<sup>42</sup> *Ibid.*, 58.

<sup>43</sup> J. Murray, ed., *Chronicles of the Atholl and Tullibardine Families*, (Edinburgh: Ballatyne Press, 1908): 200.

<sup>44</sup> Murray, *Atholl and Tullibardine*, 219- 220.

<sup>45</sup> Kennedy, “Rebellion, Government and the Scottish Response to Argyll’s Rising of 1685,” 57.

follow them. His most pressing concern, however, was not the Council's pressure to engage, but rather the rampant robbing and plundering taking place under his name.

### Highland Control

As early as June 2, Atholl was writing that "Thieves and Robbers do convocate upon the pretence of being soldiers under our command, and do commit Thifts and Robberies upon the goods of his Majesties Loyall subjects."<sup>46</sup> As such, Atholl wrote to the Laird of MacNaughton establishing a watch, and granting him the right to seize all persons who did not have passes and to seize all robbed goods.<sup>47</sup> While most of the plundering was associated with the government's forces, the rebels also took part in it. Erskine wrote that under "Mr. Charles' [Argyll's son] command" the Castle of Rosay had been burnt, and two hundred cows were driven into town by the Highlanders. However, he was quick to point out that Mr. Charles ordered them to be given back. In going through Bute, he noted that the Highlanders "committed many abuses" plundering people's houses, killing sheep and lambs etc. Furthermore, Mr. Charles himself had people depone upon oath what money they had, and then forced them to give it to him. Erskine lamented that the Highlanders had brought "on us the calumny of oppression and robbery which we were now fighting against."<sup>48</sup>

Following the rebels' defeat, the plundering from government forces became much worse. Argyll's enemies leapt at the chance to take advantage of his defeat. Breadalbane wrote to Atholl in July noting that his tenants had informed him that Lochaber's men had stolen and plundered their goods. He exclaimed "For Godsak secur us from these base villanes before you leav that shyr." He closed the letter with the ominous "I have only y Lo: to blame. I am very

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<sup>46</sup> Murray, *Atholl and Tullibardine*, 221.

<sup>47</sup> Ibid.

<sup>48</sup> Erskine, *Journal*, 122.

angry.”<sup>49</sup> Atholl’s association with the “Raids” was unfortunate. Indeed, Wodrow seemed to believe that Atholl himself sanctioned not only the plundering of Inveraray but also the plundering of the “whole Country” following the rebels’ defeat.<sup>50</sup> The plundering associated with this rebellion was indeed severe. When Argyll’s son was restored in 1689, his recorded damages alone were £60,000.<sup>51</sup> As Hopkins points out, it was not only outside Highlanders who took part in the robbing, but also smaller local clans, in addition to Perthshire gentry. Indeed, Atholl himself took some of Argyll’s trees from Inveraray’s plantations.<sup>52</sup> John Willcock argues that the people responsible for the atrocities in Argyllshire were the Duke of Gordon, as well as Atholl and Breadalbane.<sup>53</sup> However, it is doubtful how much control the men had over their men.

Following Argyll’s capture, Sir Duncan Campbell of Auchinbreck’s home remained one of the last rebel bastions. Lady Henrietta Lindsay, stepdaughter to Argyll and wife of fellow rebel Sir Duncan, described how the royalist forces slayed her husband’s uncle at the gate, and burnt the house laying everything to waste.<sup>54</sup> However, Atholl’s account in his report to the Council slightly differed. After being captured, he noted that a “rogue” in the house had set a plan to blow up the house, concealing powder in his clothes. As he was found out, he was only able to blow up the door, and the house was saved. Nonetheless, as Atholl noted, after this treachery, the McLeans fell upon the Campbells and “killed unhappily Auchinbreck’s brother, the only honest man of [the] family.” He noted that the “tumult was so great” that it was impossible

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<sup>49</sup> Murray, *Atholl and Tullibardine*, 256.

<sup>50</sup> Wodrow, *Sufferings*, Vol. 2, 549.

<sup>51</sup> For a detailed account of all the losses, see: *Account of the depredations committed on the clan Campbell and their followers, during the years 1685 and 1686, by the troops of the Duke of Gordon, Marquis of Athol, Lord Strathmaver, and others*, A. Kinkaid, ed., (Edinburgh: Printed by C. Stewart, 1816).

<sup>52</sup> Hopkins, *Glencoe and the End of the Highland War*, 102.

<sup>53</sup> Willcock, *A Scots Earl in Covenanting Times*, 425.

<sup>54</sup> Lady Henrietta Lindsay, “Extracts from the Diary of Lady Henrietta Lindsay, wife of Sir Duncan Campbell of Auchinbreck, 1685-1689,” in *Lives of the Lindsays*, Vol. 2, Lord Lindsay, ed., (London: John Murray, Albemarle Street, 1858): 423.

to save him.<sup>55</sup> This report once again highlighted the difficulties Atholl had in controlling these irregular troops.

Following the rebellion, several people petitioned the Council for redress of stolen goods. John Campbell of Carrick wrote explaining that he was imprisoned by the Council's orders in the Canongate during the late rebellion, and during that time, all his cows, horses and sheep were stolen by rebels and thieves. As such, he requested warrant given to him and his tenants to seize his goods back. In response, the Lords ordered the Commissioners for the peace of the Highlands to see that his wrongs were redressed.<sup>56</sup> Additionally, William McLaughlan and Archibald Campbell wrote to the Council explaining that they had been kept prisoner by the rebels who pillaged their houses and goods. They requested vacant stipends for their damages, which the Council recommended Atholl to give them.<sup>57</sup> While these petitioners emphasized the rebels' plundering, Sophia Campbell wrote to the Council noting that she and her family had been robbed "both by the kings forces and also by Argyles." All of their livestock and goods had been taken and "ther was not so much left them as a shirt or coat within their family." The Council recommended to Atholl and his deputes to redress the wrongs done to her, either by recovering the goods that could be found or by supplying her with the "readiest of goods" from the rebels with Argyll.<sup>58</sup> While Wodrow briefly discussed the events, interestingly, these "raids" were generally not utilized by government opponents in their narratives of the rebellion. Perhaps, this was because the raids were seen as part of a continuing Highland problem, rather than an issue of religious dissidence, and the Highlanders were not considered representative of the Scottish government. Indeed, Atholl himself only had nominal control over them. The fact that the

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<sup>55</sup> Murray, *Atholl and Tullibardine*, 254.

<sup>56</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 11, 122.

<sup>57</sup> *Ibid.*, 134.

<sup>58</sup> *Ibid.*, 147.

Council sought to provide redress to the petitioners who had been plundered by government forces also highlights the lack of control they had over them.

While Atholl's name was unfairly associated with these raids, it is interesting that the government and Privy Council were generally not blamed for the events. Indeed, blaming Atholl for the excessive plundering, burning, and starvation, Wodrow explained that "the government was so sensible of those Extremities, that in a short Time the Marquis lost his Lieutenancy of this Shire."<sup>59</sup> While Atholl's Lieutenancy did lapse, and he saw this as a slight, there is no evidence that it was a direct punishment for his involvement with the raids. However, some in the Council were indeed skeptical of his men. Queensberry wrote Breadalbane on August 4, 1685 to discuss the "noise" being made in Argyllshire. He noted that he hoped Atholl would not be "caught, for he pretends his whole people are innocent," but as to his "exoneration the Advocat only ought to answer for it whose business it is."<sup>60</sup> Atholl himself also wrote Breadalbane about "the cry of the robberies committed on good subjects in the Highlands." He noted that it was not his fault, for it was not in his power "to put a stop to three or four thousand of robbers and rascals, having few or none left with [him]." Commenting on his loss of the Lieutenancy, he noted it would have been "a whole twelve month" to have made restitution following all the plundering, and he argued that the Council should have made a proclamation about it. He continued, "but for all the noise," there were few robberies after Breadalbane left. Nevertheless, he warned Breadalbane that he would find that some of his own tenants and vassals were also guilty of robbing.<sup>61</sup> Indeed, when the shire courts resumed, some of Breadalbane's men were found guilty of stealing a fellow Campbell's cows.<sup>62</sup> Aside from Atholl's association with these robberies, his treatment of the

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<sup>59</sup> Wodrow, *Sufferings*, Vol. 2, 549.

<sup>60</sup> NRS, GD112/39/139/4.

<sup>61</sup> NRS, GD112/139/5.

<sup>62</sup> Hopkins, *Glencoe and the End of the Highland War*, 103.

rebels themselves was actually quite lenient. However, it may have been beneficial for the Council to shift the blame to Atholl, rather than highlighting their tenuous control over the Highland forces. Instead of being a problem of religious ideology, the Atholl “raids” were more of a problem of Highland/Lowland governance and the fact that they were irregular troops, which is perhaps why they were less of an issue for government opponents. As Kennedy argues, the rebellion showcases the “on-going convergence between Highland and Lowland lordship” while also “disrupting the façade of Stuart absolutism to expose the compromise between central and local power.”<sup>63</sup> Indeed, the Council did not have proper control over its Highland troops—thus it is not surprising that they would choose to distance themselves from the looting and robbing.

For all the Privy Council’s strict orders to Atholl throughout the rebellion, most rebels were punished rather moderately. However, the initial instructions sent to Atholl fell in line with the Council’s violent letters to him throughout the campaign. The Earl of Perth wrote to Atholl on June 23 noting that since many of the rebels had returned to Argyllshire, he was to gather as many as he could, and “kill or apprehend all who joined with the late Argyle against the King.” First, he was to execute all heritors and forefault their estates to the King, and then he was to take a hundred of the “chief ringleaders of the tennents and commons” and execute them in several places. Perth continued, “and for the rest who are guiltie you shall shortlie have orders for them.”<sup>64</sup> Lady Henrietta Lindsay wrote of the “melancholy time” for her family and friends, stating that twenty-three gentlemen and feuars were “execute by that bloody person who gave orders for it,” likely referring to these same men.<sup>65</sup> Furthermore, Wodrow recounted how four or

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<sup>63</sup> Kennedy, “Rebellion, Government and the Scottish Response to Argyll’s Rising of 1685,” 59.

<sup>64</sup> Murray, *Atholl and Tullibardine*, 246.

<sup>65</sup> Lady Henrietta Lindsay, “Extracts,” 423.



five Campbell men who had surrendered were executed by Atholl “with all Care and Diligence” along with eighteen more rebels.<sup>66</sup> However, Hopkins notes that Atholl only executed seventeen of the one hundred twenty heritors that he and his men had captured.<sup>67</sup> Rather than execute all of them, Atholl wisely did not follow all of Perth’s orders. His behaviour fell in line with his previous actions throughout the tenure of his Lieutenancy. While he arrested leading oppositional figures, rather than trying other suspects himself and executing them, he made them give bonds to appear before the Council.<sup>68</sup> Interestingly, in most accounts of the rebellion, these local executions are only briefly discussed, and they are not associated with the actions of the central government. Indeed, Wodrow wrote that “had not the Privy Council, upon Representations made to them of his Barbarity,” sent a letter ordering Atholl to stop taking any more lives, “he would have gone on in this work.” Wodrow exclaimed that the orders were “unwillingly obeyed.”<sup>69</sup> Considering the fact that Atholl did not follow Perth’s harsh orders, this is not a fair account. It is significant that even Wodrow, the Covenanter’s largest champion, paints the Council in a slightly more positive light, placing the blame on Atholl.

### **Executions**

In Edinburgh itself, the Council only sentenced a few people to execution as part of the rebellion: Argyll himself, Richard Rumbold and Thomas Archer being the biggest names.<sup>70</sup> Even Wodrow commented, “indeed it was much, considering the Manner of the Managers after Pentland and Bothwel, that none were executed after the Earl, but worthy Mr. Archer,” as Rumbold was executed a few days prior to Argyll’s execution. Wodrow speculated that the lack

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<sup>66</sup> Wodrow, *Sufferings*, Vol. 2, 549.

<sup>67</sup> Hopkins, *Glencoe and the End of the Highland War*, 102.

<sup>68</sup> *Ibid*, 95.

<sup>69</sup> Wodrow, *Sufferings*, Vol. 2, 549.

<sup>70</sup> Most accounts of the rebellion state only three were executed (Argyll, Rumbold and Archer). It is possible the number could be five. See discussion below.

of executions was perhaps because of the small numbers that were taken.<sup>71</sup> Gilbert Burnet noted that the rebellion ended “with the effusion of very little blood... Nor was there much shed in the way of justice; for it was considered that the *Highlanders* were under such ties by their tenures, that it was somewhat excusable in them to follow their Lord.”<sup>72</sup> Interestingly, with every succeeding rebellion, the government acted increasingly more moderately, all the while its image became more and more violent.<sup>73</sup> While Argyll claimed to be fighting for the Protestant religion, the rebellion was not a Covenanter rebellion, and the majority of the rebels were not traditional enemies to the Crown. Those who were executed were indeed strategic choices.

The Englishman Richard Rumbold, or Colonel Rumbold, had come with Argyll from Holland, having left England in 1683 due to his involvement with the Rye House Plot.<sup>74</sup> It was unclear why Rumbold joined Argyll instead of Monmouth, and the Council wanted to know why, asking Argyll that question while he was interrogated in the Castle.<sup>75</sup> Having been wounded in battle after crossing the Clyde, Rumbold was caught by the government forces and brought to Edinburgh on June 22. As Fountainhall noted, worrying that Rumbold “was in hazard by his wounds” they ordered him to be tried June 26, after which he was subsequently executed.<sup>76</sup> Although the Council moved quickly, and assumed his guilt prior to the trial, Fountainhall pointed out that Rumbold “got a fair tryall.”<sup>77</sup> The Council ordered his trial and

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<sup>71</sup> Wodrow, *Sufferings*, Vol. 2, 546.

<sup>72</sup> Gilbert Burnet, *Bishop Burnet's History of His Own Time. From the Restoration of King Charles II. To the Settlement of King William and Queen Mary at the Revolution...* Vol. 1 (London: Printed for Thomas Ward in the Inner-Temple Lane: 1724): 632.

<sup>73</sup> For instance, the larger scale Bothwell Rebellion had fewer executions than the Pentland Rising. As Ian B. Cowan states regarding the Bothwell Rebellion, “the authorities cannot be accused on this score of acting vindictively towards the rebels.” See Ian B. Cowan, *The Scottish Covenanters, 1660-1688*, (London: Victor Gollancz Ltd, 1976): 102.

<sup>74</sup> For more information on Rumbold, see: Robin Clifton, “Rumbold, Richard (c. 1622–1685), conspirator.” *Oxford Dictionary of National Biography*, (23 Sep. 2004).

<sup>75</sup> Wodrow, *Sufferings*, Vol. 2, 539.

<sup>76</sup> Fountainhall, *Historical Notices*, Vol. 2, 651.

<sup>77</sup> Fountainhall, *Historical Observes*, 190.

execution at the same time, giving detailed instructions for his execution, after he was found guilty of course.<sup>78</sup> Rumbold was indicted with treason and rebellion. While the court described Rumbold's involvement in the Rye House Plot as part of his charges, Sir George Mackenzie of Rosehaugh as Lord Advocate declared that he restricted his libel to the second part of the accusation, that Rumbold "did associat himself with that excreable traitor, Archibald Campbell, somtyme earle of Argile, and invad this kingdome in armes in manner lybelled" and the Justiciary agreed with limiting the charge.<sup>79</sup> The trial was not long, for Rumbold confessed and declared that he did indeed associate himself with Argyll. The Assize "all in one voice" found Rumbold guilty of treason for invading the kingdom in arms.<sup>80</sup> According to Wodrow, Rumbold was so weak that he could not walk to the scaffold alone, and he had to be supported by two officers.<sup>81</sup> While other English prisoners involved in the rebellion were eventually shipped down to London, Rumbold was tried in Scotland. The haste of his trial and execution was likely due to his wounds. Rather than dying in prison, it was more expedient to make an example of him. Due to his alleged involvement with the Rye House Plot, and the fact that he was one of Argyll's generals, his execution was not controversial, but expected.<sup>82</sup>

Argyll himself was executed a few days after Rumbold. Having previously been sentenced for treason due to his refusal to swear the Test Oath, he was executed upon his previous sentence. When Argyll was taken, the Privy Council wrote to the King requesting his instructions for what to do with him. The King wrote that he should be executed within three

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<sup>78</sup> RPCS, 3<sup>rd</sup> series, Vol. 11, 83.

<sup>79</sup> *A Complete Collection of State Trials and Proceedings for High Treason and Other Crimes and Misdemeanors from the Earliest Period to the Year 1783 (State Trials)*, Vol. 11, T. B. Howell et al, eds., (London: Printed by T. C. Hansard, 1816): 877-878.

<sup>80</sup> Ibid.

<sup>81</sup> Wodrow, *Sufferings*, Vol. 2, 552.

<sup>82</sup> Rumbold's execution was included in several Covenanter martyrologies. In his execution speech, he owned his association with the Argyll Rebellion, but denied his part in the Rye House Plot. He also denied being anti-monarchical. However, he advocated for a limited monarchy. See *State Trials*, Vol. 11, 880.

days after receipt of his letter, but the manner of execution was left up to the Council. As Fountainhall recorded, the Council deliberated about whether or not he should be hanged or beheaded, but “the nobility stood upon their priviledge of peerage” and he was ordered to be beheaded as due his status upon his prior sentence.<sup>83</sup> Fountainhall wrote, while “some thought this doome of forfaultor scarce weill founded, being only on his Explication of the Test, wheiras he had committed crimes 1000 tymes more important since; but to give him a new indytment on these was to louse the first sentence, to reflect on the Judges who had condemned him, and the Parliament who had ratified it.” Indeed, since his new treasons were “open, avowed, and notorious” even though “his new sentence on record bears nothing of it,” it was deemed acceptable to quickly execute him.<sup>84</sup> Wodrow also pointed out that it was debated whether or not Argyll should be indicted upon his present rebellion or not, but that it would have taken some time to process him, and that the Council did not want to “seem to question the Injustice of their former Sentence.” Even Wodrow conceded, “to be fare, a Sentence upon the present Invasion... would have been far more equal in the Eyes of many.” Nonetheless, the Council looked upon him “as already condemned.”<sup>85</sup> Leading an armed rebellion against the new monarch, Argyll had to die. There was no question of it. Indeed, his rebellion vindicated the Council’s previous actions in charging him for his explication of the Test.

At his execution, Argyll prayed that the country be protected against oppression, popery, and persecution, and that there would be “an end to the present trials.” He did not pray for the present king, stating instead “I pray God may provide for the security of his Church, that

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<sup>83</sup> Fountainhall, *Historical Observes*, 191.

<sup>84</sup> *Ibid.*, 193.

<sup>85</sup> Wodrow, *Sufferings*, Vol. 2, 538.

Antichrist nor the Gates of Hell may not prevail against it.”<sup>86</sup> With regard to his fellow rebels, he proclaimed, “I am heartily well satisfied there is no more Blood spilt, and do with the stream of it may stop at me.”<sup>87</sup> While not in his printed speech, Fountainhall also noted that Argyll “recommended the poor people had been with him as deserving mercy and compassion, for the most part of them were forced.”<sup>88</sup> Fountainhall expanded that Argyll regretted much the common people that were with him “for they are ready to take any bonds or tests, and it was not religion that moved them to rise, but ather affection to ther late master and cheiff, or else they were compelled.”<sup>89</sup> Looking at the number of men who were punished, Argyll’s wish was granted for the most part.

The next ‘big’ execution was that of Thomas Archer, a Presbyterian minister.<sup>90</sup> He had moved to Holland in 1682, having been banished from Scotland and signing a bond never to return without the government’s allowance. According to Wodrow, Archer heard from his friends in Scotland that his bond had been gotten up by them, so he decided to return with Argyll—interestingly, joining a rebellion did not seem to have phased him. Having fallen in battle, he was badly wounded, and taken prisoner.<sup>91</sup> Spending months in prison, Archer was called to the bar on August 6 with several other prisoners, including the militant Covenanter Alexander Shields. However, both a physician and surgeon vouched on his behalf explaining he had a raging fever and was too sick to go to court, so his condemnation was continued.<sup>92</sup> On August 12, Archer was brought to court, indicted, and accused of high treason and rebellion.

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<sup>86</sup> Earl of Argyll, *Copy of the last Speech of the Late Earl of Argyle; Delivered on the Scaffold, who was Beheaded at the Cross of Edinborough, June 30, 1685*, (Edinburgh: 1685): 1.

<sup>87</sup> Ibid. A copy of the speech can also be found in NRS, PC15/19/15.

<sup>88</sup> Fountainhall, *Historical Observes*, 195.

<sup>89</sup> Ibid., 189.

<sup>90</sup> See NRS, JC39/72/1 for his deposition.

<sup>91</sup> Wodrow, *Sufferings*, Vol. 2, 553.

<sup>92</sup> Fountainhall, *Historical Notices*, 658. The petition can be found in NRS, JC39/72/7, and testimony confirming his illness found in NRS, JC39/72/8.

Once again, the trial was rather uncomplicated. Having been examined in prison, Archer confessed to taking part in the rebellion with Argyll, and of trying to recruit people to join him. In court, he renewed his confession, and confessed he also had a sword. The Assize all in one voice found Archer guilty “in respect of his own judicial confession.” He was condemned to be executed on August 14.<sup>93</sup> Due to his poor health, the execution took place on either August 15 or August 21.<sup>94</sup> According to Wodrow, Archer was so weak the day of his execution that he had to be carried to the scaffold on a chair. Indeed, he noted “in all probability a few Hours would have carried him to Heaven though he had been spared.”<sup>95</sup>

From the beginning, the Council had listed Archer amongst the leaders of the rebellion. In its proclamation against fugitive rebels with Argyll, the Council offered rewards for those who apprehended or brought them in. Leaders such as Sir John Cochrane would bring in 1800 marks, while preachers such as Mr. Archer would bring in 1000 marks.<sup>96</sup> Unlike the majority of the rebels who joined Argyll, Archer was the typical Covenanter enemy to the Crown. As a preacher, he was viewed more dangerously, as one who would not own the King’s authority, and one who could stir up larger crowds. It is unsurprising that the Council would decide to execute him, especially as he had been previously found guilty in the past. Wodrow believed the Council had to have “some Ministers sacrificed to their Fury,” noting Mr. Guthrie after the Restoration, Hugh MacKail after Pentland and King and Kid after Bothwell, arguing that Archer was now to join their company.<sup>97</sup>

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<sup>93</sup> *State Trials*, Vol. 11, 900-902; see NRS, JC39/72/12 for the doom of forefauulture.

<sup>94</sup> Wodrow states August 21 while the Tolbooth Records record August 15: See John A. Fairly, ed., “The Old Tolbooth: Extracts from the Original,” *The Book of the Old Edinburgh Club Twelfth Volume*, (Edinburgh: Printed by T. and A. Constable Ltd., 1923): 172.

<sup>95</sup> Wodrow, *Sufferings*, Vol. 2, 555.

<sup>96</sup> Fountainhall, *Historical Notices*, Vol. 2, 650.

<sup>97</sup> Wodrow, *Sufferings*, Vol. 2, 553.

The fact that Archer was supposed to be tried with Shields and other extreme Covenanters, alongside three Argyll rebels is interesting. Amongst the prisoners who were tried in that session for being with Argyll were Archibald Campbell, David Law, and Gavin Russell.<sup>98</sup> Due to witness testimony proving their association with the rebellion, and the fact that most would not own the King, they were found guilty to be executed.<sup>99</sup> There is much debate about who was actually executed on August 12, as a number of prisoners received reprieves, including Archibald Campbell.<sup>100</sup> However, the records of the Old Tolbooth do record that David Law and Gavin Russell were executed on August 12, which would bring the total centrally authorized Argyll executions up to five.<sup>101</sup> However, the fact that these prisoners were lumped in with United Societies members indicates that the Council viewed them differently. It was not necessarily the fact that they were part of the rebellion that was important, but the fact that they would not own the King's authority after being captured. Indeed, as Fountainhall noted, these prisoners were "being ather obstinate in ther principles, or unclear to disowne the lawfulness of

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<sup>98</sup> Along with Campbell, Law and Russell, as well as Shields, Thomas Stodhart, James Wilkieson and Matthew Bryce were also tried. Stodhart and Wilkieson's depositions were collected at the same time as a number of Argyll rebels (See Appendix II). While they were tried at the same time, they were unlikely part of the rebellion. Indeed, they were indicted for "owning treasonous positions" (*State Trials*, Vol. 11, 896), while the former three were indicted for being part of the Argyll Rebellion. In their depositions, they refused to swear the oath, and the Council recorded that they were banished because they "not only obstinately refused the said oath of allegiance but most impertinently and indiscretely misbehaved themselves before the Council." See *RPCS* 3<sup>rd</sup> series, Vol. 11, 115. However, Stodhart and Wilkieson appear on banishment lists to be marked with a stigma. Wilkieson would later petition the Council to reprieve his death sentence which was a "meer mistake" as he had already been sentenced to be banished and his ear had already been cut. See *RPCS* 3<sup>rd</sup> series, Vol. 11, 144. The Council proceeded to keep him in prison until further order. See *RPCS* 3<sup>rd</sup> series, Vol. 11, 163. Thomas Stodhart, however, was executed on August 12, 1685. See *The Book of the Old Edinburgh Club Twelfth Volume*, 171.

<sup>99</sup> *State Trials*, Vol. 11, 896, 900; See NRS, JC39/72/9 for the verdict.

<sup>100</sup> For example, Archibald Campbell wrote to the Council in November 1685 requesting a further reprieve of his sentence, which he received. See: *RPCS*, 3<sup>rd</sup> series, Vol. 11, 234. Campbell would receive further reprieves. The Council finally wrote to the King in March 1686 requesting he provide Campbell with a remission for life only. See: *RPCS*, 3<sup>rd</sup> series, Vol. 12, 106. He owned the King's authority in his deposition. See, NRS, JC39/72/1. In addition, Dr Mark Jardine provides a detailed analysis of the different sources, and the debate over who was actually executed in August 1685 on his academic blog: Mark Jardine, "The Confusion over the Covenanters Hanged in the Grassmarket on 12 August, 1685," *Jardine's Book of Martyrs* (Nov. 15, 2016): <<https://drmarkjardine.wordpress.com/2016/11/15/the-confusion-over-the-covenanters-hanged-in-the-grassmarket-on-12-august-1685-history-scotland/>>. Last accessed December 2021.

<sup>101</sup> *The Book of the Old Edinburgh Club Twelfth Volume*, 171.

rising in armes, and the Declaration of war.”<sup>102</sup> As Russell stated in his deposition, he did not repent of the rebellion.<sup>103</sup> Along with the witness testimony proving their association with the rebellion, the sentence of execution was not surprising. Despite the confusion over who was executed, however, of the twelve who were brought to the bar, the majority were eventually reprieved.

Contrary to Perth’s initial advice, by warrant from the King’s Council, Atholl produced an indemnity in early June, pardoning the common folk who had taken part in the rebellion, as long as they laid down their arms and swore an oath of allegiance.<sup>104</sup> In the indemnity, Atholl noted that he had been informed that many of the commons in Argyllshire and Tarbet had been “forced & prest by the Rebels to joyneing.” As such, he provided “the benefit of Indemnitie” to the above-mentioned persons.<sup>105</sup> Later, Atholl issued an order requiring ministers to create a list of rebels. Most of them were eventually dealt with through fines and forefaultures. Additionally, he called for further bonds for assuming responsibility of tenants’ actions.<sup>106</sup> Atholl dealt with the rebels on the local level rather moderately, and the Privy Council followed suit. Most rebels who joined Argyll were forced, and the government took that into account. Indeed, the King wrote to the Council on July 25 noting “we are informed that there is a greater number of rebells taken prisoners then we think fitt to be executed according to their deserveings.” He instructed the Lord Advocate to prosecute only the “meanest sort of yow shall think convenient and to banish them to the plantations.” As to executions, the King told the Lord Advocate to only prosecute those who are “fit for deterring others from committing the like crimes for the

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<sup>102</sup> Fountainhall, *Historical Notices*, Vol. 2, 659.

<sup>103</sup> NRS, JC39/72/1.

<sup>104</sup> Fountainhall, *Historical Notices*, Vol. 2, 646.

<sup>105</sup> NRS, PC15/19/6.

<sup>106</sup> Kennedy, “Rebellion, Government and the Scottish Response to Argyll’s Rising of 1685,” 58.



future.”<sup>107</sup> It is likely that Archer, Campbell, Law and Russell were prosecuted in response to this letter. Archer as a Preacher, and Law and Russell for not owning the King could be considered good examples to deter others. With regard to other ringleaders and heritors, including Argyll’s sons and relatives, the Council chose to forefault rather than execute them.<sup>108</sup>

### **Depositions and Banishments**

Between July 9-31, approximately one hundred seventy-seven prisoners were sentenced to banishment, either to East New Jersey or Jamaica. Of those banished, approximately seventy per cent of them were Argyll rebels. Of the forty-nine prisoners who were to have their ears cut, approximately twenty per cent were Argyll rebels, and all of them had refused to swear the Oath of Allegiance. The remaining rebels who owned the King were banished “without mark or stigma.”<sup>109</sup> Considering the fact that Argyll landed with three hundred men, and at his peak had two thousand five hundred with him,<sup>110</sup> relatively few were punished severely. By the end of the rebellion, Argyll’s forces had dwindled to fifteen hundred, and if we calculate using that lower number, approximately eight per cent of the rebels were banished. The rebels were either sent to Jamaica on John Ewing’s ship, or to East New Jersey with Sir George Scott of Pitlochrie, William Arbuckles or Robert Barclay of Urie.<sup>111</sup> Transportation was a serious punishment. However, as Mackenzie noted, the government believed that “the turning Capital Punishment into exile, was considered an Act of Clemency; not of Cruelty.”<sup>112</sup> Additionally, it must be noted that of those one hundred seventy-seven initially banished, some of them were later liberated.

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<sup>107</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 11, 123-124.

<sup>108</sup> For some examples of processes against ringleaders and gentry, see: NRS, JC39/82; NRS, JC39/86; NRS, JC39/88.

<sup>109</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 11, 94, 114, 129, 329, 330.

<sup>110</sup> Harris, *Revolution*, 76.

<sup>111</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 11, 94, 130, 136.

<sup>112</sup> Mackenzie, *Vindication*, 1691, 11.

While banishment had been a common form of punishment in Scotland for over a century, it had typically been seen as “banishment from” rather than “transportation to,” with many banished from particular cities.<sup>113</sup> However, with the increase in Scottish colonial ventures in the seventeenth century, transportation became viewed as both a convenient way to remove dissidents, as well as bolster transatlantic economic ties. Throughout the 1650s, Cromwell had banished many Scots to Barbados, and in 1682, James authorized the establishment of the Scottish colony of Southern Carolina, and the establishment of East New Jersey in 1685.<sup>114</sup> The leaders of these ventures, such as Sir George Scott of Pitlochrie, a Presbyterian entrepreneur, were active promoters of their causes, petitioning the Council for prisoners to be transported.<sup>115</sup> While banishments increased in the 1680s, Helen Findlay argues that this was in part an effort to empty overcrowded prisons, as the number who were released from prison also increased at the same time. As such, she argues that banishment should not necessarily be viewed as a form of persecution but rather as an effort to process prisoners.<sup>116</sup>

How did the government decide who were the “meanest” sort to banish? It must be noted that the majority of rebels were examined in local settings, and most of them were freed with Atholl’s indemnity. However, a select group were taken to Edinburgh from Glasgow to be examined by the Privy Council, and they were dispersed in various prisons including the Tolbooth, Correction House and Laigh House.<sup>117</sup> In the *Register of the Privy Council* records, there are approximately one hundred seventy extant depositions from prisoners who were

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<sup>113</sup> Gwenda Morgan and Peter Rushton, *Banishment in the Early Atlantic World*, (London: Bloomsbury, 2013): 33.

<sup>114</sup> Allan I. Macinnis, *Union and Empire: The Making of the United Kingdom in 1707*, (Cambridge: Cambridge University Press, 2007): 165.

<sup>115</sup> For more information on these plantations, see Macinnis, *Union and Empire*.

<sup>116</sup> Helen Findlay, “The Later Covenanting Movement, 1660-1688: A Legal Reappraisal,” Master’s Thesis, (University of Strathclyde, 2012): 76.

<sup>117</sup> On July 3, 1685, the Burgh Council drafted a petition to send to the Privy Council desiring a payment for maintaining the prisoners, “they being great expenss to the Citie.” See: *Extracts from the Records of the Burgh of Edinburgh 1681 to 1689*, Marguerite Wood and Helen Armet, Eds., (Edinburgh: Oliver and Boyd, 1954): 147.

brought from Glasgow in June to be examined by the Council, and the majority of the depositions are from Argyll prisoners (See Appendix II). As such, it is possible to use these depositions as a case study to examine who was banished and why.<sup>118</sup> It must be noted that there are a number of missing Privy Council records from this period, so it is not possible to get an entirely accurate number. Additionally, there are many prisoners with duplicate names, so it is not entirely possible to determine if the one who deposed was the same person who was banished. As such, numbers are estimates. However, approximately forty-five per cent of the prisoners who deposed do not appear on the lists of those who were banished or those found guilty, and it is likely that they were *eventually* released, suggesting that the Council did act quite leniently for an armed rebellion. As a comparative case study, there are eleven extant depositions taken by Duncan McEwin (See Appendix III) not found in the *Register*, and over half of these prisoners were likely released.<sup>119</sup> Furthermore, it must be pointed out that just because a prisoner was banished, it did not mean his sentence occurred. Indeed, in this sample, a number of formerly banished prisoners were later released for agreeing to take the Oath of Allegiance and Abjuration.<sup>120</sup> Furthermore, prisoners who were called back to be witnesses were often released, which will be discussed below. Likewise, female prisoners could be released from their sentence of banishment should someone become their cautioner.<sup>121</sup> As such, it must be remembered that a banishment sentence was not always final.

It is not always clear from the depositions at first appearance why one prisoner was banished, and another was released. However, while the depositions contain similar stories, there

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<sup>118</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 11, 306-320.

<sup>119</sup> NRS, JC39/84/1, JC39/84/6. As the first deposition in this bundle is by a Duncan McEwin, it is possible the NRS labelling is incorrect. However, for simplicity's sake, these depositions will be referred to as McEwin's.

<sup>120</sup> See a number of examples in *RPCS*, 3<sup>rd</sup> series, Vol. 11, 318.

<sup>121</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 11, 126, 135.

are a few key details to explain why some were released and others were not. Most of the depositions are short and vague in detail. However, since these prisoners were sent from Glasgow, it is possible that a number of them were those who crossed the Clyde,<sup>122</sup> perhaps engaging in the Battle of Muirdykes, which would make them more susceptible to harsher punishment. As Kennedy has pointed out, the Privy Council dealt with the “most senior rebels” themselves,<sup>123</sup> and those who stuck with Argyll the longest could be viewed poorly by the Council.

On July 9, the Council banished fifteen prisoners who had engaged with Argyll to East New Jersey on William Arbuckles’s ship. Of these prisoners, the *Register* contains eleven of their depositions. Six of the prisoners’ depositions have a note listing them as “gone” or “absent,” marking them as easy targets for banishment, as flight could be seen as evidence of guilt.<sup>124</sup> Interestingly, at least one of them was called back to be a witness and appears to have eventually been liberated after taking the Test.<sup>125</sup> Alongside those who were gone, it also appears that the son of the Baillie of Campbelltown was banished in this first round, in addition to one rebel who admitted he had a gun and sword.<sup>126</sup> A number of others are described as young—around fifteen or sixteen—so it is possible they were considered easy to dispose of right away.<sup>127</sup> However, the Council was generally lenient toward younger prisoners, so this would be an anomaly. Because of the vagueness of the depositions, it is not entirely clear how the others were chosen for this initial batch. Nonetheless, the Council began the process of indicting the prisoners in earnest on July 24, when they found seventy-four of the prisoners guilty of either

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<sup>122</sup> For instance, John McGibbon admitted to crossing the Clyde with the rebels. *RPCS*, 3<sup>rd</sup> series, Vol. 11, 312.

<sup>123</sup> Kennedy, “Rebellion, Government and the Scottish Response to Argyll’s Rising of 1685,” Footnote 90, pg. 58.

<sup>124</sup> Thanks to Dr Michael Wasser for his comments on flight and guilt. *RPCS*, 3<sup>rd</sup> series, Vol. 11, 94, 310, 312, 320.

<sup>125</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 11, 94, 126, 136, 330, 58. Angus McConochie alias McIver was a witness and took the Test.

<sup>126</sup> *Ibid.*, 313, 317. Duncan McVicar was the son of the Baillie of Campbelltown.

<sup>127</sup> *Ibid.*, Vol. 11, 313, 318, 319 (Duncan McCallum, John Clark, Donald Thomson).

keeping or being present at conventicles, withdrawing from public ordinances, harbouring and resetting rebels or joining with them, or refusing the Oath of Allegiance.<sup>128</sup> They sentenced the majority of the prisoners to transportation. As noted above, not all of them were Argyll rebels. Of those sentenced that day, approximately thirty-three depositions are contained in the *Register*, with fourteen of them refusing the Oath of Allegiance, and not part of the rebellion.

The Council continued processing the prisoners, and from July 29 to July 31, more prisoners were sentenced to banishment, with approximately forty-three extant depositions contained in the *Register*.<sup>129</sup> The depositions were generally consistent. Those who owned the King's authority were banished with no mark or stigma, while those who refused the Oath of Allegiance were to have their ear cut. The vast majority of Argyll rebels did indeed own the King's authority. However, there were a few exceptions, such as Samuel Howie from Kintyre, who declared that even though he was forced to join Argyll's party, he would not own the King's authority.<sup>130</sup> The depositions corroborate what Argyll declared on the scaffold, that most of the rebels had been pressed or forced. Nonetheless, over a hundred rebels were still banished. As noted, the Council considered banishment an act of clemency, especially banishment with no mark. Even if these prisoners were forced, they still had taken part in open and armed rebellion, and they were indeed guilty, as they all confessed to taking part. The Council needed an example to warn others from taking part in similar ventures. Therefore, it is unsurprising that the Council chose to still punish a select number, especially with colonial adventurers pressuring them for prisoners.

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<sup>128</sup> Ibid., 114.

<sup>129</sup> Ibid., 119, 126-127, 129, 130.

<sup>130</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 11, 320.

What of those names who do not appear on lists to be transported though? While the depositions do appear similar to those found “guilty,” there are a few consistent details that mark them apart. As noted, over half of the prisoners who deposed to Duncan McEwin were released, so it is worth examining some these accounts in detail, as there are a number of consistencies with the *Register* depositions. While all of them declared that they were forced, there are some important details to pick apart. For instance, most of the rebels McEwin interviewed noted that they were able to escape or lose the rebels. It is important that they did not stay with Argyll’s forces until the end. In another deposition taken by McEwin, Duncan McDonald “being a young boy” noted he was forced to carry baggage against his will, but he escaped the rebels as soon as he could.<sup>131</sup> While youth was a significant factor, the most important part seemed to be that they left Argyll before he was defeated.

In examining the *Register* accounts, the prisoners who do not appear on the *Register* lists have similar stories. The prisoners who note that they were captured by government forces after escaping from the rebels, or those who were taken on their way home appear to have been released.<sup>132</sup> Indeed, attempting to escape from Argyll was seen as an important factor in release. Additionally, a number of rebels specifically pointed out that they did not cross the Clyde such as Neil McCavish and Donald McInvonish.<sup>133</sup> Conversely, Ewan McAlister and Donald McKovan stated that they were forced to cross the river.<sup>134</sup> Presumably, those who crossed engaged in more battles. Additionally, like in McEwin’s depositions, it would appear that youth was a factor in release. On both John McGilipharick’s and John Buchanan’s depositions, there

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<sup>131</sup> NRS, JC39/84/1.

<sup>132</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 11, 309, 315, 316 (Donald McWharrie, John McDougal, Duncan MacCallum).

<sup>133</sup> *Ibid.*, 311, 312.

<sup>134</sup> *Ibid.*, 311.

are marginal notes that state “young boy” and “a poor boy.”<sup>135</sup> Furthermore, prisoners who noted that they were tortured or suffered violence from the rebels generally seem to have been let off as well. For instance, Alexander McIlvernock explained that he was tied with cords when trying to escape, while Neil McCallum noted they threatened to shoot him when trying to escape.<sup>136</sup> While the depositions of the guilty and “not guilty” are similar, there are enough differences that help illuminate who the “meanest” sort were—those who chose not to escape, or were unfortunate enough not to escape, and those who crossed the Clyde. Furthermore, at least twenty of the prisoners from the depositions explicitly note that they were forced to join the rebels by Mr. Charles, Argyll’s son. That also may have been a factor in bringing these specific rebels to Glasgow for questioning. Many of the prisoners who appear on the banishment lists appear to have been from Islay, and according to Erskine, Argyll and his men were able to recruit a hundred or so men based on their religious principles there.<sup>137</sup> It is possible some of those who were banished were these men. Furthermore, Hopkins points out that a number of the men transported that summer were among two hundred fifteen commoners whose livestock Atholl had declared forefault at a court that October.<sup>138</sup>

The Council arguably did act rather moderately, banishing only a select hundred or so rebels. However, to some, that was still too many. In March 1686, a group of heritors from Argyll petitioned the Council to complain of their recent impoverishment and to request the end of quartering. In the petition, they pointed out that of those who fought with Argyll, “the commons generallie were forced by fire and sword and taken actuallie prisoners.” Indeed, they told the Council to “remember that quhen the prisoners who were taken an who were the verie

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<sup>135</sup> Ibid., 310.

<sup>136</sup> Ibid., 309, 315.

<sup>137</sup> Erskine, *Journal*, 118.

<sup>138</sup> Hopkins, *Glencoe and the End of the Highland War*, 103.

worst of them came to the barr they could for the most part have proven that they were forced.” The heritors also pointed out that in the prisoners’ testimonies, most abhorred the rebellion, and owned the King’s authority, while agreeing to take any oath. These facts are indeed corroborated with the existing depositions. Yet, the heritors also pointed out that “the country is not only dispeopled of men, so many having fled and bein banished, but many others dare not yet appear or return” until the King grants an act of indemnity. In response to the petition, the Council did indeed recommend to Drummond to stop the quartering of soldiers within the shire of Argyll.<sup>139</sup> While the Privy Council did let most of the Argyll rebels go, and there were some patterns in who they decided to banish, it was not always clear why they decided one rebel was a “meaner” sort than others. Many who were banished were certainly forced and pressed by Argyll into participating. It would appear the heritors of Argyll did not view the Council’s clemency quite so positively.

### **Imprisonment**

What became of the prisoners who appear to have not been banished? It is likely that a number of them continued to suffer in prison for months on end while the Council decided what to do with them. Indeed, James Duff, a boy of about fifteen years who deponed in June, explained that he had been a cook on Argyll’s ship and not part of the rebellion. He was not banished in July with the other rebels.<sup>140</sup> However, he sent a petition to the Council in March 1686, noting he had been a prisoner in the Tolbooth for six or seven weeks and that he was “but a poor young boy starving in prisone.” He asked to be set at liberty, and so the Council called for a review of his case.<sup>141</sup> It is unclear where Duff had been from July to March—perhaps another

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<sup>139</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 12, 120-121.

<sup>140</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 11, 305.

<sup>141</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 12, 126.



prison, like the Laigh House or Pauls Work. His case was reviewed, and an order was given for him to be released as long as he promised to live peacefully and loyally.<sup>142</sup>

Similarly, those who were chosen to serve as witnesses faced a similar situation to Duff. In December 1685, the Council received a petition from Archibald, Dougal and Hector McGibbons, prisoners in the Tolbooth, as well as Gilbert McArthur and Angus McIver, prisoners at Pauls Works. The petitioners noted that they had been taken in as prisoners amongst the rest of the rebels, but that the Council had found them to be of “honest and loyall principles.” While those that were guilty were sent to the plantations and others who were in “their circumstances” were set at liberty, the Council had ordered them to remain in prison to bear witness against the rebels.<sup>143</sup> However, they had been in prison for five months in a “verry miserable condition, nothing been allowed them for maintenance.” As such, they sought a warrant for liberation. The Council refused their desire for liberty, but instead gave warrant to the master of the correction house to maintain the petitioners at sixpence *per diem*.<sup>144</sup> Interestingly, while these prisoners said that they were found innocent, their names do appear on the banishment lists in the *Register* from July, further emphasizing that not all who were sentenced to banishment actually suffered the punishment. Following this petition, the Council ordered a decree calling for six shillings Scots a day for witnesses “keept prisoners upon the account of the late Argyles rebellion.”<sup>145</sup> These prisoners wrote to the Council again in January 1686 noting that they had now been examined as

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<sup>142</sup> Ibid., 140.

<sup>143</sup> For example, Hector and Dougal McGibbons were witnesses at Gavin Russell, Archibald Campbell and David Law’s trial in August 1685. See *State Trials*, Vol. 11, 897.

<sup>144</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 11, 246-247. Interestingly, Robert Moubray, master of the correction house at St. Pauls Work had written in November 1685, in regard to the “great expense” he had for maintaining McArthur and McIver, and requested they be transported to another prison. Instead, the Council gave him four shillings per diem until they were liberated. See: *RPCS*, 3<sup>rd</sup> series, Vol. 11, 210. Seemingly, this four was not enough. He petitioned the Burgh of Edinburgh in October 1688 stating that he had maintained five prisoners at his own expense for eight of nine months before they were released and requested that he be granted a gildbrothership in exchange for this expense, which was accepted. See *Extracts from the Records of the Burgh of Edinburgh*, 246.

<sup>145</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 11, 248.

witnesses. As such, they hoped the Council would now set them at liberty. Additionally, they requested a maintenance for them to be carried home, as they “live in Argyll at a great distance from this place.”<sup>146</sup> The records from the Tolbooth indicate that they were indeed released on January 12, 1686.<sup>147</sup> However, they wrote again in February 1686, noting that while in prison “several persons owt off malice and envie seized wppon yowr petitioners small goods.” As such, they requested a warrant to “call, follow and persew for all or any off their goods in ane legal way.” On the back of the petition, the Council wrote “Waived.”<sup>148</sup> While they did spend many months in prison, an unfortunate ‘punishment’ indeed, they were not banished after all.

While the Council did banish a number of rebels, and it is not always clear why some were chosen for this punishment while others were let go, there were some consistencies and logic to the Council’s actions, and they did not act entirely arbitrarily. As always, the Council wanted to ensure that proper procedures were in place, and that they had the law on their side. This can be seen in their treatment of the Dutch prisoners taken with Argyll. Due to the nature of his rebellion, he had brought a number of foreigners with him. According to Argyll, “the Dutch seamen were not acquainted with his designe till he had them at sea.”<sup>149</sup> In August 1685, the Council wrote to the Secretaries of State, noting that there had been some Dutch men taken prisoner with the late Argyll. However, “they being strangers, the Councill did not think fitt to proceed agains them until they knew his majesties pleasure anent their disposal.”<sup>150</sup> Throughout this process, a number of the Dutch prisoners petitioned the Council, with Giles Williamson perhaps being the most persistent. Williamson, along with four other Dutchman, had deponed in

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<sup>146</sup> Ibid., 451-452.

<sup>147</sup> *The Book of the Old Edinburgh Club Twelfth Volume*, 191.

<sup>148</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 11, 570.

<sup>149</sup> Fountainhall, *Observes*, 189.

<sup>150</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 11, 157.

June with the other Argyll rebels.<sup>151</sup> Williamson had been Argyll's printer and claimed that he had been forced to print Argyll's declarations. In his petition, he wrote how he has "lyen these 24 weeks in prison" in poor and starving conditions without ever being examined to be found guilty or innocent. He explained that he "craves to be examined, for he will suffer any punishment if found guilty, but if innocent he will bless their Lordships for his liberty."<sup>152</sup> Having received no reply from the King, and also receiving Williamson's letter, the Council sent another letter "to remember your Lordships concerning [the Dutch Prisoners]."<sup>153</sup> The Council responded to Williamson refusing to grant him liberty "until his Majesties pleasure be known" but appointed the keepers of the Tolbooth "a groat a day for his maintenance."<sup>154</sup>

Unfortunately for Williamson and the other Dutch prisoners, they would have to wait a while longer in prison. In December, the Council wrote again requesting that a "returne may be given to the Council's letter direct to the Secretaries concerning them."<sup>155</sup> While the Scottish government was notorious for allowing prisoners to remain imprisoned in limbo, these multiple letters do show that the Council wanted to proceed with processing them and were not keeping them imprisoned arbitrarily. Finally, in January 1686, the Council remitted the case of the Dutchmen and other "stranger, prisoners who were in the late rebellion" to a committee in consideration of the King's latest letters. They were to report what was fit to be done with them, presumably due to the King's intention to issue an indemnity.<sup>156</sup> Williamson was finally released from the Tolbooth on January 21, 1686. He had to depart the country by March 1, never to return again.<sup>157</sup> Throughout early 1686, the other Dutch prisoners were slowly granted their liberty as

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<sup>151</sup> Ibid., 306

<sup>152</sup> Ibid., 427.

<sup>153</sup> Ibid., 171.

<sup>154</sup> Ibid., 200.

<sup>155</sup> Ibid., 374.

<sup>156</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 11, 438.

<sup>157</sup> *The Book of the Old Edinburgh Club Twelfth Volume*, 192.

well.<sup>158</sup> Unlike the Dutch prisoners, however, the Council was able to move faster with regard to the English prisoners taken with Argyll. Rumbold was too near death to survive the journey, but the Council sent a number of them back to England including Colonel John Ayloff and Harry Griffith.<sup>159</sup> While it was unseemly to punish the Dutch prisoners, the Englishmen were still the King's subjects. That said, Colonel Ayloff was tried in England and eventually condemned. The proceedings of his trial and execution were shared not only in London but were also re-printed in Edinburgh.<sup>160</sup>

In January 1686, the Council received a letter from the King “for quieting the minds” of those subjects who had “been led into such mischievous courses as have rendered them guilty of several great crimes deserving severe punishments.” He noted that as they now resolve to live peaceably and regularly, he intended to publish a general indemnity. As such, he requested the Council draft a general pardon and indemnity as they saw fit and to send the draft back for his consideration.<sup>161</sup> The Council moved slowly on drafting the indemnity. On January 5, three days prior to receiving the King's letter, the Council had forefaulted a number of rebels for rising in arms with Argyll, mostly bigger names who had escaped or had been taken, such as Sir Duncan Campbell of Auchinbreck.<sup>162</sup> While not appearing in the Council records until September, Fountainhall recorded that in June 1686, the King's indemnity and pardon to those in Argyll and Tarbet had been passed—however, it was for life only, and excluded heritors, officers and ringleaders. Nonetheless, some heritors were able to be released. For instance, eleven heritors were released on probation following an assize in early 1686.<sup>163</sup>

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<sup>158</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 12, 114, 162, 163.

<sup>159</sup> Fountainhall, *Historical Notices*, Vol. 2, 711, and *RPCS*, 3<sup>rd</sup> series, Vol. 11, 151-152.

<sup>160</sup> *A true account of the proceedings against John Ayloff, and Richard Nelthorp Esquires at the King's Bench-Bar*, (London, Edinburgh: 1685): 1-4.

<sup>161</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 11, 399.

<sup>162</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 11, 444.

<sup>163</sup> NRS, JC39/84/6.

In June, Lord Strathallan was sent to hold court in Inveraray as the King's Commissioner to apply pardon and exclude who he thought fit. He was also to decern restitution for all that was robbed and stolen.<sup>164</sup> Indeed, those who robbed or took away goods and cattle before Argyll landed, and after he was taken prisoner were exempt from the indemnity. In the indemnity, the King wrote that those who joined Argyll's treasonable invasion "did justly render all who complied and much more who assisted him in that his rebellion unworthie of our favour and mercie," yet by his "royall authoritie and undoubted prerogative," he chose to be merciful and pardon the commons of Argyll.<sup>165</sup> While Atholl's previous indemnity to the commons of Argyll had been for those who were forced and pressed,<sup>166</sup> this indemnity was further reaching. Presumably, if any of the Argyll rebels were still languishing in prison, they would have been finally released at this point. Throughout the following years of James' reign, the King continued to reprieve a number of rebels who had been forefaulted, such as James Stewart, Alexander Campbell and Gilbert Eliot, all who were advocates.<sup>167</sup> Additionally, in March 1687, Fountainhall recorded that twenty-four prisoners who had been charged with attending conventicles, robbery and theft, or for being with Argyll had been transported to Barbados. However, after 1686, the Argyll business was largely finished.<sup>168</sup> Considering that as late as 1687, prisoners were still be tried for their involvement with the Bothwell Rebellion, this was no small feat.

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<sup>164</sup> Fountainhall, *Historical Notices*, Vol. 2, 752.

<sup>165</sup> *RCPS*, 3<sup>rd</sup> series, Vol. 12, 465.

<sup>166</sup> Kennedy, "Rebellion, Government and the Scottish Response to Argyll's Rising of 1685," 58.

<sup>167</sup> Fountainhall, *Historical Notices*, Vol. 2, 795, 801, 824.

<sup>168</sup> *Ibid.*, 792.

### Dunnottar Prisoners

While the government's treatment of the Argyll rebels was rather subdued, its most violent action was perhaps its treatment of what became known as the Dunnottar prisoners. With the news that Argyll was on the western coast, the Privy Council sent for prisoners who were at Glasgow and other western places to be brought to Dunnottar Castle. According to Fountainhall, around one hundred men and women were brought there.<sup>169</sup> Conversely, Erskine wrote that one hundred sixty-six prisoners were brought to the prison for not complying with the church government, and not taking the government's bonds and oaths, while Wodrow recorded that "eight score and seven persons" entered Dunnottar.<sup>170</sup> It must be remembered that Scotland did not have *habeas corpus*, and prisoners could be legally detained without being processed for months or even years on end. Whilst this was a horrific ordeal for the prisoners, their transfer to Dunnottar was within the bounds of the Scottish government's power. According to Wodrow's sources, the prisoners in the Edinburgh and the Canongate Tolbooths were taken on the eighteenth of May out of their prisons just before sunset. They were not told what was happening, so they did not have time to prepare for the journey. As Wodrow wrote, these prisoners joined others from different prisons at Leith, and from there, approximately two hundred prisoners were transferred in open boats to Burntisland, where they spent a couple days.

Significantly, the Privy Council ordered a representative to attend the prisoners while at Burntisland. He was ordered to bring as many prisoners as possible back to Edinburgh who would immediately swear the Oath of Allegiance and Supremacy. As Wodrow colourfully put it, "through the extremity of their Misery and Hardships" about forty of the prisoners complied,

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<sup>169</sup> Ibid., 642.

<sup>170</sup> Erskine, *Journal*, 153; Wodrow, *Sufferings*, Vol. 2, 559.

while the rest refused to swear the Supremacy.<sup>171</sup> Providing prisoners with multiple opportunities to swear oaths was consistent with the government's actions throughout the period. The Privy Council was indeed harsh, and persecutory toward Covenanters, but they believed they gave them ample opportunity to gain their freedom, provided they swore their loyalty to the Crown. As has been previously discussed, the Council's need for outward conformity was incompatible with the more devoted Covenanters. However, it is worth pointing out that the Council once again provided an opportunity for release prior to sending them to Dunnottar.<sup>172</sup> Following these events, the Council's representative, Sir John Wedderburn of Gosford, sent a report to the Council, noting who would take the Oath of Allegiance and who would not, and who had already been sentenced to banishment. According to the Privy Council records, one hundred twenty men and forty-two women were brought from Burntisland to Dunnottar from several prisons, including Edinburgh, Canongate, Leith, and Glasgow. Additionally, fourteen men and eight women from Dumfries joined them there. While the majority chose not to swear oaths, thirty-nine men and women were brought back to Edinburgh following their examination.<sup>173</sup> An English newsletter also commented on the events, noting that seventy odd prisoners from Glasgow and forty-eight from Dumfries had been transported to Dunnottar.<sup>174</sup>

According to Wodrow, the journey from Burntisland was difficult, with the prisoners exposed to harsh wind and weather while their hands were tied behind their backs. However, once brought to Dunnottar, they did not fare much better, as the conditions were atrocious. The

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<sup>171</sup> Wodrow, *Sufferings*, Vol. 2, 559.

<sup>172</sup> Wodrow recorded Mr. John Frazer's detailed account of being taken to Dunnottar. Frazer had been arrested for attending a meeting in London where Alexander Shields had preached. He was sent to Scotland to be tried "according to the laws of the Kingdom." Fearing the consequences of Argyll's landing, all the prisoners "for religion" were sent to the Castle. For more details on the prisoners' journey, see Wodrow, *Sufferings*, Vol. 2, 558-559.

<sup>173</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 11, 293.

<sup>174</sup> *CSPD James II*, Vol. 1, 173.

prisoners were kept in one large vault, and many of them died due to the cramped and dirty conditions.<sup>175</sup> The prisoners were allowed nothing but what was paid for— admittedly a standard practice in early modern prisons—but the rates were high, and even cold water had to be paid for. Wodrow recorded that the Governor’s wife came to see the prisoners and was so horrified by the way they were living that she requested they be given better treatment. As such, some were placed in other rooms, and all the women were removed into their own separate rooms away from the men. As noted in Chapter Three, Wodrow included a description of illegal tortures that took place after some prisoners had attempted to escape, while Erskine confirmed that those who escaped were tortured with lit matches between the fingers.<sup>176</sup> Indeed, a petition sent to the Privy Council in mid-June 1685 confirmed that the prisoners were living in horrid conditions. However, the petition also confirmed that the Governor was perhaps acting on his own volition, judging by the fact that the Council ordered provisions to be set at “ordinary rates,” and that the prisoners should have “their health be endangered as little as possible.”<sup>177</sup>

On July 9, Sir Robert Gordon and his brother Sir John petitioned the Council hearing that there were prisoners in Dunnottar that were not yet “disposed of to any of his Majesties plantations” and requested that they be the ones to transport those that the Council sentenced to be banished.<sup>178</sup> Granting them the right to some of the prisoners, on July 13, after Argyll’s threat was dissipated, the Council ordered the Earls of Erroll, Marischal and Kintore to go to Dunnottar and examine the prisoners to see which of them would be willing to take the Test or Oath of Allegiance acknowledging the King’s authority.<sup>179</sup> Once again, the Council was providing what

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<sup>175</sup> Wodrow, *Sufferings*, Vol. 2, 559.

<sup>176</sup> Erskine, *Journal*, 153-54.

<sup>177</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 11, 70.

<sup>178</sup> *Ibid.*, 94-95.

<sup>179</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 11, 97.



it believed to be a simple opportunity for release, highlighting the dichotomy between the governmental ideology and that of committed Covenanters. As Wodrow explained, “This was their Way now: After they hoped that poor people’s Patience was worn out, they came with new Offers and Temptations to quit their Principles.” According to him, none of the prisoners were willing to own the King’s Supremacy in the Oath of Allegiance.<sup>180</sup> However, on July 31, the Council received a petition from John Robertson, a merchant from Glasgow, and prisoner in Dunnottar, who petitioned for his liberty, declaring he had taken the Oaths of Allegiance and Abjuration before the Commissioners. As such, the Council ordered the Governor to set him at liberty, upon the usual caution.<sup>181</sup> Additionally, the Council received a petition from John Orr of Blairmuckhill explaining that he was “hurried away without any cause and never yet any sentence past against him,” noting that he was a most regular and orderly person, and “head of a poor and numerous family.” He promised that he was content to give sufficient caution and appear before the Council should he need to. The Council also set him at liberty.<sup>182</sup> The Council was indeed harsh, but it did keep to its word, and should the prisoners swear the oaths, they would be released. While the Earls’ initial report is not in the Privy Council records, on July 24, the Council gave the Commissioners full power to convene the prisoners in Dunnottar and banish those who would not take the Oaths of Allegiance, whether they be man or woman. They were then to bring them to the Council to grant warrant for transporting them abroad.<sup>183</sup> Coinciding with the mass sentencing of the Argyll rebels, on July 30, the Council considered the next report, also missing in the records, and called for the Dunnottar prisoners to be brought by sea back to

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<sup>180</sup> Wodrow, *Sufferings*, Vol. 2, 561.

<sup>181</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 11, 128-129.

<sup>182</sup> *Ibid.*, 68.

<sup>183</sup> *Ibid.*, 114.

Leith. Once brought there, the Council resolved to meet at Leith to sentence the prisoners to the plantations, detain them, or liberate them as they found cause to do.<sup>184</sup>

On August 4, the Council gave warrant to the Governor of Dunnottar to deliver the prisoners to the commander of his Majesty's forces, and also granted warrant to the commander to press horses on the way for carrying sick prisoners, as well as pressing boats for transporting prisoners if need be. Given the conditions the prisoners were kept in, many horses were likely needed.<sup>185</sup> According to Erskine, those that were too sickly were left behind, which is perhaps the case with the following prisoners.<sup>186</sup> Elizabeth and Margaret McClune sent a petition to the Council in December 1685 from the Edinburgh Tolbooth, noting they had been prisoners in Dunnottar. Elizabeth was over sixty and "daylie afflicted with sickness and not able to walk alone without the help of others." The Council considered their petition and liberated them.<sup>187</sup> Interestingly, their names do not appear on any of the lists of prisoners sent to Dunnottar.

On August 17, the Council resolved to meet at Leith the next day to examine the Dunnottar prisoners themselves, and set at liberty or keep prisoners as they saw fit.<sup>188</sup> Once at Leith, in Wodrow's words "another Essay was made to bring them to comply with the Impositions now put on People in their Circumstances," and this try seemingly worked on some of them.<sup>189</sup> Following the examination on August 18, ninety-five prisoners were banished to the plantations for "several crimes and irregularities," and for refusing the Oaths of Allegiance and Abjuration, and not owning the King's authority. They were to be delivered to East New Jersey by Mr. George Scott of Pitlochrie. Conversely, approximately thirty-four men and women were

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<sup>184</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 11, 125.

<sup>185</sup> *Ibid.*, 132.

<sup>186</sup> Erskine, *Journal*, 153.

<sup>187</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 11, 281, 261.

<sup>188</sup> *Ibid.*, 152.

<sup>189</sup> Wodrow, *Sufferings*, Vol. 2, 556.

released on caution, having taken the Oath of Allegiance and owning the king's authority, while a number who were sick had their cases stayed. Interestingly, Janet Fumertoun "stately and boldly in face of Council denyed the King to be lawfull soveraigne and his authoritie," so the Council decided for her to be processed before the Justices for her life.<sup>190</sup> However, Mark Jardine notes that she appears to have been banished after all with Pitlochie.<sup>191</sup> Furthermore, the Council considered a petition by Robert Sloss, who supplicated for his liberty, noting he would sign the Oath of Allegiance, and as such, he was liberated.<sup>192</sup>

On August 26, Mr. George Scot of Pitlochie petitioned the Council about his "disappointment" with the prisoners given to him for transportation. He noted that by the Council's order he had been given "sex aged infirm men and as many women, who will be altogether useless to him." As such, he requested the Council not give him so "unnecessar a charge" and that they remove them from his ship.<sup>193</sup> The Council sent a committee to consider the condition of the prisoners. They decided to keep back seven prisoners and have them continue in prison until further order. James Ralstoun was seemingly one of these prisoners. Writing in December from the Tolbooth of Leith, he wrote to the Council explaining he had been a prisoner in Dunnottar, and once brought to Leith had been sentenced to banishment, but due to his old age and poverty, the master of the ship had turned him away. He was now willing to swear the Oath of Allegiance and Abjuration. As such, the Council ordered him to be set at liberty once examined.<sup>194</sup> Interestingly, Ralstoun also does not appear in the lists of Dunnottar prisoners. While Pitlochie was motivated by selfish reasons, the fact that the Council did remove

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<sup>190</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 11, 155-156.

<sup>191</sup> Jardine, "The United Societies," Appendix, 4.6.

<sup>192</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 11, 157.

<sup>193</sup> *Ibid.*, 165-167.

<sup>194</sup> *RPCS*, 3<sup>rd</sup> series, Vol. 11, 381.

the sickly and infirm coincides with its general attitude toward these types of prisoners. The Council did not actually want people to die under their hands. As such, when petitioned about conditions, the Council usually attempted to rectify the situation, however nominally.

Unfortunately, transportation was not the end of the prisoners' sufferings. Enroute to East New Jersey, fever took hold of the ship and seventy prisoners along with much of the crew died.

Pitlochie himself and his wife also died. As Wodrow wrote, Pitlochie "enjoyed nothing of the Produce of near an hundred Prisoners gifted him by the Council."<sup>195</sup>

The Dunnottar prisoners were more poorly used, compared to the Argyll rebels, and they suffered horrendous conditions. However, the rebellion forced the Council to process them much quicker than they would have been had they stayed in their disparate prisons, which was perhaps a small blessing considering the state of the early modern prison. While these prisoners were not affiliated with Argyll, and had they been outside of prison, they likely would not have been, their poor treatment was spurred on by Argyll's threat. As Jardine notes, it is unclear how many of the Dunnottar prisoners were connected to the United Societies. However, the sheer number who refused to swear the Abjuration Oath shows that they at least had some extreme sympathies. As Jardine summarizes, "if banishment can be considered a favourable outcome," the outcome of the Dunnottar prisoners was perhaps relatively positive. Throughout the process, the majority of them stayed true to their faith, showing authorities that they could not break the United Societies' resolve. However, it must be pointed out that approximately thirty-one percent of the Dunnottar prisoners took oaths at some point in the process.<sup>196</sup> These prisoners could have been more moderate Presbyterians, or they could have just been broken down from their long imprisonment. Nonetheless, they took up the government's offer of freedom. It is worth nothing that every

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<sup>195</sup> Wodrow, *Sufferings*, Vol. 2, 566.

<sup>196</sup> Jardine, "The United Societies," 130.

prisoner could have been liberated had they sworn the oaths, and they were given ample opportunity to do so on a number of occasions throughout the process—a small matter for the government perhaps, but much more concerning for devoted Covenanters. Indeed, as Margaret Steele has discussed, Covenanter propaganda depicted governmental oaths as “weapons of political tyranny,” so swearing such an oath was no small matter for devoted Presbyterians.<sup>197</sup> As has been discussed previously, the government was greatly concerned with outward conformity and performative loyalty. However, for committed Presbyterians, the concept of secular authority in religious affairs was impossible to reconcile.

### Conclusion

The Argyll Rebellion was small and perhaps inconsequential in the grand scheme of things. However, as Fountainhall noted, Argyll’s invasion occurring while the English Parliament was sitting “contributed very much to induce” it to comply with the King.<sup>198</sup> Writing to Lord Breadalbane, Ed Griffin corroborated this fact, noting that both houses voted to assist the King with their lives and fortunes, “not only against all traitorous conspirators and rebels but also against all his enemyes whatsoever.” Indeed, the Commons only took half an hour to agree to all the King’s demands, including revenue for life.<sup>199</sup> Argyll’s rebellion coincided with the sitting of the Scottish Parliament as well. While the Scottish Parliament objected to some minor matters put forward by the Crown, the King’s powers against religious dissidents were extended and the Excise was passed.<sup>200</sup> For a King facing two invasions in two of his kingdoms, James was more popular than ever.

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<sup>197</sup> Margaret Steele, “Covenanting Political Propaganda, 1638-89,” PhD Thesis, (University of Glasgow, 1995): 362.

<sup>198</sup> Fountainhall, *Historical Observes*, 173.

<sup>199</sup> NRS, GD112/39/137/14.

<sup>200</sup> For a detailed account of the session of the Scottish Parliament, see: Kirsty McAlister, “James VII and the Conduct of Scottish Politics, c. 1679 to c. 1686,” PhD Thesis, (University of Strathclyde, 2003): 256.

While historians have generally minimized the rebellion, Fountainhall did not take the invasion for granted, noting “some look on this invasion as a small matter; but beside the expence and trouble it hes put the country to,” there are “fatall consequences of such commotions” he argued. He warned that very often those who begin a rebellion are ruined or laid aside by “another prevailing faction getting into the saddle.” As he noted, “fools begin the sitr, and knaves, not seen at first doe commonly reap the sweat of such disturbances.” However, he warned that they too are often “ruined under the load of that government they had undermined.”<sup>201</sup> He also wrote that it was hoped that the rebellion in both kingdoms would make the King more attentive and moderate in his government and “not to follow any counsel to alter our religion.” While the general populace did not join Argyll, he warned “if our phanatiques find themselves obliged in conscience to fight against Episcopacy *multo magis* will they rise against the introductive of Poperie.”<sup>202</sup> Unfortunately, James did not heed this advice. While Argyll and his co-conspirators indeed challenged the King’s authority, the rebellion actually served to show the King, or at least make him believe, that the majority of the country was *not* willing to rise against him. As such, the rebellion gave the King confidence to move on with his plans for the repeal of the penal laws and religious toleration. Indeed, the rebellion allowed James to appoint Catholics to high office with little comment, such as the Earl of Dumbarton’s command of the regular army.<sup>203</sup>

In a letter to the Earl of Arran in 1687, the author noted that several people who were concerned with the “late Rebellion” were presented to the King and humbly prostrated themselves at James’ feet with “their thanks for his Majesty’s great goodness and clemency in

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<sup>201</sup> Fountainhall, *Historical Observes*, 196.

<sup>202</sup> *Ibid.*, 178.

<sup>203</sup> Hopkins, *Glencoe and the End of the Highland War*, 97.

granting them his precious pardon.” The King explained “if they behaved themselves as they ought, they might bee certain of his protection in the full enjoyment of all their rights and properties; and that hee would let the world see that a Roman Catholick King could live well with his Protestant subjects.”<sup>204</sup> These rebels were possibly associated with the late Bothwell Rebellion, rather than the Argyll Rebellion. However, James’ actions were in keeping with his pacifying tendencies. Numerous reprieves and relaxations of sentences were passed throughout his brief reign.<sup>205</sup>

Considering the image of the violent and persecutory Scottish government, the Privy Council’s actions during the Argyll Rebellion were rather subdued, especially compared to the English reaction to the Monmouth Rebellion. Contrary to its “Killing Time” image, this rebellion served to show that the Council did not always behave as the arbitrary “managers” that the Covenanters perceived them to be. Even Wodrow commented on the King and Council’s leniency toward the Argyll rebels. However, he argued that “the Popish King...designed to show some Lenity, that People might be the better disposed to favour the taking off the penal Statues.”<sup>206</sup> While that was perhaps the case, in 1685, the Council did not know with certainty which direction the King’s policies were going to head. Indeed, James had repeatedly assured his kingdoms that he would protect the established Protestant religion. The King was arguably more lenient than the Council was, being the one to write to them that more prisoners were taken than were fit to be executed. Considering Council members such as Perth were calling for mass executions, the King was comparatively kind. This was likely because the vast majority of the Argyll rebels were not Covenanters, nor did they associate with the United Societies. As such,

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<sup>204</sup> NRS, GD406/1/3445.

<sup>205</sup> See for example: NRS, JC39/96, JC39/105, JC39/107.

<sup>206</sup> Wodrow, *Sufferings*, Vol. 2, 547.

the King and Council were able to act with more leniency toward them. These were people who at the end of the day would own the King for their lives, and most of them did. While over a hundred of the rebels who owned the King were transported, they were sent with no mark or stigma, for owning the King's authority was what was most important to the King and Council. This can also be seen with the Dunnottar prisoners as they were given ample opportunity to swear an oath for their liberty—and some did take advantage of these multiple occasions. However, these were the prisoners who were the more typical “enemies” of the ‘state.’ This dichotomy between governmental and religious authority continued to cause splinters in the Crown's stability. While the King and Council treated the Argyll rebels rather leniently, these actions were soon to be overshadowed by the King's quest to protect his co-religionists. This is perhaps why the rebellion did little in the long run to help rehabilitate the Council's image.



## Conclusion

*When ever any Man offer'd to keep the Church, former Fines  
were generally remitted, if timeous Application was made;  
and more Indulgences and Indemnities were granted by this  
King than by any that ever reign'd; and generally no Man  
was executed in his Reign, who would say, God Bless the  
King, or acknowledge his Authority; an unusual Clemency,  
never shewn in any other Nation, and such as was not  
practised by those, who now cry out against the Severity of  
that Government.*

Sir George Mackenzie of Rosehaugh, 1691<sup>1</sup>

*As for the Number of Indemnities Sir George boasts of, I  
believe it will, I am sure it ought to be granted, that they were  
much fewer than ensnaring and oppressive Laws, which  
made People stand in need of them.*

Robert Wodrow, *History of the Sufferings*<sup>2</sup>

In 1691, the former Lord Advocate of Scotland, Sir George Mackenzie of Rosehaugh published his *Vindication of the Government of Scotland during the reign of King Charles II* to “confute those *malicious Authors*, who have endeavour’d to Reproach a whole Nation with Villanies.”<sup>3</sup> Throughout the pamphlet, Mackenzie delineated the procedures of Scots Law, and went point by point “into the particular instances of pretended Cruelty,” justifying various procedures and misunderstandings.<sup>4</sup> It is noteworthy that he chose to focus on Charles II’s reign and not James VII’s. After voting that James had forefaulted the Scottish throne in 1689, the

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<sup>1</sup> Sir George Mackenzie of Rosehaugh, *A vindication of the government in Scotland during the reign of King Charles II against mis-representations made in several scandalous pamphlets to which is added the method of proceeding against criminals, as also some of the phanatical covenants, as they were printed and published by themselves in that reign*, (London: 1691): 8.

<sup>2</sup> Robert Wodrow, *The history of the sufferings of the Church of Scotland, from the Restauration to the Revolution*, Vol. 1, (Edinburgh: 1721-22): 122.

<sup>3</sup> Mackenzie, *Vindication*, 1691, 1. Gilbert Rule published a response to this pamphlet. See: Gilbert Rule, *A Vindication of the Presbyterians in Scotland*, (London: 1692).

<sup>4</sup> Mackenzie, *Vindication*, 1691, 10.

Convention Parliament passed the Claim of Right and Article of Grievances. While these acts only explicitly critiqued James, they also implicitly critiqued Charles II's policies. As Tim Harris points out, the Claim "found it necessary to declare certain things illegal which the kings in Scotland unquestionably had a legal right to do." As such, Harris contends that the Revolution settlement sought to "redefine the powers of the Scottish monarchy as it had been legally reconstituted after 1660."<sup>5</sup> As Harris argues, the Scottish Claim of Right was in some ways more radical than the English Declaration of Rights, as it critiqued the Restoration regime as a whole—more so than its English counterpart.<sup>6</sup> While Mackenzie stated he was responding to various pamphlets, many of the complaints he discussed in his *Vindication* were also addressed in the Revolutionary Claim of Right and Articles of Grievances. As Alasdair Raffe explains, the Claim of Right could be divided into four themes and grievances: "the magnification of royal power"; "the promotion of Catholicism"; the ways the King had abused his authority; and the abuses of the justice system.<sup>7</sup> It was this last theme that provoked Mackenzie the most.

After detailing specific cases and grievances, Mackenzie explained that his intention was to write "a true account of the *forms* us'd in pursuits of *Treason*, according to the *Law* of *Scotland* : by which the JUSTICE of that Nation may be known to mis-informed Strangers."<sup>8</sup> Interestingly, this pamphlet was published in London, and was likely targeted toward English readers. As he stated, his purpose was to represent "the *Legal way of Procedure*."<sup>9</sup> Although no longer Lord Advocate, Mackenzie still sought to justify the Restoration regime's actions through

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<sup>5</sup> Tim Harris, *Revolution: The Great Crisis of the British Monarchy, 1685-1720*, (London: Allen Lane, 2006): 395.

<sup>6</sup> Ibid. Interestingly, William of Orange wrote to Lord Melville in March 1689 stating, "you shall endeavour that the articles for preventing grievances be as near as may be to these of England, in so far as the case is not different." See *Leven and Melville Papers; Letters and State Papers Chiefly Addressed to George Earl of Melville, Secretary of State for Scotland, 1689-1691*, (Edinburgh: Bannatyne Club, 1843): 2.

<sup>7</sup> Alasdair Raffe, *Scotland in Revolution, 1685-1690*, (Edinburgh: Edinburgh University Press, 2018): 135-136.

<sup>8</sup> Mackenzie, *Vindication*, 1691, 27.

<sup>9</sup> Ibid.

his focus on law and authority. Furthermore, he still believed in an educational approach. However, the post-Revolution regime had already begun to successfully supplant this narrative. As early as May 1689, Mackenzie wrote to Lord Melville stating, “som tak great pains to mak Scotland and this regime very odious and terrible; and I am sure it is their interest to mak both easie.”<sup>10</sup>

Several of the case studies discussed in this thesis were listed as grievances in the Revolutionary settlement, yet the post-Revolution government continued to take advantage of the legal tools at its disposal. For instance, the Claim complained of “imprisoning persons without expressing the reason, and delaying to put them to trial.”<sup>11</sup> As Mackenzie pointed out, “we have no Act for *Habeas Corpus* in Scotland, and so these things may be accounted Severe, but not Illegal.”<sup>12</sup> Certainly, the post-Revolution government was also in no rush to implement *Habeas Corpus* either, as the “Act for preventing wrongful imprisonment and against undue delays in trials” was only passed in 1700.<sup>13</sup> Likewise, while torture was listed as a grievance at the Revolution, the Williamite government continued to torture suspects—as early as 1689—and some to much controversy.<sup>14</sup> Indeed, torture only became illegal in Scotland after Union in 1708.<sup>15</sup> Furthermore, while the Claim of Right complained of the Restoration regime’s use of state oaths—specifically complaining of Argyll’s case as well— the Revolution government

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<sup>10</sup> *Leven and Melville Papers*, 32.

<sup>11</sup> *The Records of the Parliaments of Scotland to 1707 (RPS)*, K.M. Brown et al, eds., (St Andrews, 2007-2021), 1689/3/108.

<sup>12</sup> Macenzie, *Vindication*, 1691, 11.

<sup>13</sup> *RPS*, 1700/10/234.

<sup>14</sup> For examples, see: Clare Jackson, “Judicial torture, the liberties of the subject and Anglo-Scottish relations, 1660-1690” in T. C. Smout, ed., ‘Anglo-Scottish relations 1603-1914’, *Proceedings of the British Academy*, 127 (2005).

<sup>15</sup> *Anno regni Annae Reginae Magna Britannia, Francia, & Hibernia, septimo. At the Parliament summoned to be held at Westminster, the eighth day of July, anno dom. 1708. In the seventh year of the reign of our sovereign lady Anne, by the Grace of God, of Great Britain, France, and Ireland, Queen, Defender of the Faith, &c. And by several Writs of Prorogation Begun and Holden on the Sixteenth Day of November, 1708. being the first session of this present Parliament*, (Edinburgh: Re-printed by the heirs and successors of Andrew Anderson, 1709): 185.

implemented the Oath of Allegiance, and used it as a test against “suspected persons.”<sup>16</sup>

Certainly, the ramifications of this oath and its association with the Glencoe Massacre cannot be ignored.<sup>17</sup> Nevertheless, while Episcopalians would complain of their treatment by the new Presbyterian establishment, the post-Revolutionary government successfully avoided comparisons to the “Scottish Inquisition.” Discussing the Revolution in England, Howard Nenner explains that “what had happened was not that the law had triumphed,” but that “the law had been wrested from the king’s control.” As he points out, “the Stuarts had exploited the law not wisely but too well.”<sup>18</sup> Undoubtedly, the post-Revolutionary government in Scotland exploited the law to its advantage as well, but it largely did so through Parliament.<sup>19</sup> The 1688 Revolution was undeniably significant, not the least for protecting constitutional rights. However, many of the ideas discussed during the Revolution were already very much at the forefront of Restoration political and legal thought, albeit being interpreted in different ways.

The Scottish Restoration regime was unquestionably severe. However, it was of the utmost importance to both the King and Councillors to follow the law and its procedures. Indeed, the government was seriously aware of accusations of arbitrary government, and sought to counter this perception through proclamations, pamphlets, and legal texts justifying its actions. However, as this thesis has discussed, while the Restoration regime utilized the law to maintain and promote its authority, its policies exacerbated deep-rooted tensions. The Civil Wars and Interregnum had deeply scarred the Scottish state, and the rhetoric of the Covenant had

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<sup>16</sup> *RPS*, 1690/4/63.

<sup>17</sup> For more information, see: Paul Hopkins, *Glencoe and the End of the Highland War*, (Edinburgh: J. Donald Publishers, 1986).

<sup>18</sup> Howard Nenner, *By Colour of Law: Legal Culture and Constitutional Politics in England, 1660-1689*, (Chicago: University of Chicago Press, 1977): 199.

<sup>19</sup> For instance, the “Act for security of their majesties’ government” stated that William and Mary were both *de facto* and *de jure* rulers. The intent of this Act was that people could not swear the oath believing that James was the *de jure* king which would “weaken and invalidate the allegiance sworn to their majesties.” However, many had sworn the oath this way to relieve their consciences, reminiscent of Argyll’s oath. See: *RPS*, 1690/4/161.

permeated throughout all levels of society. While the authorities attempted to “restore” things to the way they were before the mid-century, the memories remained. Without a strong theological justification for episcopacy, the Presbyterian complaints of Erastianism were often justified. However, for the Crown, maintaining authority—even in religion —was of the utmost importance.

Each chapter in this thesis has sought to highlight the tensions underlying the Restoration regime’s legal policies, as well as the challenges the regime faced in maintaining its authority alongside its image. Using Sir George Mackenzie of Rosehaugh as a case study, Chapter One examined the detailed legal justifications and arguments being espoused to justify the authorities’ procedures. By focusing on the law, governmental officials attempted to bolster public opinion and counter images of severity. However, these legal arguments were intrinsically tied to religion. Indeed, most criminal cases during this period involved religious dissidence, and for committed Presbyterians, legal arguments justifying the secular magistrate’s authority were not enough.

Chapter Two examined the implementation of the Test Act, and the Earl of Argyll’s controversial treason trial. The Test Act proved to be of some success for the government, in both restructuring local government and cultivating a performative act of obedience. Argyll’s “slender” conviction served to promote an “inquisitorial” image, but there was a reason the Council viewed Argyll’s words as dangerous. His words were reminiscent of the conditional loyalty sworn by the Covenanters, which was the antithesis of the Restoration regime’s *raison d’être* of promoting the authority of the Crown. Chapter Three examined the Privy Council’s right to judicial torture, highlighting both the legal limitations as well as the debates surrounding the controversial procedure. While the Privy Council attempted to enforce strict regulations, the

involvement of local officials and soldiers in illegal torturing, alongside political pressures, greatly damaged the central authority's image. Chapter Four explored how the government attempted to gain more control over the localities by targeting local relations, focusing on the example of resetting cases. However, these policies were far reaching, and promoted resistance even amongst the elites. Chapter Five examined the consequences of the Argyll Rebellion, which underscored the government's typical attitude toward punishing criminals. The general policy of the Council was to punish ringleaders severely to serve as an example, while letting most offenders go. Interestingly, even the Council's enemies admitted to its leniency in dealing with the Argyll rebels. However, these events were not enough to rehabilitate the Crown's image in the long run.

Through each of these case studies, we can see how the government always believed that it was in the legal right. While there were some questionable legal procedures, the government behaved under "colour of law." For some—perhaps like the Earl of Melfort—these legal procedures were just hoops to jump through. However, for others like Mackenzie, the law was there to not only protect the authority of the regime, but also to serve as a sanctuary for those in need. The tensions in the government's policy can be clearly seen in both Mackenzie and Wodrow's statements as quoted at the beginning of this chapter. Mackenzie's description of releasing criminals was certainly idyllic and simplified. However, as this thesis has shown, if one were to acknowledge the King's ultimate authority, he or she would generally be released—a troublesome prospect to moderate Presbyterians, let alone committed Covenanters. The government failed to grasp the depth of the Presbyterian beliefs in church government. However, as Wodrow argued, these clemencies would not have been needed if the severe policies were not established in the first place.

While the “Scottish Inquisition” was indeed an exaggeration, the government was still unquestionably severe. Nevertheless, the success of the “Inquisition” image in post-Revolution narratives points to a deeper image problem. The post-Revolution Whiggish and Covenanter propaganda is in part to blame for this caricature, however. Throughout its tenure, the Restoration regime failed to ultimately protect its public persona, but that is not to say that it did not have some successes. As Raffe points out, prior to 1688, there was a serious lack of challenge to James’ absolutist rhetoric, and these beliefs seemed to be accepted by most.<sup>20</sup> Likewise, Clare Jackson has shown that arguments for non-resistance proved to be strong, with even Covenanters complaining of their widespread acceptance.<sup>21</sup> Nevertheless, the government failed to come up with a long-term solution. Without promoting a theological foundation for Episcopalianism, the legal arguments espoused by Sir George Mackenzie could only go so far. Furthermore, the often-unsanctioned severity enacted by local authorities and soldiers greatly tarnished the government’s image, while its attempts to circumvent local controls only made it look more arbitrary. Generally, the government’s bark was worse than its bite, but when it did bite, it was dangerous, and the government almost always chose the wrong people to proceed against. These severe examples to “terrify” others into compliance worked too well, helping to lay the foundation for the “Scottish Inquisition.”

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<sup>20</sup> Raffe, *Scotland in Revolution*, 158.

<sup>21</sup> Clare Jackson, “The Political Theory of Non-Resistance in Restoration Scotland 1660-1688,” *Widerstandsrecht in der frühen Neuzeit: Ertäge und Perspektiven er Forschung im Deutsch-Britischen Vergleich*, Robert von Friedeburg, ed., (Berlin: Duncker & Humblot, 2001): 307.

## Appendix I: Torture Warrants

### Torture Warrants Issued Between 1678-1689 from *RPCS* and *RPS* records

Authority	Monarch	Date	Details	Source
Privy Council	Charles II	July 4, 1679 (King's Letter approving of torture of rebels).  July 15, 1679 (Council's Order).	John Kidd to be questioned by torture for "discovery of the rise of rebellious correspondence, etc."	<i>RPCS</i> 3 <sup>rd</sup> Series Vol. 6. King's Letter requesting torture, 263. Council's order, 278.
Privy Council	Charles II	November 13, 1680 (General order).  Nov. 15, 1680 (Archibald Stewart, John Spreul and Robert Hamilton tortured).	Commission to Earl of Linlithgow to examine prisoners by torture to discover harbourers and resettlers of Cargill.	<i>RPCS</i> 3 <sup>rd</sup> Series Vol. 6. General Order, 573. Prisoners tortured, 574. Letter to the King, 582.
Privy Council	Charles II	August 21, 1683 (Letter requesting if Alexander Gordon of Earlston can be tortured if already condemned.)  September 20, 1683 (Letter allowing torture of Earlston, and committee appointed).	Commission to torture Alexander Gordon of Earlston in "relation to plots, conspiracies or combinations."  He is never tortured due to illness.	<i>RPCS</i> 3 <sup>rd</sup> Series Vol. 8. Letter requesting approval, 231-232. Letter of approval and commission, 258-259.
Privy Council	Charles II	July 22, 1684.	Patrick Walker and Arthur Tackett to be tortured for refusing to declare their accomplices who were present at the murder of the Earl of Airlie's	<i>RPCS</i> 3 <sup>rd</sup> Series, Vol. 9, 58.  Walker's banishment, 69.



			troops in Lanarkshire.  Patrick Walker is banished instead of tortured.	
Privy Council	Charles II	<p>July 24, 1684 (initial order).</p> <p>July 25, 1684 (refused sleep after being tortured with the boot).</p> <p>August 6, 1684 (ordered to be tortured again the next day).</p> <p>August 21, 1684 (given assurance of life and pardon after cooperating).</p>	William Spence ordered to be tortured for his knowledge of Argyll and his conspiracies.	<i>RPCS</i> 3 <sup>rd</sup> Series, Vol. 9. Initial order, 68. Refused sleep, 73. Torture ordered again, 94. Assurance of life, 117.
Privy Council	Charles II	September 5, 1684.	Order to torture William Carstares for being accessory to the late plot against the King.	<i>RPCS</i> 3 <sup>rd</sup> Series, Vol. 9. Order, 142. Tortured with the thumbscrews, 144.
Privy Council	Charles II	November 13, 1684.	John Semple and cohort ordered to be tortured for being accessory to “the late treasonable paper and declaration against the King” and affixing it to churches ( <i>Apologetical Declaration</i> ).	<i>RPCS</i> 3 <sup>rd</sup> Series, Vol. 10. Order, 25.
Parliament	William of Orange and Mary	April 1, 1689.	Warrant to the magistrates of Edinburgh to allow	<i>RPS</i> , 1689/3/84.

			torture of John Chiesley of Dalry for murdering Sir George Lockhart.	
Parliament and Privy Council	William of Orange and Mary	<p>July 9, 1689, general Parliamentary warrant proposed.</p> <p>July 18, 1689, Privy Council orders Sarjeant Provinciall to be tortured.</p> <p>July 18, 1689, Remit for torturing Scots dragoons.</p>	<p>Act of Parliament produced to authorize the Privy Council to torture dragoons in custody for keeping in contact with Viscount Dundee, etc.</p> <p>Council orders torture of Sarjeant Francis Provinciall on conspiracy against Major General McKay.</p> <p>In anticipation of Provinciall's testimonies, the Privy Council gave warrant to torture the other Scots Dragoons in the "said matter" "how farr they shall think necessar."</p>	<p><i>RPS</i>, 1689/6/27, Parliamentary warrant.</p> <p><i>RPCS</i> 3<sup>rd</sup> Series, Vol. 13. Order for Provinciall and dragoons, 536.</p>

December 13, 1687: Fountainhall records that "Sir James Stampfield's servants are tortured."<sup>1</sup>  
 Not found in other records.

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<sup>1</sup> Sir John Lauder of Fountainhall, *Chronological Notes of Scottish Affairs, from 1680 till 1701; Being Chiefly Taken from the Diary of Lord Fountainhall*, (Edinburgh: 1822): 239.

## Appendix II: Depositions of Prisoners from Glasgow

### Depositions of prisoners from Glasgow June 22, 23, 1685 as located in the *Register of the Privy Council*

(RPCS 3<sup>rd</sup> Series, Volume 11, Pages 305-321)

Name	Origin	Notes	Outcome	Source (unless listed otherwise- <i>RPCS</i> , 3 <sup>rd</sup> Series, Vol. 11)
Archibald Campbell, son to Mr. John Campbell of Knap	Son to Mr John Campbell	Says rebels would have been about 1600 men. Had knowledge of leaders.  Seen leading a company (308).	Unclear  Possibly the Archibald Campbell who was banished, but unlikely (329).  His father and brother are forfeited.	Deposition (305). Seen leading a company (308). In list of Highland Lairds with Argyll to be indicted (428).  Father and brother forfeited (444).  Included in questions for persons in Islay about Argyll's rising (ie. which Lairds were involved) (537).
James Duff	Born in Borowstounes	Fifteen-year-old boy. He was a cook on Argyll's ship, taken by James Wishart, skipper, to go to Norway.	Still starving in prison in early 1686. Eventually released.  Released from Tolbooth ( <i>Book of the Old Edinburgh Club</i> , XII, 207).	Deposition (305).  Petition <i>RPCS</i> , 3 <sup>rd</sup> Series, Vol. 12 (126, 140).

Jean Yeason	“Dutchman” from Groninghame	“Dutchman” with Argyll.	Released from Tolbooth March 30, 1686 ( <i>Book of the Old Edinburgh Club</i> , XII, 208).	Deposition (306). <i>RPCS</i> , 3 <sup>rd</sup> Series, Vol. 12 (12, 114, 162, 163).
Giles Williamson	Amsterdam	Printer, forced by Argyll to print his declaration. Petitioned the Council multiple times for release.	Released January 21, 1686 ( <i>Book of the Old Edinburgh Club</i> , XII, 192).	Deposition (306). <i>RPCS</i> , 3 <sup>rd</sup> Series, Vol. 12 (12, 114, 162, 163).
Jacob Dregsbacker		Timberman on Argyll’s ship.	Released from Tolbooth March 30, 1686 ( <i>Book of the Old Edinburgh Club</i> , XII, 208).	Deposition (306).
Jan Fandoung	Dort	Brewer, went aboard ship without knowing its design.	Presumably released with other Dutch prisoners ( <i>RPCS</i> , 3 <sup>rd</sup> Series, Vol. 12, 114, 162, 163.)	Deposition (306).
Dougal McGibbon	Cowall	On the margin “Witness.”	Released.  Petitions for release after being witness. Initial petition refused.  Witness for the trial of Archibald Campbell and Gavin Russel.	Deposition (306-307) Called to be a witness (126). Petition (246, 376).  Witness ( <i>State Trials</i> , Vol. 11, 897).  Released from Tolbooth ( <i>Book of the Old Edinburgh Club</i> , XII, 191).
John McLean	Portindryan	On the margin “Witness.”	Banished (126), but as a witness likely released later.	Deposition (307).

			A "John McLaine" released July 29 ( <i>Book of the Old Edinburgh Club</i> , XII, 165).	
John Campbell	Silvercraigs	Declares he was forced by rebels after hiding for 14 days.	Possibly banished Two John Campbells banished (126, 329).	Deposition (307).
John McCallum	Glasfort		Banished.	Deposition (307). Banishment (126, 131).
Archibald Lamont	Kilbryde		Banished (likely) "Archibald Lammond" banished.	Deposition (307) Banishment (129, 136, 330).
Alexander McMillan	Drumore		Banished.	Deposition (308). Banishment (129).
Duncan McMillan	Carradale		Banished.	Deposition (308). Banishment (130).
John McKinnon	Carradale	Says rebels took his two cows and made him carry his own meal for the rebels.	Unclear- possibly banished. "John McKinnon in the Duppen of Kintyre" banished (115)- "John McKinnon" banished (136).	Deposition (308).
John Crawford	Otter		Banished.	Deposition (308). Banishment (129). List of names delivered to John Ewing for transportation: ( <i>Book of the</i>

				<i>Old Edinburgh Club</i> , XII, 171).
Gilbert McArthur	Islay	Detained as a witness.	Banished but as a witness probably eventually released.	Deposition (308). Banished (136). Called as a Witness (126). Petitions for release (246).
William Campbell	Islay	Says he was forced by Rumbold and his house burnt and cows taken. He ran away but was taken.	Likely released.	Deposition (308).
John Nicolson	Laderdale in Glassary	Says he was forced and tried to run away several times.	Unclear- possibly banished. "John Nicoll" banished (126).	Deposition (309).
Donald McWharrie	Rossa	Fisherman taken while fishing and kept prisoner.	Likely released.	Deposition (309).
John Clark	Cowall	Had been left to keep the cattle but was pressed by rebels.	Unclear- possibly banished. Another "John Clark" banished (126) but one released (167).	Deposition (309).
Gilmartin McVain	Kilearn beside Inveraray	"Forced out."	Likely released.	Deposition (309).
John McKellor	Glassery	Pressed by Auchinbreck's men.	Unclear- possibly banished "John McKello" banished (126).	Deposition (309).
Duncan McAvish	Stralachan	Herdsman who was forced.	Likely released.	Deposition (309).
Duncan McAlister	Glassery	Forced.	Likely released.	Deposition (309).
John McIver	Otter	On the margin "witness."	Banished but likely released after being a witness.	Deposition (309). Banishment (329).

Archibald McCallum	Otter		Banished.	Deposition (309). Banishment (129).
Malcolm Black	Argyllshire		Banished.	Deposition (309). Banishment (126).
Ewan McEwan			Likely released.	Deposition (309).
Ewan McInfun	Durmuk		Likely released.	Deposition (309).
John McIlvory	Cragintyrie		Banished.	Deposition (309). Banishment (126).
Alexander McIlvernok	Cams in McLachlans' lands	Tried to escape but was tied with cords.	Likely released.	Deposition (309).
Neil McIlbreed	Cragintyrie		Banished.	Deposition (309). Banishment (136).
John Campbell	Drunultoch in Auchinbreck's land	Ran away before the rebels dissipated.	Unclear- possibly banished. At least two John Campbells banished (131).	Deposition (309).
John McLachlan	McLachlan's lands	Forced by Mr. Charles Campbell.	Unclear. "John Dow McLauchlan" banished (329). "John McLauchlane" delayed (329).  John McLachlane released from Tolbooth on January 12, 1686. ( <i>Book of the Old Edinburgh Club</i> , XII, 191).	Deposition (309).
Archibald Campbell	Glenderule	On the margin "witness."	Released.	Deposition (310).

		Forced, but escaped before rebels dispersed. He was kept prisoners by the rebels.		Granted safe conduct to appear as witnesses (272).  Petitions that he is a tenant not a heritor (579).
John Campbell		“Poor young boy” forced to carry packs.	Likely released. “John Campbell, a young boy” dismissed (329).	Deposition (310).
Neil Lamont	Under McDougall	“Poor young boy” about 12, forced to carry baggage.	Likely released.	Deposition (310).
John Adam	Ormadale		Banished.	Deposition (310). Banishment (126).
Donald Campbell	Glenderule in Breadalbane’s land		Unclear- possibly released. Granted safe conduct as he is a tenant not a heritor (272). However, a “Donald Campbell” banished (126).	Deposition (310). Safe conduct granted (272). Petitions Council (574, 589).
Archibald McLachlan	McLachland’s lands		Banished.	Deposition (310). Banishment (126).
Murdoch McIsaac	Kintyre	On the margin “Gone.”	Banished.	Deposition (310). Banishment (94).
Malcolm McIvin	Glassery	On the margin “Gone.”	Banished.	Deposition (310). Banishment (136).
Angus McIver	Glassery	Poor young boy. On the margin “ab.”	Banished, but probably released after being detained as a witness.	Deposition (310). Banishment (94) Called as



				witness (138). Petition to be released (246).
John McKenziocht	Melfort	Says he was forced and tied by rebels.	Likely released.	Deposition (310).
Donald McIllovin	Glenderule		Unclear- possibly banished "Donald McKillon" banished (130) or Donald McIlmoon (329).	Deposition (310).
Archibald McEwan	Otter		Possibly banished. "Archbald McKeun" banished (129).	Deposition (310).
John McGilpharick		"A poor boy" of 13 years forced to carry baggage.	Likely released.	Deposition (310).
John Buchanan	Lohead	Forced by Mr. Charles Campbell, "young boy."	Released ( <i>Book of the Old Edinburgh Club</i> , XII, 194).	Deposition (310).
Archibald McIlvain	Glenderule	Forced to carry baggage.	Banished.	Deposition (311). Banishment (126).
Evan McAlister	Glenderule	Says he was forced by the Earl's forces to cross the Clyde.	Likely released.	Deposition (311).
Donald McKovan	Tenant to Laird of Oter	Forced by Mr. Charles and forced to cross the Clyde.	Likely released.	Deposition (311).
Neil McKenly	Tenant to Mckenly	Forced by Mr. Charles.	Unclear- possibly banished "Neil McInlae" banished (129).	Deposition (311).
Duncan McKerlle		Ran away before rebels were defeated.	Likely released.	Deposition (311).
Gilmartin McKello	Glassary	Left the night before defeat.	Possibly banished. "Martine	Deposition (311).

		Forced by Mr. Charles.	McKello” banished (126).	
Donald McKen	Silvercraigs	Tenant- forced by Mr. Charles.	Possibly banished “Donald McKeun” banished (329).	Deposition (311).
Duncan McKelivrige	Craigenterve	Tenant- forced by Mr. Charles, but able to escape.	Likely released.	Deposition (311).
Iver Graham	McKeneilles’ land	A herd, who was forced to be a baggage man and tried to escape. Refused to take Oath of Allegiance (115).	Banished (Not in the column to have ear cut, so perhaps took the oath after).	Deposition (311). Banished (115, 136).
Donald McInvonish	Servant to Craigenterve	Forced and tied by rebels, but parted ways with rebels before defeat and did not cross the water.	Likely released.	Deposition (311).
John McKintagared	Servant to McAlister	Carried a sword.	Possibly banished “John McIntarget” banished (129).	Deposition (311).
Robert Campbell	Son of Archibald Campbell in Kiltalvien	Left the night before Argyll’s defeat.	Unclear. Possibly not the same one: “Robert Campbell” banished for refusing to swear the Oath (145). Robert Campbell’s case delayed (329).	Deposition (311).  Sent to Tolbooth ( <i>Book of the Old Edinburgh Club</i> , XII, 163).
John McIver	Glenderule	Taken by Mr. Charles.	Possibly banished.  “John McIver” in Tulloch banished (129).	Deposition (311).
Neil McCallum	Lochowlle	“This man is sister bairnes with Alexander	Unclear- at least one Neil McCallum	Deposition (311).

		McDonald called Coalkitoch.”	banished (129). See below.	
Dougal McConochie	Servant to Craigenterve	Forced by Mr. Charles.	Banished.	Deposition (311-312). Banishment (126).
David Ochiltree	Glenderule	Escaped the rebels and content to take the Test.	Banished.	Deposition (312). Banishment (126).
Neil McKillchattan	Killhall	On the margin “Gone.”	Likely Banished “Neil McHatton” banished (94).	Deposition (312). Banishment (94).
Archibald McNeil	Servant to Alexander Blair who kept castle of Lachlan		Banished.	Deposition (312). Banished (129).
Donald McIlcherracan	Miller at Fordie Campbell’s mill		Likely released.	Deposition (312).
Patrick Stewart	From Archibald Campbell of Ormadill’s lands	Forced by Mr. Charles.	Banished.	Deposition (312). Banishment (126).
John McKillchallam	Hatton’s Land	Forced and did not cross the Clyde.	Likely released.	Deposition (312).
Archibald McKurrich	McClaye’s Lans	A herd who was forced to carry baggage. On the margin “Gon.”	Banished.	Deposition (312). Banished (94).
Donald McVicar	Tenant in Inveraray	On the margin “Gon.”	Banished.	Deposition (312). Banishment (94).
John McGibbon	Glenderule	Young miller boy. Tried to escape twice, never carried arms. He crossed the Clyde.	Likely released.	Deposition (312).
Neil McCavish	Lord Hatton’s lands	Did not cross the Clyde.	Likely released.	Deposition (312).

Neil McKiachan	McCoull of Lorne's land	Taken while doing errands. Formerly sworn to the King.	Likely released.	Deposition (313).
Duncan McCallum	Laird of Otter's lands	He had a gun and sword.	Banished (94, 129).	Deposition (313). Banishment (94, 129).
Duncan McIlverrich	Craigintarvets land	Master was robbed, and he was taken by force while going up and down the hills.	Likely released.	Deposition (313).
Alexander McWhiry	Tenant to Laird of Otter	Deserted the rebels with 36 others after they crossed the Arskine.	Likely released.	Deposition (313).
Donald Ker	Weaver in Otter's land	Forced by Mr. Charles (threatened to burn his house). Tried to escape but was beaten.	Likely released.	Deposition (313).
James Young	Tenant to McNeill of Tenish	With his master in Lord Atholl's army but having gotten leave to go home was seized by Mr. Charles. Deserted the rebels.	Banished.	Deposition (313). Banishment (129). List of names delivered to John Ewing for transportation: ( <i>Book of the Old Edinburgh Club</i> , XII, 171).
Duncan McIlmichel	Islay	Forced and deserted the rebels. Carried arms.	Possibly banished "Duncan McMichael" banished (129).	Deposition (313). Banishment (129).
John McAdam	Islay	Kept on board the ship, but fled from the rebels when he could.	Likely released.	Deposition (313).
Donald McIntailor	Tenant to Fordie Campbell	Escaped but re-captured. Stayed	Possibly banished "Donald	Deposition (314).

		for fear of his life.	McTaillior” banished (126).	Banishment (126).
Archibald McIntyre	Tenant to Fordie Campbell in Glenderule		Possibly Banished “Archbald McTire” banished (126).	Deposition (314). Banishment (329).
Donald Crawford	Tenant to Laird of Otter		Banished.	Deposition (314). Banishment (129).
James Baird	Kintyre	Had a sword but said he was forced to carry it.	Banished.	Deposition (314). Banishment (129).
Donald Walker	Gallachallies land in Otter	With his master in Lord Atholl’s army, and then taken by rebels on the way home.	Banished.	Deposition (314). Banishment (129). List of names delivered to John Ewing for transportation: ( <i>Book of the Old Edinburgh Club</i> , XII, 171).
Dougal Clark	Gallachies land in Otter		Banished.	Deposition (314). Banishment (129). List of names delivered to John Ewing for transportation: ( <i>Book of the Old Edinburgh Club</i> , XII, 171).
Neil McCallum	Neither Kaimes in Lawmonds land	Threatened to be shot if he left. Mr. Charles forced him.	Likely released, but another Neil McCallum was banished (129)-see above.	Deposition (315).
John McIlleaster	Cardells’ land	Threatened under pain of death to join.	Likely released.	Deposition (315).
Archibald McCurrich	Denoone	Tied by the neck and thrown in a	Likely released (Another	Deposition (315).

		boat. Escaped, and never took arms from the rebels.	Archibald McKurrich banished- see above).	
John Campbell	Glenderule	He, his father and two brothers were taken by the rebels while they were hiding their goods. Afraid of being shot.	Likely released (But two John Campbells banished- see above so possibly him).	Deposition (315).
John McDougal	Neil Campbell's lands in Cowell	Did not receive arms. Was forced by Mr. Charles.	Likely released.	Deposition (315).
Dougal McKellar	Craigenteries' land	Carried away by Mr. Charles, carried a sword.	Unclear- possibly banished "Dugall McKello" banished (136).	Deposition (315).
John McWhirist	Craigenteries' land	Forced to carry his master's meal.	Likely released.	Deposition (315).
Donald Mackenzie	Lord Lauderdale's land in Glastrie	Seized by Mr. Charles. Tried to escape twice.	Likely released.	Deposition (315-316).
Neil Blake	Melford	Taken by Mr. Charles with his four cows. Escaped after the break.	Possibly banished "Neil Black" banished for not taking the Oath of Allegiance (115) but not on list for having ear cut so possibly swore oath later (329).	Deposition (316). Banishment (115).
Duncan McCallum	Lochhowes	Sheriff in Argyleshire. He had been sick with fever when apprehended by Mr. Charles. He tried to escape several times but was retaken and threatened to be shot.	Likely released but at least one Duncan McCallum was banished See above.	Deposition (316).

Gilbert McWalker	Glenluce	*not with Argyll* Taken for want of a pass.	Lords be of the opinion he be liberated. He “is a seeklie dyeing creature.”	Deposition (316).
John Johnstoun	Ireland	*not with Argyll* “A sojor of the militia” and postman.	Lords of the opinion he be liberated.	Deposition (316).
William Allan	Smidyshaw	*not with Argyll* Owns the King and abjures.	Lords of the opinion he be liberated.	Deposition (316).
David Kennedy	Daly	*not with Argyll* Taken by the Highlanders. Took the Test and has a certificate from Lieutenant General.	To be liberated.	Deposition (316).
John Hair	Cumnock	*not with Argyll* Has a pass from Carlton.	To be liberated.	Deposition (316).
Gilbert McRidie	Glenluce	*not with Argyll* Taken for want of a pass.	To be liberated.	Deposition (316).
William Brown	Evandale	*not with Argyll* Taken by Highlanders for want of a pass- a herd boy “infirme and epileptic.”	To be liberated.	Deposition (316).
Andrew McMillan	Galloway	*not with Argyll* Taken for want of a pass.	To be liberated.	Deposition (316).
Roger McMichael	Dalry	*not with Argyll* Taken for want of a pass.	“To be liberated” However, on banishment list with ear cut (330).	Deposition (316).

John Mitchell	Dumfries	*not with Argyll* Taken for want of a pass.	“To be liberated” However, on banishment list with ear cut (330).	Deposition (316).
Duncan Ferguson	Kintyre	Former tenant to Argyll. Says he stayed in the boat the whole time.	Banished.	Deposition (316-317). Banishment (129). List of names delivered to John Ewing for transportation ( <i>Book of the Old Edinburgh Club</i> , XII, 171).
James Hall	Kintyre	Pressed to assist Argyll and particularly the Islay men.	Banished.	Deposition (317). Banishment (129).
William More	Kintyre	Says his horse was taken from him. Left the rebels before the break. “A good lusty man.” His brother was with Atholl.	Likely released.	Deposition (317).
Folcat Offreiz	Levardin (Dutch)	“Dutchman” taken by Argyll to be his servant. Refused to carry arms and ran away but was retaken.	“FFulbart de FFreize” liberated from Tolbooth August 20 ( <i>Book of the Old Edinburgh Club</i> , XII, 173).	Deposition (317).
John Martin	Kintyre	Servant to James Armour of Hillabee.	Banished.	Deposition (317). Banishment (129).
Duncan McVicar	Son to McVicar, Bailie of Campbeltown	Pressed by Colonel Ayloff. “Is a young boy att scholl learneing his gramer.”	Banished.	Deposition (317). Banishment (94).
Derick Albars	Bream	“Dutchman” taken as servant	Released from Tolbooth March	Deposition (317).



		and brought aboard.	30, 1686 ( <i>Book of the Old Edinburgh Club</i> , XII, 208).	
Nicolas Yeaon	Groningame	Taken under the notion of being a coachmen in London for the King's coronation.	Presumably released with the other Dutch prisoners (RPCS, 3 <sup>rd</sup> Series, Vol. 12, 114, 162, 163).	Deposition (317).
Harry Griffith	Independent Minister's son in London	Englishman brought from Holland by Colonel Ayloffe.	Imprisoned in Tolbooth (152, 156, 193).  Released from Tolbooth ( <i>Book of the Old Edinburgh Club</i> , XII, 205).  Sent to London and liberated.	Deposition (317).  RPCS 3 <sup>rd</sup> Series, Vol. 12, 116-117.
John Clark	Lochincarron	"Young boy latlie come from schools." They threatened to hang him if he did not come.	Likely released (but one John Clark was banished. See above).	Deposition (318).
John Weir	Stewartoune	Takes the Oath of Allegiance "to advisement."	"To be banished" with ear cut.	Deposition (318). Banishment (129).
Robert Edward	Cumnock	*Not with Argyll* Taken for want of a pass.	"To be liberated" However, Robert Edward on banishment list (329).	Deposition (318).
David Pattone	Dalrymple	*Not with Argyll* Old man taken for want of a pass.	To be liberated.	Deposition (318).
John Hamilton	Milneholme	*Not with Argyll*	"To be dismissed upon inacting	Deposition (318).

		Formerly banished.	himself to live orderly.”	
John Or	Lochquhinoch	*Not with Argyll* Formerly banished.	To be liberated.	Deposition (318).
David Ferguson	Glasgow	*Not with Argyll* Formerly banished.	To be liberated.	Deposition (318).
William Muir	Gorballs	*Not with Argyll* Formerly banished, still will not take oath.	“To be banished conform to sentence” (Not on banishment lists).	Deposition (318).
Alexander Small	Evandale	*Not with Argyll* Formerly banished.	To be liberated.	Deposition (318).
James Murray		*Not with Argyll* Formerly banished, still will not take oath.	“To be sent away.” Ear cut.	Deposition (318). Banishment (126).
John Marshall	Evandale	*Not with Argyll* Formerly banished, still will not take oath “with the prerogative.”	“To be sent away” (not on banishment lists).	Deposition (318).
Mathew Loudoun	Strevin	*Not with Argyll* Formerly banished.	“To be dismiss.”	Deposition (318).
Robert Semple	Lochquhinoch	*Not with Argyll* Formerly banished.	“To be dismiss.”	Deposition (318).
James Ramsay		*Not with Argyll* Formerly banished, and still will not	“To be sent away.”  Later swears oath	Deposition (319).  Liberated (330).

		assert prerogatives.	and prerogative (126).	
William Smith	Cambusnethan	*Not with Argyll* Formerly banished, still refuses oath.	"To be sent away."	Deposition (319). Banishment (329).
John Or	Lochquhonock	*Not with Argyll* Formerly banished.	To be dismissed.	Deposition (319).
Robert Or	Lochquhonock	*Not with Argyll* Formerly banished, and still will not assert prerogatives.	"To be sent away"  Swears oath and is liberated.	Deposition (319).  Liberated (126).  Liberated from Tolbooth: ( <i>Book of the Old Edinburgh Club</i> , XII, 173).
Robert Blackburn		*Not with Argyll* Formerly banished and will not take oath.	"To be sent away."  Swears oath and is liberated.	Deposition (319).  Liberated (126).
John Smith	Kirkintulloch	*Not with Argyll* Refuses oath.	"To be sent away."	Deposition (319).
Gilbert Fergus	Born in Woodhead, Lived in Islay	Forced but ran away and was retaken. Went to Woodhead after escaping.	Unclear. Possibly banished "Gilbert Ferguson" banished (126).	Deposition (319).
Alexander Ritchie	Islay	Taken with Gilbert Fergus. Forced.	Unclear. Case delayed (115, 329).	Deposition (319).
Gaven Semple	Evandale	*Not with Argyll* formerly banished.	To be dismissed.	Deposition (319).
John Steill	Evandale	*Not with Argyll* Formerly banished.	To be dismissed.	Deposition (319).

George Brown	Servant to Lady Argyle	* Not with Argyll* Taken on suspicion of the news of Argyll's coming.	To be dismissed.	Deposition (319).
William Brown	Evandale	*not with Argyll* Formerly banished.	To be dismissed.	Deposition (319).
James Forest	Cambusnethen	*not with Argyll* Formerly banished and still refuses the oath.	"The sentence to passe."	Deposition (319). Banishment (136).
John Reid	Glasgow	*Not with Argyll* Formerly banished.	To be liberated.	Deposition (319).
Alexander Wright	Bannockburn	*Not with Argyll* Taken upon suspicion but is a poor lame Highland boy and beggar.	To be dismissed.	Deposition (319).
Donald Thomson	Tarbat	Boy of 15, taken by rebels when he was going to seek a pass, kept baggage.	"Remitts his caice to the Council whither they allow him liberty or not." On Margin  Banished.	Deposition (319-320).  Banishment (94).
John Beinstoun	Orkney	Taken out of bed, taken aboard ship with Orkney gentlemen.	On margin remits his caice to the Council".  Likely released.	Deposition (320).
William Watson	Islay	Taken after the break.	Banished.	Deposition (320). Banishment (129).
John McLartich	Parbrek's man	Taken while doing business for his master	Likely released.	Deposition (320).

		who he saw with the rebels.		
John Allan	West Kilmarnock	Will take oath "to advisement."	Banished Ear cut (330).	Deposition (320). Banishment (330). Sent to Tolbooth ( <i>Book of the Old Edinburgh Club</i> , XII, 166).
Samuel Howie	Kintyre	He will not own the King's authority.	Sent to the Tolbooth "to be putt in irons." Banished with ear cut (329).	Deposition (320). Banishment (119). List of names delivered to John Ewing for transportation: ( <i>Book of the Old Edinburgh Club</i> , XII, 167).
Alexander Jamieson	Machline	Refuses to take the oath.	"Order to the irons." Banished with ear cut (329).	Deposition (320). Banishment (119). List of names delivered to John Ewing for transportation: ( <i>Book of the Old Edinburgh Club</i> , XII, 167).
John McKilandres	Straqhair	Forced by Mr. Charles who threatened to burn his house.	Likely released.	Deposition (320).
Angus McKelly	Kilmartin	Young, forced to carry baggage. On the margin "gone."	Possibly banished "Angus McKellar" banished (94).	Deposition (320).
Andrew Scott	Sevant to Andrew Riddell	Refuses to swear oath.	"Sent to the iron." Banished but not on list to have ear cut, possibly swore oath? (329).	Deposition (320). Banishment (136).

				Sent to Tolbooth ( <i>Book of the Old Edinburgh Club</i> , XII, 163).
Robert Hutchinson	Lived in Rotterdam the last two years	Came with Argyll as a carpenter.	Initially banished (126). Later set at liberty (141).	Deposition (320). Banishment (126). Set at liberty (141).
John Beveridge	Islay		Banished.	Deposition (32). Banishment (126).
William Hastie	Carlouke parish	*Not with Argyll* Taken for want of a pass, but will not swear the oath.	“Sent to the Tolbooth and irons.” Banished, but not on list to have ear cut (329).	Deposition (320). Banishment (136). Sent to Tolbooth ( <i>Book of the Old Edinburgh Club</i> , XII, 163).
David Campbell	Falkirk	*Not with Argyll* Has been a prisoner for the last three years. Refuses to swear oath.	Banished (145).	Deposition (321). Sentence postponed because of sickness (126, 330). Banished (145).
John Elliot		Says he does not know why he was taken. *Not clear if he was with Argyll or not*	“Sent to the irons to be seen whither he be in the fugitive roll.”  Banished with ear cut “John Elleot” for refusing to swear the oath (130).	Deposition (321).  Banishment (136, 137).
James Wilkieson	Jedburgh	Says “conforme to the last.”  *Likely not with Argyll*	“Ordered to the irons.”  Not initially banished, but case	Deposition (321).  Execution reprieved (144).

			<p>pursued for those “who not only obstinately refused the said oath of allegiance but most impertinently and indiscretely misbehaved themselves before the Council” (115).          Condemned to be banished (126) with ear cut (130) but also indicted and tried (125).</p> <p>Petition to relieve death sentence which was a “meer mistake” as he had already been sentenced to be banished and his ear was already cut (144).</p>	<p>Kept in prison until further order (163).          NRS, JC39/72.</p>
Robert Cameron	West Teviotale	<p>Says “conforme to the last.”          *Not clear if he was with Argyll or not*</p>	<p>“Ordered to the irons.”          Banished (130).          No stigma.</p>	<p>Deposition (321).          Banishment (130, 136).</p>
James Oliver	Jedburgh Forest	<p>Says <i>conformis precedent</i>.          *Not clear if he was with Argyll or not*</p>	<p>Sent to the irons.          Banished.          No stigma.</p>	<p>Deposition (321).          Banishment (131).          Sent to Tolbooth  <i>(Book of the Old Edinburgh Club, XII, 163).</i></p>
Thomas Stoddart	Lesmahago	<p><i>Conformis Precendti.</i></p>	<p>Sent to the irons.          On banishment list</p>	<p>Deposition (321).</p>

		*Likely not with Argyll*	by mistake? Banished with stigma (126).  Misbehaved in front of the Council so pursued further (115).  Criminal process (125).  Executed.	Sent to Tolbooth ( <i>Book of the Old Edinburgh Club</i> , XII, 163).  Tried ( <i>State Trials</i> , Vol.11, 899).  Executed ( <i>Book of the Old Edinburgh Club</i> , XII, 171).  NRS, JC39/72.
Jon Swan	Carstairs parish	<i>Conformis</i> to the last. *Not clear if he was with Argyll or not*	Sent to the irons. Banished. No stigma.	Deposition (321). Banishment (131).
James Stewart	Lesmahago	Keeps not to the kirk; says <i>ut supra</i> . *Not clear if he was with Argyll or not*	Sent to the irons. Banished. No stigma.	Deposition (321). Banishment (131).  Sent to Tolbooth ( <i>Book of the Old Edinburgh Club</i> , XII, 163).
George Young	Now living in England	<i>Ut supra</i> . *Not clear if he was with Argyll or not*	Put to the irons. Banished. No stigma.	Deposition (321). Banishment (130). Sent to Tolbooth ( <i>Book of the Old Edinburgh Club</i> , XII, 163).
Thomas Weir	Lesmahago	<i>Ut supra</i> . *Not clear if he was with Argyll or not*	Sent to the irons. Banished. No stigma.	Deposition (321). Banishment (136).



				Sent to Tolbooth ( <i>Book of the Old Edinburgh Club</i> , XII, 163).
Samuel Graham	Eskdale Muir	Says he kept to the kirk and owns the King but will not swear abjuration. *Not clear if he was with Argyll or not*	“Sent to the irons”-deleted.  Case delayed because of sickness (330).  Released.	Deposition (321). Sent to Tolbooth ( <i>Book of the Old Edinburgh Club</i> , XII, 163).  Liberation (RPCS 3 <sup>rd</sup> Series, Vol. 12, 336).
John Jackson	Near Glasgow	Refuses King and oath. *Not clear if he was with Argyll or not*	Sent to the Irons. Banished. No stigma.	Deposition (321). Banishment (131). Sent to Tolbooth ( <i>Book of the Old Edinburgh Club</i> , XII, 163).
Grisel Alston	Lesmahago	*Not with Argyll* Has not kept to the kirk nor will she own the King.	Banished with cheek burnt (126). Released with her brother-in-law becoming her cautioner (135).	Deposition (321). Banishment (126). Release (135).

### Appendix III: Argyll Rebel Depositions (NRS)

#### “Depositions Taken by a Duncan McEwin”- as per NRS description (JC39/84/1)

Name	Origin	Notes	Outcome	Source (Depositions all from JC39/84/1)
Duncan McEwin	Craiginterve's land	Left the rebels when he got the opportunity.	Possibly banished.	<i>RPCS</i> , 3 <sup>rd</sup> Series Vol. 11, 131 (Duncan McEwen in banishment list).
Donald McLachlan	Laird of McLachlan's land	He did not cross the Clyde. Taken by force.	Possibly banished.	<i>RPCS</i> , 3 <sup>rd</sup> Series Vol. 11, 136-137 (Donald McLauchlane on banishment list).
Archibald McClairan	Laird of McLachlan's lands	Taken while herding. Did not have arms.	Likely released.	
Archibald McAugh	Laird of Lamond's lands	Forced by Charles Campbell. Left as soon as he could.	Likely released.	
Donald McLerroch	Campbell of Strath[...]s land	Spent two nights bound by the rebels. Had been in Atholl's camp and had leave to go to his house when he was taken.	Likely released.	
Duncan McDonald	Captain Skipweipe's lands	Forced to carry baggage. Young boy.	Likely released.	

		Left as soon as he could.		
Donald McNeill	Montrose land	Forced by Sir John Cochran. Escaped.	Unclear-possibly released.  Archibald Campbell of Auchtimore petitioning about his innocence, states he gave “immeiatlie advertisement” to McNeil and other rebels landing Islay (He was also threatened by Cochrane).	<i>RPCS</i> , 3 <sup>rd</sup> Series, Vol.11, 243-244 (Archibald Campbell petition).
Callum McIlvain	Duncan McAllan of Bayllie’s land	Forced by the rebels and would have left sooner had he gotten the chance.	Likely released.	
Colin Campbell	Son to Archibald Campbell in Glenderule	Forced but escaped with his father and two brothers as soon as they could.	Unclear-possibly banished.	<i>RPCS</i> Vol. 11, 126, 130 (A Colin Campbell in banishment list).
Colin Campbell	Glenderule	Forced to go with the rebels otherwise they would kill him.	Unclear-possibly banished.	<i>RPCS</i> Vol. 11, 126, 130 (A Colin Campbell in banishment list).
John McIlldreil [?]	Laird of Kellburne’s land	Pressed and taken by force.	Unclear-possibly released.	

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