Marks of Division: Cross-Border Remand after 1603 and the Case of Lord Sanquhar

K.J. Kesselring

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Robert Crichton, lord Sanquhar, was a Scotsman "of a reasonable tall stature, pale faced, of a sallow colour, a small yellowish beard [and] one glass or false eye." So said the English version of the proclamation to bring him in, dead or alive, issued both north and south of the Anglo-Scottish border in 1612.[1] The glass eye was a particularly pertinent detail: the loss of his own eye in a 1604 match with English fencing master John Turner led Sanquhar, years later, to have two of his servants kill the man. The subsequent flight of the killers prompted King James VI and I to order a manhunt in both Scotland and England; significantly, he had to bring the principal back to England on his own prerogative, in the absence of any parliamentary authorization for cross-border remand, or extradition.[2] Culminating in Lord Sanquhar's execution as a common criminal on a London gibbet, the king's actions in turn prompted encomiums that he exemplified a justice that recognized no difference between lords and commoners, as well as criticisms that he had

[1] *Stuart Royal Proclamations* [hereafter *SRP*], ed. James F. Larkin and Paul L. Hughes (Oxford: Clarendon Press, 1973), I, no. 123; *Register of the Privy Council of Scotland*, ed. John Hill Burton *et al* (Edinburgh: H.M. General Register House, 1877-1908), IX, 370.

[2] "Extradition," a word of modern origin, is the term generally used for the process by which individuals charged with a crime against the law of one state and found in another are returned to the place where the crime occurred for trial or punishment, though it is not currently used for the transfer of offenders within the United Kingdom, as the process differs somewhat from that used to transfer offenders from one independent state to another. "Remand" was the word used to describe the transfer of offenders in the early seventeenth century, so it is the preferred term here, too.

subverted justice through partiality to his English over his Scottish subjects. Lord Sanquhar's case thus threw into sharp relief the peculiar problems of overlapping borders and boundaries after the 1603 regal union.

While the accession of King James VI of Scotland to the English throne erased the armed frontier between the two kingdoms, a border separating two states and two sets of legal systems endured. Although James called himself King of Great Britain and renamed the border counties "the Middle Shires," his hopes for a more complete union came largely to naught.[3] Talk of bringing the laws of both countries into conformity and of recognizing the subjects born in either as having an equal place in both was bound to be divisive; somewhat surprisingly, perhaps, plans to allow suspected criminals to be remanded from one kingdom to the other also proved deeply contentious. Ultimately, James gave up on securing a parliamentary measure to allow remand and instead relied on proclamations and commissions issued under his royal prerogative to move offenders across the border. This chapter examines the remand debates of James's reign, exploring the issues at stake and the obstacles that impeded a statutory solution. Viewing these debates alongside the highly-charged case of Lord Sanquhar suggests a deeper significance than hitherto noted for one aspect of those debates: lordly concerns for the privileges of peerage. Determination to protect the legal bulwarks of a social caste combined with English distrust of

[3] On James's plans for union, see Bruce Galloway, *The Union of England and Scotland, 1603-1608* (Edinburgh: John Donald Publishers, 1986); Brian Levack, *The Formation of the British State: England, Scotland, and the Union, 1603-1707* (Oxford: Clarendon Press, 1987); Keith M. Brown, *Kingdom or Province? Scotland and the Regal Union, 1603-1715* (New York: St. Martin's Press, 1992); and Jenny Wormald, "The Union of 1603," in R.A. Mason, ed., *Scots and Britons: Scottish Political Thought and the Union of 1603* (Cambridge, Cambridge University Press, 1994). Only Galloway pays any sustained attention to the remand debates, pp. 122-3, 142-3.

Scots law and fears of royal prerogative encroaching on their own to impede James's efforts to find a firm footing for criminal remand across the remarkably persistent border.

Before 1603, treaties and the traditions of border law regulated cross-border remand of criminal offenders between the independent nations of two separate sovereigns. As early as the 1174 Treaty of Falaise, the kings of the English and the Scots had agreed to hand over each other's fugitive felons.[4] In practice, much came to depend on the distinctive customs of the Anglo-Scottish marches where most border-crossing criminals were found. As C.J. Neville has demonstrated in her studies of march law in the middle ages, people in both kingdoms generally saw such measures as necessary to contain the effects of disorder by limiting cross-border reiving and offering alternatives to bloody reprisals lest cattle theft lead to all out war.[5] The

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[4] Paul O'Higgins, "The History of Extradition in British Practice, 1174-1794," *Indian Year Book of International Affairs* 13 (1964): 80. Histories of modern extradition sometimes note the existence of ancient parallels, though they almost invariably see the real roots of the practice in 1790s France. Earlier rendition is sometimes depicted as being focused only on "political" offenders, whereas modern extradition came to focus on "criminal" offenders and specifically to exclude or protect those deemed to fall into the political category, even though O'Higgins demonstrated the error of such claims in his 1964 article. (Note, though, that O'Higgins's focus on formal treaties and statutes, to the exclusion of custom and commissions, confuses seventeenth-century developments.)

[5] See especially C.J. Neville, *Violence, Custom, and Law: The Anglo-Scottish Border Lands in the Later Middle Ages* (Edinburgh: Edinburgh University Press, 1998). On the distinctive governance of the border region, see also: Thomas I. Rae, *The Administration of the Scottish Frontier, 1513-1603* (Edinburgh: Edinburgh University Press, 1966); Catherine Ferguson, "Law and Order on the Anglo-Scottish Border, 1603-1707" (PhD diss., St. Andrews University, 1981); S.J. Watts, *From Border to Middle Shire: Northumberland, 1586-1625* (Leicester: Leicester University Press, 1975); Maureen Meikle, *A British Frontier? Lairds and Gentlemen in the Eastern Anglo-Scottish Frontier, 1540-1603* (Edinburgh: Tuckwell Press, 2004); Diana Newton, *The Making of the Jacobean Regime: James VI and I and the Government of England, 1603-1605* (Woodbridge: Boydell Press, 2005); Diana Newton,

particular provisions in place changed over time: the very first codification of march law, in 1249, had stipulated that a Scot offending in England should be tried, but "only at the March within the kingdom of Scotland."[6] By the sixteenth century border law allowed for an offender to be remanded for punishment in the realm where the offense had occurred. A mid-sixteenth century measure allowed most criminals (but expressly not political offenders) to be tried by a mixed jury on a day of truce and then, if convicted, to be punished by the warden of the march in which the offence had occurred.[7] A treaty of 1563 stated that a warden could request the handover of a cross-border offender who fled back to his home soil; the offender might then be punished "as a subject of that realm where he offended."[8] True, monarchs and their agents did not always honour these treaties and customs; upon occasion, one or the other refused to surrender offenders when asked, and the rough realities of border life sometimes precluded the orderly enforcement of march law. Sometimes, too, the ability to provide refuge or asylum to offenders of the other nation was held up as virtue and cherished custom.[9] A host had obligations to a guest seeking refuge (even if of foreign origin), and turning one's own countryman over to a foreign (and perhaps hostile) power raised any number of concerns. On balance, though, authorities in both countries recognized the benefits of minimizing the border's ability to provide

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North-East England, 1569-1625 (Woodbridge: Boydell Press, 2006); Anna Groundwater, *The Scottish Middle March, 1573-1625* (Woodbridge: Boydell Press, 2010).

[6] "The March Laws," ed. G. Neilson and T.I. Rae, *Stair Society Miscellany*, vol. 1 (Edinburgh: Stair Society, 1971), 16

[7] William Nicolson, *Leges Marchiarum* (London, 1705), 60-1.

[8] *Ibid*., 92-3.

[9] See the contentious discussions about returning the rebel earl of Northumberland to England, discussed in Kesselring, *The Northern Rebellion of 1569* (Basingstoke: Palgrave MacMillan, 2007).

safe haven for offenders and recognized, too, the claims of the other in punishing (though not always in trying) the offenders in question.

In 1603, this centuries old system of border law effectively came to an end. Not formally abrogated until the parliaments of both England and Scotland said so in 1607, nonetheless, border law ceased to operate almost immediately upon James's accession, with the new king of England announcing as much on his ride south to claim his new crown.[10] James soon charged a pair of commissions for the recently rebranded "Middle Shires" with enforcing order in the region, and established another commission to develop an Instrument for Union intended to create the legislative foundation for a new relationship between the two kingdoms.[11]

Ensuring peace and good order in the border region arguably became even more important to James after 1603 than it had been previously, both to ease the distinctive tensions of a composite monarchy and to persuade subjects in both realms of the benefits that accrued from an otherwise unsettling change. He wanted to impose order and to remove "marks of division."[12] Preventing offenders from using the border as a refuge became, if anything, more pressing, but also more difficult. James and some supporters of his project initially favoured a unification or at least conformity of the laws of the two kingdoms: James spoke on more than one occasion of

[10] Newton, *North-East*, 83.

[11] On the border commissions, see Ferguson, "Law and Order," 99-205; on the union commission, see Galloway, *Union*, 79-92. A journal of one of the English border commissioners, now held by the Cumbria Archive Service's Whitehaven office [hereafter CAS], D/PEN 216, is also calendared in the Historical Manuscript Commission's 10th report, Appendix vol. IV, *The Manuscripts of...Lord Muncaster and Others* (London,1885), 229-73. For the journal of the union commissioners, see British Library [BL], Add MS 26635, fols. 1-29.

[12] CAS D/PEN 216, fo. 1.

"one law" governing both.[13] North of the border, Sir Thomas Craig thought full legal union unnecessary, but argued cautiously that it might be possible "to fashion one body of law applicable equally to both."[14] South of the border, Sir Francis Bacon advocated a partial conformity of laws. He divided the laws into *jus privatum* and *jus publicum*, "the one being the sinews of property, the other of government." Bacon thought the first not yet ready for meddling, but aspects of the latter fit to be harmonized, for both "policy and justice."[15] The undue optimism of such plans soon became apparent, though. As Bruce Galloway noted, the widespread English belief in the immutable nature of their law, inherited from time immemorial, combined with Scots patriotism to make legal union unlikely.[16] In the short term, at least, James and his agents decided to focus their efforts for legal reform on the repeal of "hostile" laws, including within that category a measure to allow remand.

Even some of the English border and union commissioners had a qualm or two about remand, however. Despite the lack of any common law or statutory provision allowing remand, the king's instructions to the border commissioners stipulated that offenders be returned to the

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[13] Levack, *Formation*, pp. 27, 71-3.

[14] Thomas Craig, *De Unione Regnorum Britanniae Tractatus*, ed. C.S. Terry (Edinburgh: Scottish History Society, vol. 60, 1909), 328. See Levack, *ibid*., 77-81, and "Law, Sovereignty, and the Union," in Roger Mason, ed., *Scots and Britons: Scottish Political Thought and the Union of 1603* (Cambridge: Cambridge University Press, 1994), 213-37.

[15] Bacon, "Preparation toward the Union of the Laws of England and Scotland," in *The Works of Francis Bacon*, ed. J. Spedding, vol. 4 (London,, 1803), 287. See also Bacon, "Certain Articles or Considerations Touching the Union of the Kingdoms of England and Scotland," *The Letters and the Life of Francis Bacon*, ed. James Spedding (London, 1868), vol. 3, 218-34.

[16] Galloway, *Union*, 40.

scenes of their crimes for trial.[17] One of the commissioners, Sir William Selby, expressed concerns about the harshness of Scots law enforcement after being invited to witness the Scottish trial of English offenders; he observed, too, that the Scots commissioners "made no bones" about summarily killing offenders who resisted arrest. [18] It also surprised the English that Scots law allowed the killing with impunity of outlaws, or those "put to the horn," for either civil or criminal offences.[19] The union commissioners dealt with hostile laws at their meeting of 2 November 1604, recommending that an enumerated list of statutes previously enacted by both parliaments and all the laws, customs, and treaties dealing with the borders be abolished. Remand came up for discussion on 17 November, but only on 24 November did the commissioners agree to recommend that both parliaments devise measures to allow a justice of one country to request the return of an offender who had fled for safety to the other side of the border. They also suggested, however, that such remand would be warranted for "special causes only, as namely in the cases of wilful murder, falsifying of moneys, and forging of deeds," and noted that it would need to be done without prejudicing lords' rights to escheats or forfeitures of offenders' property.[20]

Whatever qualms James's commissioners may have had about remand, they paled in comparison to the heated objections raised in the English parliament that discussed the

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[17] CAS D/PEN 216, fos. 1-2; Watts, *From Border to Middle Shire*, 140.

[18] HMC *Muncaster*, 236; Galloway, *Union*, 85. See also Ferguson, "Law and Order," 128-9 for acts of exoneration granted by the Scottish privy council for the summary hangings of offenders, and p. 171 for Selby. The discussion of remanding on p. 172 includes some errors, however; as will be noted below, the Scots parliament did pass a measure in 1612, and the 1617 English declaration did not come from parliament.

[19] See National Records of Scotland [NRS], PC 8/4, f. 22.

[20] BL ADD MS 26635, f. 18.

Instrument of Union. The parliamentary session of 1606-7 notoriously obstructed much of James's union project, ultimately passing only a measure to abolish hostile border laws. Immediately upon the Instrument's introduction, MPs objected to the provisions for mutual naturalization of Scots and English subjects, adding to xenophobic dislike of Scots and fears of mass migration concerns of a constitutional nature. As Conrad Russell has noted, their anxieties "involved the nature of law, the origins of authority, the definition of a state, and the nature of political obligation and citizenship, to name only a few."[21] James's insistence that he could naturalize Scots subjects as English upon his own authority, without needing parliament, did nothing to placate fears about the relationship between law and prerogative. When the bill to abolish hostile laws came before the Commons on 4 May, it went immediately to committee, where the remand provision became a special focus of men already sensitive to broader constitutional concerns.

Differing views on the relative merits of the English and Scottish criminal laws quickly emerged. The discussion narrowed from what to do about offenders in general to focus on English offenders who had committed crimes in Scotland and returned to their homes south of the border. Whether Scots offenders captured in England would be tried in England or returned to Scotland remained almost unaddressed, with just a passing reference to Scots, as aliens, not being liable to English justice made as a statement of accepted fact, alongside a contradictory statement that Englishmen offending in Scotland and captured there were to be subject to the justice of that realm (and vice versa). The debate centered on the treatment of any English subjects offending north of the border who then made it home before arrest. Those MPs arguing

[21] Conrad Russell, *King James VI and I and his English Parliaments*, ed. Richard Cust and Andrew Thrush (Oxford: Oxford University Press, 2011), 66.

in favour of remand noted that it aligned with both past practice on the borders and with precedents in other composite states. They cited the truism that the exemplary qualities of justice proved strongest at the scene of a crime. They brandished a letter from English commissioners in the north, including Selby, the earl of Cumberland, and the bishop of Durham, which touted the benefits of the current practice of "justicing offenders in the country where the offence is committed…whereof so great good hath ensued."[22] Their opponents, however, highlighted the inequality of the laws in the two kingdoms, arguing that "the law of Scotland is more severe and less favourable to life than ours." In England, two juries passed on matters of life and death, with a presentment or coroner's jury advancing an indictment before a trial jury gave the final verdict. English juries had to be unanimous in their verdicts; not so the Scots. Scots juries might hear evidence in private, they had no benefit of clergy with which to give even non-clerical offenders a second chance, they tried accessories before principals, and so forth. On the other hand, some suggested that in Scots courts offenders might have too many advantages, being allowed an advocate and to challenge the judge himself. Opponents of remand argued that the exemplary qualities of justice were strongest when it happened where the offender was best known. Finally, they adduced reason of state, "for if remanding be allowed, how good soever the justice be, it will be otherwise conceived, for people shall not understand the proceeding but by report."[23] Justice needed to be seen to be just.

The remand provision was debated by men already sensitive to broad constitutional issues and talk of the nature of justice, but was rendered more contentious still by fearsome

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[22] *Journal of the House of Commons* (London, 1902), I, 377.

[23] *The Parliamentary Diary of Robert Bowyer, 1606-1607*, ed. David Harris Willson (New York: Octagon Books, 1971), 245-6, 270-1, 293-307, 310; *Commons Journal*, I, 374-5.

examples and personal fears. James tried to dispel rumours about the treatment of one Lord of Barrow, an Englishman who had stolen several horses in Scotland and been returned there by English border commissioners for trial and subsequent execution. The assurances by Scottish commissioner Sir William Seaton of due process seemed not to outweigh the emotional impact of the report of Barrow's futile insistence that he would recognize no Scottish court nor have "No Scot my judge nor my trior." Seaton observed with little effect that thus far, Scottish border commissioners had sent some 30 Scots south for trial, with all executed, but that of the "16 or 17" sent north from England, only seven had died.[24] MP Sir Henry Widdrington opposed the measure with all the vehemence of a man fearing for his own life: on an armed foray north of the border in 1598 he had killed members of a Scottish hunting party. While he had avoided demands for his own return to Scotland then, he brought a special doggedness to his effort not just to defeat the proposal for remand but to have the practice actively banned.[25]

Indeed, discussion in the Commons quickly turned to making remand itself a crime. MPs inserted in their bill phrasing to block potential royal efforts to bypass any such ban, though the penalty clause came out after an angry intervention by the king. They consoled themselves instead with language forbidding remand until a perfect and complete union of the laws of both nations could be had, by which they meant the subordination of Scots law to English. Until then, they deemed remand too dangerous, despite its history. [26] The Lords then introduced their own wrinkle: whereas the Commons had allowed that Englishmen offending north of the border

[24] *Bowyer*, 293-6.

[25] Newton, *North-East*, 89-90; Paul Hunneyball, "Widdrington (Witherington, Woodrington), Sir Henry," *The History of Parliament: The House of Commons, 1604-1629*, ed. Andrew Thrush and John P. Ferris (Cambridge: Cambridge University Press, 2010).

[26] On the revival of talk of a "perfect union" by union opponents as a stalling tactic, see Galloway, *Union*, 110ff.

might be tried in the northern counties instead of being sent to Scotland for trial, the Lords wanted to ensure that their own privilege of being tried by their peers remained. Peers were free from the common law criminal courts, tried instead by their fellows in the court of the Lord High Steward or in the House of Lords, a privilege first given statutory backing in 1442, then subsequently entrenched and zealously defended.[27] Jurisdiction differed by personal status as well as by territorial boundaries; being tried by one's noble peers represented too valuable a protection and marker of status to be abandoned.

Thus, the statute that passed authorized not remand but something akin to reciprocal jurisdiction. The "Act for the Utter Abolition of All Memory of Hostility and the Dependences thereof Between England and Scotland, and for the Repressing of Occasions of Discord and Disorders in Time to Come" opened by invoking the "fraternity or brotherly friendship" that now happily existed between these two kingdoms, brought together under James "as under one parent." But the tenor quickly shifted. Given "some difference and inequality in the laws, trials, and proceedings in cases of life between the justice of the realm of England and that of the realm of Scotland," offenders should be tried "in their own country, according to the laws of the same whereunto they are born and inheritable and by and before the natural born subjects of the same realm." (The debates on naturalization clearly had their echoes here.) English subjects who offended in Scotland would not be returned for trial to Scotland, but tried in England's northern counties, with cases heard by judges "being natural born subjects within this realm of England and none other." To be clear, it specified that "no natural born subject of the Realm of England or the Dominions of the same" shall for any offence be sent out of England for trial, "until such

[27] *Bowyer*, 323; Colin Rhys Lovell, "The Trial of Peers in Great Britain," *American Historical Review* 55 (1949): 69-81.

time as both realms shall be made one in laws and government." The provision for trials in the north necessitated a few departures from the common law: the measure allowed that witnesses be sworn, that accessories be tried before principals, and that no such offender be allowed the benefit of clergy. Indictments would need to omit the usual phrasing that the offence was "against the peace and dignity of the Crown," as an offence in Scotland was not an offence against the English Crown, but would be deemed good in law nonetheless. Moreover, "no natural subject of his Majesty of the Realm of England" shall for any offence committed in Scotland suffer one of the usual incidents of felony committed within England, the forfeiture of lands or tenements. Finally, as the Lords had insisted, the Act stipulated that whatever the provisions allowing trial in the northern counties, English peers offending in Scotland would only be tried by their peers.[28]

The whole measure remained suspended until the Scots parliament passed a matching measure. The Scots did rather more but also less. They, too, revoked the hostile laws and those dealing with the border and made provision for a similar reciprocal jurisdiction. Scots offending in England would not be sent to England for trial, but tried in the Scottish border region, before "natural born subjects of the realm of Scotland only." Until it pleased God to effect a "perfect union," no Scotsman would for any crime be sent out of Scotland for trial or judgement. They, too, prohibited loss of lands for such offenders, though they failed to make any special provision for lordly offenders. Their measure went further, however, in enacting other elements of the Instrument of Union to which the English MPs had objected, including the measures for free trade and naturalization, desiring "to give all possible proof of their devotion to accomplish all his sacred majesty's royal designs and projects." Nonetheless, they kept the entire act in suspense

[28] 4 Jac. I, c. 1.

until the English Parliament matched it in all points, presumably assured that the English would never pass the more contentious elements.[29] Remand, then, remained possible only through the king's prerogative, with statements issued by both Parliaments directly opposing it.

James soon decided to let his grander plans for union rest, but could not allow the defeat of the remand provisions to stand. Dealing with cross-border criminals had somehow become more difficult than it had been when an armed frontier separated the two countries. He called a conference on legal union in 1607, but it produced nothing of use. He secured through a collusive court action, the famous Calvin's Case, a judicial statement that at least the "*post nati*," those born after 1603, could be naturalized as either Scots or English, a partial defeat of parliamentary objections to his naturalization proposals that seemed to satisfy him on that front.[30] He did not reintroduce naturalization or other aspects of the Instrument of Union to the 1610 meeting of parliament, but made an exception for a new remand bill. Calling it "his bill," he gave it special emphasis. Perhaps because discussed independently of the broader proposals for union, with the contentious framing issue of naturalization somewhat settled, this time around remand excited far less comment in the Commons. The evident inadequacies of the former measure may also have helped; according to the new bill's preamble, not one offender had been tried under the provisions set out in the 1607 Act, which remained in effect suspended. Perhaps, too, Widdrington's treatment after the 1607 session prompted some caution, at least in himself if not others: removed from the list of JPs and deprived of his other offices after his performance in the previous parliamentary meeting, he had been placed under "virtual house arrest" and released

[29] 1607/3/12, *The Records of the Parliaments of Scotland to 1707* [RPS], K.M. Brown *et al*, eds. (St. Andrews, 2007-2016).

[30] Galloway, *Union*, 148ff.

only in time to attend the new session.[31] Of greater salience, most likely, was the more restricted nature of this remand proposal: it would not apply to all English offenders, but only to those captured north of the River Tyne, who would be sent to Scotland for trial only upon "pregnant proofs" of their offenses being presented to English justices. As such, it seemed much more clearly just a replacement for the earlier and now abrogated border law.

The bill still excited comment in the House of Lords, however. Again, the Lords wanted a specific exemption for peers. Their first suggested amendment threatened to extend that privilege to all men of noble status rather than just peers alone. When debates about the precise language with which to exempt the peers from trial in Scotland risked stalling the bill, James intervened with a promise that he would provide for the peers' security with a separate document to be issued under the great seal. The Lord Privy Seal assured the Lords that the king "commended your wisdoms that you were so careful to keep your privileges, which he would never endeavour to break or alter but to give his confirmation and strength thereunto."[32] With this promise, the bill passed, but with a proviso limiting its life until the next meeting of parliament, and again with another that suspended its force until the Scots parliament passed a like measure.

As the Scots parliament did not meet to discuss the matter until late in 1612, it was in this unhelpful impasse that matters stood when Lord Sanquhar had John Turner killed. Sanquhar had served as a diplomat for King James in the 1590s, with duties in France and various Italian states, but also had a reputation for feuding, duelling, and assorted acts of aggression.[33] After

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[31] Hunneyball, "Widdrington."

[32] *Proceedings in Parliament, 1610*, ed. Elizabeth Read Foster (New Haven: Yale University Press, 1966), 122, 137, 247, quote at p. 140. See also *Lords Journal*, II, 642-3, 644-5; *Commons Journal*, I, 423-4, 445, 446-7, 448-9.

[33] "Crichton, Robert, eighth Lord Crichton of Sanquhar (*c.*1568–1612)," M. J. Bowman in *Oxford Dictionary of National Biography*, online ed., ed. David Cannadine, Oxford: OUP, 2004 (accessed July 13, 2016).

1603, Sanquhar served in James's bedchamber and seems to have embraced his king's hopes to create closer ties between his Scots and English aristocrats, though not without incident. In 1608 he performed in Ben Jonson's masque to celebrate the king's ambitions for union and, more particularly, its embodiment in the marriage of John Ramsay, Viscount Haddington, to Elizabeth Radcliffe, daughter of the earl of Sussex.[34] Like Haddington and several other Scottish dancers in the masque, Sanquhar found himself a wealthy English bride, marrying Anne Fermor soon thereafter. As he later reported at his trial, though, all this while he smarted from an injury to his person and, more importantly (as he saw it), to his honour. In 1604, while visiting Sir George Norris at Rycote, he sought to prove his prowess as a swordsman in a match with one of England's best known fencing masters, John Turner. Turner proved his better, however, and Sanquhar lost an eye.[35] Turner had already killed a man with a thrust through the eye in another ostensibly friendly match; even so, this incident, like the last, was treated by most as being merely an unfortunate accident.[36] Accident or not, Sanquhar came to believe himself intentionally wronged and sought vengeance.

[34] Keith M. Brown, "The Scottish Aristocracy, Anglicization, and the Court, 1603-38," *The Historical Journal* 36.3 (1993): 546, fn. 7; David Riggs, *Ben Jonson: A Life* (Cambridge, Mass.: Harvard University Press, 1989), 149.

[35] *The Letters of John Chamberlain*, ed. Norman McClure (Philadelphia: American Philosophical Society, 1939, 2 vols.), I, 197 and *Cobbett's Complete Collection of State Trials*, ed. T.B. Howell (London, 1809), II, cc. 747, 748.

[36] *Chamberlain*, I, 184-5. Joseph Swetnam later reported that Turner had "thrust out two or three eyes" and doubted just how unintentional these "accidents" had been: *The School of the Noble and Worthy Science of Defence* (London, 1617), sigs. C3v-4r.

Sanquhar lost none of his fondness for swordplay and challenges in the coming years, but as he plotted revenge against the fencing master, he came to favour indirect action.[37] In 1606, hearing that Turner was to perform as part of the festivities for the king of Denmark's visit, Sanquhar tried to waylay him but without success. Later, fearing that he was too well known where Turner lived and kept his fencing school in Whitefriars, Sanquhar asked two of his countrymen to do the deed for him, but to no effect. He then had another posting to France, but upon his return, he undertook with two other Scots to do the deed: Robert Carlisle and Gilbert Gray. When Gray lost heart, Carlisle turned for assistance to another man, one James Irwing. On the evening of 11 May 1612, Carlisle and Irwing went to Whitefriars, to an alehouse Turner often visited after leaving his fencing school for the day. Upon their greeting, Turner invited them to join him for a drink. Instead, Carlisle took from under his coat a pistol that Sanquhar had given him. He fired upon Turner, killing him almost instantly.[38]

The long, slow pursuit of revenge then gave way to a frantic search for justice. Irwing ran toward the river, but mistakenly entered a woodseller's close with no exit and was trapped. Sanquhar hid. Carlisle fled to the north of the city to make his way to Scotland. James ordered that Turner be buried quietly in the evening, hoping to avoid the gathering of an angry crowd, and sought the killers' immediate capture.[39] Meanwhile, London crowds cried for their own vengeance against the Scots.

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[37] Most mentions of Sanquhar's story include reference to the French king prodding him to revenge by asking about the eye and whether the man who inflicted the injury still lived, perhaps to help explain the long wait between injury and revenge. The story comes from Arthur Wilson's unreliable account, however, and Sanquhar's own confession makes no mention of it. Arthur Wilson, *The History of Great Britain* (London, 1653), 60.

[38] *State Trials*, II, cc. 749, 762.

[39] C*hamberlain*, I, 348-9.

Turner's killing was only the most recent of a set of affronts between Scots and English. In 1611, a London sergeant was stabbed to death by the servants of a Scotsman he had tried to arrest for debt. As the sergeant had not shown his warrant or mace, the killers might well have gone free, but the highly charged case ultimately produced an important legal precedent that any killing of an officer of the law might, through notions of constructive malice, be deemed murder.[40] In March 1612, the Scot Sir William Ramsay switched the earl of Montgomery in the face at a race meeting. Shortly thereafter the Scottish courtier Sir James Maxwell publicly made barrister James Hawley bleed, tearing out his earring during a dinner party quarrel. More generally, as the rabid Scotophobe Francis Osborne later reported, the "Caledonian boars" were despised throughout London for rooting about for grants of criminals' forfeitures and any and all sources of income that became available as they "lay sucking at the breasts of the state."[41] Together these incidents provided fodder for one widely dispersed rhyme:

> Upon the Scots:
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> They beg our lands, our goods, and our lives,
>
> They switch our nobles and lie with our wives,
>
> They pinch our gentry, and send for our benchers,
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> They stab our sergeants and pistol our fencers.
>
> Leave off, proud Scots, thus to undo us,
>
> Lest we make you as poor as when you came to us.[42]

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[40] MacKalley's Case, 9 *Coke's Reports* 65b.

[41] Francis Osborne, "Traditional Memoirs," in *The Secret History of the Court of James the First,* ed. Walter Scott (Edinburgh, 1811, 2 vols.), I, 217, 240.

[42] See *Ibid*, 217, for a slight variant; for this version, see *Early Stuart Libels: An Edition of Poetry from Manuscript Sources*, ed. Alastair Bellany and Andrew McRae. Early Modern Literary Studies Text Series I (2005).

Other anti-Scottish libels and verses appeared as well. James had good reason to fear the escalation of tensions.

The authorities soon had both Irwing and Gray in custody, the latter freely confessing his knowledge of the murder plot when captured at the port of Harwich trying to secure shipping abroad. With the two key offenders still missing, however, James issued proclamations for their capture. The proclamation made in England on 14 May offered rewards of £500 and £100 for Sanquhar and Carlisle respectively if brought in alive, or £300 and £50 if dead.[43] The Scottish privy council issued its own version on 19 May. It described the killing as "a mater of a sclanderous and havie imputatioun aganis this hail kindome, and tuitcheing his Majesteis hail subjectis of this kindome who attendis his Majesteis Court in their credite and reputatioun." Noting the possibility that the fugitives would return to Scotland, it promised anyone who captured them rewards suited to their "rankis and qualityis."[44]

Once he heard of the English proclamation, Sanquhar turned himself in to George Abbott, archbishop of Canterbury.[45] Carlisle, however, had indeed made it to Scotland. The king

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http://purl.oclc.org/emls/texts/libels/, notes to E1. For a second libel, circulated after the execution of Sanquhar's men, see E2, "Now doe your selves noe more so deck." Unfortunately now missing, "a ballad of the Lord Sanquire" called "Bloodshed Revenged" was entered into the Stationers' Registers in July 1612: C.H. Firth, "Ballads Illustrating the Relations of England and Scotland during the Seventeenth Century," *Scottish Historical Review* 6.22 (1909): 114.

[43] *SRP*, I, no. 123.

[44] *Register of the Privy Council of Scotland*, IX, p. 370. For this and for orders to seize Sanquhar's property, see NLS Adv MS 34.2.2, Haddington's privy council memoranda, fols. 398d, 407 and 35.4.4, fol. 21d.

[45] Abbott had spent time in Scotland and was said to have owed his position to well-placed Scottish friends, which may explain Sanquhar's choice. See S.M. Holland, "George Abbott: The 'Wanted Archbishop'," *Church History* 56.2 (1987): 185.

faced a conundrum. Lords very rarely suffered death for criminal transgressions short of treason; the English might point to Lord Hungerford under Queen Mary, or Lord Dacre under Henry VIII, but few others. The Scots had no recent examples. Such habits of lenience must have encouraged the many courtiers and others of high rank who now petitioned James for mercy. Sanquhar compensated Turner's widow: in Scotland, such reparations routinely preceded remission of royal penalties, and in England, sometimes did so informally.[46] Turner's widow reportedly now added her voice to those seeking mercy for Sanquhar. The king, however, wanted Sanquhar punished, but even the law seemed to be working against him: as an accessory, Sanquhar could not be tried before Carlisle, the principal, or at least not without lengthy outlawry proceedings against the latter. And that principal was in a separate jurisdiction, with which no treaty or statute enabling remand now existed.

Where law failed, royal will sufficed. Carlisle was captured in Scotland and returned to London for trial, arriving on 20 June. As solicitor general, Sir Francis Bacon enthused that even when the killers had all fled, "no man knew whither, to the four winds," James had spoken "in a confident and undertaking manner, that wheresoever the offenders were in Europe, he would produce them forth to justice, of which words God hath made him master." The king issued his proclamation "somewhat of a rare form," prosecuting the offenders in God-like manner "with the breath and blasts of his mouth." Then did "his Majesty stretch forth his long arms" and bring the offenders to the court of his justice.[47] As Sir Edward Coke later noted, with a little less biblical fervour, "it was impossible by legal process to apprehend the body of Carlisle, being in

[46] On the practice of assythment in Scotland in these years, see Jenny Wormald, "Bloodfeud, Kindred, and Government in Early Modern Scotland," *Past and Present* 87 (1980): 54-97 and Michael Wasser, "Violence and the Central Criminal Courts in Scotland, 1603-1638" (PhD diss., Columbia University, 1995), 140ff, 209-10.

[47] *State Trials*, II, c. 752,

Scotland." Indeed, "the principal in this case could not be taken by any common power, but by means of his Majesty's royal and absolute power only." It was, Coke wrote, a case without parallel, resolved only because of the "great wisdom, power, and vigilance of his Majesty." [48]

With Irwing, Gray, Sanquhar, and now Carlisle all in custody, James called upon his chief justices to resolve remaining questions. Internal jurisdictional borders briefly threatened to be a problem: at common law, murders could be tried only in the county where they had occurred, with killings begun in one county but completed in another being all but exempt from prosecution in a system where jurisdiction remained resolutely territorial and local. Statutes of the 1540s had addressed this, with a 1548 measure allowing justices of gaol delivery with commissions of oyer and terminer to try murders that crossed county boundaries.[49] Turner's murder, counselled and procured in Middlesex but completed in London, fell into this category; but could the justices of King's Bench be considered justices of gaol delivery? After some discussion, yes, they resolved that the justices of King's Bench were indeed the "sovereign" justices of gaol delivery and of oyer and terminer, so the statute applied and they might try a case that crossed county boundaries.[50]

Another question related to jurisdiction for a person of Sanquhar's status. As a baron of ancient family, did he not merit a trial by his peers? A precedent from Elizabeth's reign barred Irish lords from this privilege of English peers, however, a fact that Bacon had recently raised in his arguments in Calvin's Case, when trying to assure his listeners that naturalization need not be

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[48] 9 *Coke's Reports* 116a-122.

[49] 2&3 Edward VI, c. 24; see also 33 Henry VIII, c. 23. For context, see Michael Hirst, *Jurisdiction and the Ambit of the Criminal Law* (Oxford: Oxford University Press, 2003).

[50] 9 *Coke's Reports* 118a-119a.

feared.[51] The English justices now quickly replied "that none within this realm of England is accounted a peer of the realm, but he who is a lord of the parliament of England." As Sanquhar was not a lord in the English parliament, he could be tried by common justice.[52]

Irwing and Carlisle had their trials at Newgate. Much hinged on Carlisle's conviction, with some fearing that if he stood mute and refused a jury trial, willing to suffer death by *peine forte et dure* rather than be convicted, then law could not easily proceed on Sanquhar as his accessory. Measures had been taken on Carlisle's journey south to ensure that the Scot was not informed of this quirk of English law, and apparently with success. The two men were found guilty, then hanged in Fleet Street on 25 June.[53]

Sanquhar's trial in King's Bench could thus proceed. While he had pleaded not guilty at his arraignment, at the trial itself he freely confessed, though with efforts to move the judges or king to mercy. He asked that they consider "the indignity I received from so mean a man," which he insisted was done intentionally, and the "want of law to give satisfaction for such a loss."[54] Bacon acknowledged "that even in extreme evils there are degrees," but argued that Sanquhar acted upon no motive but revenge, "which the more natural it is to man, the more have laws, both divine and human, sought to repress it." Rehearsing arguments he would later develop in his attacks on duelling, he sought to dispel any notion that Sanquhar's act could be considered justified or honorable. The long gap between injury and retribution spoke of inveterate malice rather than hot blood. Finally, he tactfully attributed Sanquhar's act not to Scottish feuding habits

[51] *State Trials*, II, cc. 574, 583.

[52] 9 *Coke's Reports* 117b.

[53] *Chamberlain*, I, 362.

[54] *State Trials*, II, c. 750.

but to "outlandish manners" likely acquired on the continent, and turned to praising the king's determined pursuit of justice, which showed him to be "God's true lieutenant."[55]

Justice Yelverton then offered a lengthy speech before pronouncing the sentence. He condemned the murder as especially vile and barbarous, not least in being done with a pistol in a manner that gave the victim no chance to defend himself. He, too, praised the king's "extraordinary care of justice in this case," particularly in ensuring that though the murderer flew "into his own country of Scotland, far remote from the justice of the law of England, yet his Majesty's care hath so pursued him, that there he was quickly apprehended, and that country could be no protection for him." In a matter of justice, "he respects not his own native nation of Scotland more than he doth his own hereditary realm of England." Yelverton awarded a sentence of death by hanging, not the more dignified beheading, noting that though Sanquhar might think the manner of his death to be "by the law of England unfitting…for a man of your honour and blood, yet surely it is fit enough for a man of your merit and offence."[56]

Accordingly, on 29 June, Sanquhar was brought to a gibbet erected before Westminster Hall's great gate. There his dignified carriage prompted much pity from the assembled crowd, despite the earlier calls for blood. Coke noted that the "great grief" and "extraordinary affection of the people" for this lord dimmed only when Sanquhar confessed his Catholicism from the scaffold.[57] His body was left hanging on the gallows a long while, so "that people in this great man might take notice of the king's greater justice."[58]

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[55] *State Trials*, II, cc. 750-2.

[56] *State Trials*, II, cc. 752-4.

[57] 9 *Coke's Reports* 122a.

[58] *State Trials*, II, c. 755.

Indeed, while Coke's report focused on the "impediments, difficulties, and impossibilities in legal proceeding" that centered on the principal's attempt to find refuge in Scotland, much of the discussion at and after the trial focused on Sanquhar's being tried and hanged as a commoner for a murder of a lowly man as an unusual but exemplary act of equal justice. At the trial, Bacon maintained that the king had shown himself to be "no respecter of persons, but English, Scots, noblemen, fencer (which is but an ignoble trade) are all to him alike in justice."[59] Others were equally effusive. Joseph Hall's *An Holy Panegyrick* praised the king for his "unpartial execution of one of the ancientest barons of those parts, for the murder of a mean subject."[60] Thomas Scot used the case to present a critique of noble privilege, lauding the king for dismissing arguments that noblemen merited special treatment even in cases of murder. He mocked those who believed themselves "privilege[d] above the rascal rout," who petitioned to rescue a fellow lord who was "by unrespective laws, condemned to die a villain's death," but faced a king "unpartial, just, and free."[61]

As Alastair Bellany has shown, though, this praise of the king's "unpartial justice" came back to haunt James just three years later, during the scandal provoked by the murder of Sir Thomas Overbury, a crime involving his Scottish favourite Robert Carr, then earl of Somerset. In 1612, Carr helped prepare Sanquhar's burial back in Scotland; in 1615, Carr was pardoned for his own part in a murder of an Englishman, despite the expectations and criticisms premised on James's earlier show of strict justice.[62] As John Holles reported, those who argued against mercy

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[59] *State Trials*, II, .c. 752.

[60] Joseph Hall, *An Holy Panegyrick* (London, 1613), 66.

[61] Thomas Scot, *Philomythie* (London, 1616), sigs. K2v and K3r.

[62] Alastair Bellany, *The Politics of Court Scandal in Early Modern England* (Cambridge: Cambridge University Press, 2002), 234.

for Somerset said that "justice must respect no person, and remembreth to the king of my Lord Sanquhar."[63] Much of the political capital James had gained with Sanquhar's death may well have been squandered on Somerset's pardon. And, of course, some of James's inveterate critics found ways to deride his motives in the Sanquhar case itself. According to a story related by Francis Osborne, James had in fact allowed Sanquhar to die not from a zeal for justice but because the Scottish courtier had once laughed along to a jibe about James's legitimacy.[64] Some Scots, too, saw Sanquhar's execution not as an exemplary act of equal justice but as motivated by the king's privileging of his English subjects. In his *Historie of the Kirk of Scotland,* for example, David Calderwood concluded that "To content the Englishe, the king consented that Sanquhar should be hangit. For the greater contempt of our nobilitie he was hangit among a number of theevs."[65]

County Durham diarist Thomas Chaytor said nothing of intentions but agreed about effects, recording news of Lord Sanquhar's hanging, "which pacified the humour of the Englishmen, being much inflamed against diverse Scottishmen."[66] Sacrificing Sanquhar may well have helped James soothe dangerous anti-Scottish sentiment in London in the short term, while also stressing the continuing "marks of division" between English and Scots, and between lords and commoners. He might also have thought it a necessary or natural step in his longer term project to tame his Scottish nobility, following upon earlier measures against feuding and

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[63] *Letters of John Holles, 1587-1637*, ed. P.R. Seddon (Nottingham: Thoroton Society, 1975), I, 122.

[64] Osborne, "Traditional Memoirs," 231. Alluding to Queen Mary's personal secretary, the French king reportedly jested that of course James was called Solomon, as he was the son of David.

[65] David Calderwood, *The Historie of the Kirk of Scotland* [c. 1640s], ed. Thomas Thomson (Edinburgh, 1842-9), VII, p. 165.

[66] My thanks to Diana Newton for this reference: Durham University Library, Add MS 866, f. 2r.

being followed in turn by a few more executions of recalcitrant lords.[67] In England, at least, it fed into a simmering conflict over lordly privilege, with a strengthening sense amongst some that law should offer equal treatment to all countered by a commitment amongst others to entrench their jurisdictional distinction. Bills to deal with duelling, among other things, stalled in debates over how to try peers differently than others; the 1621 parliament produced both a clear affirmation from the judges that "in all cases, the lords are to be tried by their peers, unless they be excepted by particular words" and also an intense revival of debates over precedence between English and "foreign" peers -- Irish and Scottish.[68] James's efforts to bring his Scottish and English realms into closer union threatened to redraw jurisdictional boundaries that differentiated not just territory and nationality but personal status as well. The Sanquhar case played upon all these tensions.

What Sanquhar's case did not do was push the English parliament to create a statutory basis for remand. Later in 1612, the Scots parliament passed a measure that offered to go beyond the narrow English act of 1610, allowing remand of those captured in any part of Scotland, not just in the border counties, but again, only if and when a matching English measure passed.[69] None did. Instead, the king relied thereafter, as he had in Sanquhar's case, on his "royal and absolute power only." In 1617, the English and Scottish councils cooperated in devising directives for the better order of the borders, some to be put into effect through proclamation and some through new commissions under the great seal. These directives authorized that "any such

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[67] See Wasser, "Violence," and Keith Brown, *Bloodfeud in Scotland, 1573-1625* (Edinburgh: John Donald, 1986).

[68]SP 14/119 f.263; Elizabeth Read Foster, *The House of Lords, 1603-1649* (Chapel Hill: University of North Carolina Press, 1983), 73; Brendan Kane, *The Politics and Culture of Honour in Britain and Ireland, 1541-1641* (Cambridge: Cambridge University Press, 2010), 210-12.

[69] 1612/10/9, *RPS*.

who commit felonies or other heinous offences punishable by the laws of England and of Scotland and fly into England shalbe apprehended and remanded to the place where the fact was committed, and that the like be done in Scotland."[70] Reissues of such commissions governed the remand of offenders between England and Scotland through many decades and developments to come. Only in 1773 did a parliamentary measure to regularize remand pass, then in a British Parliament presiding over a much different union but one that retained even then a border between two distinct systems of law.[71]

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[70] See *Acts of the Privy Council*, XXXV, 380-3; NAS PC 8/4, fols. 53d, 55d; *SRP,* I, 168.

[71] 13 Geo. III, c. 31, "An Act for the More Effectual Execution of the Criminal Laws in the Two Parts of the United Kingdom."

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