The Classification of Murder and Slaughter in the Justiciary Court from 1625-1650: Malice, Intent and Premeditation - Food ‘Forethought’?

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Abstract

The prosecution of homicide in Scotland during the early seventeenth century is all too relevant to a wider appreciation of the law, government, legal profession and society of the time. It is, consequently, surprising that this subject has hitherto received little in the way of scholarly attention. By re-examining various historical records (both archival and printed) this article aims to answer important questions about the classification of the law of homicide, with a specific focus on the prosecution of murder and slaughter. It considers the key differences between these crimes with regard to various issues, most notably: (1) the role of ‘malice’ in the prosecution of slaughter and (2) the term ‘forethought’ and how that influenced the prosecution of murder.

Keywords: Evidence, Procedure, Seventeenth-Century, Homicide, Scots Criminal Law, Archival Material, Malice, Forethought

1. Introduction

This article explores the classification of homicide in seventeenth century Scotland. It is important first to understand the distinction between murder and slaughter in that period; thereafter, the further classifications within these categories are examined.

In the first half of the seventeenth century, acts of homicide could be placed into one of two broad categories: ‘slaughter’ and ‘murder’. As shown below in Table 1, the overwhelming majority of homicide cases heard before the Justiciary Court from 1625-1650 were for the crime of ‘slaughter’ (more than 76 per cent). The next

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2 There are two principal sets of sources from which the Justiciary Court cases were taken. Firstly, there were three volumes contained in the National Records of Scotland: JC2/6 High Court Book of Adjournal - Old Series (7 Oct 1619 - 24 Mar 1631) (hereinafter, ‘JC2/6’); JC2/7 High Court Book of Adjournal - Old Series (29 Mar 1631 - 15 Nov 1637) (hereinafter, ‘JC2/7’); and JC2/8 High Court Book of Adjournal - Old Series (17 Nov 1637 - 17 Jul 1650) (hereinafter, ‘JC2/8’). Secondly, the cases can be found in printed editions of SA Gillon (ed), Selected Justiciary Cases: 1624-1650, Vol 1 (Stair Society 1953) (hereinafter, ‘SJC (Vol 1)’); JJ Smith (ed), Selected Justiciary Cases: 1624-1650, Vol 2 (Stair Society 1972) (hereinafter, ‘SJC (Vol 2)’); JJ Smith, Selected Justiciary Cases: 1624-1650, Vol 3 (Stair Society 1974) (hereinafter, ‘SJC (Vol 3)’). Given the nature of the archival material it is often difficult to provide pinpoint paragraph references. The references made throughout this article are to the modern pagination provided by the National Records of Scotland, which can be found on the bottom left-hand corner of each page. The manuscripts, at least those contained in the three Justiciary Court volumes used here, do not include paragraph numbers. In some of the ‘case law’ citations below,
most prevalent accusation to feature in this period was that of ‘murder and slaughter’, with just over 12 per cent of the cases accounting for that double charge. As explored in greater detail below, this double charge might have been used by pursuers who, despite wishing to libel murder, were not confident of fulfilling the burdens of proof associated with that crime.

<table>
<thead>
<tr>
<th>Crimes</th>
<th>Number of Cases</th>
<th>Percentage*</th>
</tr>
</thead>
<tbody>
<tr>
<td>‘Slaughter’</td>
<td>126</td>
<td>76.8%</td>
</tr>
<tr>
<td>‘Murder and slaughter’</td>
<td>21</td>
<td>12.8%</td>
</tr>
<tr>
<td>‘Murder’</td>
<td>14</td>
<td>8.5%</td>
</tr>
<tr>
<td>‘Murder under trust’</td>
<td>1</td>
<td>0.6%</td>
</tr>
<tr>
<td>‘Treasurable murder’</td>
<td>1</td>
<td>0.6%</td>
</tr>
<tr>
<td>‘Accidental slaughter’</td>
<td>1</td>
<td>0.6%</td>
</tr>
<tr>
<td>Total Cases</td>
<td>164</td>
<td>100%</td>
</tr>
</tbody>
</table>

~Table 1: Showing the number of homicide cases from 1625 - 1650 that came before the Justiciary Court (*Percentages rounded to one decimal place).

There is very little secondary literature on the topic of the classification of murder and slaughter in the seventeenth century. This was recognised by David Sellar, who remarked that, apart from writings on the payment of assythment, blood-feuds in early Scottish society and violence more broadly, little has been written about the development of the law of homicide in Scotland.3 His study on ‘forethought felony’ is the most comprehensive examination of the classification of murder and slaughter, and so is examined here in detail. Sellar suggested that the notion of ‘forethought felony’ was part of Scots law for more than five hundred years.4 He traced the classification of murder starting with the earliest known classification of homicide in Scots law to Regiam Majestatem, in the early-fourteenth century. That source specifically associates the term ‘murder’ with a secret killing.5

more than one page number will be mentioned. This has been done because the case in question appears more than once in the volume, the aim being to provide the reader with as much information as possible.


4 Sellar, ‘Forethought Felony’ (n 3) 45.

The law of homicide was further developed by legislation. A statute of 1370 enacted that the King should not grant a remission for homicide until an inquest had determined whether the killing had been committed, ‘per murthyr vel per praecogitatum malitiam’ (‘by murder or malicious forethought’). Two years later an Act required that an assize or inquest determine whether the accused had killed another, ‘ex certo et deliverato proposito vel per forthouch felony sive murthir vel ex calore iracundiae viz chaudemelle’ (‘according to the certain and deliberated proposition, either by forethought felony or murder, or from heat of passion, namely chaudemelle’). The 1372 statute mentioned the assize adjudicating on the possible existence of ‘forethocht felony’ or ‘chaudemella’. According to Sellar, at least two fifteenth-century Scottish statutes mentioned ‘forethocht felony’ and contrasted it with actions on a ‘suddante’ or ‘chaudemella’. By the eighteenth century, the term ‘murder’ seemed to have moved from its older, restricted meaning of secret killing to cover all killing done with forethought felony. However, Sellar said little of the law in the seventeenth century.

This topic has also been addressed in the work of Alexander Grant, who discusses the classification of the law of homicide with reference to Regiam Majestatem, as well as Skene’s De Verborum Significatione, and the importance of the classifications contained in these works to the context of feuding in medieval Scotland. Grant suggests that secret killing was central to the concept of murder and retained this meaning until at least the end of the fifteenth century. He quotes Skene’s definition of murder (or murtherum), which is provided in De Verborum Significatione:

Whereof of some is called private, that is manslaughter, whereof the author is unknown, whereof the inquisition belongs to the crowner; as where a person is found slain, or drowned, in any place or water. Other is public committed by forethought felony. And murder is committed by forthought felony and not by suddently.

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6 APS i 509, as cited in Sellar, ‘Forethought Felony’ (n 3) 48. See also ‘1370/2/12’ in KM Brown and others (eds), ‘The Records of the Parliaments of Scotland to 1707’ (St Andrews, 2007-2016) (hereinafter, ‘RPS’) <www.rps.ac.uk/trans/1370/2/12> accessed 17 February 2017. The version of this statute consulted by Sellar seems to differ in its wording from the ‘RPS’ version thereof.
7 APS I, 547-48, as cited in Sellar, ‘Forethought Felony’ (n 3) 48; this statute can also be found in the Records of the Parliaments of Scotland’: RPS 1372/3/6.
8 Sellar, ‘Forethought Felony’ (n 3) 48. See RPS 1372/3/6. This seems to be the only statute in 1372 that refers to murder and chaudemella.
9 Sellar, ‘Forethought Felony’ (n 3) 49. In fact, there seem to have been at least three such statutes. See APS II, 9, c 7, RPS 1426/10; APS II, 21, c 7, RPS 1432/3/8; and APS II, 95, c 11, RPS 1469/25.
10 Sellar, ‘Forethought Felony’ (n 3) 49.
11 (n 5).
12 Skene, De Verborum Significatione: The Exposition of the terms and difficull words (EG 1641).
14 ibid 224.
15 See both Skene, De Verborum Significatione (n 12) 69 and Grant, ‘Murder Will Out’ (n 13) 224.
Grant’s reading of Skene’s definition is that murder came under ‘forethought felony’ and that it was still ‘non-public, with unknown perpetrators’, meaning that it had essentially retained its clandestine aspect.\(^{16}\)

The main influence on Scots criminal law was undoubtedly Civilian. This can, for example, be observed in Mackenzie’s division of homicide into four categories borrowed from the Civilians: homicide committed casually, in defence, culpably and wilfully.\(^{17}\) More particularly, according to Sellar, this division could ultimately be traced to the Canonist source, *Decretals*.\(^ {18}\) For instance, the term ‘de homicidio voluntario vel casuali’\(^ {19}\) can be taken to prefigure the distinction, later recognised by Mackenzie,\(^ {20}\) between homicide committed casually and homicide committed wilfully.\(^ {21}\)

Sellar argues that the development of homicide and the terms associated therewith, ‘points to the consistent and uninterrupted use of the term malice aforethought to describe a premeditated, rather than a merely deliberate homicide, from at least the later fourteenth until the eighteenth century’.\(^ {22}\) However, exploration of the Justiciary Court records reveals some, admittedly minor, variations in terminological classification. The term ‘forethought felony’ was successfully prosecuted once\(^ {23}\) and mentioned only one other time.\(^ {24}\) The term ‘malice aforethought’ was not in frequent use during the early seventeenth century, which is not to say that Sellar is incorrect; at worst, his observations simply belie the terminology, as against the concepts, used by the courts during the early seventeenth century. The use of these terms is explored more fully below in the section on slaughter. As this article shows, the terminology relating to homicide was not used consistently in practice; rather, the pursuer would allege slaughter, murder or both in reference to particular circumstances from which ‘malice’ or ‘intention’\(^ {25}\) on the part of the ‘panel’ (i.e. the accused) could be inferred. At times, evidence would also be produced in court, to disprove the murder or slaughter charge.\(^ {26}\) For instance, the case of *Thomas Crombie and others* (1625) featured the averment of medical evidence. However, reliance on such expert evidence was notable for its relative rarity in the seventeenth century; it seems, in other words, to have been the exception rather than the rule.

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\(^{16}\) ibid.

\(^{17}\) Sellar, ‘Forethought Felony’ (n 3) 58. Mackenzie’s classification of homicide can be found in Sir George Mackenzie: *The Laws and Customs of Scotland in Matters Criminal* (OF Robison ed, Stair Society 2012) 1,11.

\(^{18}\) *Decretals* (Compiled by St Raymund of Penafort for Pope Gregory IX, 1234) V,xii. This source was discussed in Sellar, ‘Forethought Felony’ (n 3) 58. It was not directly consulted for the purposes of this article.

\(^{19}\) This translates roughly as ‘homicide wilful or accidental’.

\(^{20}\) Sir George Mackenzie, *Matters Criminal* (n 17) 1,11,6-8.

\(^{21}\) Sellar, ‘Forethought Felony’ (n 3) 58.

\(^{22}\) ibid 56.

\(^{23}\) In the case of Robert Walker and others (1642), SJC (Vol 3) 536.

\(^{24}\) In the case of Johnne Bell (1644), JC2/8, 374.

\(^{25}\) By ‘intent’ is meant ‘thinking in advance of an act’ or ‘planning in advance of an act’; it should not be understood in the looser, more modern sense of the word. A further discussion is provided in section 3 below.

\(^{26}\) For example, see the case of *Thomas Crombie and others* (1625), SJC (Vol 1) 18 and JC2/6, 324.
From the foregoing it would appear that, in order truly to understand the law pertaining to homicide in seventeenth century Scotland, it will be necessary to re-examine the classification of murder and slaughter as distinct forms of homicide in the light of the seventeenth century evidence. By reference to the Justiciary Court records, this article examines the crimes of slaughter, murder, and thereafter the double charge of ‘murder and slaughter’. To that end, specific reference is made to the procedure of the Justiciary Court and to the pleadings brought before it. The ultimate aim of this historical survey is to furnish a richer understanding of court practice in seventeenth century homicide cases and, more generally, a greater appreciation of the concept of homicide in Scottish legal history.

2. The Crime of Slaughter

A. Overview of Findings

This section explores the prosecution of ‘slaughter’ before the Justiciary Court from 1625-1650. Re-examining the prosecution of this crime allows for interesting conclusions to be drawn regarding the classification of homicide, for instance the determination that, in contrast to ‘murder’, ‘slaughter’ was never libelled on the grounds of express ‘intent’ or ‘deliberate’ killing. It is also possible that ‘slaughter’ was used, in the early seventeenth century, as a general term for homicide. ‘Slaughter’ was libelled in three principal ways: ‘slaughter chaudemella’, ‘slaughter with precogitat malice’, and ‘accidental slaughter’.

As many of the sources considered below make clear, ‘slaughter with precogitat malice’ was the killing of another maliciously by a deadly wound. The malice in these cases concerned the conduct or verbal words exchanged between the ‘panel’ (i.e. the accused) and the ‘defunct’ (i.e. the alleged victim) prior to the latter’s death. The precogitata (i.e. thinking in advance) did not appear to relate to the actual act of killing; rather ‘slaughter with precogitat malice’ seemed to concern the scenario of killing preceded by a more general, non-homicidal sentiment of malice and ill-will. The notion of ‘accidental slaughter’ can be discerned from the single case so termed,27 and also from the cases in which this term was invoked as a defence against an allegation of ‘slaughter with precogitat malice’.28 In other words, the panel might plead that, although there had been a homicide, this had been committed without precogitat malice. This defence, explored more fully below, was often accepted by the court. The practice before the Justiciary Court indicates that ‘slaughter chaudemella’ was, like ‘accidental slaughter’, different from ‘slaughter with precogitat malice’, though the confines of that classification are not made explicitly clear. There was specific reference to statutory material, explored in the sub-section

27 James Mathiesone (1640), SJC (Vol 2) 395.
28 See for example the cases of: Johnne Young (1630) SJC (Vol 2) 313 and JC2/6, 667; William Jamesoun and another (1632) SJC (Vol 1) 201 and JC2/7 102 & 103 & 105; and James Heart (1637) SJC (Vol 2) 332. The varying page numbers listed for the case of William Jamesoun have been provided so that consultation of the case itself is easier.
below, that provides an indication of the meaning of *chaudemella* in the period under consideration.

It is sometimes difficult to pinpoint the meaning of the term ‘malice’ in this period: the pursuers tended simply to libel slaughter committed with ‘malice’ without any precise explanation as to the meaning of the latter term and, based on the content of the criminal letters and evidence presented before it, the court would conclude whether said ‘malice’ had existed. This lack of definitional clarity could be taken to suggest that the lawyers of the period had not reached a complete consensus as to the word’s meaning.

The present section focuses on homicide in connection with the different classifications that emerge from the Justiciary Court records: ‘slaughter *chaudemella*’, ‘slaughter with *precogitat* malice’ and ‘accidental slaughter’. Thereafter, the evidential implications of the allegations of slaughter through the nature of the wound are considered. The Justiciary Court records indicate an increasing tendency on the part of pursuers to include ‘deadly wound’ within the libel or to mention expressly the location of the wound and the effect that it had on the body of the defunct. Prior to the 1630s, libels had not always mentioned ‘deadly wound’. The subsequent tendency to mention this concept in the ‘libel’ could be attributed to a change in practice. The need to prove that the wound was deadly, or, in other words, that the defunct had died therefrom, suggests that there existed a requirement of causation in all but name. The notion of ‘deadly wound’ and the requisite severity of the wound to secure a conviction are explored further below.

**B. Malice**

The records show that ‘malice’ had an important connection to the charge of ‘slaughter’, simply libelled as such, in the Justiciary Court from 1625-1650. The idea of malice in connection to slaughter can be seen in the panel’s defences to the crime. It seems that the panel would allege, as a defence to slaughter, that there had been no malice in connection with the homicide committed and therefore that a charge of slaughter could not be sustained. The following section considers the different forms of ‘slaughter’ in descending order of gravity.

i. Slaughter with Precogitat Malice

It seems that malice was an important element in the successful prosecution of most cases involving a libel of ‘slaughter’. In such cases, this was referred to as ‘*precogitat* malice’, which consisted of malice borne by the panel to the defunct prior to the

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29 The criminal letters were a central part of Scottish criminal procedure during the seventeenth century. The records suggest that the criminal letters consisted of a formal written accusation drawn up on behalf of the pursuers and served on the panel before the trial. Generally speaking, the criminal letters identified the panel(s) directly by name(s) and made reference to various key details: for instance, where and when the alleged crime took place, the circumstances of the death, and when the defunct died. Sometimes there was specific reference to the ‘dittay’, which seems to have been the substantial legal point contained within the criminal letters. However, the criminal letters would contain a substantial legal point even where there was no reference to the ‘dittay’.

30 For examples of cases that do not mention the concept of a ‘deadly wound’, see *Robert Buchannane and others* (1626) SJC (Vol 1) 54 and *Robert Andersone* (1627) SJC (Vol 1) 69.
latter’s death. This could find expression through, for instance, hateful words. Crucially, however, this did not entail homicidal premeditation. The presence of ‘malice’ might signify a desire on the panel’s part to injure the defunct or to do him or her an ill turn, but it did not, in itself, bespeak a desire to kill the defunct.

In ‘slaughter’ cases (i.e. those cases where the term ‘slaughter’ was specifically used in court or the criminal letters) the pursuer had to show that some form of malice had occurred in connection with the homicide. This can be seen in the court pleadings of Thomas Bryce and another (1639). The accused in that case were charged with the cruel slaughter of the defunct.31 Contained within the criminal letters was the allegation that the panels had openly vowed an ‘evil turn’ on the defunct and to ‘wind him ane pirne’ him.32 Given the context it seems that ‘wind him ane pirne [him]’ signified a threat to do the defunct a physical injury. The King’s Advocate, who appeared as a pursuer alongside the defunct’s mother and sisters, submitted to the court that the malice only applied to Thomas Bryce (the father who was then art and part panel with his son) and not to Robert Liddell (the other co-accused).33 Liddell and his advocate submitted to the court that since only one strike had been given to the defunct, as alleged in the criminal letters, the charge of slaughter was not relevant to the said Robert Liddell. The defenders and pursuers then debated at great length the law of accomplice, namely whether Liddell’s harbouring of Bryce meant that he was a party to the crime and could be charged as such.34 The trial was ‘continued’35 and does not reappear in the records for the selected period. However, the averment of circumstances suggestive of ‘precogitat malice’ in the criminal letters reflects the possibility that ‘precogitat malice’ was, at least as a general rule, a requirement for the successful pursuit of a slaughter charge.

The element of ‘precogitat malice’ (i.e. malicious forethought) in connection to slaughter was further developed in the form of a defence invoked by panels in court. This is particularly apparent in the cases of Johnne Young (1630)36 and William Jamesoun and another (1632).37 In these two cases the only defences provided were that the slaughters had not been committed with ‘precogitat malice’; the panels in both cases were acquitted. These two cases are now explored in detail to identify what, precisely, ‘no malice’ signified in connection to slaughter from 1625-1650 in the Justiciary Court.

The trial of Johnne Young (1630) for the slaughter of Archibald Reid contained a particularly lengthy court discussion about the lack of malice.38 To, ‘clear his innocence’ the panel presented to the court and the assize a testimonial subscribed by the minister of Curmonnoche and in the name of the elders of the said Kirk and

31 SJC (Vol 1) 299.
32 ibid.
33 ibid 301.
34 SJC (Vol 1) 299.
35 The ‘continuation’ of a trial meant that it had been postponed. This was done by the Justice-Depute, usually without giving an explicit reason therefor. One reason for ‘continuing’ a case was to allow more time for witnesses to be called (William Anderson (1641), SJC (Vol 2) 409 and JC2/8, 122).
36 SJC (Vol 2) 313 and JC2/6, 667.
37 SJC (Vol 1) 201 and JC2/7, 102 & 103 & 105.
38 SJC (Vol 2) 313 and JC2/6, 667.
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Session. The ministers and elders testified that there was never malice or discord between the panel and the defunct. The panel had never uttered a word against, or borne any malice towards, the defunct for any cause whatsoever before his death or thereafter. The pursuers objected to the evidence submitted by the ministers and elders. Even so, the Justice-Depute allowed the evidence and the matter went before the assize. The assize returned a verdict of ‘innocent’ and acquitted Young of the charge of slaughter. It is unclear whether this evidence was the basis on which the assize acquitted the panel, but it could be argued that the absence of malice was a contributing factor to that outcome.

Likewise, in William Jamesoun and another (1632), which concerned two men charged with slaughter, the panels used as exculpatory evidence the fact that they had never borne any ‘precogitat malice’ towards the defunct or committed a previous felony against him and the fact that the strike inflicted upon the defunct had actually proceeded upon a ‘sudden passion and chaudemella’ by the father of Johnne Andersone. The case is slightly convoluted as the original entry charged William Jamesoun and Johnne Andersone as ‘art and part’ of this slaughter. It was then alleged that the father of Johnne Andersone was the one who had committed the strike and that William Jamesoun had only been there to witness the slaughter, which led the court to conclude that William Jamesoun (and also Johnne Andersone) could not have been art and part thereof. Clearly, in this case, ‘art and part’ liability for slaughter was seen to involve physical participation in the homicide. This seventeenth century understanding can be contrasted with later, more ‘modern’ conceptions of the term, according to which ‘art and part’ liability did not require each party involved to deliver a fatal blow or strike; rather, simply being present whilst the strike or fatal blow was delivered would have sufficed to render those present ‘art and part’. The key point to note, for present purposes, is that the assize in William Jamesoun and another acquitted William Jamesoun and Johnne Andersone. This could have been on the basis that they did not bear any malice towards the defunct. On the other hand, the verdict may have resulted from the allegation, made after the criminal letters had been drawn up, that the father of Andersone was the one who had committed the crime and that he had not been charged in the criminal letters. Thus, there are at least two possible explanations for the assize’s decision. Regardless, it can at least be said that the panel’s defence placed great emphasis on the absence of malice. In addition, this case can be seen to reinforce the distinction between ‘precogitat malice’, on the one hand, and a sudden passion (or chaudemella), on the other. The latter term is discussed below in relation to ‘slaughter chaudemella’.

39 ibid.
40 ibid.
41 ibid.
42 ibid.
43 ibid.
44 SJC (Vol 1), 201 and JC2/7 102 & 103.
45 This reference to ‘modern’ ‘art and part’ liability is to Sir Baron Hume’s treatise: Commentaries on the Law of Scotland. For a fuller discussion of ‘art and part’ liability, see D Hume, Commentaries on the Law of Scotland (2nd edn, Bell and Bradfute 1819), i, 273. For a more current understanding of ‘art and part’ see the Criminal Procedure (Scotland) Act 1995, s 293.
Later in the period under review, panels began to invoke not only the defence of a lack of malice but also that of the lack of a deadly wound. This was the case in *James Heart* (1637), in which the panel was charged with slaughter for giving a ‘cruel and unmerciful’ deadly strike to the defunct. What follows in the court records is a rather elaborate discussion between the advocates and the Justices about the nature of the wound and the alleged ‘precogitat malice’ on the part of the panel. The panel contended that there had been no malicious discord and argued that, as such, he could not be accused of slaughter; further, he argued that he had not inflicted a mortal wound upon the defunct. The Justice, having read and considered the ‘exceptions and duplyis’ made by the panel and the pursuer’s answers, found the criminal letters relevant and remitted them to the trial of an assize. The assize returned a verdict of ‘clean’ and ‘innocent’ and ‘acquit[ted]’ Heart of the slaughter. The assize would have been present in court when the panel, advocates and pursuers were making their arguments. Given the assize’s reliance on the criminal letters, it seems likely that the defence put forward by the panel, to the effect that there had been no ‘precogitat malice’ in connection to the slaughter, was a key reason for the acquittal.

This indicates that ‘slaughter’, when specifically libelled, tended to involve ‘precogitat malice’ between the parties. If the panel could put to the court, in defence, that he or she had not harboured such malicious sentiments towards the defunct, there would likely be an acquittal. The above cases indicate a focus on a ‘precogitat malice’ in the sense of prior discord between the panel and the defunct, as opposed to forethought or planning of the actual killing. This is important to the internal classification of slaughter but even more important to the distinction between murder and slaughter. What appears to be the case, in connection to the libel of ‘slaughter’, is that ‘precogitat malice’ consisted of hostile behavior or words towards a person; whether this had to occur immediately prior to the violent act leading to death is unclear. This can be compared with murder, explored in more detail below, whereby a specific circumstance would be libelled in connection to the killing from which premeditated *homicidal* intent could be inferred.

**ii. Slaughter Chaudemella**

‘Slaughter chaudemella’ was a different libel from ‘slaughter with precogitat malice’. In *John Bell* (1643), which concerned a charge of slaughter, the advocate stated that ‘our auld law and practik’ distinguish between slaughter that is ‘chaudemella’ and murder ‘per precogitatam malitiam’, and that the crime of slaughter ‘without forthought felony’ was of a different nature from slaughter ‘per precogitatam malitiam’. This case follows the classifications that were put forward in *William Jamesoun and another* (1632), which suggest that there were two principal ways in

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46 SJC (Vol 2) 332.
47 ibid.
48 SJC (Vol 2) 339.
49 See n 29.
50 SJC (Vol 3) 582.
51 SJC (Vol 3) 586.
52 SJC (Vol 1) 201 and JC2/7, 102 & 103.
which slaughter could be libelled: that which was *chaudemella* and that which was *precogitatum malitiam* (characterised by prior malice). The former term is not defined in the Justiciary Court records. However, the Act of 1372 defines ‘chaudemella’ as ‘the heat of anger’, and ‘foorthought felony or murder’ as a ‘certain and deliberate purpose’.53 From the court discussion, and with reference to the statutory material, it seems that ‘slaughter chaudemella’ involved a culpable killing but one that lacked ‘precogitat malice’. In other words, the term *chaudemella* seems to have referred to a killing committed in ‘hot blood’.

### iii. ‘Accidental Slaughter’

Towards the end of the period under consideration, certain panels alleged that there had been no malice and that the killing had, in fact, been accidental. This classification seemed to indicate a special, exceptional category of ‘slaughter’, distinguishable from ‘slaughter with *precogitat* malice’. *William Watsone* (1639) concerned the alleged slaughter of Niniane Calderwoid. The panel and his advocates stated that if the defunct had been slain, as was alleged in the criminal letters, then it had been done ignorantly and without any ‘foirthoucht fellonie or precogitat malice borne towards’ the said defunct.54 The Justices continued the diet until 3 June. They ordered letters to be directed for the summoning of witnesses who would be able to attest to, ‘the verritie and the form and manner of the said slaughter’.55 Interestingly, the Justices accepted the declaration made by the panel and his advocates concerning the ‘maner and sudane accident’. It is unclear whether the above statement by the accused was meant to imply that he was only guilty of ‘accidental slaughter’, or if he was attempting to exculpate himself completely. Unfortunately, the case was ultimately deserted because of the Justices’ absence.

There is only one case in which ‘accidental slaughter’ was specifically libelled. The pursuers in *James Mathiesone* (1640) alleged the ‘rashe and accidental’ slaughter of the defunct by causing stones to roll off of Edinburgh castle.56 The defunct was playing at the foot of the hill and was killed by the falling rocks. Mathiesone was convicted and banished. *Mathiesone* can be contrasted with *Watsone*, as the pursuer in the former case averred that the slaughter occurred because of accidental circumstances; the criminal letters only alleged ‘accidental’ slaughter. In *Mathiesone*, it seemed that there was genuinely no malice on the part of the panel. Still, he was not blameless in the eyes of the court, for the ‘rashe’ conduct libelled in connection to the slaughter ultimately led to his conviction and banishment. It is quite likely that the term ‘rashe’ here referred to the carelessness and negligence of his actions.

The above cases illustrate the importance of distinguishing between libels and defences in ‘slaughter’ cases. The libel in *Mathiesone* expressly stated that the slaughter was ‘accidental’; the libel in the first case considered (*Watsone*) was simply one of slaughter, the panel attempting to prove that it was accidental by way of defence. As such, the case of *Watsone* is particularly illustrative of the distinction between ‘slaughter with *precogitat* malice’ and ‘slaughter without *precogitat* malice’.

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53 RPS, 1372/3/6 (n 7).
54 SJC (Vol 1) 305 and JC2/8, 76.
55 ibid.
56 SJC (Vol 2) 395.
(or ‘accidental slaughter’). It demonstrates that ‘slaughter’ was generally understood to be ‘slaughter with precogitat malice’; hence a successful conviction of slaughter usually required the pursuer to prove that there had been a precogitat malicious relationship. A panel’s argument, by way of defence, that the slaughter had been committed accidentally meant that he or she was attempting to obtain an acquittal, as in Watsone, or at least a more lenient sentence, as in Mathiesone.

iv. Conclusions
The above discussion on malice allows for certain conclusions to be drawn regarding the classification of slaughter. The first concerns the central importance of the criminal letters in the classification of the crime. It seems that the criminal letters needed to be very specific to the circumstances surrounding the crime of slaughter. One such circumstance that tended to be alleged by pursuers was the mental state of ‘precogitat malice’. This thinking in advance seemed to have been connected to specific conduct, for instance hostile behaviour or words between the panel and defunct. Besides the central case of ‘slaughter with precogitat malice’, there appear to have been two other ways in which slaughter could be libelled: ‘slaughter chaudemella’ and ‘accidental slaughter’.

It could be that slaughter, more generally, was used as a term for homicide. This was alleged by Grant in his study of the sixteenth century. On that broad view, murder was simply a form of ‘slaughter’. Still, it remains to be considered what distinguished murder from ‘slaughter’ in the narrower sense of the word.

As explored in section 3 (below), murder, like slaughter, entailed an element of thinking in advance. The important conceptual distinction between slaughter and murder was the fact that, in the latter case, the forethought concerned the act of killing itself, whereas the concept of forethought associated with slaughter (‘precogitat malice’) related to a more general, non-homicidal manifestation of hostility. However, it would potentially be an overstatement to argue that all cases of murder and slaughter in the early seventeenth century were distinguishable in that manner.

The other types of slaughter besides ‘slaughter with precogitat malice’ can be referred to collectively as ‘slaughter without precogitat malice’. This category of slaughter sub-divides into ‘slaughter chaudemella’, which probably concerned a spontaneous, emotionally-fuelled killing not in any way prefigured by feelings of malice, and ‘accidental slaughter’, which, as the name suggests, encompassed cases in which there had not been any homicidal intent at all, premeditated or otherwise.

C. Nature of the Wound
The nature of the wound was an important aspect of the evidential burden associated with the prosecution of slaughter from 1625-1650. This section of the article examines three terms used to describe the injury inflicted by the defunct: namely, ‘diverse strikes’, ‘cruel strikes’ and ‘deadly wound’. It considers to what

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57 Grant, ‘Murder Will Out’ (n 13) 218.
extent, if any, these features of the pleadings bore upon the classification of slaughter.

i. ‘Cruel’ Strikes in Connection to ‘Slaughter with Precogitat Malice’

As discussed above, the main type of slaughter was that committed by ‘precogitat malice’. It could be that the way in which malice was inferred was through the use of the word ‘cruel’. In Jon Sagery (1625), the earliest case in the period selection, the panel was charged with the slaughter of Helene Thomestune by ‘several crewall strikes’. The case was ‘continued’, and does not appear again in the period under review. The use of the term ‘cruel’ in connection to the strike can, however, be explored in a later case.

In Margaret Dannills and another (1627), the panels were charged with the ‘cruel slaughter’ of the defunct. It was alleged in the criminal letters that the slaughter was committed by means of strikes to the defunct’s head, back and side and one cruel strike inflicted by one of the panels. The panels argued that the criminal letters were not relevant because of the way in which the strikes were labelled. The criminal letters did not give a clear impression as to who had given the cruel strike that caused the death of the defunct. They simply stated that, ‘one cruel strike was given by the panel’, causing confusion as to which of the panels had committed that specific act. This detail seems to have influenced the assize in its decision to acquit both Dannills and Bell.

It is suggested here that the use of the term ‘cruel’ in relation to the injury inflicted was indicative of ‘precogitat malice’ towards a person; if the pursuer libelled a ‘cruel’ strike it would be possible for the court to infer from that word the allegation of malice. This follows from Armstrong’s suggestion, made in his study of medieval Justiciary Ayre cases, that the use of the word ‘cruel’ was meant to signify ‘wickedness or mal-intent’.

ii. Diverse Strikes

There are two cases in which the pursuers alleged that so-called ‘diverse strikes’ had been sustained by the defunct. ‘Diverse strikes’ were strikes given to several parts of the body rather than one part. The case of Peter Balmanno and others (1626) records the slaughter of the defunct by, ‘dyuers straikis ane grevous wound (…) in his breist, shouderis, heid, bak, bellie and dyuers utheris partis of his body and thairby bruiseing and breaking his intrall and noble pars within him’: a rather detailed description of the location of the wound and the effect that it had on the body. This focus on the frequency of the strikes can also be seen in the case of Thomas Hunter and another (1627), in which the panels were charged with the slaughter given by

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58 JC2/6, 316.
59 JC2/6, 433.
60 ibid.
61 ibid.
62 ibid.
64 SJC (Vol 1) 37 and JC2/6, 355.
‘duyers deidlie strikies’. This aspect of ‘diverse strikes’ may have featured prominently in the pleadings but it does not seem to have been a requirement for a successful conviction of ‘slaughter’.

iii. Deadliness of Wound

In slaughter cases, one aspect of the pursuer’s evidential burden was to prove that the strike(s) inflicted upon the defunct had been ‘deadly’ or, in other words, that they had caused the latter’s death. In Thomas Crombie and others (1625), it was alleged that the panel had slaughtered the defunct by striking him on his right arm. The court examined the nature of the wound libelled and the implications that this had on the panel’s culpability. The defunct had been struck with a short sword on his right arm and had died the following day. The panel refuted the libel, stating that the criminal letters were not relevant because they had not libelled the injury as a deadly wound. A doctor appeared before the court to give evidence that the wound was not lethal. Counsel for the pursuers, however, submitted to the court that, although the wound had not been deadly, the libel was still relevant because the panels gave the defunct a ‘crucial’ strike, resulting in a wound that became deadly. Given the context of the pursuers’ allegations it seems that they were attempting to illustrate that the ‘crucial’ strike was fundamental in causing the death of the defunct. The panels were found innocent of the charge of slaughter.

The ‘deadly wound’ issue that featured in Crombie was one of causation in all but name. Interestingly, the facts of this case seem to suggest that the strike libelled could, under the modern ‘but for’ test, be deemed to have caused the defunct’s death. In other words, but for the strike, the defunct would not have died of a wound that became deadly; indeed, there would not have been a wound in the first place. This raises the question as to what was needed for a wound to be deemed causal in the seventeenth century. Seemingly, the wound would have only been deemed causal if it had been (1) sufficient, on its own, to bring about the defunct’s death and (2) sufficient at the time of infliction. The case of Thomas Crombie certainly supports that supposition, suggesting that a wound that was not deadly on its own, but which led to death later on (perhaps because, to give a hypothetical example, it became infected), would not have been deemed causal of the defunct’s death.

The trial of the panel in Johnne Young (1630) for the slaughter of Archibald Reid contained a lengthy court discussion about the nature of the wound and the defunct’s subsequent death. The panel alleged that the criminal letters were not relevant, ‘to pass to the knowledge of the assize’, as the strike was libelled to have

65 SJC (Vol 1) 64 and JC2/6, 393.
66 SJC (Vol 1) 18 and JC2/6, 324.
67 ibid.
68 ibid.
69 For a description of the ‘but for’ test in modern criminal law see, eg, McDonald v HM Advocate 2007 SCCR 10, 11.
70 SJC (Vol 2) 313 and JC2/6, 667.
been inflicted on the defunct’s ‘schakill’, which can probably be interpreted as referring either to the defunct’s wrist or ankle.\textsuperscript{71} In either case, then, the blow had clearly not been directed at a vital part of the body.\textsuperscript{72} After the alleged strike, the defunct had been able to continue his ordinary work as a smith, ‘communing with his cronies, binding, staking and his other ordinary efforts up and down the country’, and he, ‘never lay bedfast all that time’, until shortly before his death, which was caused by a fever.\textsuperscript{73} The pursuers answered that the libel was relevant and argued that, ‘[although] the schakill bane [was not] a vital part’ of the body, ‘life consists [of] all (...) parts of the body’.\textsuperscript{74} The panel countered that when any man survives for forty days after a wound it cannot be presumed that he died thereof.\textsuperscript{75} The defunct had lived for four or five months after the strike,\textsuperscript{76} and so easily satisfied this ‘forty day’ test. The panel was subsequently acquitted.

The cases of Young (1630) and Crombie (1630) make for a worthwhile comparison. In each, any prospect of conviction was thwarted by the lack of a deadly wound. The fact that both cases seemed to fail on that basis becomes interesting when one remembers that the defunct in Crombie survived for considerably less time (one day) than the defunct in Young (several months). In Crombie, the inference that the wound was not deadly was probably bolstered by the presence of medical evidence, which seemed to weigh compellingly in favour of a non-deadly wound, hence acquittal. By contrast, in Young, where the defunct survived for a much longer period, the evidence prayed in aid was of a much less specialised variety. For instance, the panel argued that the defunct had been able to continue his daily activities, notwithstanding his wound. Otherwise, however, the cases are very similar. Both essentially concerned causation and the inference that the wound inflicted had not been sufficient, on its own, to bring about the defunct’s death.

Several cases subsequent to the two discussed above started to include a ‘deadly strike’ in the libel and to detail the location of the wound and the effect that it had had on the defunct, as shown in Table 2 below.

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\textsuperscript{71} According to the Dictionary of Scots Language (hereinafter the ‘DSL’) the schakill was ‘a fetter for the ankle or wrist of a prisoner.’ ‘DSL’ <www.dsl.ac.uk/entry/dost/schakill_n> accessed 22 July 2016.
\textsuperscript{72} SJC (Vol 2) 313 and JC2/6, 667.
\textsuperscript{73} ibid.
\textsuperscript{74} ibid.
\textsuperscript{75} ibid.
\textsuperscript{76} ibid.
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<table>
<thead>
<tr>
<th>Case</th>
<th>Nature of stroke</th>
<th>Verdict</th>
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<tbody>
<tr>
<td>William Hangetsides (1632)</td>
<td>‘deadly strike’</td>
<td>past simpliciter(^{77})</td>
</tr>
<tr>
<td>James Wright (1632)</td>
<td>‘deadly strike in the breast’</td>
<td>acquit</td>
</tr>
<tr>
<td>Andro Grahame (1632)</td>
<td>‘deadly strike’</td>
<td>convicted</td>
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<tr>
<td>Jon Waterstony and others (1632)</td>
<td>‘deadly strike in his breast, bellie and sydies breaking of his internal and noble parts’</td>
<td>past fra(^{78})</td>
</tr>
<tr>
<td>James Balfour (1632)</td>
<td>‘deadly strikes hurting and wounds upon his breast, sides, bellie’</td>
<td>deserted</td>
</tr>
<tr>
<td>George Linly (1632)</td>
<td>‘deadly and cruel strike in his body and upon his sidies and his head’</td>
<td>past simpliciter</td>
</tr>
<tr>
<td>James Jonston and another (1634)</td>
<td>‘deadly wounds in his head, breast, bellie and sides’</td>
<td>continued (i.e. does not appear again in period under review).</td>
</tr>
<tr>
<td>Mr Gavin Dunbar and another (1637)</td>
<td>‘cruel and deadly strikes in his head and under parts of his body’</td>
<td>continued</td>
</tr>
<tr>
<td>Thomas Stott (1643)</td>
<td>‘cruel and deadly strike’</td>
<td>convicted</td>
</tr>
</tbody>
</table>

\(^{77}\) ‘Past simpliciter’ was one of the verdicts returned by the Justiciary Court in homicide cases from 1625-1650. According to the DSL, ‘simpliciter’ meant ‘simply, without qualification or condition being placed upon the event described; without further restriction’ (‘DSL’ <www.dsl.ac.uk/entry/dost/simpliciter> accessed 4 November 2016). Both the verdict of ‘past fra’ (see n 78 below) and that of ‘past simpliciter’ indicated that the pursuits had been dismissed. However, the verdict ‘past simpliciter’ seemed to differ from ‘past fra’ in indicating that the court, as against the pursuers, had decided to cease pursuit of the case.

\(^{78}\) ‘Past fra’ was one of the verdicts returned by the Justiciary Court in homicide cases from 1625-1650. It seems, from the reading of the records, that a verdict of ‘past fra’ occurred when the pursuer agreed to forgo pursuit. The DSL does not define this verdict, nor do the records.

\(^{79}\) See ibid.

It seems that it was simply not enough to allege that the strike given had been cruel: the pursuer had to show that the wound had been deadly or, which amounts to the same thing, that the panel’s strike had caused the defunct’s death. If the pursuer failed to show this, or the panel provided evidence suggesting that the wound inflicted had not been deadly, there were several possible outcomes: the assize would acquit the panel; the case would be deserted entirely by the Justices; or the pursuer would agree to ‘past fra’\(^{79}\).

A detailed exploration of the evidence needed to show the deadliness of the wound was again illustrated in the case of Janet Corsair (1641). The panel was
charged with the cruel slaughter of James Johnstoun, an eight-year-old boy, by gripping him on his two ears and casting him with great force to the ground whereupon she gave him strikes with her hands, fists, knees and feet. The panel alleged that, though libelled as ‘deadly’, the strikes allegedly inflicted upon the child could not have been deadly as the child survived for six months after the alleged incident. Several witnesses were presented, who verified that two or three months after the incident the child was walking about in as good health as, ‘if not better’ health than, he had been in prior to the incident; these circumstances were deemed incompatible with the infliction of a mortal wound. Implicit in this statement was the argument that the child would not have survived the pox had the wound been deadly. The panel also alleged that, a month after the incident, a great sickness of pox had raged for months among the children of Leith and Edinburgh, but that this child had subsequently managed to recover therefrom. Implicit in this statement was the argument that the child would not have survived the pox had the wound been deadly. The panel also presented to the court a surgeon called Patrik Johnstoun, who had visited and attended to the child before his death. He gave evidence that the child had died of another cause, namely the fluxes. The court continued to examine the issues of relevancy of defence witnesses to be called and ultimately acquitted the panel of the slaughter. The panel was able to prove to the court that the original wound was not deadly; hence a libel of the crime of slaughter was unsustainable. Clearly, the appearance of an expert witness, namely the aforementioned surgeon, would have facilitated that conclusion. Like Crombie and Young, the case of Corsair indicates the importance of connecting the panel’s wrongful conduct with the defunct’s subsequent death.

D. Conclusions

The above discussion shows that the nature of the wound was very important to a charge of slaughter. Firstly, it becomes apparent, from the prosecution of slaughter in all its sundry forms, that the pursuers had to prove that the wound had been ‘deadly’. If, however, the panel could provide evidence to the contrary, the case would be deserted or the panel acquitted by the assize. The need for a ‘deadly’ wound was very much linked to causation. The pursuer had to prove that the defunct’s death had resulted from the wound inflicted upon him or her. The notion of a ‘cruel’ strike was very different: it was a circumstance from which malice could be inferred, hence it was specifically related to the mental element of ‘slaughter with precogitat malice’. In determining whether ‘malice’ had been present, some of the cases relied upon the wording of the criminal letters and the details therein of a cruel and deadly strike, while other cases relied on the testimony of witnesses to prove that there had been some form of hostile discourse between the panel and the defunct (as explored above). Finally, the term ‘diverse strikes’ was sometimes used

80 SJC (Vol 2), 414 and JC2/8, 125.
81 ibid.
82 ibid.
83 ibid.
84 ibid.
to describe injuries to multiple parts of the body. ‘Diverse strikes’ do not, however, seem to have been a requirement for a successful conviction of slaughter.

It is important to consider what relevance, if any, the above three characteristics of a wound (‘deadly wound’, ‘cruel strikes’ and ‘diverse strikes’) had to the classification of ‘slaughter’ and the three different forms thereof. Clearly, the notion of a ‘cruel strike’ had great classificatory significance in distinguishing ‘slaughter with \textit{precogitat} malice’ from the other two types of slaughter. From the presence of so-called ‘cruel’ strikes could be inferred ‘malice’, and from ‘malice’ could be inferred ‘slaughter with \textit{precogitat} malice’. Certainly, the notion of ‘diverse’ strikes was similar to ‘cruel’ strikes in its clarification of the nature of the wound, but the former does not seem to have played a classificatory role; it did not relate to a distinctive mental element. Finally, though the notion of ‘deadly’ wound was very significant, given that ‘deadliness’ was necessary for a conviction of ‘slaughter’, it was arguably not of classificatory significance. It related, essentially, to causation, and so, being a requirement that applied to all forms of ‘slaughter’, was not a particularly useful point of classification. It follows that the nature of the wound was relevant to the classification of ‘slaughter’ in some, but by no means all, respects.

3. The Crime of Murder

A. Overview of Findings

This article suggests that, to sustain a charge of murder in the Justiciary Court, as distinct from a charge of slaughter, the Justices and assize needed to be convinced that the panel’s act had been intentional and deliberate. Here the notions of ‘intent’ and ‘deliberation’ referred specifically to \textit{homicidal} forethought (or ‘aforethought’). In other words, to be guilty of murder, the panel must not merely have harboured hostile sentiments towards the defunct prior to the act of killing (‘\textit{precogitat} malice’), but must have planned the killing itself. Such a specific, technical understanding of ‘intent’ is to be distinguished from ‘intent’ in the loose sense of the word. For instance, whereas someone who kills another in a spontaneous rage can, to the modern layperson, be understood to have acted with ‘intent’, such a killer would not have been deemed to have acted with ‘intent’ for the purposes of a ‘murder’ charge in seventeenth century Scotland.

In ‘murder’ cases, the intent or deliberate purpose preceding the homicidal act was not libelled by express mention of aforethought in the criminal letters; instead, this was done indirectly, by libelling in connection to murder certain circumstances from which deliberate conduct could be inferred. These circumstances included treason, killing in a relationship of trust, ‘unnatural’ killing (e.g. where a mother killed her child), or killing by stealth (e.g. at night or by poison).

Treasonable murder started to be libelled and classified as murder ‘under trust’ in the latter part of the period under review. Here the word ‘treasonable’ did not refer to betrayal of one’s country, but betrayal of a person; it concerned the scenario where the panel and defunct had been in a relationship of trust and the panel had betrayed that trust by killing him or her. A homicide where the defunct
The Classification of Murder and Slaughter in the Justiciary Court from 1625-1650: Malice, Intent and Premeditation - Food ‘Forethought’?

had been under the trusted credit, assurance and power of the accused would have amounted to an aggravated form of murder known as ‘treasonable’ murder. The difference between ‘treasonable murder’ and ‘murder under trust’ was inconsequential; these were essentially different terms for the same crime.

The following study is arranged to show the classification of the aforementioned types of murder, each of which corresponded to the particular circumstance suggestive of ‘deliberate’ killing.

B. Murder under Trust and Treasonable Murder

The concepts of ‘treasonable murder’ and ‘murder under trust’ were indistinguishable. Consequently, the mere fact that the latter term became more commonly used will not, in itself, have effected a drastic change to this area of the law. In *Andro Rowane* (1627), the panel was charged with the ‘treasonable murder’ of Euphame Douglas, his spouse. It was put to the court that contained in an Act of Parliament was the rule that, ‘if a party is slain under trust, credit, assurance or power of the slayer he shall be put to death for the crime’. As the defunct had been the lawful spouse of the panel, he was considered to have, ‘most cruelly and unnaturally under her trust and his power murdered her’. This can be compared with the case of *Jon Jamesone* (1628), wherein the panel was charged with the ‘cruel murder and slaughter’ of his spouse by giving to her a cruel and deadly strike. Jamesone was put to the knowledge of the assize, which returned a verdict of ‘culpable’ and convicted him of the ‘horrible murder of his spouse’. Thus, despite the similar facts with which Rowane and Jamesoun were concerned, the approach to the legal question was slightly different: notably, the panel in the latter case was not charged with treasonable murder. Still, it is significant to note that the assize convicted him of the ‘horrible murder’ of his spouse. The conviction of murder, as against slaughter, was likely a reflection of the fact that the defunct had been the panel’s spouse and, consequently, that the two had been in a trustful relationship.

These two cases also show the divergence of the statutory law and the law of homicide in practice. The aforementioned Act of Parliament states that:

(...) where the party slain is under the trusted credit, assurance and power of the slayer, all such murder and slaughter to be committed in time coming after the date hereof, the same being lawfully tried and the person dilated found guilty by an assize thereof, shall be treason, and the persons found culpable shall forfeit life, lands and goods.

This seems to indicate that ‘treason’, rather than ‘murder’, should have been libelled in the cases just discussed. It is likely that the first case of Rowan was libelled as ‘treasonable’ as a result of the reading of this statute. It could also be the case that ‘murder under trust’ indicated a circumstance that aggravated the libel of murder.

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85 APS III 45, c 34, RPS 1587/7/44.
86 SJC (Vol 1), 73 and JC2/6, 437.
87 JC2/6, 513.
88 ibid.
89 APS III, 45, c 34, RPS 1587/7/44.
This was certainly the case in *Walter Urquhart and others* (1642), in which the panels were charged and found culpable and guilty of the crime of, ‘treasonable, barbarous and cruel murder under trust and friendship’ of the defunct. This case links the notion of ‘treasonable murder’ with that of ‘murder under trust’.

### C. Murder by ‘Unnatural’ Circumstances

Several murder cases in the period under review involved a mother killing her infant child. Most importantly, however, the term ‘child murder’ or ‘infanticide’ was not used in the Justiciary Court records. Instead, this crime was termed the ‘unnatural murder and destruction’ of an infant. It is not clear why this violation of the maternal bond was placed into the special category of murder by ‘unnatural circumstances’, and not simply deemed another form of ‘treasonable murder’ or ‘murder under trust’.

Three of the ‘unnatural circumstances’ cases discussed below involved a mother killing her infant child to conceal adultery. This is not the only instance of the word ‘unnatural’ being used in connection with the classification of murder: as discussed above, *Andro Rowane* (1627) was alleged to have, ‘most cruelly and unnaturally [murdered his wife] under her trust and his power’. What is meant by the word ‘unnatural’ is unclear, but given its use in the five cases below and the case of *Rowane*, it seems to have indicated the violation of a relationship of the utmost sanctity, of which the two paradigms were spousal and parental.

<table>
<thead>
<tr>
<th>Case</th>
<th>Year</th>
<th>Citation</th>
<th>Charge</th>
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<tbody>
<tr>
<td>Jonet M’Craith</td>
<td>1626</td>
<td>SJC (Vol 1) 47</td>
<td>‘horrible murthour’</td>
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<tr>
<td>Christiane Hamilton</td>
<td>1634</td>
<td>JC2/7, 305</td>
<td>‘unnatural murder and destruction’</td>
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<tr>
<td>Margaret M’Linle</td>
<td>1634</td>
<td>JC2/7, 317</td>
<td>‘cruel and unnatural murder and destruction’</td>
</tr>
<tr>
<td>Margaret Cunningham</td>
<td>1642</td>
<td>SJC (Vol 2) 532</td>
<td>‘cruel and unnatural murder’</td>
</tr>
<tr>
<td>Jonet Campbell</td>
<td>1644</td>
<td>JC2/8, 383</td>
<td>‘cruel murder and slaughter’</td>
</tr>
<tr>
<td>Jonet Jonstone</td>
<td>1644</td>
<td>JC2/8, 388</td>
<td>‘cruel and unnatural murder’</td>
</tr>
<tr>
<td>Margaret Chalmers</td>
<td>1648</td>
<td>SJC (Vol 3) 768</td>
<td>‘cruel murder, death and destruction’</td>
</tr>
</tbody>
</table>

~Table 3 – Showing cases involving the killing of an infant child by its mother.

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90 SJC (Vol 2) 550.
91 SJC (Vol 1) 73 and JC2/6, 437.
The cases of Hamilton, M’Linle, Cunningham and Jonstone mentioned in Table 3 all used the phrase ‘unnatural murder’ in relation to the killing of an infant child. This terminology was used in three of the seven cases of homicide committed to conceal adultery. The case of Campbell deviates from that pattern. Despite the use therein of the phrase ‘cruel murder and slaughter’ to describe the killing of an infant, the facts of this case did not involve a killing intended to conceal adultery. The case of Chalmers also differs from the others in its use of the phrase ‘cruel murder, death and destruction’ to describe a mother’s killing of her infant child in an attempt to conceal adultery. From Campbell and Chalmers it would seem that the term ‘unnatural’ was replaced by ‘cruel’ in the mid-1640s.

These six cases are notable for the absence of defence counsel. Although these were not the only cases in the period under review where no advocate appeared to defend the panel, this appears to have been a relatively rare occurrence, accounting for roughly 20 per cent of the homicide cases considered in this article.92 It has been suggested by Wasser that it was common for a person accused of a crime before the Justiciary Court to have an advocate present.93 This is plausible in the light of the Parliamentary Act of 1424, which required judges to appoint counsel to ‘poor men free of charge’, although Wasser has suggested that this was likely intended for civil suits.94 The various auld laws, practicks, treatises and Acts of Parliament, passed before the 1424 Act, concerning legal representation were either ambiguous in their scope or mentioned civil cases only when referring to aid being given to a defender.95 By the beginning of the seventeenth century, it was probably common for a person accused of a crime before the Justiciary Court to be represented by an advocate.96 In 1587, an Act of Parliament stipulated that no advocate or prolocutor should be stopped, in Parliament, from appearing, defending, or reasoning on behalf of a person accused of treason or otherwise.97 Thus, even in the case of a very serious criminal charge (treason), the accused could avail himself or herself of an advocate. Against this backdrop, the lack of legal representation in cases involving infanticide is particularly marked.

In each of the six cases mentioned above, the woman on trial confessed judicially to the killing of her child, and was thereafter capitally punished. It is unclear whether the lack of defence counsel contributed to the women’s convictions; it is, conversely, possible that it was their confessions that accounted for the absence of advocates in the first place. It is also unclear whether the confessions were obtained through the use of torture, as the records do not indicate as much.98 One of these cases, however, states that a woman confessed in the avowed hope that God

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92 In other words, between 1625 and 1650, 164 cases were decided. Of these, a mere thirty-six did not feature an advocate (including the six aforementioned cases on infanticide).
94 ibid.
95 Wasser, ‘Defence Counsel’ (n 93) 184.
96 ibid 183.
97 APS III, 443, c 16, RPS 1587/7/26.
would show mercy.\textsuperscript{99} Thus, some confessions were possibly motivated not simply by the fear of torture, but by heartfelt religious sentiment.

D. Murder by Stealth

The commission of homicide by stealth, or in the darkness of night, could successfully lead to the prosecution of a charge of murder. This scenario arose in the case of \textit{Johnne Myller and another} (1636), wherein the panels were charged with ‘murder under night’ by giving six or seven cruel and deadly strikes to the sleeping defunct on his head.\textsuperscript{100} This aspect of stealth was also evident in the case of \textit{Robert Walker and others} (1642), in which the panel killed the defunct ‘under silence and cloud of night’.\textsuperscript{101} According to the libel, the defunct was sent from her house at night by her husband, Robert Walker, to a neighbour’s house for a pint of ale. She was then shamefully and cruelly strangled to death by that neighbour, David Grahame. He did so under the order of Robert Walker and David Grahame’s wife, Margaret Grahame. It was alleged that Robert had committed adultery with Margaret; had been called before the Session of the Kirk of Montrose for the adultery previously; and had planned the killing of his wife to prevent her from revealing the adultery.\textsuperscript{102} All three conspirators were found guilty of murder ‘art and part’. This case indicates a clear, deliberate purpose; indeed, ‘forethought’ was specifically mentioned in the libel.

E. Conclusion

For a successful conviction of murder to be brought in the Justiciary Court, the Justices and assize had to be convinced that there had been some ‘intent’ or deliberate purpose underlying the killing. This was done by including in the libel a reference to such circumstances as treason, unnatural killing and killing by stealth (e.g. at night or by poison). Treasonable murder was murder aggravated by the betrayal of a trustful relationship between the panel and defunct. It was aggravated in the sense that the homicide would be libelled as murder but could also lead to a charge of treason under the statutory law. The term was used in the Justiciary Court records at the beginning of the period under review but seems later to have been superseded by the term ‘murder under trust’.\textsuperscript{103} Most cases do not explicitly indicate when and how ‘forethought felony’ played a part in the murder. In this, the practice of the prosecution of murder in 1625-1650 might have differed from the statutory law discussed above.\textsuperscript{103} However, the circumstances by which murder was termed and libelled seem to indicate an intent or deliberate purpose behind the homicide. Invoking such a deliberate purpose seems to have been sufficient to import a ‘forthought felony’ in connection with the murder – the key element of a successful prosecution. It should be stressed

\textsuperscript{99} Margaret Chalmers (1648), SJC (Vol 3) 768 and JC2/8, 579.
\textsuperscript{100} SJC (Vol 1) 274 and JC2/7 662. The verdict for this case appears at JC2/6, 700.
\textsuperscript{101} SJC (Vol 2), 536 and JC2/8, 240.
\textsuperscript{102} ibid.
\textsuperscript{103} RPS, 1372/3/6 (n 7).
that the nature of the forethought associated with murder was specifically homicidal in character; it signified that the panel had not only borne malice towards the defunct, in advance of the killing (‘precogitat malice’) but had planned to kill him or her.

To some extent, the seventeenth century notion of ‘murder’ was similar to the older, more restrictive understanding of the term as secret killing specifically.\textsuperscript{104} This is particularly apparent from the aforementioned importance of murder by stealth. Also, it might be hazarded that some of the other categories of murderous killing, for instance ‘unnatural killing’ of an infant child, were also, incidentally, committed in secret. However, the existence of multiple circumstances from which murderous ‘intent’ could be inferred is suggestive of a broader definition of ‘murder’ than one associated solely with secret killing.

4. The Libel of ‘Murder and Slaughter’?

A. Overview of Findings

Several records refer to charges of both ‘cruel slaughter and murder’.\textsuperscript{105} This double charge has not received scholarly exploration and has been disregarded in the index and introduction to the printed Justiciary Court records.

Usually, the cases in which the panel was charged with both ‘murder and slaughter’ concern homicide in circumstances which, for reasons explored immediately below, were potentially indicative of an intentional, premeditated killing. Two key examples of these circumstances were killings committed at night and killings committed in the context of hospitality. It thus becomes slightly unclear why the double charge of ‘cruel slaughter and murder’ was libelled in these cases rather than just ‘murder’. Perhaps this was done so that the pursuer had a higher chance of securing a conviction. Apprehensive as to whether he or she would be able to sustain a charge of murder, the pursuer may, quite plausibly, have libelled ‘slaughter’ in the alternative.

This impression seems particularly credible given the importance of the criminal letters and the fact that the cases would be deserted if a pursuer only libelled one charge but failed to prove it. As discussed above, just over 47 per cent of the ‘murder and slaughter’ cases were libelled as the cruel ‘murder and slaughter’ of the defunct.

\textsuperscript{104} See text to nn 11-16.

\textsuperscript{105} This double charge appeared in the following cases: Hary Gordoun (1627), JC2/6, 400; Walter Jamesone (1628), SJC (Vol 1) 4 and JC2/6, 477; Jon Jamesone (1628), JC2/6, 513; David Qualte (1629), JC2/6, 523; William Lennox and another (1635), JC2/7, 522; James Grant (1635), JC2/7, 629; David Robert and others (1637), JC2/8, 8; James Spalding (1637), JC2/8, 8; James Donaldson (1638), JC2/8, 40; James Graham (1640), SJC (Vol 2) 399 and JC2/8, 107; William Anderson and others (1641), SJC (Vol 2) 409 and JC2/8, 122; William Fraser (1641), SJC (Vol 2) 443 and JC2/8, 151 & 155; John Morrison and others (1642), SJC (Vol 3) 524 and JC2/8, 213 & 225; Laurence Mercer and others (1643), SJC (Vol 3) 564; John Bell (1643), SJC (Vol 3) 582; Johnne Bell (1644), JC2/8, 374; Johnne Campbell (1644), JC2/8, 384; Patrick Meldrum (1646), SJC (Vol 3) 726; James Urquhart (1646), SJC (Vol 3) 728; Margaret Lamber (1646), SJC (Vol 3) 731; Thomas Calander (1647), JC2/8, 544; and Alexander Milne (1649), JC2/8, 667.
The libelling of specific circumstances in connection with the killing in the cases explored below (e.g. the fact that it was committed at night, in the context of hospitality, or in violation of a trustful relationship), was probably intended to infer the ‘intention’ or deliberation necessary for a conviction of murder.

B. Homicide Committed by Stealth

The previous section on murder suggests that a charge of murder would be successfully prosecuted if the killing appeared, on the evidence, to have been committed by stealth. In the case of William Lennox (1635), the panel was charged with the ‘cruel murder and slaughter’ of the defunct, which was committed ‘under night’. The fact that the homicide was committed ‘under night’, hence covertly, seemed to indicate that murder, as against mere slaughter, could be inferred from the circumstances. The outcome of the case is unknown as it was ‘continued’ and did not appear again in the period under review. It seems likely that this was done merely as a safeguard to increase the chances of conviction. This also happened in the case of James Donaldson (1638), where the assize dropped the charge of murder (from the double charge of ‘murder and slaughter’) and returned a verdict of ‘slaughter’. The circumstances of that case are explored further below.

C. Homicide Committed in Such Contexts as Hospitality

In William Andersone and others (1641), the panels were accused of being guilty, ‘art and part of the cruel slaughter and murder’ of William Davidsone. The pursuers alleged that the panel and defunct were dining together when, at some point, they ‘fell out in evil words’. The case was eventually deserted for the lack of an assize. However, the fact that the panel and defunct were friends and were dining together seemed to indicate circumstances from which homicidal ‘intent’ could be inferred, which, had there been an assize in place to decide on the matter, would have been all too propitious for a charge of murder. This seems particularly credible when consideration is paid to the expectations, particularly those of honour and good behaviour, that hospitality tended to engender in the early-modern period.

Hospitality can be understood as, ‘preponderantly a private form of behaviour, exercised as a matter of personal preference within a limited circle of friendship and connection’. One of the earliest uses of the term ‘law of hospitality’ was in Philip Sidney’s, The Countess of Pembroke’s Arcadia, which promoted good behaviour towards strangers. William Heale, who wrote against wife-beating in 1608, stated that, ‘none who entered into [the house of another], should for the time

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106 JC2/7, 522.
107 SJC (Vol 2) 409 and JC2/8, 122.
108 ibid.
of his aboad there, suffer any kind of injury upon any occasion'. Stair also mentions the, ‘laws of hospitality’ as, ‘the mutual trust between the host and the guest, whom he has willingly received in his house, whereby neither of them can act anything prejudicial to the life or liberty of the other, while in that relation’. At the beginning of the early-modern period, the elite became preoccupied with hospitality, in particular the perceived need to show honour through the household and to provide guests with good entertainment.

Hospitality would thus infer a friendly, trusting relationship that imported certain societal and behavioural norms within the period under review. The above case does, however, describe a ‘sudden and passionate exchange’ between the defunct and the panel. Given the classification of slaughter and murder above, this description could mean that there was doubt that the circumstances of the case would sustain a successful charge of murder or even slaughter ‘with precogitat malice’, given the difference between ‘precogitat malice’ and chaudemella (discussed above). As such, it is possible that the pursuers charged ‘slaughter and murder’ in the criminal letters in an attempt to straddle the uncertain classificatory boundary between those two crimes.

This case of Andersone and others can be compared with the case of John Dick and others (1649), in which it was alleged that the panel committed the cruel murder of the defunct by, ‘poisoning him, under trust and friendship’ within Dick’s household. With great repentance and remorse, the panel confessed judicially to the killing in the manner specified in the criminal letters. The friendship between the panel and the defunct implied a relationship of trust, the violation of which by poisoning was all the more heinous for having occurred within the panel’s household. This aspect of hospitality and friendship seems to have facilitated the inference that the killing was the product of forethought and premeditation, hence the unequivocal characterisation thereof as ‘murder’ rather than ‘murder and slaughter’.

D. Homicide Committed in the Context of a Trustful Relationship

As mentioned above, the dual charge of ‘murder and slaughter’ seems to have featured in the Justiciary Court records of 1625-1650 because it increased the pursuer’s chances of obtaining a conviction, an impression that is further reinforced by the case of James Donaldson (1638). Here the panel was charged with both ‘cruel murder and slaughter’, committed by giving a ‘terrible and deadly strike’ to the defunct, and also with adultery, although the latter charge can, for present purposes, be considered irrelevant. The assize returned a verdict of ‘culpable’ and

111 W Heale, An Apologie for Women, or an Opposition to Mr Dr G[ager] His Assertion. That it was Lawfull for Husbands to Beate theire Wives (Oxford 1609) 23, as cited in F Heal, Hospitality in Early Modern England (n 109) 5.
112 Sir James Dalrymple, Viscount Stair, The Institutions of the Law of Scotland (1st edn, Andrew Anderson 1681) 1,10; Stair, The Institutions of the Law of Scotland (2nd edn, Andrew Anderson 1693) 1,1,11.
113 F Heal, Hospitality in Early Modern England (n 109) 11.
114 SJC (Vol 3) 811 and JC2/8, 656.
115 JC2/8, 40.
convicted James Donaldson of ‘slaughter and adultery’, thereby dropping the charge of murder and only returning a verdict of ‘guilty’ on the ‘slaughter’ charge. There is no indication as to why the assize returned that verdict, as only the criminal letters were relied upon and no extra evidence was produced. However, based on the classification of murder proposed hitherto by this article, it could be argued that the assize returned a verdict of ‘slaughter’ alone because the pursuers had failed to aver a relationship from which intentional, premeditated (hence murderous) killing could be inferred.

Conversely, ‘deliberate’ or ‘intentional’ killing was potentially present in the case of Thomas Calander (1647), wherein the panel was charged, and found culpable of, the ‘murder and slaughter’ of his son-in-law. This would suggest that the circumstances of the homicide, namely the trustful relationship between the defunct and panel, were potentially enough for a successful prosecution of ‘murder’. This certainly differs from the case of Donaldson and is more in keeping with the above cases wherein the only charge was ‘murder’. This calls into question why the pursuers included both charges of ‘slaughter’ and ‘murder’. Perhaps this was done for fear that the tie between father-in-law and son-in-law was not as close as, say, that between father and son or husband and wife, hence too weak a basis on which to ground a charge of murder.

E. Conclusions

The records do not make it completely clear why some cases were libelled as ‘murder and slaughter’. However, the likely explanation is that this double charge would have given the pursuer a better chance of securing a conviction in more borderline cases, where there was some uncertainty as to whether a murder conviction would be successful.

5. Conclusions

From the present survey of the Justiciary Court records, a number of conclusions can be drawn regarding the early seventeenth century Scottish notion of unlawful killing.

The cases considered indicate a division of the law of homicide into ‘slaughter’ and ‘murder’. For a successful prosecution of murder or ‘forethought felony’, in the Justiciary Court, the pursuer had to convince the court that the killing had been committed in circumstances from which a ‘certain and deliberate purpose’ could be inferred. This was made clear by a statute enacted in 1372. The above cases of murder illustrate that there tended to be an absence of explicit written confirmation of when and how ‘forethought felony’ had played a part in the homicide. However, the specific circumstances libelled in connection to the murder,

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116 ibid.
117 JC2/8, 544.
118 RPS, 1372/3/6 (n 7).
119 ibid.
for instance treason, ‘unnatural circumstances’ and covert killing, seem to have been included to signal the presence of ‘forethought felony’: that is, a deliberate and premeditated intention to kill the defunct. The criminal letters relied upon by the pursuers, the nature of the terminology included therein, and the circumstances in the libel were a reflection of what was required to obtain a successful conviction of murder.

A tentative suggestion can be made regarding the historical context of the ‘murder’ cases considered in this article and what role they might have played, if any, in the wider development of the Scots law of homicide. As mentioned in the introduction, the pre-seventeenth century conception of ‘murder’ was, for many years, defined narrowly in terms of secret killing.\(^{120}\) By the eighteenth century, the ‘murder’ concept had been liberalised into the notion of premeditated killing per se. Considering this article’s focus on the seventeenth century, it is only fitting to ask: what happened in the interim? What inferences might be drawn regarding the development of homicide in the period 1625-1650? From the cases considered, it is clear that murder did not, by the first half of the seventeenth century, consist exclusively of ‘secret killing’. ‘Secret killing’ was certainly one of the circumstances that would give rise to an inference of ‘forethought’ but it was by no means the only circumstance. On the other hand, the seventeenth century concept of ‘murder’ was arguably not one of premeditated killing per se, given pursuers’ tendency to plead specific circumstances (for instance treason and killing by stealth) from which premeditated intent might be inferred. This could be taken to suggest that ‘murder’ had not yet completely freed itself from the strictures of the old, more rigid understanding of that term, and that the seventeenth century conception thereof was possibly not as wide as it would become in the eighteenth century. What conclusion might be drawn from this development? Quite possibly, the seventeenth century could be seen to represent an intermediate stage in a broader trend: namely, the liberalisation of the ‘murder’ concept. Equally, however, this may simply be taken to indicate that the notion of ‘murder’ was in flux during the seventeenth century and that the lawyers of the time had not yet agreed on a definition. Regardless, more scholarly exploration of the prosecution of crime in the seventeenth century could shed light on this particular issue.

Besides ‘murder’, the other key form of ‘homicide’ considered in this article was that of ‘slaughter’. The term ‘slaughter’ could, in turn, be sub-divided into ‘slaughter chaudemella’, ‘slaughter with precogitat malice’ and ‘accidental slaughter’. The prosecution of slaughter entailed the use of evidence regarding the nature of the wound. Pursuers ultimately had to allege and prove that the wound was deadly and inflicted maliciously. This was either done directly through the production of witness testimony (in court) or by referring to the wording of the criminal letters, which would detail whether the strike was given cruelly; was deadly; and included diverse strikes. The judicial preoccupation with the nature of the wound concerned causation; the pursuers had to show that the defunct’s death had resulted from the wound inflicted by the panel.

\(^{120}\) See text to nn 11-16.
In some sense, the precise meaning of the term ‘slaughter’ is difficult to pinpoint. ‘Slaughter with precogitat malice’ was not the only form of slaughter; there was, in addition, ‘slaughter without precogitat malice’, which, in turn, sub-divided into ‘slaughter chaudemella’, relating to culpable killing in the heat of the moment, and ‘accidental slaughter’. Since it was used as a label for different crimes, it is hard to give the term a consistent, concrete meaning. As a term applicable to all three of those crimes, the term ‘slaughter’ was perhaps simply a convenient ‘catch-all’ referring to all culpable killing short of ‘murder’.

One of the more fruitful comparisons that can, based on the above survey, be drawn is that between ‘murder’ and a specific type of ‘slaughter’, namely ‘slaughter with precogitat malice’. In a broad sense, the two crimes were very similar. Both ‘slaughter with precogitat malice’ and ‘murder’ entailed the killing of another coupled with some element of malicious forethought on the part of the killer. The terms ‘forethought felony’ and ‘precogitat malice’ both related to some sort of premeditation, which poses the questions: Were some forms of ‘slaughter’ simply ‘murder’ by a different name? Were the differences between ‘forethought felony’ (associated with murder) and ‘precogitat malice’ (associated with slaughter) merely linguistic, rather than conceptual; more apparent than real? In fact, it was in this fundamental similarity between murder and ‘slaughter with precogitat malice’, namely the shared notion of killing preceded by some element of forethought, that the two crimes also seemed to differ in a fundamental way. With murder, malicious forethought consisted of a premeditated desire to kill the defunct. Contrariwise, the notion of malicious forethought associated with ‘slaughter’ (‘precogitat malice’) seemed to consist of an antecedent course of dealings, which, while suggestive of prior ill-will and animosity towards the defunct on the part of the killer, did not indicate that the killing had been planned. At least to that extent, ‘slaughter’ did not simply refer to all unlawful killing less serious than ‘murder’; it had a positive, coherent definition in its own right.