

# The Trial of Captain Green

Sheriff J Irvine Smith QC\*

## INTRODUCTION

Piracy, one of the oldest and apparently still ineradicable of crimes, has always intrigued the minds of humanity, and its details corrupted their imagination. It does not, however, occupy a significant place in the calendar of Scottish crimes. Here was a country which for centuries had an unenviable reputation for violence in most of its many forms, but the criminal records of Scotland contain few cases of piracy. Scotland had neither the coast, the climate nor the commerce found in the traditional pirate areas of the world in the seventeenth and eighteenth centuries – the Mediterranean, the Caribbean, the Indian Ocean (“most strange, sequestered and beautiful of Seas”) and the South China Seas – on profitable trade routes and comparatively calm seas. Baron Hume’s classic *Commentaries on Scots criminal law* refer only to some eight Scottish cases of piracy in the period 1535 to 1781.<sup>1</sup> In 1705, however, the trial of Captain Green, and his crew in Edinburgh, gave Scotland the most noted trial for piracy in the modern era. Hume describes this case as “one of some interest and curiosity in itself, but which attracted still more attention, owing to the prevailing discontents and political complexion of the times”.<sup>2</sup> Most trials of importance, and this is certainly one, concern and interest only the parties, their relatives and friends. There are, however, a few whose facts are of an importance and concern, where the interest extends to societies and nations. These are cases which involve, acutely and immediately, the issues which at their date are the concern of their societies. The trial of Captain Green and his crew in 1705 by the Scottish Admiralty Court was one such case which had many claims on the interest of Scotland and of England and of their lawyers. It provoked violent passions in both countries and was the last public demonstration, before the Union of Parliaments, of Scotland’s ancient hatred for her Auld Enemy – England. In England it was regarded

---

\* The text represents a revised version of a lecture given to the Annual General Meeting of the Stair Society in Edinburgh in 1998.

<sup>1</sup> D Hume, *Commentaries on the Law of Scotland, Respecting Crimes* (1819; 3rd edn, 1829; repr 1986) D M Walker (ed) vol I, p 480.

<sup>2</sup> Hume, *Commentaries* (n 1) vol I, p 484.

as proof positive of the corruption, inefficiency and rottenness of the then Scottish system of criminal justice and of the violence and instability of her people. It was a case which proved to both countries that the two could no longer be separately governed, and it precipitated the Union of their Parliaments. Most histories of England and of Scotland refer to the trial of Captain Thomas Green. In England the general view has been that the captain's conviction was one of the great miscarriages of justice in the history of the two countries. In Scotland, Anglophobia was endemic from the early Middle Ages but not until this case – and, as yet, never since – has the loathing of each country for the other reached the intensity it did over the prosecution, conviction and execution of Green, Madder (his mate) and Simpson (his gunner), and the conviction for piracy of eleven of the crew. Daniel Defoe's contemporary comment on the subject, on which, as an eyewitness, he took much interest, was: "Never two nations that had so much affinity in circumstances have such inveteracy and aversion to one another in their blood."<sup>3</sup>

## HISTORICAL BACKGROUND

### Politics

The antecedents of the trial lay in the disastrous history of Scotland from the end of the Cromwellian Union in 1660. In that period Scotland experienced one misfortune after another, for most of which she blamed England and King William III, and all of which eventually drove the old ancestral hatred of England into frenzy. The closing of the English colonial markets, which, during the Cromwellian Union, had been open to them, was a blow to Scottish traders. The Massacre of Glencoe in 1692 shocked even the Lowlanders and was execrated as an act of English tyranny. The harvests of the late 1690s were disastrous. There was famine in which one in five of the population in Scotland died – "The hungry years of King William". It was the period of the war between the two Parliaments which, in the early eighteenth century, produced an impossible situation. The English Act of Settlement 1701 adopted the Hanoverian and Protestant succession. In 1703 the Scots Parliament refused to follow. At one point the English Government considered the possibility of an Anglo-Scottish War. In March 1705 the English Alien Act provided that until Scotland adopted the Hanoverian Succession, Scottish imports to England of linen, coal and cattle were forbidden. Defoe commented that, at one point, England had twenty-four warships fitted to prevent the Scots trading with France.

---

<sup>3</sup> D Defoe, *The History of the Union of Great Britain* (1709) p 1.

### The Company of Scotland

In Scotland, in the 1690s, there was the unprecedented enthusiasm for, followed by the tragedy of, the Darien Scheme. This was the age when chartered companies, like the East India Company in England, were granted exclusive monopolies and their trading was regarded as the state's proper commercial activity. Scotland watched with envy the wealth that flowed to England from its trade and, by an Act of 1695, the Scots Parliament provided for the setting up of a Company of Scotland, with extensive powers to found colonies and to trade with Asia, Africa and America.<sup>4</sup> When English investors in the new company withdrew, leaving the necessary capital short, the Scottish capital share was increased to half the total capital available in Scotland. It became the particular and accepted duty of Scots to subscribe. Not since the Reformation had there been a national movement like it. Great and small subscribed<sup>5</sup> and all Scotland followed the fortunes of the company as these ranged from unbridled optimism to unmitigated disaster. By 1697 the Company of Scotland was committed to a settlement of Darien on the Isthmus Panama – "The door of the seas and the key of the Universe", which geographically it was, but the land in question belonged to Spain and its climate was fatal to Europeans. Scotland sent two expeditions to Darien both of which were disastrous. Of the first (1698), fewer than one in four of the immigrants survived hostile natives and fever-ridden swamps. Only one of the five ships sent out survived the horrendous voyage returning to Scotland. It was accepted in Scotland that that ship made its return because of the determination and efforts of her captain, Robert Drummond. Another relief expedition sailed under an order from William III but English colonies in the area refused any help and eventually this relief expedition surrendered to Spanish troops. The Company of Scotland had collapsed with a loss of two thousand lives, untold misery for those who survived and the loss of £250,000 sterling.

The Company then planned a trading venture to the East. They secured the use of a ship, *The Annandale*, then moored in the Thames, where they started to fit her out for the India trade and to recruit English sailors. To the English East India Company these were breaches of the English company's charter. They had *The Annandale* seized; an expensive

<sup>4</sup> Act for a Company Tradeing to Affrica and the Indies 1695 (APS IX, 377, c 10; RPS 1695/5/104). This implemented the undertaking given in the Act for Encouraging of Foreign Trade 1693 (APS IX, 314, c 50; RPS 1693/4/107).

<sup>5</sup> The Faculty of Advocates, for instance, invested £1,000 sterling in the venture: J M Pinkerton (ed), *Minute Book of the Faculty of Advocates 1661-1750* (Stair Society vol 29, 1976) pp 167-69, entries for 24 March, 3 June and 13 June 1696, directing the Faculty Treasurer, Mr John Fairholm, to subscribe.

litigation followed with seventeen counsel engaged and, in the end, the ship was forfeited to the English Company. The Scottish reaction was that here was another example of England's determination to thwart Scottish commercial ambitions.

The last venture of the Darien Company was to be as ill-fated as its predecessors. It sent two ships, *The Speedy Return*, captained by the formidable Robert Drummond, and a smaller vessel – a brigantine – *The Content*, under Captain Stewart, and with Robert's brother, Thomas Drummond, as supercargo. Their destination was to be The Indies and their professed object trade. They sailed from the Clyde on 25 May 1701 with crews of twenty-four and twenty respectively. Not one of these men would ever return to Scotland. In 1705, shortly after Green's trial, two men, who claimed they had been two of the crew of *The Speedy Return*, appeared in Portsmouth and swore affidavits that *The Speedy Return* and *The Content* had been pirated. Having so sworn these two men then disappeared. They are referred to later in this account. The result, however, was that both these ships and the crews had disappeared without trace. Captain Green's trial, which absorbed the attention and passions of both countries, concerned the fate of these two vessels and the alleged doings of an English ship, *The Worcester*, which had also been in Indian waters for some two years.

## ENTER THE WORCESTER

### Background

*The Worcester* – between 130 and 160 tons (the figures at this time were always vague) – was what was called a “separate stock ship”, that is to say, separate from the East India Company. She had a crew of about thirty-two and was armed. Her owners were a group of London merchants headed by Thomas Bowrey and, in 1701, they appointed Thomas Green, then aged twenty-one, as master, with a view to trading to the East. Green seems a rather colourless, unassertive figure with a weakness for alcohol and some indifference to his instructions. He was forbidden to carry drugs or deal in slaves but, when he returned, he had on board two black slaves and some opium. On 8 March 1702, *The Worcester*, with a crew, most of whom were under twenty-one, sailed from England and, for some two years, was in Indian waters: according to her owner, trading; according to the Scots, turning pirate. Returning home in 1704, to avoid French privateers in the Channel, she took the route round the west of Ireland and the north of Scotland, eventually putting into Fraserburgh; from there she sailed south and, waiting for an escort, on 3 July 1704, dropped anchor in Leith, in a Scotland seething with anti-English feeling.

### Boarding of *The Worcester*

To the disillusioned directors of the Company of Scotland, the arrival of this English ship appeared a godsend which gave them the opportunity to avenge the loss of *The Annandale* and recoup some of their consequent losses. The Act founding the Darien Company gave it a right to make reprisals and seek reparation for damage done by sea or land. Founding on this the Company issued a warrant to the Company's secretary, Roderick MacKenzie, for the seizure of *The Worcester*. The phraseology of the warrant was interesting: MacKenzie and "such others as he should think fit to call to his assistance" to "go on board in a prudent and a discreet manner to make seizure of the ship". This was, even for those days, an unusual order for a company secretary. It was in fact an order to seize an armed merchantman with a crew of thirty-two in a "prudent and discreet manner". The warrant, it will be noted, says nothing about legal manner. MacKenzie, in a long report, which he obviously enjoyed writing,<sup>6</sup> described how these instructions were obtempered. He described how he collected eleven "good gentlemen and (I must own) much prettier fellows than I pretend to be".<sup>7</sup> Their numbers were later increased. They proposed to go on *The Worcester* on 12 August in three different parties, each party equipped with brandy, limes, sugar and the prerequisites of an acceptable and hopefully powerful punch. These three parties of pretty fellows, who purported not to recognise one another, boarded *The Worcester*. The visitors, in MacKenzie's words, were soon "lulling all the crew into a full security with drinking, singing &c".<sup>8</sup> At the "passing of a watchword", however, the pretty fellows took up various positions and produced their weapons. The few of the crew who offered resistance were overcome; some of them, according to Mackenzie, attempted to give the visitors "a pretty rugged chorus by laying hands on some brass blunderbushes that hung ready charged in the cabin, but they were quickly made to lose their holds". By 9 pm MacKenzie had seized the vessel or, as he put it, "The ship was at last taken with a Scots song".<sup>9</sup> It was undoubtedly an unorthodox and remarkable bag for 12 August. The next day, with a prize crew on board, the ship was laid up at Burntisland.

Unfortunately the Company had confused nationality with ownership. They had a case against the East India Company, to which company they believed *The Worcester* belonged. *The Worcester*, however, did not belong to the East India Company but to a group of English merchants, headed by

<sup>6</sup> A copy of his report is reproduced in J Hill Burton, *Narratives from Criminal Trials in Scotland* (1852) vol I, pp 159 ff.

<sup>7</sup> Hill Burton (n 6) vol I, pp 160–61.

<sup>8</sup> Hill Burton (n 6) vol I, p 163.

<sup>9</sup> Hill Burton (n 6) vol I, p 164.

Thomas Bowrey, against whom the Scots had no civil claims, and who set about attempting to recover his ship. In short, the Scots now had on their hands not a "prize" but a liability.

In his report, MacKenzie states that when the ship was taken, he sealed the hatches, chests etc on *The Worcester* with the Company of Scotland's seal, and "by the transient view which I have already had of the captain's books and papers, and by some very odd expressions dropt now and then from some of the ship's crew, I have reason to suspect him as guilty of some very unwarrantable practices".<sup>10</sup> These "odd expressions" were the subject of evidence at the trial; but, long before the trial, expressions dropped by the ship's crew demonstrated that, whatever *The Worcester* had been up to, she had a crew, which to use a description of a certain Glasgow murderer "talked too much". To Hill Burton, a mid-nineteenth-century historian and advocate, "the crew of the *Worcester* were of a suspicious aspect – profligate in their lives and conversation".<sup>11</sup> Daniel Defoe, who was in Edinburgh at the time, blamed such indiscretions of the crew for their ultimate conviction. They not only talked too much, they talked too much in a community avid for anything they said. Their expressions became the talk of Edinburgh and the Firth towns.

### The Privy Council's investigation

The conclusion Scotland drew from all this was that Green had pirated *The Speedy Return* and *The Content* and murdered Drummond and the crews. Eventually the talk reached such a pitch that the Scottish Privy Council decided they had no alternative but to investigate the whole matter. As the Chancellor put it, "the matter was in everybody's talk" and he was "under some obligation to call the Council and acquaint them of the business".<sup>12</sup> In the result the Privy Council appointed a committee of twelve to investigate the whole matter. Such investigation by a committee of the Scottish Privy Council was neither unusual nor sinister nor arbitrary. It was standard practice in Scotland at that time for the Privy Council, or a committee of the Privy Council, to judicially investigate allegations of serious crime and, in particular, crimes which endangered the public peace.

They were no "tyros" (beginners in learning) as some of their critics have suggested. The personnel of the committee of twelve here was distinguished. It included the Lord Chancellor and two judges. They were thorough as well as experienced. This was no rushed job: their enquiries took four months and they judicially examined the whole crew, some of

---

<sup>10</sup> Hill Burton (n 6) vol I, pp 166–67.

<sup>11</sup> Hill Burton (n 6) vol I, p 170.

<sup>12</sup> Hill Burton (n 6) vol I, p 175.

them several times. One sailor, Alexander Taylor, claimed to have appeared about twenty times before several committees of the Lords and the Queen's Advocate. The committee had witnesses confront one another – then a well-known practice and not just in Scotland. They examined the ship and its contents. By December, the committee had “declarations from some of the crew and verbal acknowledgement from others” concerning piracy and murder committed at sea by Captain Green and his crew. This Privy Council committee, well aware of the implications, national and international, of their investigation and conclusions, on 13 February 1705, ordered that Captain Thomas Green, John Madder, chief mate, John Reynolds, second mate, and fifteen of the crew should be tried by the High Court of Admiralty of Scotland for the crimes of piracy, robbery and murder. Six other members of the crew, upon recommendation of the Council, were admitted as Queen's evidence. To describe the Council's decision, as it has been described in some English texts, as a “trumped up” case ignores the personnel, experience, duration and character of the Council's investigation, and the detail of the charges framed from their deliberations. Their conclusion was that “having taken precognition of the grounds of the information against Thomas Green and others of his crew, they ordered the said captain and crew to be put on trial upon the crimes informed, before the judges of the High Court of Admiralty”.

In addition they appointed five members of the examining committee to be assessors to the Admiralty Court, that is, to sit as additional judges with the Judge Admiral during the trial – again in Scotland a common practice. The five assessors included two High Court judges. The court that tried the accused was unquestionably a strong and a distinguished one. One comment was that “there can be no doubt that the case was tried by some of the most approved of the Judicial Authorities in Scotland – as befitted its importance”.<sup>13</sup> Having reached the conclusions they did, holding there was a case against Green and his crew, for the Privy Council not to have ordered prosecution here would have been perverse. The Worcester's owners at first could not believe that the Scots were serious; but, when they realised they were, they instructed seven respected and established counsel for the defence – respected, but whose forensic efforts, I fear in this particular case, were wholly uninspiring and ineffective.

### The indictments

Two indictments in identical terms charged Green and his crew with piracy of an unnamed ship, robbery and murder. Piracy, it will be noted, of an unnamed ship, not *The Speedy Return*; robbery from the ship, and the

<sup>13</sup> Sir Richard Temple, *The Tragedy of the Worcester* (1930) p 222.

murder of persons unknown, upon days in February to May 1703 on the coast of Malabar near Calicut, said vessels having English or Scots aboard. The indictments then set forth in detail, and – as was then the practice in Scottish criminal trials – the facts and testimonies which the prosecution claimed it would prove, and which, if proved, were held to be cumulative probation against all the accused.

## THE TRIAL COMMENCES

### Counsel

The trial started on 5 March 1705 with a formidable representation of counsel on both sides. For the pursuers: the procurator fiscal of the Admiralty Court (Mr Alexander Higgins), Her Majesty's Advocate (Sir James Stuart), Her Majesty's Solicitor General (Sir David Dalrymple, Bt), Sir Patrick Horne, Sir George Elliot, Sir Francis Grant and Mr Alexander Macleod – a collection of surnames which, generation after generation, appeared as advocates in Scotland. Seven advocates appeared for the accused headed by Sir David Cunningham, Sir David Thoirs, Sir Walter Pringle, Mr David Forbes, Mr George Alexander, Mr John Elphinston and Mr John Spottiswood. They represented the accused as a group and I am unable to find any evidence that any particular accused had a particular counsel.

### Initial arguments

The prosecutor deserted the case against three of the accused whom he accepted had joined the ship after the alleged piracy.<sup>14</sup> The defence then challenged the relevancy of the indictments with their detailed specification – a practice then inevitable in Scottish criminal trials and, in particular, where the charges and the facts were as unusual, and detailed, as those here. One of the earliest defence submissions was that the libel was too general and undefined as it did not specify the name of the ship alleged to have been pirated; the names of the pirates said to have been murdered; nor any circumstances by which the ship in question might be specially distinguished. There was no *corpus delicti*. The court rejected this submission: a course which Hume, in his *Commentaries*, considered in the circumstances narrated in the libel, to be acceptable.<sup>15</sup>

These defence submissions on relevancy, their length, their ingenuity, their display of Civilian and other legal authorities make far from easy or even interesting reading. The *State Trials* report devotes seventeen pages to the debate on the relevancy as against some five and a half pages for

---

<sup>14</sup> See (n 22) below.

<sup>15</sup> Hume, *Commentaries* (n 1) vol I, p 484.

the whole evidence heard in the trial.<sup>16</sup> Such elaborate defence pleas to the relevancy, as those tabled here, resulted from the statute of 1695, c 4, which ordered relevancy to be pleaded first *viva voce*, and afterwards in written informations. "Under this ordinance," Hume reflected, "a double debate on the relevancy, first *viva voce* and then in writing, became an ordinary, or rather a necessary part of every criminal process."<sup>17</sup> But it was a procedure which resulted in a "great load of frivolous objection and sophistical argument".<sup>18</sup> The court here rejected what they considered, with much justification, to be "a great load of frivolous objection and sophistical argument" of the defence. The exact terms of the court's interlocutor were, "having advised both the indictment and the foregoing debate [they] repelled all of the defence submissions, and, find the crimes of piracy, or robbery, or murder, as libelled, being proven by clear and plain evidence relevant to infer the pains of death".<sup>19</sup> This was, at the time, a conventional interlocutor where pleas to the relevancy were rejected. The conclusion English opinion drew from these words was that it was in fact a direction to the future jury to convict: that was neither the function nor the intention of the interlocutor nor the understanding of it by the jurors here.

Early in the debate the defence moved for separate trials for certain of the accused, in order that they might have defence evidence from some of the co-accused. At that time an accused could not give evidence on his own behalf. This was strenuously resisted by the prosecution who pointed out that the defence must name those whom they intended to use as witnesses from among the other accused and at the same time obtain, for the individual selected, a precept of exculpation – ie evidence that the proposed witness had a defence. "Why the trial of one [accused] should proceed before the trial of another", the prosecutor claimed, "it never was, nor could be left to the arbitrament [sic] of the panels."<sup>20</sup> This defence motion, according to the prosecutor, was "never allowed unless some ground of exculpation was positively alleged for clearing of their innocence".<sup>21</sup> None of the accused attempted to take that course and the motion was refused. By dropping the charges against three of the crew<sup>22</sup> the prosecution made three witnesses available to the defence and it did not come too late for them to appear at

<sup>16</sup> There are numerous collections of State Trials. Both *A Complete Collection of State-Trials, and proceedings for high treason, and other crimes and misdemeanours; from the reign of King Richard II to the end of the reign of King George I* (2nd edn, 1730) vol 5, pp 576 ff; and T B Howell (ed), *A Complete Collection of State Trials* (1816) vol 14, pp 1199 ff. Citations are given to each report.

<sup>17</sup> Hume, *Commentaries* (n 1) vol II, p 284.

<sup>18</sup> Hume, *Commentaries* (n 1) vol II, p 284.

<sup>19</sup> 5 State Trials (n 16) pp 598-99; 14 Howell's State Trials (n 16) p 1259.

<sup>20</sup> 5 State Trials (n 16) p 584; 14 Howell's State Trials (n 16) p 1226.

<sup>21</sup> 5 State Trials (n 16) p 584; 14 Howell's State Trials (n 16) p 1226.

later stages of the trial. The three were all members of the crew of *The Speedy Return* after she left the Malabar coast.

## THE CONDUCT OF THE TRIAL

### Empanelling

On 14 March 1705 the jury of fifteen men were empanelled. They were chosen by the court and consisted of five local ship's captains, eight Edinburgh merchants and two lairds, only one of whom was a shareholder in the Darien Company. The Scottish procedures for empanelling of jurors and the swearing of witnesses were of particular significance in the present case and are described later. Two of the witnesses were Indians and required an interpreter, and Captain Yeaman, a Dundee merchant, was appointed.

### Evidence of the prosecution witnesses

The first witness, Antonio Ferdinando, was an Indian. The defence objected to him on the ground that he was not worth "the King's unlaw", namely ten pound Scots (16s 8d),<sup>23</sup> and was a heathen whose evidence was inadmissible. The witness swore that he believed in God and was born of Christian parents. The court repelled the objections. Ferdinando then testified that some two and a half years earlier he had joined *The Worcester* at Callicoiloan on the Malabar coast.<sup>24</sup> *The Worcester* then had a sloop with her. There *The Worcester* and her sloop attacked another ship, bearing English colours, sailed by white men speaking English. (This last fact was obtained in answer to a question the defence asked of the witness.) The engagement, which was a running fight, lasted two days. On the third day the unknown ship was boarded, her crew were killed with hatchets and thrown overboard and her cargo was transhipped to *The Worcester*. The unknown ship was then manned by some of *The Worcester* crew who sailed her to Callicoiloan and there sold her to one Coge Commodo acting on behalf of a local king. In the engagement Ferdinando received an arm wound which he exhibited to the court. He also showed to the court the coat he then wore which was, he declared, his share of the spoils.<sup>25</sup> Ferdinando recounted that he was told

<sup>22</sup> 5 State Trials (n 16) p 581; 14 Howell's State Trials (n 16) p 1219: ie against Samuel Urlines, carpenter's mate; Henry Barnes, seaman; and Daniel Stringman, cook.

<sup>23</sup> The defence team was chancing its luck. Hume, *Commentaries* (n 1) vol II, p 368 doubts whether there was ever any settled rule of witness disqualification on this ground.

<sup>24</sup> Presumably a reference to the historic port town known today as Kollam or Quilon, on the south-west Indian coast, near the Asthamudi Lake.

<sup>25</sup> Sir David Dalrymple, in addressing the jury, gave it as his judgement that this coat "was of Scots Rugg" (5 State Trials (n 16) p 605; 14 Howell's State Trials (n 16) p 1272), which might suggest Sir David considered the pirated ship to have been *The Speedy Return*.

by Madder, the mate, that he would kill him and heave him overboard if he mentioned the affair to any person either white or black. During the engagement, eight of the accused were aboard *The Worcester* and the others, including the witness, were on the sloop, except Reynolds who was ashore. Captain Green's ship carried about twenty guns.

Here, then, was one eyewitness to the whole charge: a witness, the prosecuting Solicitor General commended to the jury as reliable for his "stayedness, simplicity and constancy, ... who, in many examinations before the Council, and Committee of the Council, had uniformly given the same account which he has now deponed before this Honourable Court" and "it adds to the weight of his testimony", he submitted, "that it was emitted while he was under heavy sickness and forced to lie down at the End of the Table".<sup>26</sup> The Scots have always had a high opinion of dying confessions and the jury could be relied on to place much weight on the testimony of a witness who looked, and indeed was, a dying man. Ferdinando died on 22 March 1705 – a death for which rumour and gossip claimed Roderick MacKenzie to be responsible. No one appeared to consider that, for a man from a warm climate, the experience of living through a Scottish winter might prove fatal.

The next witness, Charles May, surgeon of *The Worcester*, testified that he went ashore at Callicoiloan apparently to attend certain patients. He remained there for two weeks during which time he heard the firing of guns at sea and met Coge Commodo and Francisco de Olivera, the ship's linguister (interpreter) who told him that *The Worcester* had gone out and was fighting another ship. Next morning May saw from the shore *The Worcester* in her former berth some four miles out with a strange vessel riding at her stern. The ship's longboat presently came ashore in haste and her crew told him the captain had sent them for water because they had "spilt and staved" all their water aboard and they had been "busking" all night, which word, May understood, meant they had been at heavy labour and fatigued. May returned to Callicoiloan a few days later; on going aboard to get some medicines he required, he found *The Worcester*'s deck lumbered with goods and casks and said to Madder, "What have you got there? You are full of business", whereupon the mate did curse him and bid him "go mind his plaster-box".<sup>27</sup> He afterwards learned the prize was sold to Coge Commodo who, as the linguister informed him, complained he had bought the ship too dear. May dressed Ferdinando's wound which, in May's view, was occasioned by a gunshot. Two of the other sailors also required surgical aid but, when he asked how they came by their wounds, the mate told him

<sup>26</sup> 5 State Trials (n 16) p 605; 14 Howell's State Trials (n 16) p 1274.

<sup>27</sup> 5 State Trials (n 16) pp 600–01; 14 Howell's State Trials (n 16) p 1263–64.

to ask no questions and forbade the men to answer upon their peril. On May persisting in his enquiries, an altercation arose and Madder ordered him to be put ashore. It was discovered *The Worcester* had sprung a leak but, instead of having her repaired at any port on that coast, Captain Green sailed her to Bengal – a five-week voyage – preferring, it appears, to risk the loss of his ship than face a local court of enquiry. The surgeon, May, dated all this as having occurred in January or February 1703.

Antonio Francisco, Captain Green's black servant, was next called. The objections taken to him that he was worth nothing, was a slave to Captain Green and had no religion, were repelled. The witness swore that he was a Christian. He joined the ship at Delagoa off the Malabar coast and he heard firing from *The Worcester* but saw nothing of the engagement being at that time chained and nailed to the floor of the forecastle. Two days afterwards he saw goods brought aboard which Ferdinando told him were from a captured ship whose men had been killed after she was taken. Ferdinando exhibited his wound received in the fight. He told Francisco to say nothing about the engagement. The witness Francisco remained chained in the forecastle for two months.<sup>28</sup>

James Wilkie, tailor, burgess of Edinburgh, stated that, in the October after *The Worcester* was taken, he accompanied his mother to Burntisland with a design to learn some news of his brother, Andrew, who had sailed as a surgeon on *The Speedy Return*. At the house of Mrs Seaton they fell in company with the prisoner Haines who in answer to his enquiries replied, “Damn me – what have I to do with Captain Drummond” but, “after that they had taken some cups about”, Haines became more communicative and said that, when upon the Malabar coast he heard from a Dutch vessel that Drummond had turned pirate. Haines added that he “had in his custody, at the time the ship the *Worcester* was seized in the road of Leith, that which he would not have fall into the seizer's hands for twice the value of the ship, [and] threw it overboard … saying, ‘Let them seek it now at the bottom of the sea’”.<sup>29</sup> What was thrown overboard, we learn later, was his diary.

Kenneth MacKenzie, inhabitant of the Canongate, said that he was present on the occasion referred to by Wilkie and heard Mrs Wilkie entreat Anne Seaton to obtain from *The Worcester* crew some news of her son. The next day Anne Seaton told him that Haines fell in a passion when she questioned him, swearing (not indeed without reason), “that they had a design to pump him”, but he would tell nothing.<sup>30</sup>

---

<sup>28</sup> 5 State Trials (n 16) p 601; 14 Howell's State Trials (n 16) p 1266.

<sup>29</sup> 5 State Trials (n 16) p 602; 14 Howell's State Trials (n 16) p 1267.

<sup>30</sup> 5 State Trials (n 16) p 602; 14 Howell's State Trials (n 16) p 1267.

William Wood, gunner, described his meeting at Burntisland with Haines, who having "drunk pretty warmly", fell into a melancholy fit for which he accounted as follows: "It is a wonder that, since we did not sink at sea, that God does not make the ground open and swallow us up when we are come ashore, for the wickedness that has been committed during this last voyage on board of that old bitch Bess."<sup>31</sup> He said this pointing to the dismantled ship. Thereafter, as they walked upon the Links, Wood observed that Madder's uncle had been boiled in oil at Amsterdam for piracy, whereupon Haines rejoined that, if what Madder had done during the voyage were known, he deserved as much as his uncle. (It is extraordinary but there was no cross-examination by the defence of this evidence.) John Henderson, writer in Edinburgh, who was present, corroborated, as did Anne Seaton. She also had heard his reference to the item he committed to the deep. Haines told her he knew more of Captain Drummond than what he would express at that time.<sup>32</sup>

John Brown and Archibald Hodge, both skippers in Leith, said they assisted at the discharge of *The Worcester*'s cargo when she was rummaged by order of the Privy Council. They found upon the goods no such marks or numbers as was customary for identifying the owners to whom they were consigned. The goods were, however, regularly enough stowed.<sup>33</sup>

John Glen, goldsmith in Leith, stated that the second day after *The Worcester* arrived in the roads he visited the ship. In the cabin, Madder took a seal out of his pocket and asked Glen what he thought of the Scots African Company's arms. Glen examined the seal and found thereon the St Andrew's Cross, a dromedary or camel with a castle on the back of it, a ship with a rising sun above the helmet and two wild men as supporters. "In a word," Glen deponed, "the official blazon of The Darien Company". But the seal produced in court was not, he said, the same as the seal Madder had shown him.

### Productions

The prosecution proof was closed by the prosecutors lodging in court, and therefore accessible to the jury, instructions and letters found among Captain Green's papers. From these it appeared that his owners had given him unusual, and to the Scots suspicious, orders regarding the conduct of the voyage. He was to write to them in cypher only, without title, date or signature, and under cover to a third party, "the names of any dead" to be appended at the end of his letters without comment. He was to allow no

<sup>31</sup> 5 State Trials (n 16) pp 602–03; 14 Howell's State Trials (n 16) p 1268.

<sup>32</sup> 5 State Trials (n 16) pp 602–03; 14 Howell's State Trials (n 16) p 1269.

<sup>33</sup> 5 State Trials (n 16) p 603; 14 Howell's State Trials (n 16) pp 1268–70.

letters whatever to be sent to England by any other of the ship's company and, when *The Worcester*'s cargo for England was provided, he was to sell the sloop for what she would fetch. The care and secrecy of the crew would be rewarded at the voyage's end by a month's pay and a share in the benefits accruing from "the whale fishing" – this strange addition referring to an idea of Thomas Bowrey's, *The Worcester*'s owner, but which had not been pursued by the crew on their voyage.

### The Solicitor General's speech

In these days, when a trial started it continued, uninterrupted, until it was concluded. The leading of evidence took some twelve hours. It must have been late in the evening when Sir David Dalrymple, son of James Dalrymple, 1st Viscount Stair, rose to address the jury. His speech is comprehensive and balanced.<sup>34</sup>

The prosecution's view was that such sailing orders were inconsistent with the pursuit of peaceful trading. But "Why all this mystery?" the Solicitor General inquired, "... Fair trading requires no such affectation".<sup>35</sup> He then added: "[b]ut further you will be pleased to take notice, that the outward cargo for a ship of 200 tons and 20 guns mounted, sailed with 36 men, was in value but £999. 17s and 2d sterling, which appears by the document produced by themselves, for instructing their entry at the Custom-house; and that too, for the most part, arms".<sup>36</sup> Here, I suggest, is subtle and perceptive pleading. He added, "to me it seems very strange, that a voyage so exceedingly hazardous and expensive, should have been undertaken with so small means".<sup>37</sup>

### The defence case

What appears to be remarkable about the conduct of this trial is the passive and disinterested part played by the accused's seven "respected" defence counsel. They called no witnesses. After the prosecution speech, the defence advocates, or some of them, did "speech the assize, by resuming the defences for the pannels, and for taking off the weight of the probation led against them, and by alledging what could be further said for their exculpation and defence".<sup>38</sup> These are words of style and all too generous to the pleaders here. The report records only that the defence speeches were made "extempore and viva voce" which presumably meant that they lacked

<sup>34</sup> 5 State Trials (n 16) pp 604–08; 14 Howell's State Trials (n 16) pp 1271–80.

<sup>35</sup> 5 State Trials (n 16) p 606; 14 Howell's State Trials (n 16) pp 1275–76.

<sup>36</sup> 5 State Trials (n 16) p 606; 14 Howell's State Trials (n 16) pp 1275–76.

<sup>37</sup> 5 State Trials (n 16) p 606; 14 Howell's State Trials (n 16) pp 1275–76.

<sup>38</sup> 5 State Trials (n 16) p 608; 14 Howell's State Trials (n 16) p 1280.

coherence and were undocumented. Later, however, when the report of the trial was being printed and they were desired “to give in to be printed, a full copy of what they had said in defence to the assize, they declined to do the same”. In the report, the refusal of the defence to submit any of their remarks ensured that the public of the day, in Scotland and England, and in particular Bowrey and his colleagues, would never know what was the substance of the accused’s defence. In short, these counsel were instructed and paid for conducting a defence without apparently ever saying formally to the court and the jury what the defence was. The failure of the defence here to make what, even then, was the conventional jury speech, in the absence of other explanation, could be taken as a sign of desperation in a profession whose very life blood is speech.

### The jury retires

This was a case in which there was a strong bench and an intelligent jury. There was no formal charge by the judge – such charges to juries came much later – but, after the evidence here closed, the jury sought the guidance of the court on the words: “Being proven by clear and plain evidence” in the judge’s interlocutor. They asked:<sup>39</sup>

[I]f the same did require, that the said crimes of piracy, or robbery, or murder should be proven by two or three witnesses, directly proving the foresaid crimes: or, if it were only required, that the crimes of piracy, or robbery, or murder, as libelled, being proven by a clear and plain evidence, as to the cumulative and concurring presumptions, whereby the same werealleged to be inferred, although two concurring witnesses should not be found as to every several presumption, were sufficient?

This was clearly a jury that knew they had duties to perform and meant to perform them. They wanted direction on whether corroborated evidence was required for every circumstance and modification. The court’s answer was:<sup>40</sup>

[I]f the crimes did appear by the qualifications and circumstances, as they were libelled, to be made out *per indicia ad probationem indubitata et luce clariora*, by undoubted presumptions as clear as sun-shine, albeit every circumstance and qualification were not proven by two direct witnesses, the same should be held for a clear and plain evidence.

One senior High Court judge, after I quoted this passage in the lecture I gave on this trial, described it as “a model formula”.

<sup>39</sup> 5 State Trials (n 16) p 604; 14 Howell’s State Trials (n 16) p 1271.

<sup>40</sup> 5 State Trials (n 16) p 604; 14 Howell’s State Trials (n 16) p 1271.

### The verdict

Thereafter the jury were enclosed, it must have been in the early morning of 15 March, and directed to return their verdict at 10 am. This was the verdict:<sup>41</sup>

They by plurality of votes, find that there is one clear witness as to the piracy, robbery, and murder libelled; and that there are accumulative and concurring presumptions proven, for the piracy and robbery so libelled: But find, that John Reynolds, second mate of the said ship, was ashore at the time of the action libelled.

It bespoke their understanding and approval of the directions they had been given. It was, in addition, a special verdict and a highly illuminating and perceptive one. It was not one of the now standard verdicts guilty, not guilty or not proven. It was a special verdict much used in Scots criminal law from the seventeenth until the nineteenth centuries. The majority verdict was that “there was one clear witness as to the piracy, robbery and murder libelled” (ie Ferdinando), and that there are accumulative and concurring presumptions proven for the piracy and robbery so libelled (ie not for murder). They found, in effect, the charge of murder *not proven*. In addition, they acquitted John Reynolds, the second mate of the ship, who was ashore at the time of the action libelled. In short, then, they had accepted Ferdinando as a clear, reliable witness but did not consider that his evidence of the killings was corroborated; a view which was entirely in accord with the evidence. This was certainly no rubber-stamp verdict. It was technically an impeccable one.

### Sentence

Sentences were passed on 21 March on fourteen of the accused. They were to be hanged in batches on the Sands of Leith within the flood mark – the traditional place in Scotland for the execution of its rare pirates.

## THE REACTION

### The confessions

The Edinburgh mob, now much reinforced from the surrounding countryside, reached fever pitch, demanding the blood of those convicted and, as the time passed between the sentence and the execution date, their determination to have blood became ever more passionate, particularly when the post-trial confessions were known, and even more when news of the Queen’s attempt to prevent or delay the executions became known. In

<sup>41</sup> 5 State Trials (n 16) p 608; 14 Howell’s State Trials (n 16) p 1281.

England, infuriated public opinion claimed that the witnesses had been suborned; that the confessions had been induced by threats of torture; and that the whole affair was a Jacobite plot. However, hot on the conviction, came confessions from three of the accused. Thomas Linstead and George Haines gave long and circumstantially detailed confessions in which they alleged that the ship pirated was, in fact, Captain Drummond's *The Speedy Return*. These confessions were later retracted by them. John Bruckley, *The Worcester's* cooper, made two confessions and retracted neither.

English opinion was shocked both by the verdicts and by sentence; it was even more shocked by what followed – the conduct of the Scots Privy Council and the circumstances in which the three were executed.

### Affidavits from England

The first move from England was the transmission to Scotland of affidavits taken from two alleged Scottish sailors, calling themselves Freeland and Phippany. Having given affidavits, these two sailors disappeared and Scotland neither saw nor heard of them again. The Scots Privy Council did not accept the terms of their affidavits, which are referred to later.

### Her Majesty, the Scots Privy Council and the mob

The Queen wished the execution to be delayed but it was the opinion of her Chancellor that such a move would so exasperate Scotland that it might endanger the entire project for the Union of the Parliaments. On 25 March, the Scots Privy Council received intimation from the Queen wishing the executions to be delayed until Her Pleasure was known. The Scots Privy Council protested that the trial had been regular. They sent the Queen the new confessions claiming that they, the Privy Council, had no doubts about the verdicts or about the sentences. They begged her to make no attempt to interfere with the sentences: "If the Queen will grant them remissions it will spoil the business in Parliament [ie the Union] and I am afraid will so exasperate the nation as may render it difficult to make them join with England upon any terms whatever."<sup>42</sup>

The day before the first execution was due to take place the Queen ordered a reprieve until further enquiry and the Scots Privy Council postponed the execution for one week until 11 April. On 10 April the Scots Privy Council, or as many of them as the Chancellor could persuade to attend, met together. The majority had excuses for their absence, some of these of the most specious nature; one, for example, because his son had gone to the West Country and had taken all the horses. The Chancellor was in despair. The issue of postponement was on the agenda and it was that

<sup>42</sup> Quoted without attribution by W Roughead, *The Riddle of the Ruthvens* (1936) p 276.

issue which brought tens of thousands to Edinburgh from all parts of the country determined to see what they considered to be justice done. They were excited, incensed, and passionate. Many were armed and ready for any violence. The reason, put by Seafield, was that “[t]he English they see will now be protected though they murder, rob and pillage Scots by sea or land”. The choice before the Privy Council was an unenviable one: to obey the Royal Pleasure would let loose on the city the rage of the mob. Three of the Council voted for further reprieve; three voted against it. The others who were present would not vote. The Chancellor who had the casting vote declined to exercise it. He said he was in favour of the reprieve and would sign it if those who had not voted would join him. They refused. Accordingly the last decision of the Scots Privy Council on the matter was that the first batch of prisoners would be hanged.

On 11 April, the mob, estimated at eighty thousand, was menacing, bloodletting. The Privy Council was in a situation where they must either have the men executed, or themselves be assaulted and possibly murdered. A flying post from London excited the mob who thought it was a reprieve; instead it left matters in the hands of the Council. They reached a compromise of sorts: Green, Madder and Simpson would be executed, the rest reprieved.

### THE EXECUTIONS

The three men died reluctantly, Green in particular. To the end he expected a reprieve. Madder accepted his fate, and once the mob had seen the three hanged, their mood changed. According to the ecclesiastical historian, Robert Wodrow, who was present, “[t]here was at the scene of the execution the greatest confluence of people there that ever I saw in my life for they cared not how far they were off so be it they saw”. Green was first executed; then Simpson; and, last of all, Madder. “Every one of them when the rope was about their necks,” Wodrow recorded, “denied they were guilty of that for which they were to die. This indeed put all people to a strange demur”, and with the death of each of these accused the rage of the crowd appeared to abate. The bloodletting had had dramatic effect. Rage appeared to give way to remorse.<sup>43</sup>

### AFTERMATH

Reaction at the time, and since, to the trial and its results has largely divided on national lines. Scots opinion, immortalised in contemporary ballad, was clear:

---

<sup>43</sup> M Fry, *The Union: England, Scotland and the Treaty of 1707* (2006) pp 168–70.

*"Of all the pirates I have heard or seen  
The basest and bloodiest is Captain Green"*

In the nineteenth and early twentieth centuries three Scots historians – Hill Burton, Andrew Lang and William Roughead – conceded Captain Green to have been guilty of some acts of violence at sea but stopped short of blaming him for the fate of *The Speedy Return*. English opinion, with one notable exception, has made Green a martyr to Scottish Anglophobia. That one exception, however, was significant. It was Daniel Defoe, the greatest and most prolific journalist of his time who was in Scotland, at the time of the trial, to report on the Union negotiations. The principal, and much quoted, support for the English view, was Lt Col Sir Richard Temple's book *The Tragedy of The Worcester*, published in 1930, whose thesis is that Green and his crew were innocent of any illegal practices, and the Scottish trial a travesty of justice. For Temple, and his followers, the conception of "a fair trial" was that which prevailed from the nineteenth century: the presumption of innocence, strict rules of evidence, and a procedure fair to both sides. But the criminal procedure of 1705 was very different from what it was to become.

In considering the entire case, Sir Richard offers complaints and a catalogue of the classic constituents of miscarriages of justice, and claims they all appeared in Green's trial. His complaints and allegations of miscarriages of justice catalogued can be listed as follows:

- (1) A harsh and unscrupulous prosecution instigated by the Scots Privy Council.
- (2) New and exonerating witnesses found after the trial, ie Phippany and Freeland.
- (3) Fresh evidence, which was said to confirm Green's innocence, in documents found in Bowrey's papers, that is the owner's papers, correspondence and a memorandum which it is claimed was made from Green's journal. All these papers had been impounded and were put to the jury at the trial.
- (4) Affidavits taken in England after the trial from members of the crew who returned there, particularly Haines and Bruckley, containing allegations of pressure, bribery, inducements to confess, at the instigation of the prosecutors. Perhaps the only thing these post-trial affidavits do not allege is threat of torture, which would have been competent, but which the Privy Council did not utilise. The number of conflicting statements which members of this crew signed does not encourage belief in either their honesty or consistency.

- (5) A packed jury incapable of giving the accused a fair trial because of the prevailing Scots hostility to England. Having five Scottish ships' captains as jurors is regarded as part of the alleged unfairness.
- (6) It was claimed prosecution witnesses were said to be not just lying, but lying from "a wicked spirit of revenge" against Green.

### THE SCOTS PRIVY COUNCIL

The prosecution was at the instance and order of the Scots Privy Council. That Council, as described earlier, investigated the whole evidence and ordered the prosecution after these investigations. In doing so they were conducting an inquisitorial investigation, a process in which they were experienced, and which was then customary in Scotland. This process, lasting four months, examined all the various accused and witnesses, some several times, and some in confrontational situations. None of the defence counsel at the trial, experienced in Scottish practice, suggested that the Privy Council were not entitled to examine in the way they did, or that that process was harsh and oppressive. The Council examined certain witnesses frequently but no allegation was made at the trial, where it should have been made if it was to be made, that their examination had been harsh or pressurised, or that they had been offered inducements.

### NEW WITNESSES

The "evidence of new witnesses" was the last-ditch attempt to have the execution of Green and his two companions postponed. The incident concerns two men and four names. In March 1705, two men, calling themselves Israel Phippany and Peter Freeland, arrived in Portsmouth, England, on an English ship, *The Rapier*, from Mauritius. They claimed that they had escaped from pirates. The timing of their arrival was impeccable – post-trial and pre-Green's execution. They were to be the only two men claiming to have been members of the original crew of *The Speedy Return* who ever appeared in either England or Scotland after the trial. In London they were initially interrogated by an unidentified Scottish official who found that they were "not very distinct in answering some of the questions asked concerning the trafique Captain Drummond had made, and what sort of goods he had at the time his ship was taken".<sup>44</sup> How their arrival came to be known to John Green of Green & Thornhill, Attorneys in London, the

---

<sup>44</sup> P Insh, *The Company of Scotland* (1932) p 301

elder brother of Captain Green, is not known, but he went to Portsmouth, contacted the two men and, doubtless in the hope of helping his brother to "cheat the wuddie", had the two men swear affidavits before the mayor of Portsmouth.

This I take to mean that the formalities of preparing and swearing an affidavit were seen to by the lawyer and, in particular, that the statements to be sworn were compiled by him or approved by him or both. The affidavits sworn<sup>45</sup> are comprehensive and ordered documents. They are the products of a literate and articulate man of business who knew the matters which had to be covered. John Green was already familiar with the case. Not only was he brother to Captain Green, he was in constant touch with him from the beginning of this case and, at one early stage, was in Edinburgh in consultation with his brother. He was also a close friend of Bowrey and became his solicitor, and as all the London world of shipping and trade knew, Bowrey was seeking compensation for the loss of *The Worcester* held by the Scots.

The terms of both affidavits purport to give a history of their ship *The Speedy Return* in Indian waters. Each of them admitted being members of the crew when the ship sailed from Port Glasgow under Captain Drummond, and afterwards they arrived at Bengal at Guinea and from thence sailed to Madagascar where both *The Speedy Return* and brigantine (ie *The Content*) took on board negroes.

From thence they sailed to the port of Maritan [Saint Mary's Island] in Madagascar aforesaid, where the said Captain Drummond went on shoar, and about 9 or 10 hours after his going on shoar, five several persons, who afterwards appeared to be pirates, armed with pistols, swords and other weapons, came on board the said *Speedy Return*, with a pretence to buy something, and taking the advantage of the said Captain Drummond, Andrew Wilky, his surgeon, and several of the said ship's company being on shoar, and others working in the hold, the said five persons by force of arms took possession of the said ship and immediately made a signal, upon which about 40 or 50 other pirates came on board, ... and then took the said brigantien (which was afterwards burnt), and the said pirates forced these appearers and the other persons on board the said ship the *Speedy Return* to sail in her till such time as she arrived at Rajapore, a place so called, where the said *Speedy Return* was also burnt, and then these appearers, and the other men that did belong to the said *Speedy Return* went on board a Moca [Mocha] ship called the *Deffiance*, which some time after touched at the island Mauritius, where the appearers made their escape; and the said Raper galley soon after arriving there, the said appearers went on board her, and are since arrived at the port of Portsmouth. And the said appearers did farther declare that, at or, after the time of taking the said ship the *Speedy Return*, neither the said Captain Drummond, nor [any] other persons

<sup>45</sup> Temple, *Tragedy* (n 13) pp 266-67.

belonging to her were killed or wounded, neither was she ever attacked by a ship called the Worcester, Captain Green commander, or any other ship, sloop or vessel whatever.<sup>46</sup>

These affidavits were immediately sent to London, then sent express to Scotland and arrived there before Green and his companions were executed. The content of these documents did not impress the Scottish Privy Council whose response was to send to England the recent confessions of Haines and Bruckley.

The other two names involved here were Israel Fisonne, a native of New England who had been apprenticed to a Glasgow merchant, and Peter Parlane, born at Milton of Slains. Both had been to Darien and figure in the Company's papers. Both signed their names when the crew signed on at the departure of *The Speedy Return* from Scotland, their signatures being witnessed by Captain Drummond. There is no name on the original crew list which is, or resembles, the surnames of Phippany and Freeland.<sup>47</sup> It was, however, men calling themselves Phippany and Freeland who swore and signed the affidavits at Portsmouth. Their use of these names was repetitive. On the voyage to England on *The Rapier*, they used the names Phippany and Freeland. The affidavit they signed at Portsmouth relates that "there personally came and appeared before the Mayor of Portsmouth Israel Phippany and Peter Freeland now belonging to the *Rapier* galley ... and did solemnly declare upon the holy evangel that they did belong to a ship called the *Speedy Return*". Affidavits were then unknown in Scotland but English practice required a written statement and the name of the person (deponar) who makes and signs it, and swears to its truth before an official, in this case the mayor of Portsmouth, authorised to deal with such matters. It would certainly involve, as it still does, the oath taker, ie the mayor, asking the applicants their names to confirm the names they used in the application. There is then no question of anyone having any doubts of the applicant's claims to be known as Israel Phippany and Peter Freeland. According to the crew list neither of these names belonged to the crew of *The Speedy Return*. There was nothing to stop the two from adopting new names but the matter is not so simple or innocent when they take to using false names in making, signing and swearing an affidavit. After swearing the affidavits nothing more is heard of, or from, them again. Their alleged history leaves a multitude of questions unanswered, not least: When did they change their names? And why?

<sup>46</sup> 14 *Howell's State Trials* (n 16) p 1299; and reproduced in Temple, *The Tragedy of the Worcester* (1930) pp 267–68. Spellings as in original.

<sup>47</sup> Insh (n 44) p 301 takes Freeland to be Fisonne and Phippany to be Parlane, although suggests too that he mistranscribed Parlane for Phippany.

The critical question is why the two men abandoned the names they used as their name when they signed on the crew list of *The Speedy Return*. I have no doubt John Green would be consulted on this before he drafted the affidavit. One obvious answer, where an individual changes his name, is to deceive as to his true identity, which raises the questions of if, and why, these two men were trying to deceive as to their true identity. Today, it is still a familiar tactic where fraud is contemplated.

Temple and Insh accept that the evidence establishes that it was Israel Fissone and Peter Parlame who unquestionably were on the crew of *The Speedy Return* who appeared in London and before the mayor of Portsmouth, calling themselves and swearing they were Israel Phippancy and Peter Freeland.<sup>48</sup> Here, then, we start with a fraud – false names – and in the result what we have are false, perjured and worthless affidavits, which at least throws some doubt on the reliability of their evidence thus far never questioned.<sup>49</sup>

### BOWREY'S PAPERS

Bowrey, the principal owner of *The Worcester*, was a meticulous collector and keeper of all documents concerning his many business enterprises and ships which he owned or in which he had an interest. His collected papers were discovered in 1913. They record Bowrey's trading activities and, in particular, the voyage of *The Worcester*. It was the contention of Sir Richard Temple that these papers showed Captain Green to have been involved in a normal, law-abiding, trading voyage. The relevant papers from *The Worcester* had all been put to the jury who tried Green. How they came into the possession of Bowrey is not explained but he unquestionably obtained and kept them. The Scots' reply to the peaceful commercial entries in these

<sup>48</sup> G Pratt Insh (ed) *Papers relating to the Ships and Voyages of the Company of Scotland trading to Africa and the Indies 1696–1707* (1924) p 248. It is strange if they knew then what they published in their affidavits – no one belonging to *The Speedy Return* killed or wounded; never attacked by *The Worcester* or any other ship – that they did not give the glad news to the Scottish official they met in London.

<sup>49</sup> The terms of the affidavits have rarely been questioned: either from indifference or innocence neither Temple nor his supporters make anything of the change of names; and the two deponents have invariably been treated by all who supported Temple's view as honest, reliable witnesses and as unchallengeable testimony of the innocence of Captain Green. One distinguished example is G M Trevelyan, *Ramilles and the Union with Scotland* (1932) p 254. He accepts the affidavits of Phippancy and Freeland "to the effect that their ship had been seized by the pirate Bowen ... on a date when the *Worcester* was far distant". His comment is that their new evidence "read by the Scottish Privy Council must have further shaken the faith of several present on the guilt of Green". Another factor relating to these two men is that the only evidence that they were members of the crew of *The Speedy Return* comes from themselves. As with all affidavits, however, there was no cross-examination of their content.

papers was that it was highly unlikely that Green would refer to any piracies he had undertaken in such papers or indeed on any paper.

### THE CREW'S STATEMENTS AFTER THE TRIAL

Under sentence of death three of the accused confessed to the charges against them: Linstead, Haines and Bruckley. In Scotland, Haines made a confession and a declaration;<sup>50</sup> the latter does more than confess the crime. It does so in astonishing, incriminating and lurid detail which could be expected to come only from an eyewitness describing what he had seen and certainly not just what he had heard or imagined. He declared that, after the ship was seized he saw men which were therein "all white and sickly, killed and murdered with pole axes and cutlasses and saw these dead bodies put into a sloop and thereafter thrown overboard and to the best of his knowledge the men so killed were Scotsmen". It was understood by the crew of *The Worcester* to have been Captain Drummond's ship. If these confessions were true, they put the fate of *The Speedy Return* and its crew beyond doubt.

After Green's execution all the crew were reprieved at Royal Will, and released whether they confessed or not. When he reached England, Haines retracted his first confession and made a further two: it appears a consistency in confessions was not one of his qualities. Some of the crew claimed they had been subjected to pressure and bribes which, if they had told their counsel of the matter, would certainly have been raised in the course of the evidence by any competent counsel and, if proved, would have been fatal to the prosecution case. One of the far-fetched stories of inducement to confess, already mentioned, was from Taylor – one of the crew – who claimed he was examined twenty times by the Privy Council and by the Lord Advocate. He claimed the Marquis of Annandale told him that, if he confessed, he would get a pardon – which the Marquis showed him – he would be looked after, and he should get the first commission that fell vacant in the Queen's Guard. It would be interesting to know if Queen Anne had been consulted on the possible addition of a convicted pirate to her Guard. Witnesses, it was said, were suborned, the confessions got by threats of torture. No such suggestions were ever made by the defence in the course of the trial that unwarranted pressure had been applied to anyone.

### THE JURY

The many criticisms of this trial ignore the details of Scottish criminal procedure relating to jurors and witnesses. In 1705, Scots criminal law

---

<sup>50</sup> Temple, *Tragedy* (n 13) pp 254–57.

was actively and elaborately concerned to secure impartiality of jurors, honesty of witnesses and the extent of the evidence which the court could competently hear.

Temple calls the Green jury “a packed” jury, but he makes no mention of the then Scottish practice for citing jurors and for jury selection. To Sir George MacKenzie, assizers (jurors) were partly judges and partly witnesses.<sup>51</sup> Scottish practice in the seventeenth century favoured jurors who knew something of the accused and of the facts. In the seventeenth century, trials were often adjourned because there was no one on the jury list who “knows the verity”. Scots practice in a case of this kind would regard ship’s captains, as jurors, to be the jurors most likely to understand and appreciate evidence relating to all things nautical. Important here is that no one involved in that trial took any exception to the composition of that jury. The Scottish practice was for a list of forty-five names, made by the clerk of court, from whom the jury would be named. The individual jurors were selected by the court. They were then presented five by five to the panels, who were asked if they had any objection on cause shown to any of them, and, if so, what that objection was. There was no peremptory challenge of jurors at that time, but each accused had been served with a list of potential jurors fifteen days before the trial diet and they had, therefore, the opportunity to investigate any potential juror. If they had any objection as, for example, that the man had expressed desire for revenge or had expressed a view on the outcome of the case, and if such an objection were admitted or proved, that juror would be excused.<sup>52</sup> In the trial of Captain Green, at the very start of the trial, not a single juror, when his name was presented to each accused and his counsel, was objected to: this does not suggest a prejudiced jury.

### WITNESSES

Scots practice required from each witness that he be solemnly sworn and “purged of partial counsel” such as favour and affection, or undue zeal for one party.<sup>53</sup> The crux of Temple’s miscarriage of justice claim is that the Crown witnesses were lying. He describes their evidence as “tittle tattle, bearing grudges, perjury, perjurors acting from a wicked spirit of revenge”.<sup>54</sup> In particular he says this of Ferdinando, Francisco and May. At the trial, however, there was no real challenge of any of the prosecution

<sup>51</sup> G Mackenzie, *The Laws and Customs of Scotland in Matters Criminal* (1678; repr 2012, Stair Society vol 59. O F Robinson (ed)) paras 2.23.2 and 2.23.6.

<sup>52</sup> Hume, *Commentaries* vol II, pp 308–09: “This has at all times been our invariable practice.”

<sup>53</sup> Hume, *Commentaries* vol II, p 377.

<sup>54</sup> Temple, *Tragedy* (n 13).

witnesses and, according to the trial report, it was never suggested to any of the witnesses that they were mistaken, had motives to lie, or were lying. Such an omission could be fatal to the defence in the eyes of a jury. There was defence objection taken to Ferdinando and Francisco that they were heathen and to the girl that she was a female, but these objections were repelled. Not one of these witnesses was objected to on the grounds of malice, bias, grudge, relationship and the like grounds, on which a juror, like a witness, could be excluded.

There is no suggestion from the defence that May's evidence of Madder's conversation was wrong; if it was wrong, in what respects; and what motive he had for saying what he did. None of the evidence of incriminating statements made by Green's crew was the subject of any cross questions.

### THE DEFENCE

The defence team here had the reputation of being a distinguished one and certainly all its members were experienced advocates familiar with Scots criminal law: this, however, was not a trial where these qualities were displayed. There was no suggestion in their conduct of the defence that they had prepared a defence on the facts alleged here, and knew and took all the options open to them – admittedly a difficult duty when they had canvassed no defence except a plea of not guilty. Temple, writing on the absence of speeches from the defence, says that “without any direct knowledge of the defence which Green's competent counsel collected”, the English public did not know what their defence here was: in this they were and are certainly not alone.<sup>55</sup>

The duties incumbent on defence counsel in the seventeenth and eighteenth centuries are familiar. These were to “resume the defence of the panel” that “the assize may judge by the deponar's countenance, gestures, assurance how far he should be believed”, and that advocates are to be present that they may interrogate upon emergents. Even then it was accepted their interrogation could be vigorous. Again, according to MacKenzie,<sup>56</sup> the advocates “are accustomed to much freedom, and are oftentimes transported by the heat of opposition, and zeal to their client”. Of the seven defence counsel here, there is no record in the trial of any of them indulging in any zeal for their client in cross-examining witnesses and, in particular, those witnesses whom Sir Richard Temple accuses of “tittle tattle” and of seeking revenge for some grudge against Green.

---

<sup>55</sup> Temple (n 13) pp 243–44.

<sup>56</sup> Mackenzie, *Matters Criminal* (n 51) para 2.20.2.

Scots law at the time had provision for an accused's defence where he alleged an exculpation or an extenuation of his guilt. If a panel claimed he had a positive defence like alibi, self-defence or coercion – much used in piracy cases – he was entitled to seek a precept of exculpation: a separate process before a judge in which the judge heard the evidence of the defence and, if he found the defence established, that ended the prosecutor's case. This procedure, however, was not open to an accused where his defence was that no crime had been committed – as appears to have been the import of the unsuccessful precepts of exculpation lodged on behalf of the accused here. If no relevant defence was stated and the accused's position was a plea of *not guilty* then the trial proceeded, with the prosecutor seeking to prove his libel in the normal way and with the defence cross-examining the Crown witnesses.<sup>57</sup>

The evidence of the first three witnesses (Ferdinando, May and Francisco) was recorded in the reports without division into examination-in-chief and cross-examination. Cross-examination was competent and was often bitter. Temple's explanation of the reports is that the witnesses were cross-examined "apparently during their examination-in-chief, not after it". Certainly, in the reports of each of the three vital witnesses, after what is clearly their evidence-in-chief, they answer questions directed at particular details in the witnesses' recollection. This is especially the case with Ferdinando and May. But in the reports of their evidence under examination-in-chief and in cross, there is no suggestion of the questioner trying to destroy, discredit or undermine the witnesses. This is another omission in the conduct of the defence: if Temple is correct there was ample material to justify having taken such a course.

Temple's comments on the evidence of these first three witnesses are scathing but I fear are unsupported by the evidence of the trial. Temple describes the evidence of Charles May, the surgeon, as "malignant, revengeful, unscrupulous – twisting innocent happenings into an accusation of piracy".<sup>58</sup> Of Antonio Ferdinando, it is claimed he utilised tales about pirates current upon the Malabar coast to concoct an allegation of piracy against *The Worcester* crew. Francisco, another Indian, is accused

<sup>57</sup> The crew members against whom the prosecutor withdrew the charges because they were not present when the pirate attack took place, as well as the crew members who claimed they were coerced to join the piracy, would have been entitled to a precept of exculpation in respect of their alibi. Such precepts, however, were confined to a very narrow field. In particular, they did not admit any defence that was contrary to the averments of the libel. Here, the decision of the Scots Privy Council that piracy, robbery and murder had taken place, as narrated in the libel, excluded any defence which sought to claim the opposite. The import of the precepts of exculpation, tabled on behalf of the panels and suggesting there had been no such crime as the prosecution alleged, was inevitably dismissed.

<sup>58</sup> Temple (n 13) p 10.

of backing Ferdinando's story out of petty spite and revenge for injuries he had received.<sup>59</sup> If these men were so lying or could be suspected of doing so, the failure of the defence to challenge each of them when they were, as they undoubtedly were, purged of malice, a process which could be confrontational. It is strange moreover that none of this emerged in the course of the Privy Council's four-month judicial investigation.

If the indifferent performance of the defence counsel was remarkable, so was their number. There was never any suggestion here that there was a conflict of interest between any of the accused which would have justified a separate or more limited representation. Any cross-examinations there were, were on behalf of all of the accused and it is difficult to see how seven counsel, notwithstanding the lengthy contribution on relevancy which they made early in the proceedings, can be justified in being involved in this trial from start to finish.

It is said that after Green's execution the defence counsel "were in ill odour and left Edinburgh for a while". Temple says they did so for their own safety; but their mute performance at the trial, I suggest, would hardly produce that public reaction. Perhaps their leaving Edinburgh was to distance themselves from what was an unprofessional performance and to escape from their brethren's gossip, not least about how they charged their fees, how they were paid and how many of them were required for the conduct of business.

The only contemporary written comment on the trial favourable to the Scots came from the Englishman, Daniel Defoe, the versatile and inquisitive journalist. His comments go a long way to rebut English criticisms of the trial. "Scotland lies under much scandal in this account," wrote Defoe, "which as to the methods of public justice, I think she does not deserve ... It is most certain," he concluded, that "the folly and imprudence of the men hanged them to say no more". He refers to their coming to Scotland and,

[T]he men falling out among themselves and being open instruments of detecting what no one ever could have charged them with. These and more concurring circumstances which were observed by the most curious, and some which were noted upon the trial seemed to jump together so visibly ... nor was this the sense of the few, but I generally believed of the whole nation, I mean of considering [ie thoughtful] people, and such as usually notice such things and particularly of many who cried out the loudest when it was too late ... when the conviction of such circumstances was in the mind of people it is no wonder the men were found guilty by the jury and I persuade myself they themselves would have done the same. If they were innocent, as now alleged, yet as they were condemned by a due Court of Law, tried and executed by the common forms

---

<sup>59</sup> Temple (n 13) p 10.

of justice in that country and in the same manner by which their own subjects were tried and executed, the fault must lie in the witnesses and the jury that condemned them.<sup>60</sup>

### POSTSCRIPTS

There are two important postscripts to this trial, one of the utmost significance.

#### Robert Drury's journal (1729)

Drury was probably an ex-pirate returned to England. He claimed that as a boy of fourteen he was wrecked on the coast of Madagascar. He had been a sailor on the East Indiaman on which John Benbow, son of the Admiral,<sup>61</sup> was fourth mate. There, Drury claimed he found one Captain Drummond, a Scotsman whose ship had been pirated, holding high office under a native king. During his fifteen years on the island, Drummond was active in local politics – like a condottiere of Renaissance Italy to a native ruler – until he was killed by natives. “But they told me one piece of remarkable news. They said this Captain Drummond was the same man for whose murder and that of his crews, one Captain Green, commander of an English ship, was hanged in Scotland.” Green, however, was never convicted of murder, still less the murder of Captain Drummond. Green was hanged after having been found guilty of piracy and robbery.

But this information is highly suspect. The last edition of Drury's journal was published in 1890,<sup>62</sup> edited with notes by Captain Passfield Oliver who effectively demolishes any claim Drury ever had to accuracy or reliability. His conclusion is that Drury himself was a pirate who came back to London with what he called his memories; his journal was edited by Defoe, or some associate, from material stolen from a French history of Madagascar published in 1661.

#### Alexander Hamilton

The last word, I think, on this whole matter lies with another Scottish merchant adventurer, Captain Alexander Hamilton, who first went to Bombay in 1688. He became a merchant of status, influence and experience: the Sultan of Johor was his friend. He fought pirates, he commanded an East India Company fleet and he traded extensively. He was a man

<sup>60</sup> Defoe (n 3).

<sup>61</sup> Also John Benbow: see J B Hattendorf, “Benbow, John (1653?–1702)” Oxford DNB (2004–).

<sup>62</sup> P Oliver (ed) *Madagascar; or Robert Drury's Journal, during fifteen years captivity on that Island* (1890).

everyone held in the highest regard. In 1727, he was another sailor home from sea and published his *A New Account of the East Indies* which can, I think, be relied on from the very status of its author, as Drury's journal could never be.

I quote the passages in his account which concern Captain Green:<sup>63</sup>

The unfortunate Captain Green, who was afterwards hanged in Scotland, came on board of my Ship at Sun-set, very much overtaken with Drink, and several of his Men in the same Condition [at Colecut, 1703]. He told me, that he had some small Arms, Powder, Shot and Glass-ware to dispose of, and asked me if I would take them off his Hands at a very reasonable Rate. ... He told me, that the Arms and Ammunition were what was left of a large Quantity that he had brought from England, but had been at Don Mascherenas and Madagascar, and had disposed of the rest to good Advantage, among the Pirates. ...

I told him, that, in Prudence, he ought to keep these as Secrets, lest he might be brought into trouble about them. He made but little Account of my Advice and so departed.

About ten in the night, his chief Mate, Mr Mather, came on board of my Ship and seemed to be very melancholy. ... He burst out in Tears, and told me, he was afraid that he was undone. ... that they had acted such Things in their Voyage that would certainly bring them to Shame and Punishment, if they should come to light; and he was assured that such a Company of Drunkards as their Crew was composed of, could keep no Secret. ... I told him ...that I had heard at Coilan, that they had not acted prudently nor honestly in relation to some Moors Ships they had visited and plundered, and in sinking a sloop with ten or twelve Europeans in her, offCoilan. ... Next day, I went ashore, and met Captain Green and his Supercargo, Mr Callant, who had sailed a Voyage from Surat to Sindy with me. Before Dinner-time they were both drunk, and Callant told me, that he did not doubt of making the greatest Voyage that ever was made from England on so small a Stock as 500 pounds. ...

In the evening, their Surgeon accosted me in my Walk along the Sea side, and asked if I wanted a Surgeon. ... He said he wanted to stay in India, for his Life was uneasy on board of his Ship; that tho' the Captain was civil enough, yet Mr Mather was unkind, and had treated him with Blows for asking a pertinent Question at some wounded Men, who were hurt in the Engagement they had with the Sloop. I heard too much to be contented with their Conduct, and so I shunned their Conversation for the little Time I staid at Colecut. Whether Captain Green and Mr Mather had Justice impartially in their Process and Sentence, I know not. I have heard of as great Innocents condemned to Death, as they were.

## CONCLUSION

That Edinburgh jury on 14 March 1705 were confident of their verdict: so confident, indeed, were they, that they not only reached it, they gave

---

<sup>63</sup> A Hamilton, *A new account of the East Indies, being the observations and remarks of Capt. Alexander Hamilton, who spent his time there from the year 1688 to 1723* (1727) vol I, pp 317-20.

their reasons for reaching it. Scotland has had very few jury trials where the prosecution could be described as harsh and oppressive: the trial of Captain Green and his crew was certainly not one of them.

