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SOME OLD SCOTTISH CRIMINAL LAW

WILLIAM RENWICK RIDDELL

The ponderous Folios of *The Acts of the Parliaments of Scotland*, printed by Royal Command in 1844 are a perfect mine of information concerning Scotland in early times, whether to the philologist seeking information as to the Scottish language, the economist, as to the condition economically, the theologian, as to the course of religious thought—not least so, the student of the history of law.

The purpose of this paper is to gather some idea of the provisions of the early Statutes—or what corresponded to Statutes—in early Scotland in respect of certain criminal offences; and I shall not quote from any but the first volume, before the Parliament at Perth of James I, in 1424 (contemporary with Henry VI of England).

First, it is to be noted that great care was had that when a man was sentenced to be hanged, he was hanged—there was no Court of Appeal, and the executioner was held to his duty.

We find in the first Titule of the “lawes of the Kyng David” (1124-1153) “Of hym yat eschapis ye wallowys. Gif ony mysdoer thurch dome be hingit and eftirwart he eschapis of ye gallowys he sal be quyit as of yat deid fra yin furth And yai yat hingit him sal mak fine wyth ye Kyng saüfeud yaim lyf and memberis and disherisone for quhi yat trespas is mekil and oure mesur.” (I, following the usual practice, employ “y” for the old letter indicating our “th”.)

Translating—“If any misdoer through judgment be hanged, and afterwards he escapes off the gallows, he shall be quit as of that deed from thence forth And they that hanged him shall make fine with the king, saving life and members, and disherison, because that trespas is great and beyond measure.”

The Scot did not believe in “half-hanging,” which we read of in English and Irish Criminal “Ana”: and one is reminded of the story of Sir Henry Maule, who when a Bishop claimed greater power than he had, “because,” said the Prelate, “you say ‘You be hanged,’ while I can say ‘You be damned,’” replied “Yes, but when I say ‘You be hanged,’ you *are* hanged.”

The gallows was a very favorite punishment in those days; but it was not in all cases inevitable—for example, in Tit. XIII of the Assise of King William, it is provided (I translate) “Concerning ‘Berthynsak,’ that is to say, the theft of a calf or of a ram or as much as one can

carry on his back, no one is to be held to judgment; but he upon whose land the thief is caught is to have the sheep or calf forfeited and the thief is to be beaten or have his ear cut off. . . . No one ought (aw) to be hanged for "less price than two sheep each of the value of 16 pence."

In a law of King William, dated 1575, it is provided that if anyone be accused of theft or receiving, the accusation being made under oath by the "greyff" (the prepositus or chief civil officer of the town) and three other "lele" (lawful) men inhabitants of the town, he shall be taken and undergo the Trial by Water. But if the accuser can bring three other witnesses against him in addition to the witnesses already mentioned, then through no battle shall he pass nor water nor yet to iron but speedily shall he be hanged ("thruch na batal sal he pas na to wattir na zit to yrn bot hastily sal he be hangyt"). Also, it shall not be lawful to take redemption of anyone after judgment given of battle or water.

Moreover, the thief caught by Hue and Cry and found in possession of the stolen article, is to be treated as a convicted thief, even if he has dropped the stolen chattel and it has been picked up by the people following. (Tit. VII.) The same appears in the Regiam Maiestatem, Lib. IV, Tit. VII.

In the Quoniam Attachamenta, Tit. VIII, it is provided that if anyone is charged with theft, he may defend, and he may if he wishes go to an Assise; or he may defend himself by Battel on finding sufficient sureties to recompense the accuser if he (the accused) should fall in the duel. If he succeeds, he goes free; if he fails, his sureties pay for the articles stolen and his Lord takes all his goods, &c.—the humane provision, however, is made that "Vxor vero illius dampnati non dampnabitur pro furti viri sui cum sit sub virga sua." The thief caught red-handed, "rubea manu," however, can be favored with no essoign.

Thieves and other malefactors were pursued with sleuth-hounds; and we find in the Acta Parliamentorum Roberti I, Tit. VII, a provision that "no one shall interfere with a sleuth-hound (canis traciens, sometimes written "tras sens," see Du Cange *sub voc.*, "canis"; it is the same word as "tracing") or with men going with it to follow thieves or to capture malefactors nor even to interfere with men without a sleuth-hound following thieves with their plunder. And whoever does so on being convicted is to be sentenced as a receiver."

In the Assise Regis David, Tit. XVI, it is provided "yat na man sell a theyff of thyft pruffyt for na mone na for na frendschip

na for na manner of meyd," i. e., "that no man sell a thief of theft proved, for no money, nor for no friendship nor for no manner of advantage."

In the Regiam Maiestatem, Lib. II, Tit. XLVI is a somewhat curious provision *De usurariis et eorum bonis*, i. e., concerning usurers and their goods. "All the goods of usurers dying testate or intestate belong to the King. . . . It is, however, to be known that if any one have formerly been a usurer, publicly famed as such, yet if afterwards and before his death, he repents and does penance, he will not be considered a usurer after his death": and a direction was given that usurers should not be molested during their lifetime. This may, possibly, be looked on as a measure of prudence to allow the usurer to make as much money as possible so to enrich the Treasury—which was in a chronic state of impecuniosity; but perhaps it was to allow a *locus penitentiae* even to the man *in tali crimine*.

Of course, "heretici debent comburi," heretics are to be burnt, Regiam Maiestatem, Lib. IV, Tit. LIII. Counterfeiters were to have their hand cut off; the man who used violence in the King's Court had the same punishment, most others had a severe enough punishment to show the Scotsman's dislike for crime.

Oddly enough, there is a provision whereby a freeman may relinquish his freedom, or as the Scots title runs: "How fredome may be tynt foroutyn recover," i. e., "How freedom may be lost without hope of recovery." And this is the way—"Ilk fre man may leff his fredome gif him likis in ye kyngis court (or in ony oyr court) but yat fredome nevir mar in his lyf may he recover"—i. e., "Every free man may rid himself of his freedom if he likes in the king's court (or in any other court) without that he may recover that freedom ever in his life again." Assise Regis David, Tit. IX.

Clergymen are held in hand—in the Assise Regis Willelmi, Tit. XXXVIII, "Of ye life and honeste of clerkis," we read—"Item it is statut yat kirkmen live honestly of ye fructis rentis and profitis of yair kirkis and sall nocht be husbandmen scheipherdis nor merchandis," i. e., "Also, it is enacted that churchmen live honestly of the fruits, rents and profits of their churches and shall not be husbandmen, shepherds or merchants."

Perhaps I cannot better close this paper than by quoting in full a delightful Titule from the *Fragmenta* gathered by the accomplished editors, Tit. 21 "Of differens betwix Goddis law and manis law." It reads—"All laws outhar ar manis law or goddis law Be ye law of Gode a heid for a heid a hand for a hand ane e for ane e a fut for

a fut Be ye low of man for ye lyf of a man IX XX. ky for a fut a merk for a hand als mekill for an e half a merk for ane er als mekill for a tuth XII. penijs for ilk inch of lynth of ye wound XII. penijs for a strak vnder ye er XVI, penijs XVI. penijs for a strak with a staf. VIII penijs and gif he sal with ye strak .XVI. penijs for a wound in ye face he sal gif ane ymage of golde And be manis law for brekin of banis. V. oras, for a wound vnder ye clathis. XIJ. penijs for a wound befor ya sleif .XVI. penijs and for ilk seable wound outane ye face. XV. penijs for a manis lyf .XII. mark for a wound abone ye aynd .V (J) Sand vnder ye aynd .LX. penijs for a fut strak .LX. penijs for blude drawyne .XXXV. S and beyonde ye see .VI. ky" Which, being interpreted means; "All laws are either man's law or God's law. By the law of God, a head for a head, a hand for a hand, one eye for one eye, a foot for a foot. By the law of man, for the life of a man, nine score cows, for a foot a merk, for a hand as much, for an eye half-a-merk, for one eye as much, for a tooth 12 pence, for each inch of the length of the wound 12 pence, for a blow under the ear 16 pence, for a blow with a staff 8 pence, and if he gives a wound with the staff 16 pence, for a wound in the face he shall give an image of gold and by man's law, for breaking of bones 5 oras, for a wound under the clothes 12 pence, for a wound before the sleeve (manica) 12 pence and for every visible wound not on the face 15 pence, for a man's life 12 marks, for a wound above the hand 6 shillings, and under the hand 60 pence, for a foot-stroke (i. e., a kick) 60 pence, for blood drawing 25 shillings and beyond the sea 6 cows."

The above is just a sample of the interesting information to be had from the perusal of these volumes.