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A DAY IN COURT IN SCOTLAND IN THE OLDEN TIMES

WILLIAM RENWICK RIDDELL

A very interesting little volume, written by an eminent Scottish lawyer, Christopher N. Johnston, K. C., and published by Blackwoods in 1916, contains, *inter alia*, an account of the proceedings of what we would call a Criminal Assize, at Stirling, Scotland, in 1707: the work is intitled: *John Blaw of Castlehill, Jacobite and Criminal*; and in this Article, I propose to extract the substance of what the learned author tells of two criminals and their trial at that Court. I have, indeed, long been in possession of what I supposed was authentic information concerning one of these men; but I shall here confine myself to the story told by the learned King's Counsel.

At the ancient City of Stirling in September sat the Justiciarii Itineris, corresponding to the Justiciarii Itinerarii or Justices in Eyre of the English law—and, indeed, their Court was called the "Justice Ayre": the English Justices in Eyre disappear after the Assize practice was firmly settled by the Statute of Westminster II, 13 Edward I, cap. 30, in 1285, followed by that at Westminster in 1299, 27 Edward I, St. I, cap. 4, that of 1318, 12 Edward II, cap. 3, and of 1340, 14 Edward III, St. I. But the name continued in Scotland, the functions of such Scottish Justices being similar to those of the English Judges under a Commission of Oyer and Terminer and General Goal Delivery.

The two Justices were Lord Justice Clerk Miller of Glenlee and Barskimming, a man of note in his day, but now quite forgotten except in musty legal circles, and Lord Kames, a man of many sides, who wrote on many topics and whose *Rhetoric* is still occasionally quoted. Perhaps, he will be remembered longest by his bitter addition to the sentence of death which he pronounced on a gentleman, with whom he had frequently played chess: "That's checkmate to you, Matthew"; or by his feeling good-by in the Robing Room to his collected Brethren: "Fare ye a' weel, ye bitches." The former bit of primeval pleasantry, Lockhart attributes to the famous Braxfield, but Kames seems to have the better right to the honor, such as it is.

Two men were to be tried, of whom the first to be named is unknown to fame—apparently even to tradition.

James Hogg, a Butcher of Falkirk was in prison charged with stealing two cows: apparently he had taken them in the absence of their owner, instead of following the time-honored practice, not yet out of vogue, buying them and not paying for them, a much safer and quite as expeditious practice. He made a very satisfactory deal with the Crown; he pleaded Guilty on condition that the Advocate Depute would "restrict the Lybel to an arbitrary punishment" that is, that he would ask for a sentence in the discretion of the Court, but not extending to death. This, the learned author says was very common in those days when the ordinary offender was "thocht to be nane the waur o' a hangin'." "It was very common in these days for a prisoner to plead guilty on the understanding that if he did so, the Prosecutor would 'restrict the pains.'" But though he pleaded Guilty, when arraigned, the case had still to go to a Jury of 15; these were called and Hogg found guilty: at that time the 15 Jurymen were selected by the Judges out of a list of 45 names served upon the accused a fortnight before: 5 by 5, they were presented to the accused, who was asked if he objected to any; if he objected, he had to make his exception good, as there was no peremptory challenge. This practice of pleading guilty on condition of receiving a less severe sentence still seems to prevail in some jurisdictions—I am appalled to think what would happen, if anyone were to approach a Crown Counsel in this Province with such a suggestion!

The erring butcher was sentenced to "be carried to the Tolbooth of Stirling . . . detained" for some 17 days, then "carried to the Publick Market place . . . betwixt . . . midday & Two o'clock . . . and there . . . whipt by the hands of the common executioner receiving sixty stripes upon his naked back . . . recommitted . . . to be detained till an opportunity offer for transporting him to one or other of His Majesty's Plantations in America . . . for seven years." Of course, he was to be sold as a "servant," not far removed from a slave. If he came back within the time, he was to be rewhipped and reshipped as before: "And so oft as he shall return or be found in Scotland at any time during the said seven years, the said Lords Ordain him as oft to be apprehended transmitted imprisoned whipt & again transported in the way and manner before directed, ay and while his Seven years Banishment at one time shall be completed . . ." And that, in a manner of speaking, settled that.

Severe as the punishment was for returning from banishment, it was less so than was sometimes awarded: we read that the noted Elizabeth Canning found guilty of Perjury in London, 1754, on being banished "to some of His Majesty's Colonies or Plantations in America for the term of seven years," was told by the Recorder, William Moreton, Esq.: "if you return and are found at large in any of His Majesty's dominions of Great Britain or Ireland, you shall suffer death as a felon without benefit of clergy": 20 *Howell's State Trials*, 675. Every reader of Dickens will remember the fate of Pip's friend, Magwitch in *Great Expectations*, for whom "the appointed punishment for his return to the land that had cast him out" was "Death" Nay, even in this favored land, this Province, as late as 1804, an Act of her Parliament provided for the banishment of those who were dangerous to her peace, "and if such person . . . shall remain in this Province or return thereinto . . . without license from the Governor . . . such person . . . shall be deemed guilty of felony, and shall suffer death as a felon, without benefit of Clergy": (1804) 44 George III, cap. I (U. C.). We have no record of anyone returning from such banishment—of course, they all went to the United States; and it would appear that at that time all preferred to remain in the United States to being hanged: it must be remembered that that was before the 18th Amendment, however.

The other criminal was of a different character: John Blaw, the descendant, apparently, probably many generations back, of a Dutch immigrant, was a landed gentleman, Laird of Castlehill, near Culross. He had been in earlier years mixed up in the Stewart attempt of "the 45"; he had been commissioned to visit Paris and consult with the Pretender and his adherents there: he must have been adroit and enterprising as he made his way through the opposing armies in the Low Countries. However, the Rising failed, Blaw was arrested in Edinburgh and taken to London, there to be examined by Tweeddale. After some 17 months imprisonment, he was released on bail, but hung around London, till after the Act of Indemnity of 1747 relieved him of all fear of prosecution: with true Scottish sense of his rights—for he was one of those

"Who know their rights"

And, knowing, dare maintain"—he complained bitterly that he was not tried—not that he was innocent, for his disloyalty was notorious, and if he had been tried he would probably have been drawn, hanged and quartered (not "hanged, drawn and quartered," as some write it, as though the traitor was "drawn" like a barn-door fowl),

but just on general principles of "kicking"—not wholly unlike the case on record in which a convict sued the Sheriff for omitting to lash him as had been adjudged, the Judge at the trial, with strict legal accuracy, directing the Jury that he was to be awarded the amount of damages he had actually suffered by the omission of the Sheriff to give him his due as the law directed.

The Laird came back home to Scotland, where he seems to have "swung a free leg" for awhile; but not long after he got into serious trouble. He had had trouble with a family named Cairns; was informed that they had been robbing his orchard, not simply "hooking" an apple or two but carrying away his fruit in quantities: he also accused them of cheating him in a transaction in corn—"corn," be it remembered, means "oats" in Scotland, as it means "wheat" in England and "maize" in North America. Blaw met William Cairns and John Cairns, his son, in an ale-house; and, on a quarrel arising, he stabbed the son with a three-inch-long penknife and wounded the father, also. The son died in a few hours, and Blaw taken to the Tolbooth at Clackmannan, was brought to trial on a charge of Murder at the Stirling Justice Ayre. Found guilty, he was sentenced to be detained for 14 days on bread and water, and then hanged—with the further provision "his body to be delivered to Dr. Walter Stirling and Dr. Robert Graham, Physicians in Stirling, or either of them to be by them publicly dissected and anatomized in terms of the . . . Act."

The Act was the well-known Act of 25 George II, cap. 38, which by sec. 5, required the body to be dissected by a surgeon before burial, thus adding a new terror to death.

That Blaw was hanged at Stirling, October 30th, 1767, is certain; there is much doubt as to the dissection having actually been performed—it is one thing to get a "subject" from resurrection-men or otherwise for private dissection or in the education in Anatomy of a class of medical students; but another, to have to dissect publicly a corpse from the scaffold.

They were dour folk in thae days.