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BY-GONE PHASES OF CRIMINAL JUSTICE IN ENGLAND

WILLIAM RENWICK RIDDELL*

THE ANCIENT CUSTOM OF HALIFAX

A little less than three centuries ago, that is in 1650, took place in England, the last execution by decapitation of felons according to the Ancient Custom of Halifax or, as it was sometimes called, the Custom of the Forest of Hardwick.

This execution stirred up so much public feeling in the Kingdom that the "Customary Law of the Forrest of Hardwick got its suspension." Many of the people in the district enjoying this Custom were not reconciled to its suspension: and one of them, a little more than half-a-century later, published a small 12mo. of 174 pages in which he defended it as legal, wise and merciful.

The volume has the Title:—

"Hallifax

and its

Gibbet-Law

Placed in a True Light

: : : :

London, Printed by J. How, for William Bently,
at Hallifax, in Yorkshire, 1708"

William Bently was the author and, as he says in his Dedication to the Duke of Leeds, he wrote it as "a just Vindication from Sinister and Vulgar Prejudices (of) the Antient Customary Law of the Forrest of Hardwick within" the Duke's "Mannor of Wakefield . . . as a Child of Truth."

In this work, we find a full description of the Custom and of the country governed by it—this was part of the West Riding of Yorkshire bound on the West by the boundary between Yorkshire and Lancashire, on the East by the Salter-Heblebrook, on the North by the Vicarage of Bradford and on the South by the Rivers Riburn and Calder, and included Halifax in the Forest of Hardwick and other Towns, Hamlets and Villages.

Like the Custom of Gavelkind in Kent, that of Borough-English in Nottingham, some of the Forest Laws and certain Customs of

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London, this Custom of Halifax was believed to have come down from time immemorial, and, undoubtedly was recognized for centuries as a valid Custom binding upon all within the ambit of its operations. It was considered by many, including William Bently, that the Custom arose from the circumstance that the inhabitants of the Forest of Hardwick," since when it is not in the Memory of Man to the contrary", had the "usage Custom and Freedom" confirmed by the Statute 2, 3 Philip and Mary, "to buy and sell Wooll by retail in order to the carrying on of . . . Manufacture" of cloth, the Custom being primarily intended for their protection against theft of their wool or cloth. It was not, however, confined to the theft of wool or cloth, but extended to theft of all kinds of personal chattels, animals or otherwise, within or without the Forest.

The Custom is thus described: "If a Felon be taken within their Liberty, with Goods stolen out or within the Liberty or Precincts of the said Forest (of Hardwick), either *Hand-habend*, *Backberand* or *Confessand*, *Cloth*, or any other Commodity of the Value of Thirteen Pence half-penny, that they shall after three Markets, or meeting Days, within the Town of Hallifax, next after such his Apprehension and being condemned, he shall be taken to the Gibbet, and there have his Head cut off from his Body" (The syntax limps a bit but the meaning is clear enough).

An engraving is given of the Gibbet, which had the local name of "the Scottish Maiden in their vulgar language", from which it is manifest that the "Engine" was practically identical with the French guillotine and that Dr. Guillotin was not an original inventor.

The method of execution is fully described—the Prisoner was brought to the scaffold by the Bailiff, the axe was drawn up by a pulley and the rope fastened with a pin to the side of the scaffold, the Bailiff, the Jurors and the Minister chosen by the Prisoner being always upon the scaffold with him. The Minister performed his Christian duty; then, if the article stolen was a horse, ox, cow, &c., it had been brought along with him to the scaffold and fastened to this pin holding the axe from falling, then one of the Jurors holding up his hand as a signal of execution, the Bailiff or his servant whipped the animal, which starting, pulled out the pin, the axe fell and the execution was completed. If there was no animal, the Bailiff or his servant cut the rope.

While no one could be apprehended outside the Liberty, anyone who had been apprehended within could, if he should make his escape, be again apprehended if he ever came within the Liberty and "Taken, he is certainly Executed". "An example whereof is continued in

Memory of one *Lacy*, who made his Escape and lived seven years out of the Liberty, who after that time came boldly within the Liberty of *Hardwick*, was retaken and Executed upon his former Verdict of Condemnation”.

To justify a conviction under this Custom, in the absence of confession, the accused must be caught in the very act of stealing or else have the stolen goods about him or in his custody—he must be “Hand-haband or Back-berand”—the Civil Law *Furtum Manifestum* and Common Law “Taken with the manour”—and the thing stolen “must be produced before the Jury to bear Evidence against the Felon”.

The thing stolen must be a personal chattel of the value of more than $13\frac{1}{2}$ d as against the Common Law shilling—if it was worth just $13\frac{1}{2}$ d or less, “the Jury are to acquit the Felon and he shall not die for it”. It will be remembered that at the Common Law Juries sometimes, by what Blackstone calls “a sort of pious perjury”, found the value of the goods stolen to be less than a shilling and saved the thief from the gallows to be only whipped and imprisoned for Petty Larceny.

When anything was stolen in the Liberty, it was the duty of its owner to raise the Hue and Cry and he was not permitted secretly to recover his goods without prosecuting the thief if he knew him.

The proceeding followed when one was arrested “Hand-haband or Back-berand” was to bring him with the stolen goods into the custody of the Chief Bailiff of Halifax in order to have his trial, the Complainant making an Information as to the alleged facts. Thereupon the Bailiff, *virtute officii*, issued “his Summons to the Constables of four several Towns in the Liberty . . . charging and requiring them That, without fail, they make their Appearance with each of them four Men of the most Ancient, Intelligent, and of the best Ability within their several Constableries at his House in Halifax” at a day named, “to Hear, Examine and Determine the Case,” naming the charge.

On the day named appeared the Constables each with his four “Frith Burghers”, and these “sixteen . . . by the Bailiff impaneled into a Jury, in a convenient Room at his House, according unto Custom, wither the Felons and their Prosecutors being Brought Face to Face before them as also the Stolen Goods to be by them Viewed, Examined and Apprized”.

The Jury were not sworn, but the Bailiff opened to them the occasion of their Summons, addressing them Formally as “Neighbours and Friends” and charging them “to make diligent search and in-

quity into such Complaints as are brought against the Felons, concerning the Goods that are set before you".

Then the Information of the Complainant was brought in and read to the Jury—this was not sworn to, but the "Informant saith and affirmeth" that on a day named the Prisoner feloniously took a chattel "which . . . you have here before you . . .". The Prisoner could deny or confess or make any statement he chose without being sworn. From the report of the cases in 1650, spoken of above, it would appear that the Informant might set out hearsay of what the Prisoner had said. After hearing all that was adduced against or said by the Prisoner the Jury might decide, or "as is Customary in such Cases . . . adjourn themselves unto" a day fixed, "resolving that day fully to give in their Verdict"—the adjournment in the cases in 1650 was for three days.

The Verdict was given in writing as "An Inquisition" and signed by all the Jurors—if the Prisoner was found guilty, the Inquisition went on to pronounce "the Determinate Sentence" which read that "By the Antient Custom and Liberty of Hallifax whereof the Memory of Man is not to the contrary, the said (naming the Prisoner) is to suffer Death by having his Head severed and cut off from his Body at Hallifax Gibbet". He then was allowed at least six days to prepare himself for death before being brought to the "Scottish Maiden" for execution.

During this time, he on every Meeting or Market day of which there were three every week in Halifax, Tuesdays, Thursdays and Saturdays, that on Saturdays being for cloth, was set in the public stocks; and, if the stolen goods were portable, they were placed on his back, if not, before his face, "that they may be noted by all Passengers. And this is done, both in Terror to others, that they may take Warning by his wicked Deeds, never to commit the like", as William Bently somewhat sententially puts it.

The last execution was on May 6, 1650, of two persons, Abraham Wilkinson and Anthony Mitchell, the former being convicted of stealing 16 yards of Kelsey, of which 9 yards were brought before the Jury "worth 9 shillings at the least", from one Samuel Colbeck of Warley, also a Black Colt worth 48 shillings from John Cusworth of Durker in Sandall Parish, and a Grey Colt worth £3 from Paul Johnson also of Durker: the latter being convicted of the last two thefts. They were tried together and along with John Wilkinson who was accused with the two others of the first theft, but not convicted.

Abraham Wilkinson and Anthony Mitchell confessed to the three crimes, but the former denied another charge of stealing "one whole

Kersey piece . . . from the Tenters at Brereley-Hall" belonging to John Fielden of Stansfield: and it was because of this denial that the Jury decided to adjourn from April 27th (the day of the actual trial) till April 30th when they rendered their Verdict in which there was no mention of the Fielden charge.

The Jurors were 16 in all, 4 from each of the places, Halifax, Sowerby, Warley and Skircoat.

It is interesting to read the objections urged against the Custom and the defence by those who approved of it.

The two main objections were that the Custom had become obsolete and in desuetude for want of use, and the Jury were not sworn.

The advocates of the Custom answered that the temporary suspension had been due to the unsettled condition of the country through the Civil War—it will be remembered that Charles I was executed in January, 1649: moreover a well established Custom could not be superseded or even suspended except by Act of Parliament—and it must be conceded that the answer is perfectly conclusive.

As to the want of oath of Jurors—this was a matter of practice; and even in cases of life and death, those who were to try an accused were not always sworn. For example, on the trial of a Peer of the Realm, those who gave the judgment or verdict did so upon their Honour not their oath. The incident was quoted of Lord Chancellor Egerton—when a matter of great moment was submitted to the Judges and they scrupled to give their opinion, "because they were not upon the Bench and under the Power of an Oath. This Great Man makes unto them this smart Reply, saying, 'Your Determination in this Case is not to be doubted of, altho' there be no Oath at all, for except Men of Knowledge, Antiquity of Years, and of a good Repute, do not fear God and his Judgments, even out of a Religious Conscience, which is *Fraenum ante Peccatum et Flagrum Post Peccatum* [a Bridle before and a Scourge after Commission of a Wrong Act], it may justly be doubted, that the External Ceremony of adding a Book to Kiss would little avail."—which will probably not be considered a valid answer, the law attaching such effect to the Oath, and the comment of the Chancellor being equally applicable to a Judge taking an Oath of Office or any Oath at all.

Some of the advantages of the Custom urged by its upholders were the necessity of the accused being taken in the act, or being found with the stolen goods on his person or in his custody—or else, a confession; the value of the stolen goods to justify the penalty of death being found by the Jury above 13½ d instead of 12 d as at the Common Law; the necessity of the stolen goods being produced before

the Jury at the trial; the delay of six days before execution after sentence instead of immediate execution as at the Common Law as it was originally understood or "the day after the morrow" as had come to be the practice (Sunday not being a *dies non* and not counted, the custom grew up to sentence on Fridays, thus giving the condemned man an extra day); the manner of execution, the axe instead of the rope—a knightly death—to which as is well-known, the King not infrequently commuted in cases of persons convicted of high degree the horrible Common Law execution for Treason or even in convictions for Felony, death by hanging.

With all its merits, however, the Custom of Halifax, the Ancient Custom of the Forest of Hardwick in the Manor of Wakefield was doomed—and after May, 1650, the thieves who were convicted of stealing goods of a value of more than a shilling were hanged *secundum artem* and without delay.

A LEGAL SCANDAL, TWO HUNDRED YEARS AGO: THE HIGHWAYMAN'S BILL IN EQUITY: AND THE CONVICT SOLICITOR

Every Student-at-law has read of the famous Bill in Equity, filed by one Highwayman against another, his partner, for an account of the profits made in that occupation: many have wondered how any Solicitor could be found to draw such a Bill, and what was his later career.

The actual existence of such a suit was for long doubted, although there are several references to it in legal literature. Not to mention the law writers, Lord Kenyon, during the argument of *Ridley v. Moore* at the Gloucester Summer Assizes, August 1797, reported in the Appendix to Clifford's *Report of the Two Cases of Controverted Elactions of the Borough of Southwark*, London, 1802, at p. 372, said: "He had heard of a Bill filed in the Court of Chancery, to obtain an account of the profits of a partnership trade carried on at Hounslow; but when it appeared that the trade was taking the purses of those who travelled over the Heath, the Court would not endure the Bill".

So, too, in *Ashurst v. Mason* (1875) 20 Eq. Ca. 225 at p. 230, Vice Chancellor Bacon is reported as referring "to the legendary case of a highwayman against his comrade of the road for a partnership account of his plunder".

In Evans' edition of *Pothier on the Law of Obligations or Contracts*, 1808, in Vol. II at p. 3, it is said "There is a tradition that a suit was instituted by a highwayman against his companion to account for his share of the plunder . . . It was a Bill in the Exchequer,

which avoided stating in direct terms the criminality of the engagement, and is founded upon a supposed dealing as copartners in rings, watches, &c., but the mode of dealing may be manifestly inferred. The tradition receives some degree of authenticity by the order of the Court being such as would in all probability ensue from such an attempt. The order was, that the Bill should be dismissed with costs for impertinence, and the Solicitor fined £50." As authority is cited the *European Magazine* (1787, Vol. II, p. 360): The editor adds a note, giving a fairly full account of the Bill and of the order of the Court—this will be referred to later in this Paper. But he adds: "Taking the case as a supposititious one, it sufficiently illustrates the general principle".

It is, then, perhaps, not to be wondered at that general credence was not given to the story: and, as late as 1893, we find Sir Frederick Pollock after discussing the story, saying: "We still decline to believe it and can only suppose it took rise from some otherwise forgotten jest or hoax in an Equity draftsman's Chambers": 34 *Law Quarterly Review* (April, 1893, pp. 105, 106).

But the sceptic was convinced, and in the next number of the *Law Quarterly Review* (for July, 1893, at pp. 196-198) he fully accepts it, as he found that it was supported by the Records of the Court. From these it appears that it was a Bill filed in the Exchequer in Equity in or before 1725, an "English Bill", and was to the effect set out in Evans' note and copied in *Lindley on Partnership*, 5th. edition, 93, note.

The plaintiff was John Everet, the defendant, Joseph Williams, White and William Wreathock (Wreathocke or Wreathcock are variant spellings) being the plaintiff's solicitors. The Bill alleged that "the plaintiff was skilled in dealing in several commodities, such as plate, rings, watches, &c.; that the defendant applied to him to become a partner; and that they entered into partnership, and it was agreed that they should equally provide all sorts of necessaries, such as horses, saddles, bridles, and equally bear all expenses on the roads and at inns, taverns, alehouses, markets and fairs; that the plaintiff and the defendant proceeded jointly in the said business with good success on Hounslow Heath where they dealt with a Gentleman for a gold watch; and afterwards the defendant told the Plaintiff that Finchley, in the County of Middlesex, was a good and convenient place to deal in, and that commodities were very plenty at Finchley, and it would be almost clear gain to them; that they went accordingly, and dealt with several gentlemen for divers watches, rings, swords, canes, hats, cloaks, horses, bridles, saddles and other things;

that about a month afterwards the defendant informed the plaintiff that there was a Gentleman at Blackheath, who had a good horse, saddle, bridle, watch, sword, cane, and other things to dispose of, which he believed might be had for little or no money; that they accordingly went and met with the said Gentleman, and after some small discourse they dealt for the said horse, &c., that the plaintiff and the defendant continued their joint dealings together until Michaelmas, and dealt together at several places, viz., at Bagshot, Salisbury, Hampstead, and elsewhere, to the amount of \$2000 and upwards. The rest of the Bill was in the ordinary form for a partnership account." The note proceeds: "The Bill is said to have been dismissed, with costs, to be paid by the Counsel who signed it; and the Solicitors for the Plaintiff were attached and fined £50 a piece. The Plaintiff and the Defendant were, it is said, both hanged and one of the Solicitors for the Plaintiff was afterwards transported."

Another account is that the Solicitor was ordered to be led around Westminster Hall, when the Courts were sitting, with the obnoxious Bill cut in strings and hung around his neck.

The plaintiff, John Everet (or some one of the same name) was hanged at Tyburn in February, 1780 (N. S.), and the defendant suffered the same punishment at Maidstone in 1776. Of White, one of the offending Solicitors, I do not find any further account: but Wreathock himself became a Highwayman and in December, 1735, was convicted of robbery committed on Dr. Lancaster and was sentenced to death. However, his sentence was commuted, and he was transported to America. Transportation of convicts began as early as 39 Elizabeth, c. 4, though the word was not used until 13 & 14 Charles II, c. 43: the practice was made general in 1718 by 4 George I, c. 11: the Transportation was to the American Colonies, Botany Bay being first mentioned as the place for transportation in 1787, 27 George III, c. 2—of course, the transportation to the American continental Colonies became impossible after 1776.

What of the later fate of Wreathock? I do not find this spoken of by any of those who have dealt with this curious episode.

The answer will be found in a volume published some years ago: *The Records of the Society of Gentlemen Practitioners* . . . London, 1897.

This Society of Attorneys and Solicitors was the predecessor and progenitor of the Incorporated Law Society: it began early in the second quarter of the eighteenth century in friendly and convivial meetings of its members, an origin which has been attributed to many other organisations, amongst them the Freemasons (to the exclusion

of King Solomon) and, *horresco referens*, even to the Shriners (to the exclusion of the Mystic Shrine, itself). Assuredly, they did not lose sight of comaraderie and good fellowship, the wing of friendship did not moult a feather nor did the taper of conviviality become extinguished—as late as 1808, the Stewards were directed “to discontinue the use of spruce beer, soda water, cider, and perry at the Dinners”, and a glance at the Bills for spirituous liquors would make even Falstaff’s mouth water—witness “Bread and Beer 6s 8d, wine £5.3.0”, like Falstaff’s “half pennyworth of bread to this intolerable deal of sack.”

The resolution to exclude “soft drinks”, the editor of this volume thinks “a good regulation”: and it would appear that the liquor was paid for by bets, not “always of the most refined character”.—“when the wine is in, the wit is out”.

But the Society undertook serious business as well, and watched over the good name of the profession—they stopped the practice of an attorney having as an Articled Clerk a Turnkey of the King’s Bench Prison in Fleet Street, who remained constantly at his duties as Turnkey and whose only service to the Attorney was to bring him 63 causes on behalf of prisoners in two years—a practice almost worse than ambulance chasing, and probably unknown on either side of the Atlantic at the present time.

They also had an Attorney struck off the Rolls who permitted his Articled Clerk to become a menial servant in the house of another—where, by the way, he was guilty of robbery and was hanged for it.

Another Attorney had the same fate, i. e., he was struck off the Rolls, because he had been convicted of a crime for which he was condemned to stand in the pillory.

How the attention of the Society was called to the fact that Wreathock was practising, does not appear, but probably, he had got into trouble again, as we find him later in the Fleet on the command of the Lord Chancellor. However that may be, at a meeting of the Society held February 20th, 1758 (at the Devil’s Tavern, I presume), “It being notorious that Mr. Wm. Wreathock was in the year 1735, convicted for a robbery on the highway, and was afterwards transported, and that he was then acting as an Attorney, the Secretary was ordered to make proper searches in the several Courts, and find of what Courts, the said Wreathock then stood admitted as Attorney and Solicitor, and to make application to such Court or Courts as the said Wreathock should practice in to have his name struck off the Roll. It was referred to the Standing Committee . . . to

carry this Resolution into execution . . .” The Committee, after a meeting abortive for want of a Quorum, met, June 29th, 1758, and ordered the Secretary to get a copy of the Record of Wreathock’s conviction; also to search for and read the Royal Pardon, alleged to have been granted him; and to get a copy of the Orders of the Court of Exchequer for taking off the File, a Bill exhibited by one highway-man against another, in case he should find Wreathock named in the Orders as Solicitor concerned in filing the Bill—and to prepare a Notice and Brief for Counsel to move to strike him off the Roll of Attorneys of the Common Pleas.

After an abortive meeting (for want of a Quorum) the Committee met, Friday, February 4th., 1757: finding that Wreathock was in the Fleet Prison where he had been committed for contempt by the Lord Chancellor, November 1st., 1756, and being informed that a complaint had been filed against him in the Court of Common Pleas and a Rule to Show Cause had been granted against him so that there was a probability that an Order would be made to strike him off, they thought it desirable to postpone their application for the time being.

A copy of the Orders by the Court of Exchequer in the premises will be found in 34 L. Q. R., p. 197; but I have not been able to discover the circumstances of the committal in November, 1756; the Lord Chancellor, however, must have been Lord Hardwicke, who resigned a few days later.

The Society held a General Meeting, July 15th., 1757; at this meeting the proceedings of the Committee were reported and the Society thinking that as the Motion against Wreathock had not come to a determination, they “ought to endeavour for the honor of the profession to get” him struck off, appointed a Special Committee for the purpose directing the Secretary to give them assistance.

This Select Committee met, Tuesday, November, 1757, at the Anchor and Baptist’s Head—why they deserted the Devil’s Tavern does not appear—and determined that the first thing to be done was to obtain a copy of the Record of Conviction in 1735 (what we now call an “Exemplification”). For this purpose, a Fiat of the Attorney-General was, as with us it still is, necessary; and for that purpose, an affidavit must be filed: they, accordingly agreed that they would meet on the following Thursday at the Crown and Rolls Tavern, Chancery Lane, to swear to such an affidavit. Whether that meeting was to have as a concomitant, a drink or two, does not appear from the Record, but it may be noted that the Editor of this volume, who should know the custom of the country, says of a Committee Meeting, which “only one of the Committee attended, in 1805”, that “it

was impossible for him and the Secretary, being two Christian men, to separate without having something to drink": and he thinks "one bottle of Port between the Secretary and the Committee-man", about the right thing. However that may be, the Committee met at the Crown & Rolls Tavern, November 10th., "and went to Judge ffoster's Chambers in Serjeants' Inn, and swore the affidavit" required: then they adjourned till November 18th., when the Secretary reported that he had obtained the necessary Fiat as well as a copy of the record of Wreathock's conviction in December, 1735: he had, also obtained a Certificate showing that Wreathock had been admitted Attorney of the Court of Common Pleas, when he had been dropped from the Roll of Attorneys, and when again admitted. He had been unable to find when Wreathock had been discharged from the death sentence on condition of Transportation, but it appeared that he had had the death sentence respited and been carried on the Books of Newgate, till May, 1736: he could not learn when or on what terms, his sentence had been commuted, or when he had been transported or when he had returned from banishment. The Special Committee thought they had enough upon which to base a Motion, and adjourning, they met again, Monday, November 21st., when they settled the affidavit and signed the Notice of Motion. Meeting on the 24th., the Motion against the Solicitor was mentioned in Court, but could not be proceeded with owing to the absence of the Lord Chief Justice: so the Committee met next day, and, in a body, went to the Chambers of Serjeant Prime, and being "politely received by the Serjeant", instructed him to "inforce the motion".

It appears by the proceedings of the General Meeting of the Society, held Friday, February 24th., 1758, that a Rule to Show Cause was granted, November 25th., that it was three times enlarged, and that on January 31st. "the Court, on hearing councill on behalf of the Committee and of the said Wm. Wreathocke were pleased to order that the name of the said Wreathocke be left out of the Roll of the Attorneys of the said Court for the future." It is pleasing to note that "on this application Sergeants Prime, Poole, and Davy obligingly gave their assistance as councill for the Society without taking any fees"; and that "Mr. Cowper, the clerk of the Rolls of the King's Bench, and . . . Mr. Barnes, one of the Secondaries of the Common Pleas . . . remitted their fees on the two aforesaid applications": and were thanked for their kindness.

And so, there is an end of Mr. William Wreathock, as an Attorney or Solicitor: I do not find him mentioned again; and it is not impos-

sible that he took up the old business, so rudely interrupted at the Middlesex Assizes in December, 1735.

In reading this book, there appear one or two things which may be mentioned as not without interest—for example, at a General Meeting, some one suggested “No Jew to be bail for any person but a Jew”; but nothing seems to have been done about it. Then we find Jeremiah Bentham, acting as Attorney for the Scriveners’ Company in the long-drawn-out litigation with the Attorneys—the Scriveners objecting to the Attorneys doing Conveyancing, and the Attorneys objecting to becoming a City Company. This was, however, not our Jeremiah Bentham, the trenchant critic of Blackstone and one of the most scientific writers on Political Economy we have seen, but his father, who as well as his grandfather was an Attorney in active practice in London—the great-grandfather having been a prosperous Pawnbroker. This Jeremiah Bentham had no large practice, but made considerable money by dealing in land: he is described as “authoritative, restless, aspiring and shabby”: and, certainly, his correspondence copied here in connection with this litigation is sufficiently impudent and “authoritative”.

THE FIRST NEW TRIAL IN CRIMINAL CASES

In a Criminal Appeal, argued before my Court, a short time ago, the question came up as to the inherent right of the Court to grant a new trial in criminal cases: we pointed out that the only power we had in that respect was statutory. It may be of interest to see what was the occasion of the first case known, in which such power was exercised by the Court, long before there was any Statute conferring the power—and duty.

At the Common Law, there was no new trial in criminal cases, except in certain quasi-civil misdemeanours: *Rex v. Inhabitants of Oxford* (1811), 13 East, 410, especially the Notes on pp. 414, *sqq.*: *Rex v. Scaife* (1851), 17 A. & E., N. S., 238 is not approved: Attorney-General of New South Wales (1867), L. R. 1 P. C. 520: an Article. “New Trial at the Common Law”, written at the request of Mr. Taft, formerly President and later Chief Justice of the United States, printed in 26 Yale Law Journal, pp. 49, *sqq.*, may be looked at, as also an Article “The Sacco-Vanzetti Case from a Canadian Viewpoint” in 13 American Bar Association Journal, pp. 683, *sqq.*

In capital cases, this may be immediately understood, when the custom is considered that the convicted felon was promptly hanged—in the earliest times, apparently, the practice was, as it undoubtedly was in Scotland much later, to hale the convict to the gallows forth-

with: but in later times, the usual sentence was for the Sheriff to hang him the next day but one—this, by the way, was the cause of sentence to death being pronounced by the Judge at Oyer and Terminer, on Friday, to give the poor prisoner an extra day of life. There was no time to apply to the Court of King's Bench, which, almost invariably, sat at Westminster.

So far as I have been able to discover, the first instance of a new trial being granted was in 1752, 27 George II: the material facts are given in 19 Howell's State Trials, pp. 580-692, and fully in an exceedingly rare pamphlet, published by one of the persons concerned, James Ashley.

The facts are that a Pole, named Henry Simons, coming to England in 1751, and putting up at an Inn kept by one Goddard, complained that he had been robbed of 554 ducats by two men during the night. His complaint was laughed at; but he took proceedings and Goddard was indicted of robbing him: at the trial at the Old Bailey, Simons swore that Goddard was one of the two men who had robbed him, but Goddard was acquitted. Then Goddard laid an information against Simons for Perjury, Simons set off for Harwich to get over to Holland, but was seen near Ilford in Essex, by James Ashley, an acquaintance of Goddard's, and by him and others arrested. Simons was acquitted of the perjury; but his troubles in the strange land were not by any means over. Ashley charged him with putting into his (Ashley's) pocket at the Saracen's Head Inn at Chelmsford, three ducats, with the intention of charging him (Ashley) with robbery. Simons came up for trial at the Lent Assizes at Chelmsford, March, 1752, on an indictment of four counts. The Judge, Mr. Justice Foster, understood the Jury to find him guilty and so endorsed the Indictment—perhaps some of the misunderstanding was occasioned by the circumstance that the Jury were out from 9 P. M., till 2 P. M. Simons, "a native of Ostrog in Volhinia near the Ukraine in Poland" had friends who took an interest in him: they had a motion made in the King's Bench for a New Trial. On the return of the Rule to shew cause, there were produced for the prisoner the affidavits of all the Jurymen, in which it was clearly made to appear that there had been a misunderstanding between Judge and Jury, the Jury intending to find only that Simons had put the ducats in Ashley's pocket, but not that this was done with the intent charged or any wicked intent. There had, it seems, been much noise in Court when the verdict was given in, and the Jury were not aware that their verdict had been misunderstood. The motion, "being spoken to by nine several Counsel, who took up the Court several days, the

Court was pleased to adjudge a new trial"—"Which" says Ashley, "is the first precedent of the kind to any person who had been convicted of a criminal offence". Simons was tried again at the Chelmsford Assizes, July 12th., 1752—the result is not stated.

That this, however, was not in fact an order for a *New Trial* is apparent: the proceedings in the March Assizes were not a full trial—no verdict was in fact delivered to the Court: what the Jury said and what the Judge thought they said were wholly different—what they said did not impute a crime—what he thought they said, did.

This was made perfectly apparent in a not dissimilar motion two years later in a case that still puzzles the students of Criminal Law. A girl of nineteen, Elizabeth Canning by name, living at service in London, disappeared on New Year's Day, 1753: four weeks afterwards, she appeared at her mother's home, dishevelled, almost unclothed, emaciated and obviously having been the subject of ill-treatment. She told an extraordinary story of assault, robbery and incarceration in a house of ill-fame: and gave evidence on the prosecution of certain women who were charged on her story of stealing her clothes. The prisoners were convicted; but proceedings were stayed, and enquiry showed that the girl was wrong in her identification of the alleged thief. She was indicted for Perjury, and tried at the Old Bailey, the General Sessions of Oyer and Terminer, April, 1754. The Jury brought in their verdict "Guilty of Perjury, but not wilful and corrupt": at the present day, the Judge would tell the Jury that this finding was equivalent to a verdict of "Not Guilty", and either so enter the Verdict, direct the Jury so to find or send them back to the Juryroom to return a proper verdict. These were very technical days: and the Recorder told them "That he could not receive their verdict, because it was partial (i e., incomplete); and they must either find her guilty of the whole indictment, or else acquit her". They retired and after over two hours returned a verdict "Guilty of Wilful and Corrupt Perjury". This verdict was delivered in open Court, all jurymen being present. Enquiry disclosed the fact that some, at least, of the Jurymen did not intend to find her guilty of anything else than swearing to what was untrue, and thought the language employed imported no more than that finding—they never had intended to find anything but swearing to a mistake, and thought the language employed was that required by the law. Their affidavits to that effect were submitted to the Court: the matter was argued, May, 1754, before the Session of Oyer and Terminer, Willes, C. J. C. P.; Dennison, J., K. B.: Clive, J., C. P.; Legge and Smythe, BB., Ex.,

the Lord Mayor and certain Aldermen of London: and the application for a New Trial was refused.

Rex v. Simons was cited; but the difference between the cases is perfectly plain: in the *Simons* case, what was intended as the verdict of the Jury was not understood by the Court, and their verdict was not received at all: in the *Canning* case, the actual verdict in the words of the Jury was received by the Court and entered, though the actual meaning of the words so employed was not understood by, at least, some of the Jury: in one case, there was no verdict given by the Jury and received by the Court; in the latter, there was. In an Article "Buttered on Both Sides", 8 Boston University Law Review, pp. 177, *sqq.*, I have discussed the *Canning* case.

The girl, a victim, *me judice*, of a judicial error, was banished to the American Colonies, with the comforting notification that if she returned before her term was up, she would be hanged. Accounts differ as to her later life: one, and apparently the better, account is that she in America, married an opulent Quaker named Treat, and died at Wethersfield in Connecticut in 1773, consistently asserting her innocence to the last: another is that after her term of seven years banishment expired, she returned to England: it may be that both stories are true.

If anything, I have said, induces any of my legal brethren to read the State Trials, I shall be glad and they will be delighted.

WHAT IS SAUCE FOR THE GOOSE IS SAUCE FOR THE GANDER
(Sometimes)

The extraordinary tenderness with which woman was regarded by the Common Law of England is well-known to all who have even a superficial knowledge of it. This was shown by its looking upon her as something to be guarded in all things; when she was unmarried, indeed, she in that unnatural condition was left pretty much to her own guidance, but when she entered the condition for which she was destined by Providence, she came under the tutelage and care of the man—her property became his, at least, so long as he lived, and she could not be allowed to make a valid disposition of it—the husband could say with Petruchio,

She is my goods, my chattels; she is my house,
My household-stuff, my field, my barn,
My horse, my ox, my ass, my anything.

That tender regard was shown for her not less when she came to be punished for crime. The man convicted for High Treason was

drawn, hanged and quartered (not hanged, drawn and quartered as the uninformed persist in putting it): this involved the convict being cut down alive from the gallows, quartered by the executioner—or later, nicks being put in his body, indicating the places the cuts would be made if he was actually quartered; for the woman, however, that was not thought right, so she was burned alive at the stake. As Blackstone delightfully and with apparent seriousness puts it: “In Treasons of every kind, the punishment of women . . . is different from that of men. For, as the decency due to the sex forbids the exposing and publicly mangling their bodies, their sentence . . . is, to be drawn to the gallows, and there to be burned alive”. The learned author somewhat superfluously adds that this punishment “is to the full as terrible to sensation as the other”—in which statement, most will readily agree.

To make this tenderness the more apparent, it should be said that not content to burn the woman only when she was guilty of High Treason the law prescribed the same fate also when she was guilty of Petit Treason by killing her husband, for Katharine herself says:

Thy husband is thy lord, thy life, thy keeper,
Thy head, thy sovereign . . .
Such duty as the subject owes the prince,
Even such a woman oweth to her husband.

And that this form of execution was not due to a regard for decency is to be gathered from the circumstance that a man, convicted of Petit Treason was not quartered, but only drawn and hanged. Blackstone does not explain the reason for the difference in the punishment of man and of woman. In this regard as in no few others, at the Common Law, Sauce for the Goose was not Sauce for the Gander.

The origin of this punishment for the murder of the husband, Blackstone thinks is to be found in the laws of the ancient Druids; in any case, by his times, burning at the stake was confined to cases of Treason, High or Petit. Even the Common Law seems to have fallen away from the ancient high standard of consideration for the fair sex; it would seem that in the olden time, a woman found stealing in association with her husband, enjoyed the privilege of being burned at the stake, though he could claim only to be hanged, out of hand; at least, I have found such a case mentioned in one of the publications of the Selden Society. This right was lost in the course of years—and, indeed, it may have been under a local custom, like the Custom of Halifax, which entitled the thief to be beheaded by the “Scottish Maiden” instead of being hanged *secundum artem*.

The right to be burned at the stake was not, of course, a monopoly of women; even a man, when found guilty of Heresy, had the right to a Writ de Heretico Comburando, and to be burned accordingly; or, if he had the fortune to be found guilty of both Heresy and Treason he might have a double form of execution like Sir John Oldcastle (who some still insist was Sir John Falstaff, though two men more unlike can scarcely be found or thought of), who in the spacious times of Henry V, was "ordered to be hanged and burnt—the first part of his sentence was for Treason; and the other for Heresy. Accordingly he was executed on a gallows, built on purpose in Saint Giles's fields, being hung by the neck in a chain of iron, and his body with the gallows, consumed to ashes". So says Howell's State Trials Vol. 2, col. 256; there is a more ghastly account which I do not recommend anyone to read, who has not extra strong nerves.

But the goodly custom of burning Heretics at the stake was allowed to fall into desuetude after King James I and VI hanged two Heretics, one certainly partially insane, both denying the doctrine of the Trinity and holding the invalidity of Infant Baptism—this was in 1612; and the people were so shocked with the circumstances that the King directed that there should be no more such executions.

By Blackstone's times, the privilege of being burned at the stake was limited to Traitors of the female sex, Grand or Petit. It is often said and it is largely believed that Witches could claim and could be made to undergo this punishment; the sole foundation for this supposition is that not uncommonly, Witchcraft was considered a form of Heresy or was associated with Heresy, and it can be confidently stated that a Witch, as such, was not subject to burning at the stake.

That the law was no dead letter is all too manifest; but, in the course of time, a custom arose which, illegal as it was, became practically universal; the Officers entrusted with the execution of a sentence of Burning, instead of burning the woman alive, were accustomed to strangle her before lighting the fire, and burning only her dead body. This practice was not unlike that which came to be followed of simply nicking the body of a man found Guilty of High Treason at the points where the incisions would be made if quartering had actually been done.

It was not until the last decade of the 18th Century that women were deprived of the privilege, exclusive as it was, of being burned at the stake.

At the General Election in 1784 for the Sixteenth Parliament of Great Britain—a Parliament which was to be of the greatest moment to Canada—one Benjamin Hammet was elected one of the Members

for Taunton: he had been a Member of the previous House and had taken an active part in Parliamentary proceedings: his activities continued in the Sixteenth Parliament; but we are not concerned with them until the year, 1790,—by the way, we may notice that he had in 1788, approved of a tax on Maid-servants, but that he explained was because he knew that the tax would be paid by their employers—he had been knighted by 1790, having theretofore been only Mr. Alderman Hammet.

On May 10th., 1790, Sir Benjamin moved to have the sentence of Burning changed; he said that it had been his official duty to attend such executions; the practice was a relic of the savage Norman times; that while the Sheriff who followed the usual practice of strangling the convicted woman was liable to a prosecution, he thanked God that there was not an Englishman to be found, whose humanity did not triumph, and who would not rather risk prosecution than execute the shocking sentence. He had consulted the first law authorities in the Realm, and they unanimously agreed in the advisability of the change. Will it be believed that there was not a single member of the House to raise a voice in favor of the time-honored privilege of the sex? Yet so it was; the Bill passed without opposition and the Statute of (1790) 30 Geo. III, cap. 48, became law.

By that Act, the common and ordinary punishment of being drawn to the place of execution and being there hanged by the neck until she should be dead was substituted for the existing sentence of a woman found Guilty of High or Petit Treason—and the Commentators have the audacity to call the Act, “a humane Statute”, and make that statement in an edition of Blackstone in a note to his explanation of the former privilege.

The humanity of Sir Benjamin and those who thought with him did not extend to the male traitor; he still was drawn, hanged, cut down alive, eviscerated and quartered—at least in theory—till 1814. One man was so treated in old Quebec in 1797—but he was a half-insane American and perhaps should not count—and eight in Upper Canada after the Ancaster Bloody Assize of 1814. Sauce for the Goose was not yet Sauce for the Gander. Some enthusiasts persuaded Parliament in 1814 to abolish the evisceration which was effected by the Act (1814) 54 George III, cap. 148; but, in England, men had to wait till the times of Queen Victoria to attain the privileges of women and be simply hanged for High Treason—(1870) 33, 34 Vict., cap. 43. Thereafter, the sexes were equal.

On this Continent, so far as I can find, men never had the privilege of being burned at the stake by regular sentence of law, except

Negroes in the Colony of New York after their attempted Revolution in 1712; no distinction of sex was made in that legislation. Before this time there was at least one woman burned for the murder of her spouse, i. e., for Petit Treason, as in England; but no such punishment was inflicted upon men.

If Englishmen could not see the illogicality—not to say, the gross partiality—involved in allowing the woman killer of her spouse the right of dying in the flames, while the man killer of his spouse had only the right of the gallows, some of them when they came to this free Continent saw a better light; recognizing the injustice, they rectified it as far as they could.

Captain John Smith, he of Pocahontas fame, with 104 companions, set sail in 1606 for Virginia, and for a time, at least, he was the sole ruler of the nascent Colony at Jamestown; but he was sent away and evil times came upon the pioneers; famine enveloped the land and cannibalism was not unknown. One man—I do not find his name mentioned—was found to have murdered his wife. Sir Thomas Gates had been appointed Lieutenant-Governor in 1609, and came out with some 500 colonists, found a shocking state of affairs, due in part to the idleness of the colonists. Of the wife slayer, he thus tells:

“There was one of the company who mortally hated his wife, and therefore secretly killed her, then cut her in pieces, and hid her in diuers parts of his house; when the woman was missing, the man was suspected, his house was searched, and parts of her mangled body were discovered, to excuse himself he said that his wife died, that he hid her to satisfy his hunger, and that he fed daily vpon her. Vpon this, his house was againe searched, where they found a good quantitie of meale, oatemeale, beanes and pease. Hee therevpon was arraigned, confessed the murder and was burned for his horrible villany”. If all stories are true the confession was not quite voluntary; George Percy who had attained power, on the exclusion of Smith in 1609, tells us that he tortured the man till he confessed.

There was not as yet a code of laws for the Colony, the first one being issued by Gates, on his arrival, which, of course, was after the execution; the only law, which could be considered to govern them was the Common Law of England which every Englishman was supposed to carry with him and to be entitled to the benefit of in any English territory. There was no authority in that law either to procure a confession by torture or to punish a man (except for Heresy) by burning at the stake; but, apparently, it was thought that spouse-killing should be thus punished in man as in woman—Sauce for the Goose was in that one instance Sauce for the Gander.