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CRIMINALS AND EXECUTIONS.

We have heard persons express unlimited disgust at the Guiteau affair, as though never before had a criminal been so treated, or been made such a spectacle. It will serve to disabuse their minds to turn to England, at a time no more remote than the last century. In the *Fortnightly Review*, we find under the title of "Newgate: a Retrospect," the following:—

"There was every element of callous brutality in the manner of inflicting the extreme penalty of the law. From the time of sentence to the last dread moment the convict *was exhibited as a show*, or held up to public contempt and execration. *Heartless creatures flocked to the gaol chapel to curiously examine the aspect of condemned malefactors* on the Sunday the gaol sermon was preached. * * * The actual ceremony was to the last degree cold-blooded and wanting in all the solemn attributes befitting the awful scene. The doomed was carried in an open cart to Tyburn, or other appointed place; the halter already encircled his neck, his coffin was at his feet, by his side the chaplain or some devoted amateur philanthropist and preacher like Silas Todd, striving earnestly to improve the occasion. *For the mob it was a high day and holiday*; they lined the route taken by the ghastly procession, encouraging or flouting the convict according as he happened to be a popular hero or unknown to criminal fame. In the first case they cheered him to the echo, *offered him bouquets of flowers*, or pressed him to drink deep from St. Giles's Bowl; in the latter they pelted him with filth, and overwhelmed him with abuse. The most scandalous scenes occurred on the gallows. * * * The convicts were permitted to make dying speeches, and these orations were elaborated and discussed in Newgate weeks before the great day; while down in the yelling crowd beneath the gallows spurious versions were hawked about and rapidly sold. It was a distinct gain to the decency and good order of the metropolis when Tyburn and other distant points ceased to be the places of execution, and hangings were exclusively carried out in front of Newgate, just over the debtor's door. But some of the worst features of the old system survived. There was still the *melodramatic sermon*, in the chapel hung with black, before a large congregation *collected simply to stare at the convicts* squeezed into one pew, who in their turn stared with mixed feelings at the coffin on the table just before their eyes. There was still the same tumultuous gathering to view the last act in the tragedy, the same bloodthirsty mob swaying to and fro before the gates, the same blue-blooded spectators, George Selwyn or my Lord Tom Noddy, who breakfasted in state with the gaoler, and so got a box seat or rented a window opposite at an exorbitant rate. The populace were like degenerate Romans in the amphitheatre waiting for the butchery to begin. They fought and struggled desperately for front places: people fell and were trampled to death, hoarse roars came from thousands of brazen throats, which swelled into a terrible chorus as the black figures of the performers on the gallows stood out against the sky. 'Hats off!' 'Down in front!' these cries echoed and re-echoed in increasing volume, and all at once abruptly came to an end—the bolt was drawn, the drop had fallen, and the miserable wretch had gone to his long home."

The lines which we have italicised in the extracts above show that all the revolting incidents of the Guiteau affair were paralleled in England only a century ago, and it would be unfair and unsafe to base any appreciation of national character upon the acts of the wretched persons craving for a sensation, who come to the front on these occasions.

CHANGE OF NAME.

In the case of *Linton* v. *First National Bank of Kittanning*, before the U. S. Circuit Court, W.D., Pennsylvania, March 11, 1882, it was decided that at common law a person may lawfully change his name, and he is bound by any contract into which he may enter in his adopted or reputed name, and he may sue and be sued by his known and recognized name. In a suit by husband and wife, in the wife's behalf, a plea which alleges that the name in which they sue is not the husband's real name, but which does not deny that it is his known and recognized name, is bad. Among the cases referred to were *Doe* v. *Yates*, 5 Barn. & Ald. 544; *King* v. *Inhabitants of Billingshurst*, 3 M. & S. 250.

DESPATCH OF BUSINESS.

The *Canadian Law Times*, referring to the Ontario Court of Appeal, and the fact that the court had not got through with the old cases before the approach of a new term, says the court occupied very much the position of a man whose next meal is about to be served before he has had time to digest the previous one. We concur in our contemporary's opinion that it is better the court should be relieved of the old *délibérés* before it undertakes to hear a long list of new cases. "Where there are arrears of business," remarks our contemporary, "the cases standing for argument must be delayed. The only question is, shall they stand on the docket unargued until the court has overtaken the arrears, and then be taken up and decided while the arguments are fresh in the minds of the judges? Or, shall they be argued, and then be allowed to lie untouched while the judges work off the arrears, and be disposed of after the lapse of a term, two, three terms, or perhaps a year from the day of argument? There is no question as to the expediency of the course to be adopted. There is no suitor who would not rather have his cause decided shortly after the argument, than after it had lain a long while waiting for its turn to be considered. There is no counsel who would not feel that his arguments had been better appreciated if judgment were delivered in the term following that in which his argument was heard, than if it had been delivered a year afterwards."

NOTES OF CASES.

COURT OF REVIEW.

MONTREAL, July 7, 1882.

TORRANCE, JETTE, GILL, JJ.

[From S. C., Montreal.

LARIN v. KERR.

Sale—Time of delivery—Demeure.

The demand was in damages, for breach of contract. On the 26th October, 1880, the defendant bound himself to deliver to the plaintiff fifty tons of hay in his yard as required, up to the 1st May, 1881, at $13 per ton. The defendant received a protest from plaintiff on the 23rd May, demanding the hay still undelivered.

The defendant met the demand with two objections: First, the demand was too late, as the delivery was up to the 1st May, and no longer, and the price of hay on the 1st May was no higher, and there was no damage.

TORRANCE, J. I see no *demeure* in time, unless on the 29th April, 1881, when the defendant offered 32 bales, which were refused as not according to contract. But I see no proof as to what this quantity means in tons. No damage is proved, and the judgment is confirmed.

Longpré & David for plaintiff.

Kerr, Carter, & McGibbon for defendant.

COURT OF REVIEW.

MONTREAL, June 30, 1882.

JOHNSON, TORRANCE, GILL, JJ.

[From S. C., Montreal.

LA SOCIÉTÉ DE CONSTRUCTION JACQUES CARTIER v. LAMARRE, and ROSS et al., opposants.

Registration.

The inscription was from a judgment of the Superior Court, Montreal, Mathieu, J., rendered March 27, 1882.

JOHNSON, J. The opposants were collocated in the report of distribution for a balance of price of sale as transferees. The plaintiff contested their right because their deed, registered by memorial, was defectively registered. The contestants, however, on the 19th August, 1874, before taking their hypothec on the property, themselves, caused the registration to be renewed. They must be held therefore to have taken their hypothec with full knowledge of what they themselves had done; and in their mouths, at all events, whatever questions others might raise, the objection is not to be received. The point, in any case, would only be a technical one. The form used is the form given in the Code of Procedure (appendix No. 26), and under Art. 2172 C.C. it was in time. The judgment which dismissed the contestation is confirmed with costs. The object of all registration is notice. A registration by one is as good as by another.

GILL, J., differed from the majority, being of opinion that the registration effected in this case was irregular and without effect.

Judgment confirmed.

Macmaster, Hutchinson & Knapp for opposants.

Longpré & Co. for plaintiff contesting.

COURT OF REVIEW.

MONTREAL, June 30, 1882.

JOHNSON, TORRANCE, GILL, JJ.

[From S. C., Montreal.

TRUST & LOAN CO. OF CANADA v. FRASER, and FRASER es qual., opposant.

Substitution—Sale of the substituted movables for debt of the grevé.

The inscription was on a judgment of the Superior Court, Montreal, Rainville, J., rendered March 11th, 1882.

JOHNSON, J. The plaintiff proceeded to execute a judgment whichhe had obtained against the defendant personally, and the defendant in his quality of curator to the *appelés* in a substitution met him with an opposition *à fin d'annuler*, on the ground that the property was substituted, and that he, as curator to the children, had a right to prevent the sale. The judgment granted in a modified way the curator's pretension, that is to say, it ordered the things to be sold, though it maintained the right of the curator to the price, under Art. 931, C. C. This judgment is certainly a very equitable one, at all events the curator can hardly complain of it. Under the article cited, it is his duty to sell the property, and apply the proceeds to the profit of the substitution. If he exercised this right, the creditor would still have the right to execute and sell his *jouissance*. In the present case the defendant, who was the *grevé*, made a *remise* of the property to the *appelés*, after the seizure, which ought not to deprive the creditor of the right he would have had to sell the *grevé's* interest in the property. The curator, opposant, therefore, does not get all he asks; but he gets all he is entitled to, and there is no violation of his right, while the right of the creditor to get the interest of the money when it is invested is preserved. It was said that the judgment gave what neither party asked. That is not exact. It gives the curator what he asks as far as he is entitled to get it; but not all that he asks. The case of *Wilson* v. *Leblanc*, 13 Jur. 201, does not touch this case. There it was first held that a seizure of substituted property for the debt of the *grevé* was null. That was reversed in review, apparently because it did not appear that the property seized was the one substituted. In the present case the *grevé* is certainly a proprietor—he is always proprietor, but subject to the substitution. His property in the thing seized can be made answerable for his debt, and that is the extent of the judgment.

Judgment confirmed.

Judah & Branchaud for plaintiff.

Loranger & Co. for opposant.

A SKETCH OF THE CRIMINAL LAW.

[Continued from p. 212.]

Such are the English Courts of criminal justice. I will now say something of the procedure observed in them. The first step in criminal procedure is to secure the appearance of the person accused; the next, to examine and prepare the evidence against him. It would be of little interest to enter into detail upon the manner in which these operations are performed, and it would take more time and space than I can at present afford to relate their history, which is curious. I may, however, make one remark.

Preliminary proceedings before a justice of the peace are practically all but universal in English prosecutions, but theoretically they are not necessary. According to the theory of an English trial, the prisoner is accused not by the magistrate who commits him, but by the grand jury, and a prosecutor may still, if he chooses, prefer an accusation before a grand jury without giving notice to the accused person, and so as to prevent him from having any knowledge of the nature of the case against him till he is brought into court to take his trial. This course is so oppressive and so objectionable on public grounds that it is seldom taken, but it is still legally possible. The fact that it exists can be understood only by reference to the history of the English modes of accusation and trial, which is shortly as follows:—

At present there is in England only one mode of trying criminal cases of any importance, namely, that by jury. There are some few cases in which justices of the peace sitting without a jury may sentence offenders to as much as six months' imprisonment and hard labor, and there are one or two cases in which they may imprison offenders for a year; but these are exceptional.

Trial by jury is the survivor of several modes of trial which were in use at, and for a consi-

derable time after, the Norman Conquest. Its history, though still obscure in detail, is now, as far as its main points go, well ascertained, and it is as follows: the early modes of trial depended on the early modes of accusation, which were two, namely, accusation by a private person, and accusation by public report.

Accusations by private persons were, I am inclined to think, the commonest mode of prosecution in early times. Such accusations were called "appeals," a word which in this connection means simply accusation, and not recourse from an inferior to a superior tribunal.

The nature of an appeal was as follows. The injured person was bound to use every effort to have the criminal arrested by raising the country, which was bound to pursue him "with hue and cry". If he could not be taken otherwise, his name was proclaimed, and he was called upon to appear at five successive county courts, and if he did not appear he was outlawed; the effect of which was in very early times that he might be put to death in a summary way, and afterwards that he was taken to be convicted. In the meantime, the complainant had to register his complaint before the coroner, who was in ancient times something like a modern justice of the peace. If the person accused appeared, various proceedings took place, which ended at last, if the parties could not otherwise settle the matter, in trial by combat, which, however, was not permitted if the guilt of the accused person was considered to be so clearly proved as to be undeniable. Appeals had a long and curious history which I cannot now relate. They applied at first to many offences, but were at last restricted to cases of homicide, in which the heir of the murdered person had a right, even after the person accused had been acquitted by a jury, to "appeal," or accuse him. This strange procedure, though used but seldom, nevertheless continued to exist till the year 1819, when, upon an appeal of murder, the Court of King's Bench actually awarded trial by combat, which was not carried out only because the accuser was no match physically for the accused, and refused to go on with his appeal as soon as the court held that the accused had a right, as it was called, "to wage his body". This case was the occasion of an Act of Parliament, by which appeals were abolished.

As time went on, accusation by public report superseded appeals. This system of accusation was carried out by a body of persons who acted as public accusers, and who were the predecessors of the modern grand jury. The system worked thus: England was divided into counties, hundreds, and townships, each township being represented on all public occasions by the reeve, the predecessor of the parish constable, and four men. When the king sent his justices into any county on one of the eyres or circuits already mentioned, they were met by the sheriff, the coroner, the high bailiffs of the hundreds, and the reeves and four men from the townships. The principal persons of the county having been in some unascertained way chosen from this numerous body, they made a report to the justices of the persons within the county whom they suspected of any offence; these persons were arrested forthwith if they were not already in custody, and were at once sent to the ordeal (*urtheil*) whether of fire or of water. The ordeal of fire consisted in handling red-hot iron of a certain weight, or walking over red-hot ploughshares placed at different intervals. The ordeal of water, which, strange to say, seems to have been more dreaded, consisted in being thrown into the water, when sinking was the sign of innocence, and swimming the sign of guilt. How any one without fraud escaped the one ordeal or was condemned by the other is difficult to understand. I have sometimes thought that the water ordeal may have been like the Japanese happy despatch. If the accused sank, he died honorably by drowning. If he swam, he was either put to death or blinded and mutilated; but this is a mere guess. Many records still remain which end with the ominous words, *eat ad juisam aquæ*, or *purget se per ignem*. If the accused person escaped from the ordeal he was nevertheless banished. It was obviously considered that though it might have pleased God to work a miracle to save him from punishment the bad report made of him by the local authorities was quite enough to show that he was a dangerous character who must leave the country.

Early in the thirteenth century ordeals fell into disuse, probably in consequence of their condemnation by the Lateran Council held in 1215. The result of this was that the report of

the grand jury became equivalent to a conviction, or would have been so if means had not been found to avoid a result which even in that age was seen to be monstrous. The method adopted was apparently the introduction into criminal trials of a practice which had already been introduced in civil actions under the name of the Grand Assize.* This was the summoning of twelve persons from the place where the dispute arose, who were to swear to their knowledge of the matter. The persons so summoned were called an assize, and afterwards a jury, and elaborate precautions were taken for securing the attendance of persons acquainted with the subject. When twelve persons were found willing to swear one way or the other, their oath was decisive. Even before ordeals were abolished a person accused by a grand jury was allowed as a special favour to purchase of the king the right of having a body of this kind (which in such cases were called an "inquest") to "pass upon him." When ordeals were abolished, juri, or inquests, instead of being an exceptional favor purchased in particular cases, came into general use. The first jurymen were thus official witnesses, and not, as their successors are and have been for centuries, judges as to the truth of the evidence given by witnesses.

There is no more obscure question in the whole history of English law than the question how and when jurymen ceased to be witnesses and became judges. They were undoubtedly witnesses in the thirteenth century, and undoubtedly judges of the testimony given by others in the middle of the sixteenth century, and it seems probable that in the latter half of the fifteenth century they were judges in civil cases, but not to the same extent in criminal cases. Many curious traces of their original character remained long after the change had taken place. Thus, for instance, as I have already observed, perjury by a witness was no crime in England till the seventeenth century; but perjury by a juryman, that is, a wilfully false verdict given by a juryman, was theoretically punishable in some cases by a process called an attaint, which in practice was never put in force. The reason why the witness was not punishable was that according to the theory described his appearance at the trial was accidental. The juror was the only witness whom the law recognised as such. The reason why the juror was not actually punished, though he was in theory liable to punishment, was that as time went on every one knew that whatever the theory of the law might be, he was in fact dependent on witnesses, and was not himself a witness, so that if his verdict was wrong it was impossible to say that it was not mistaken.

However this may have been, trial by jury in the modern sense of the word was fully established in England in the sixteenth century. From that time to this we have full reports of nearly all the most remarkable trials which have taken place in England, and it is possible to trace the gradual growth of the present system by comparing together the trials which took place at different times.

The result of such a comparison is to show that criminal trials in England have gone through several distinct phases. Down to the civil wars of the seventeenth century, the prisoner was interrogated as closely as a prisoner is in France at the present day; and though torture was never legalized in England, it was to a considerable extent in use under Queen Elizabeth, being employed principally in the case of persons accused of conspiring against her life.

The preliminary procedure was secret to a much later date. Indeed, though in practice it became public in the course of the eighteenth century, it was not till the year 1848 that a right was conferred by act of Parliament on the accused to be present at the preliminary examination of the witnesses. A right to have copies of the depositions made by them was given in 1836.

In the second half of the seventeenth century, and especially towards the close of it, the procedure was not unlike that of our own day; but the furious passions of the times, and the corruption and partisanship of some of the judges, exhibited all its weak points in a terribly strong light. Some of its defects, and in particular the temptation to the judges to be corrupt, were removed at, or soon after, the Revolution, and in the course of the eighteenth century, the general management of a criminal trial was closely assimilated to the course of a

* The word "assize" is used in a variety of senses in old English law. It means (1) a law, (2) a jury, (3) the sitting of a Court.

civil action. The present method of procedure may be considered as having been fully established with not more than one important exception by the beginning of the reign of George the Third (1760). It is so well known that it is unnecessary in this place to give any account of it.

I must content myself with a very cursory glance at some other curious features in English criminal procedure. The whole subject of legal punishments as inflicted in England is full of curiosity. All common offences—murder and manslaughter, rape, robbery, arson, coining, and theft to the value of a shilling or upwards—were by the law of England punished by death from the early part of the thirteenth century to the year 1827. This, however, was qualified by a singular institution called benefit of clergy, by which first the clergy, then every man who could read, unless he was *bigamus*,—*i.e.*, unless he had been twice married, or unless he had married a widow (but no women except, till the Reformation, a nun); then all people, men whether *bigami* or not, or women who could read; then all people, whether they could read or not, were excepted for their first offence in nearly all cases, not only from the punishment of death, but from almost all punishment for nearly every offence, for, at common law, only high treason, and perhaps arson and highway robbery, were excepted from the benefit of clergy. Side by side with the process by which benefit of clergy was extended to all persons, a parallel process went on by which large numbers of crimes were excluded from it, by being made, as the phrase was, "felonies without benefit of clergy". For instance, every one, as time went on, became entitled to benefit of clergy in cases of theft, but it was provided by successive acts of Parliament that the theft of horses, sheep, and other cattle, stealing to the value of five shillings in a shop, and stealing from the person to the value of one shilling or upwards, should be "felony without benefit of clergy". This made the law terribly severe in appearance; but in practice it was seldom carried out, the judges being authorized to commute the sentences which they were obliged to pass—a power which they exercised very freely.

Between the years 1827 and 1861, capital punishment was abolished in all but four cases—treason, murder, piracy with certain aggravations, and burning dockyards or arsenals. The discretion entrusted to the judges as to the amount of secondary punishment to be awarded was also carried so far that minimum punishments were abolished in every case but one, so that there are many crimes for which an English judge can sentence a man, either to penal servitude for life, or to a single day's imprisonment without hard labor, or to any intermediate punishment. English criminal law has thus, in the course of a little more than fifty years, passed from being by far the most severe system in the world, to being the most lenient, as far as the amount of punishment is concerned.

The great leading peculiarity which distinguishes English criminal procedure from the criminal procedure of every other country, is to be found in the extent to which the control of criminal proceedings is left in private hands. Every one has a right to prosecute anyone for any crime of which he is suspected, and, what is even more remarkable, everyone has almost identically the same facilities for doing so. The police can hardly do anything which any private person cannot do, and the law officers of the crown, the Attorney and Solicitor-General, have hardly any power in conducting the prosecution of a State criminal, which the youngest barrister has not in prosecuting a fraud which concerns no one but the person defrauded. The Attorney-General can stop prosecutions; but he hardly ever does so, and he can personally accuse any person of having committed a misdemeanor without resorting to a grand jury; but this is not a matter of much practical importance, especially in the present day.

It is hardly an exaggeration to say that criminal prosecutions in England form a branch of litigation over which private persons have nearly as much authority as the parties in civil proceedings have over such proceedings. This was not the result of any intention on the part of any one whatever. It was caused by the working of the institutions already described. The grand jury at first were no doubt public accusers, and in early times the coroners and justices of the peace acted to some extent as public prosecutors; but as time went on the grand jury reported only such matters as were represented to them voluntarily by private persons, and the coroners and justices of the peace came to occupy the position of preliminary judges, who could be set in motion only by private complainants, and thus the whole system came to assume its present character.

I now pass to that part of the criminal law which consists of the definitions of crimes and the apportionment to them of punishments, and which would form the matter of a penal code, as the branch of law which I have already des-

cribed would form the matter of a code of criminal procedure.

The first subject to be mentioned under this head is that of the conditions of criminal responsibility, or, as it may otherwise be called, matter of excuse. It consists of the exceptions to the general rule that every one is responsible for every crime which he may commit. The exceptions recognised by English law are age, to some extent insanity, to some extent compulsion, to some extent necessity, to some extent ignorance of fact as distinguished from ignorance of law. The effect of such a maxim as "Non est reus nisi mens sit rea" is given by including terms relating to the state of the offender's mind in the definitions of a large number, if not of most crimes. This is done by the use of such words as "wilfully," "knowingly," "fraudulently," "negligently," and, above all, "maliciously," which has much in common with the *dolus malus* of the Roman law.

There is a good deal of indistinctness in this branch of the English criminal law, the word "malice" in particular being made to bear a great variety of meanings. Thus, for instance, murder is defined as "unlawful killing with malice aforethought," and manslaughter as "unlawful killing without malice aforethought." "Malice aforethought" is here interpreted to mean any one of several states of mind, such as an intention to kill, an intention to do grievous bodily harm, an intention to resist a lawful apprehension, recklessness as to killing, etc. In order that the publication of a libel may be criminal it must be "malicious." This means that it must be done without certain specified circumstances which justify or excuse it. So, again, mischief to property is, as a rule, criminal if it is "wilful and malicious." These words seem to mean little more than "intentional and unlawful, and done without a claim of right." In popular language malice means ill-will to another, which it is discreditable to feel. Thus envy would be described as a form of malice, but no one would apply that term to honest indignation excited by a wicked action. In law the word is generally used in senses so unnatural that it would be well if it were altogether disused. It does not occur in the Criminal Code Bill of 1878, or in that of 1879.

The law as to insanity is somewhat vague, but this, I think, arises rather from the defective state of our knowledge as to the disease than from any other cause. The law as to compulsion is also in an unsatisfactory state, but the subject is one of singularly little practical importance.

Next come the definitions of crimes. The crimes known to the law of England, and, I suppose, to the laws of other countries, may be reduced to a very few leading classes, namely:—

(1.) Offences against public tranquillity.

(2.) The obstruction or corruption of public authority.

(3.) Offending against public morals.

(4.) Offences against the persons of individuals and rights annexed to their persons.

(5.) Offences against the property of individuals and rights connected with property.

The history of these branches of English law is shortly as follows. With regard to most of them, a few general names have been in common use from the most remote antiquity. These were applied to common cases of crime long before any precise definitions had been found to be needful, and the offences so named are called "offences at common law". Such words as treason, homicide, murder, rape, robbery, theft, are instances. The words were defined by different writers on legal subjects, and, as occasion required, by the decisions of courts of justice, which in England, from a very early time, were in many instances carefully recorded. Some of our reports go back as far as the thirteenth century. In some instances, also, the legislature defined expressions which were considered dangerously vague and wide. This, however, was done very seldom indeed; almost the only instance I can remember of an attempt by Parliament to define common law offences, is the famous Statute of Treason passed in 1352, and still in force. New offences, however, were from time to time, created by act of Parliament, and special forms of common law offences were subjected to special punishments. For instance, though Parliament has never defined theft, it has made special provisions for the punishment of different kinds of theft, such as theft of wills, of letters in the post office, of articles of the value of £5 in a dwelling-house, of thefts by clerks and servants of the property of their masters, and the like.

This part of the criminal law of England is thus composed of two elements, namely, common law definitions and various rules connected with them, and Parliamentary enactments which assume, though they do not state, the common law definitions and rules. Moreover, both the common law and the statute law have been illustrated and explained by a great number of judicial decisions which, as far as they go, are as binding as if they were laws. To understand these decisions properly, and to apply their principles to new combinations of facts, are amongst the most important of the duties which lawyers have to discharge. The decisions are exceedingly numerous, though I think they are less numerous on this branch of our law than on others. The statutes relating to crime are of all ages, and each particular statute has its own special history. Nearly all of them have been enacted at least three times over. The general history of this part of the subject is, in a few words, as follows. The first writer on the criminal law, whose works are in any sense of authority at the present day, was Bracton—a judge who lived in the latter part of the thirteenth century, in the reign of Henry

the Third. His book, "*De Legibus Angliæ*," is by far the most comprehensive work on the subject written for several centuries, and the third book of it, entitled "*De Coronâ*," is the source of much of our existing criminal law. His definitions of crimes are in several instances taken, though with not unimportant modifications, from the "Digest". For instance, he thus defines theft, "Furtum est secundum leges fraudulosa contrectatio rei alienæ invito illo domino cujus res illa fuerit." This omits the words which extend the Roman law definition of theft to temporary appropriations. Bracton's book served as the foundation for other works of less note, as, for instance, Fleta, and, to a less extent, Brittan; but no writer of anything like equal note dealt with the subject between his time and the early part of the seventeenth century, three hundred and fifty years after. About that time Coke wrote his "Institutes of the Law of England," the third of which is devoted to the subject of criminal law. Coke had great technical learning and a character of great force and audacity; but he had no power of arranging or generalizing his knowledge, and not only was his style pedantic, but his mind never rose above a very trivial kind of acuteness. His book, however, shows fairly, though in a most disorderly manner and with many inaccuracies, what the law was in his day.

Coke was followed at the distance of about half a century by Sir Matthew Hale, a much more considerable personage, though he was far less conspicuous in the political history of his time. His "History of the Pleas of the Crown" is far superior to the third Institute, and is, I think, entitled to the first place amongst books on English criminal law. It is full of learning, especially historical learning, and in several parts shows power of a higher kind.

Both Coke and Hale show conclusively what a crude, imperfect, meagre system the criminal law of their time was, and how little it had been improved by legislation. What can be said of a system under which it was a capital crime to steal a shilling, and a mere misdemeanor, punishable with fine and imprisonment, to run a man through the body with a sword with intent to murder him?

Neither Coke nor Hale notices the fact that the common law dealt only with a small number of the grossest and commonest offences, such as homicide, theft, and rape; nor the further fact that a large addition to the law was made by the decisions of the Court of Star Chamber, which treated as criminal a number of actions (such as attempts to commit crimes, perjury, some kinds of forgery), for the punishment of which the common law, properly so called, made no provision. After the abolition of the Court of Star Chamber the offences which it had been in the habit of punishing were treated as being offences at common law, though most of them were unknown to the system properly so called.

Any defects which the criminal law in Hale's time may have had on the side of undue lenity were effectually removed by the legislation of the eighteenth century, under which innumerable offences were made felony without benefit of clergy. The excessive severity of this legislation and the capricious character which it gave to the execution of the law excited great attention. At the same time the efforts of many reformers, of whom Bentham was the best known as a writer and thinker, and Romilly as a politician, directed much attention to the form of the law itself. The result was that between the years 1827 and 1830 a great mass of the then existing statute law was repealed, and the substance of it was re-enacted in a less fragmentary shape, the punishments for the different offences being in most cases considerably mitigated. The commoner offences were by this means dealt with by four or five statutes, which consolidated in whole or in part probably many scores or hundreds of earlier acts.

This was a considerable improvement, but it was merely a first step towards a complete criminal code. Efforts were made to have such a measure prepared, and a commission was opened which made many reports upon the subject of the criminal law between 1833 and 1861. After great delay five acts of Parliament were passed in the year 1861, relating respectively to theft and offences in the nature of theft, malicious mischief to property, forgery, offences relating to the coin, and offences relating to the persons of individuals. These five acts constitute the nearest approach to a penal code now in existence in England. They are very useful as far as they go, but they are extremely imperfect; first, because they assume and are founded upon the unwritten common law definitions and rules relating to crimes; and, secondly, because they deal only with offences against the persons and property of individuals, and leave unnoticed the subject of criminal responsibility and the definitions of offences against public order, offences consisting in the corruption of public officers, and offences against public morals and convenience. In other words, they leave unnoticed nearly half the matters which ought to be disposed of by a criminal code, and they do not deal at all with the subject of procedure, the law as to which is principally unwritten. There have thus been three sets of criminal statutes; namely, first, the unconnected scattered enactments passed before the reign of George the Fourth in order to fill up the gaps in the old common law; secondly, the acts passed between 1827 and 1833, which re-enacted the first set in a shorter form; and, thirdly, the acts passed in 1861, which repealed and re-enacted, with some additions and improvements, the acts of George the Fourth, and extended them to Ireland. Some others have been passed which I need not notice here.

(To be continued.)