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THE FIRST BRITISH COURTS IN CANADA

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Quebec, the capital of Nouvelle France, was surrendered by de Vaudreuil to Amherst shortly after September 18, 1759, the day of the famous Battle of the Plains of Abraham which was fatal to both Commanders.[1] At once the city and its dependencies came under martial law and were so to remain until other disposition by the conqueror.

Brigadier-General James Murray, Commander-in-Chief of His Britannic Majesty's Troops in the River St. Lawrence, "Governor of Quebec and of the Conquered Territory," did not delay in providing for the administration of justice. In the exercise of the absolute power given to him by martial law, he, on November 15, 1759, issued a public ordinance, in which amongst other things appears the following:[2]

"(4). Colonel Young, who dwells near Government House, is appointed Judge of the cases and disputes which may arise among the inhabitants, and will sit for this purpose at his house on Tuesday and Friday mornings from nine o'clock until noon."

Early in the following year, January 16, (or January 6) 1760, Murray extended this judicial system by appointing three civil and

[1] For the terms of this Capitulation, see Shortt and Doughty, *Documents Relating to the Constitution of Canada* (2d ed. 1918) 1-25. This invaluable collection should be consulted by everyone interested in early Canada.

[2] "4. Monsieur Le Colonel Young demeurant prés du Gouvernement est Etably Juge des Procés et differens qui pourront Survenir Entre les Habitans, et donnera pour cet Effet audience Ches lui tous les Mardis et Vendredis matin, depuis les neuf heures jusques a midi." *Report of the Public Archives for the Year 1918* (1920) 1 ff. "Habitans" was (and is) the word applied to the common people, the tenantry, of the Province as distinguished (originally) from "la Noblesse."

While no records of proceedings before Colonel Young have been found and it is probable none are extant, several references to judgments delivered by him are to be found in the records of the Military Council established in Quebec after the Capitulation of Montreal.

criminal judges from whose decisions lay an appeal to Colonel Young at Quebec: André Allier, for the Parish of Berthier-en-bas and as far down as Kamouraska inclusive; Antoine-Joseph Saillant, from Berthier-en-bas up to Lauzon; and Jacques François Gugnet at Lorette. Colonel Young was to exercise original jurisdiction also in Quebec itself.[3]

Sir Jeffrey Amherst proceeded with his military operations and on September 8, 1760, Vaudreuil capitulated, surrendering Montreal to Amherst, including the post at Acadia, Detroit, Michillimackinac and elsewhere. Thereby all Canada came under British rule. By Article XLII of the Capitulation it was agreed:[4] "the French and Canadians shall continue to be governed according to the custom of Paris and the laws and usages established for this country." Amherst issued a proclamation, "Placart," at Montreal, September 22, 1760. To carry out the provisions of this Article, he said,[5]

[3] Shortt and Doughty, *op. cit.* 37. ". . . . sauf l'appel en la ville de Quebec devant le Colonel Young, juge civil et criminel en dernier ressort da la dite ville et pais conquis." Berthier-en-bas is in Montmagny County about 32 miles below Quebec on the South shore of the St. Lawrence, and Kamouraska is about 100 miles below Quebec on the same shore. Lauzon is in Levis County about 2 miles east of Levis, opposite Quebec; Lorette is in Quebec County 8 miles northwest of Quebec. The functions of Colonel Young were closely analogous to those of the *Intendant* in French times.

[4] "Les francois et Canadiens Continueront d'Estre Gouvernés Suivant La Coutume de Paris et les Loix et Usages Etablis pour ce pays. . . ." Shortt and Doughty, *op. cit.* 20, 34. The *"Coutume de Paris"* was the system of laws in Paris and had long been in vogue in Nouvelle France with some slight local modifications, "etablis pour ce pays."

[5] "Que pour terminer autant qu'il sera possible tous differens qui pourroient survenir entre les habitants à l'amiable les dits Gouverneurs sont enjoints D'autoriser l'officier de milice Commandant dans chaque paroisse ou District, d'ecouter toutes plaintes, et si elles sont de nature qu'il puisse les terminer, qu'il ait à le faire avec toute La droiture et Justice qu'il convient; s'il n'en peut prononcer pour lors il doit renvoyer les parties devant l'officier des troupes Commandant dans son district, qui sera pareillement autorisé de décider entre eux, si le cas n'est pas assés grave pour exiger qu'il soit remis devant le gouverneur même, qui, dans ce Cas, comme en tout autre, fera rendre Justice où elle est due." Shortt and Doughty, *op. cit.* 38 ff. "Equity" had nothing to do with the "Equity" of Chancery Jurisprudence—it meant simply "right," "justice." *Ibid.; Rep. Pub. Arch. 1918,* 86. The division in French times of Nouvelle France was into the three Districts of Quebec, Montreal and Three Rivers. This division was continued by the conqueror. Sir Jeffrey Amherst, Commander-in-Chief, appointed Brigadier-General Thomas Gage, Governor of Montreal and its dependencies, Colonel Ralph Burton, Governor of Three Rivers and its dependencies, while Murray remained Governor of Quebec. When Gage was sent to New York, Burton succeeded him, October, 1763. The *Dict. Nat. Biog.* (2d ed. 1906) Index, 473, makes Gage "Governor of Montreal 1759-60"; this is an error. Montreal was in French hands until the Capitulation, September 8, 1760; and Gage continued Governor from his appointment by Amherst, 1760, until he was sent to New York in October, 1763, his last Ordinance being dated at Montreal, October 6, 1763, and Burton's announcement that he had taken over the Montreal government from Gage is dated October 29, 1763. *Rep. Pub. Arch. 1918,* 77.

"In order to settle amicably as far as possible, all differences which may arise amongst the inhabitants, the said governors [of Montreal and Three Rivers] are charged to authorize the officer of militia commanding in each parish or district, to hear all complaints, and if they are of such a nature that he can settle them, he shall do so with all due justice and equity; if he cannot decide at once, he must send the parties before the officer commanding the troops in his district, who shall in like manner be authorized to decide them, if the case is not sufficiently serious to require its being brought before the Governor himself, who in this, as in every other case, shall administer justice where it is due."

"The officer of militia" was French and could be trusted to apply the *Coutume de Paris* to which the Capitulation entitled the "habitans." The records of certain of the Courts under this system are still preserved, and it is the object of this article to make some of their proceedings known. I select the Courts in the District of Montreal, as I have recently had occasion to peruse their records.

Brigadier-General Thomas Gage, whom Amherst had appointed Governor of Montreal and its dependencies, issued a Proclamation on October 26, 1760, drawing attention to Amherst's Proclamation of September 22, and stating that an appeal could be taken from the officers of militia in each parish to the officer commanding the King's troops in the district or cantonment in which the parties resided, and if dissatisfied with this second decision, the parties had a right of appeal to him. He directed that all appeals should be in writing and said that days would be appointed when the parties interested with their witnesses would be heard.

Notice was given that the officers of militia would meet every Tuesday to hear all disputes between private individuals in Montreal.[6] This practice did not prove wholly satisfactory and, October 13, 1761, Gage issued another Proclamation to render the administration of justice in the country districts "more prompt and easy and less expensive."[7] He divided the Government of Montreal into five Districts, fixed the place of audience for each, directed that the officers of militia should meet on the 1st and 15th of each month (if that date were on Sunday, then the

[6] *Rep. Pub. Arch. 1918*, 32—the notice as to the officers of militia having authority to settle differences and the two appeals is repeated, October 26, 1870. *Ibid.* 32, 33. While it is quite aside from the present subject, it may be of interest (at least in New England) to learn that Gage found it necessary to issue a Proclamation, May 13, 1761, that as several English children and others taken in the War were still among the inhabitants of Montreal and the country notwithstanding repeated orders of long standing, all persons of whatever rank must bring all English children, men, and women, prisoners or deserters to the officer commanding in town or country by May 20 or pay 100 crowns fine and 6 months' imprisonment. *Ibid.* 45, 46. Col. Burton, Governor of Three Rivers, said, May 31, 1761, "English children and domestics .... whether they received them as a gift or have purchased them from Indians." *Ibid.* 103.

[7] ". . . les moyens de la rendre plus prompte, plus aisé et moins couteuze a Ceux qui Seront dans l'obligation dy recourir. . . ." *Ibid.* 48.

following day), the court to consist of not more than seven or less than five of whom one should be a captain, the senior officer to preside. Witnesses were compellable to attend, being paid three livres a day or if the distance should exceed five leagues, six livres a day, by the losing party who also paid the fees allowed to the members of the Court for loss of time, etc.—the amount being regulated by the amount in dispute.[8] An appeal had to be taken if at all within one month to the Council of Officers of the Royal Army which assembled at the place fixed on the twentieth of each month. From the Council an appeal could be taken to the Governor within a fortnight. Suits for not more than twenty livres (about $4.00), however, could be determined by one officer of militia and no appeal was permitted in such cases.[9]

While apparently no records are extant of the courts of officers of the militia, we have a full record of those of the officers of the Army sitting at Montreal from February 20, 1762 to March 21, 1764. All these courts were superseded under the Second Ordinance, passed after the cession of Canada to Britain by the Treaty of Paris. This Ordinance of September 17, 1764 established civil courts.[10]

Some of the cases tried in these courts of the Army are of no interest, being simple actions of debt, etc. Some, however, are not in that category, and a few will be noticed.

The "Chambre des Milices" of Pointe Claire on February 2, 1762, directed the defendant Claude Dumay, a habitant, who had been sued by Jean Baptiste Chenier, to send to Chenier, "a heifer like his own." An appeal was taken and a Court of Officers of the Royal Army sat at Montreal, February 20 and reversed the judgment. They ordered the

[8] The livre was practically the same as the franc which replaced it at the Revolution. Murray's Report, Shortt and Doughty, *op. cit.* 47-81, makes the livre = 10d. (20¢).

[9] *Rep. Pub. Arch. 1918*, 48, 49. For similar provisions for the District of Three Rivers, see the letter of Colonel Ralph Burton to all the Captains of Militia, October 6, 1760, advising them "to decide them in a friendly way, according to the light of your reason, and in conscience with all the justice and uprightness needful free of all charge. If the obstinacy of the parties or the embarrassing nature of the cases deprives you of the power of settling them yourself, you will then send the parties before the officer of the troops commanding in. . . ." *Ibid.* 90. Colonel (afterwards Sir) Frederick Haldimand, substituting for Burton at Three Rivers (until his return the following March), by his Proclamation of June 5, 1762, erected Courts of officers of Militia and Appellate Courts of Officers of the Royal Army, with fees, etc., similar to those of Gage. *Ibid.* 129, ff. For Quebec, Murray made full provisions of a kind like those of Gage. See Ordinances of October 31 and November 2, 1760. *Ibid.* 14-16; Shortt and Doughty, *op. cit.* 42-45.

[10] Treaty of Paris, February 10, 1763, Shortt and Doughty, *op. cit.* 97-126. Ordinance establishing Civil Courts, September 17, 1764. *Ibid.* 205-210. It was thought advisable to wait for the lapse of the eighteen months allowed by the Treaty for those who wished it to retire from the country—some did go to France. An Ordinance was passed, September 20, 1764, confirming and ratifying all the proceedings of these Military Courts. *Ordinances made and passed by the Governor and Council of the Province of Quebec, 1763-1791* (1917) 52.

appellant to pay to the appellee thirty livres "for the payment of the note which he had agreed to give for the heifer in question, on the maturity of the note," costs above and below equally divided.[11]

We do not have the evidence but there is no difficulty in reconstructing the facts. Dumay bought a heifer from Chenier for thirty livres (about $6.00) agreeing to pay for it at a certain date, giving a note in the meantime. The heifer dies, is lost, or is stolen (or why should Dumay defend?). The lower court of French Canadian officers order him to give Chenier a heifer like the one he received, he appeals and is ordered to pay the price; and this is sound law.

There are a few of what we call "affiliation cases"; one will be mentioned. Jacques Baulue, acting as guardian ("tuteur") of his niece, Margueritta Baulue, had obtained judgment in the *Court des Milices* of Pointe Claire, October 1, 1763, against Toussaint Damant, blacksmith, whom the girl accused of having seduced her under promise of marriage and of being the father of the child of which she was *enceinte*. The French Canadian Court, after hearing evidence, including the admission of the defendant, ordered him to marry the girl within a month without further delay. In case of default the uncle was authorized to take him and keep him in safe guard till he did marry her. He was ordered to pay the fees of the Court, twenty-four livres, and costs, sixteen livres.

On appeal, October 21, the court of British officers heard the parties; Margueritta Baulue swore "que c'est reellement l'appellant qui est l'auteur de l'enfant dont elle est Enceinte et qui la abusée sous promesses de marriage"; the Council allowed the appeal in so far as it authorized imprisonment until the appellant should marry Margueritta and it did not award damages. The Council set aside the decree for specific performance and decreed that the appellant should pay one hundred and fifty livres for damages and interest, and in case he should not find himself in a position to pay the amount at once he was given a year's delay upon giving good security before the clerk of the court. He had to pay the costs of case and appeal, the latter fixed at nine livres.[12]

The most interesting of all the cases heard by this Court was that of a poor negro, André. This was not a case of appeal such as is

[11] The Court consisted of Colonels Frederick Haldimand and Baron de Munster, Major Prevost, and Captain Glass. "Vue la sentence dont est appel coneue en ces Termes—Nous avons condamné le dit defendeur a remettre au dit demandeur une vache semblable a la sienne—Le Conseil condamné le dit Dumay, appellant, a paier au dit Intimé La somne de Trente Livre pour le paiement du Billet quil Luy a consenty pour La Vache dont est question au terme porté au dit Billet."

[12] Not even an English Court of Equity has ever gone so far as to decree specific performance of a contract to marry; *Lumley v. Gye* (1853, Q. B.) 2 El. & Bl. 216, was not a circumstance to *Baulue v. Damant*. The Court in Appeal had as members, Captain Falconer of the 44th Regiment (presiding), Captain Tassell of the 23d, Lieutenants Evans, John S(h)epherd and Denis Carleton; it heard another affiliation appeal on the same day, affirming the judgment.

provided for by Gage's ordinance of October 13, 1761. It came under the description in Amherst's Proclamation of September 22, 1760, the officers of militia could not decide it at once, and therefore sent the parties before the officers of the Royal Army.

On July 20, 1762, a negro named André appeared before the Council praying that the Council should accord him his liberty from Sieur Gershon Levy, a merchant of Montreal, who held him in bondage. The negro claimed that Sieur Best from whom Levy had bought him had the right to his services for only four years and that that term had expired. Levy pleaded a purchase in good faith without notice of any limit to the servitude and that André could not establish the existence of such limit. The court ordered André to remain in possession and the property of Levy until he should prove by witnesses or authentic certificates that he was bound to serve Best only four years and then to have his liberty.

Nine months afterwards, April 20, 1763, André brought on his case again before the Court. He produced witnesses but they failed to satisfy the Court and he was sent back to bondage until he should produce other evidence or baptismal extract or certificate from a magistrate in the place of his birth "that he was free at the moment of his birth." Apparently the unfortunate man could not produce such evidence; at all events, we hear no more of him.[13]

I cannot resist the temptation to mention one of the cases in the military courts at the city of Quebec, interesting from its utter unlike-

[13] The Court of July 20, 1762, was composed of Lieutenant Colonel Beckwith, Captains Falconer, Suby, Dunbar and Osbourne; on April 20, 1763, Captain Davies replaced Osbourne. It was not at all unusual at this time for a master to bind himself by Notarial Act to set a slave free after a term of faithful service—e. g. John Young, a merchant of Quebec, who had bought a negro lad, Rubin, from Dennis Daly, Tavern-Keeper of the same place, August 15, 1795, for £70 (Halifax currency), bound himself by Notarial Act, June 8, 1797, to set him free seven years thereafter if he should serve faithfully for that term—but there was an express condition that if "he the said Rubin, shall at any time during the said term of seven years get drunk, absent himself without leave or neglect the business of his master, he shall forfeit his title to his liberty. . . ." *Rep. Arch. Quebec* (1921-22) 123. Instances have been known where a negro who was supposed to be or who was free, bound himself for a certain number of years—André apparently claimed that he was free born.

In Nova Scotia, there were in early days many instances of those who had been bought as slaves claiming their freedom—sometimes running away and being recaptured. Chief Justice Thomas Andrew Strange on *habeas corpus* proceedings taken, always tried to have the parties come to an arrangement whereby the supposed slave should serve the claimant for a fixed number of years and then be free—if the parties did not agree, he required the question to be decided by a jury who generally found for the negro. His successor, Salter Sampson Blowers, cast the onus of proving the servile status on the claimant.

It will be noticed that in Quebec, the onus of proof was cast on the negro—a black man was presumed to be a slave unless he could prove the contrary; that was the law in the Southern States. 1 Cobb, *Law of Negro Slavery* (1858) 67, sec. 69.

ness to anything possible at the present time, but recalling to the English-speaking lawyer some of the ancient law recorded by Blackstone. It is to be remembered that French Canada was under a feudal tenure—it did not indeed disappear wholly until the middle of the last century.

On November 26, 1760 an "Audience" was held by the Military Council of Quebec, Messrs. Cramahé (afterwards Sir Hector Théophile Cramahé, Governor at Quebec), Barbutt and Brown being present. A petition was presented by Le Four; and the Council made an order for all the *habitans* of the Seigneurie of Beaufort to take their grain in future to the mill of said Seigneurie, on condition that the said miller at all times keep the mill in good state, make good flour and render a true account—it being forbidden to the *habitans* to take their grain to be ground at other mills on penalty of paying the usual milling-dues and six shillings penalty, the present decree to be read and published at the charge and expense of the said miller. This decree was not a mere *brutum fulmen,* for we find at the "Audience" of March 11, 1761, Charles Couillard complaining of certain *habitans,* Antoine La Vallé (who appeared by Jean Baptiste Payent by power of attorney) and Jean Barbau (who appeared by Louis Barbau by power of attorney) and Jean Gosselin, Pierre Lacroix, Jean Valliere, and another who appeared in person. The Council, "Cour et Conseil Militaire de Quebec," composed of Messrs. Cramahé, Barbutt and Cameron, ordered these *habitans* to pay the milling-dues owed by them since the publishing of the decree of November 26, 1760, as they had made default by carrying their grain to be ground elsewhere than to the mill of the Seigneurie. As to the penalty which they had thereby incurred, they received grace for the time only, considering the evil of the times ("attendu le malheur des tems"), but they were ordered to pay $10.00 travelling expenses—the right being reserved to them to make known any cause of complaint they might have against the Seigneurie or the miller. This decree was to be published at the door of the Parish Church of Beaumont and there affixed.

A subsequent case on the same day shows that Le Cour (Venue Le Cour) was the Seigneur who complained in the first instance and Charles Couillard now complaining was the miller.

Perhaps enough has been said of civil proceedings. Quebec and Nouvelle France generally were not exempt from crime. Crimes were triable by Court Martial under a well settled procedure. Governor Gage gave specific directions that if there should be committed any atrocious crime such as murder, rape or other capital offence, the officers of militia should arrest the accused and accomplices and send them to Montreal under good and safe guard with a statement of the crime and a list of witnesses.[14]

[14] "S'il se commettoit quelque Crimes a Trocoes Comme assacin, Viol ou autres Capitaus chaque officier de milice est authorisé a areter les criminel et Leur

Perhaps the most noted criminal trial during the Régime Militaire was that of "La Corriveau." Marie Josephte Corriveau, daughter of Joseph Corriveau, married November, 1749, a habitant of St. Vallier.[15] He died, April 27, 1760, and vague rumors arose that she had got rid of him by pouring melted lead into his ear when he was asleep. Nothing seems to have been done in the way of inquiry to ascertain the truth or falsity of the charge and within three months of her husband's death, La Corriveau married, July 20, 1760, another habitant of St. Vallier, Louis Dodier. She killed him, January, 1763, taking advantage of his being asleep to break his skull by repeated blows with a *broc*.[16] She then dragged the body into the stable and laid it at the heels of a horse to make it appear that the wounds had been caused by kicks from the horse.

La Corriveau and her father were arrested by the officers of militia at St. Vallier and sent under guard to Quebec. In April of 1760, a Court Martial was convened at Quebec, Lieutenant-Colonel Morris presiding, to try the accused. The woman had such influence over her father that he took the crime on himself, pleaded guilty, and was condemned to be hanged. She was found guilty of knowing of the said murder,[17] and was sentenced to receive sixty lashes with a cat-o'-nine-tails on the bare back, twenty lashes at each of three places, under the gallows, at the market place at Quebec and in the Parish of St. Vallier, then to be branded in the left hand with the letter "M." A witness, Isabelle Sylvain, was found guilty of perjury committed at the trial and she was sentenced to suffer the same punishment at the same time as La Corriveau, except that she was to be branded with the letter "P."

The Governor, General James Murray, approved the findings and sentences. The father, being resigned to die for his daughter, sent for Père Glapier, then Superior of the Jesuits at Quebec, to prepare him for death. After confession he asked to see the authorities, and confessed

complices, et les faire conduire sous bonne et Sçur garde a Montréal avec L'etat du Crime et La Liste des temoins." *Rep. Pub. Arch. 1918*, 48, 49. Ordinance of October 13, 1861.

The same appears (a few changes in orthography and the place "3 Rivières" for "Montreal" excepted) in Çol. Burton's Ordinance, Art. XIX, of June 5, 1762. *Ibid.* 130.

[15] "Josephte" was a nickname given in old Canada by the townspeople to the habitants' wives; but it was the real name of La Corriveau. St. Vallier is now, if not always, at least generally, spelled "St. Valier." It is in Bellechasse County, about thirty-five miles below Quebec on the South side of the River St. Lawrence.

[16] "Broc" is not used in modern French in this sense; the French-Canadian word means a heavy pronged pitchfork—what the Scotchmen call "a graip"—the "c" is sounded in "broc" as the original is the Picard "broque," with the same meaning.

[17] I presume as an accessory after the fact—had she been an accessory before the fact or a principal in the second degree, she would have been condemned to death.

the facts that he was innocent, that his daughter had murdered her husband and that Isabelle Sylvain had told the truth.

The former Court Martial was dissolved and a new one constituted, which, on April 15, 1763, convicted La Corriveau of murder. She was sentenced to be hanged and her body to be suspended in chains. The sentence was approved. She was hanged near the Plains of Abraham at the place called "Les Buttes," near Nepveu. Her body was placed in an iron cage in the form of a human body with arms and legs and a round box for the head. It was hung on a stake a little west of the Church at Point Levix across the River from Quebec where it remained to the terror of many until taken down and buried by some young men during the night.[18]

The English Criminal Law was not introduced until October, 1763; and consequently La Corriveau escaped the appalling penalty for Petit Treason, burning at the stake.[19]

[18] The documents of this extraordinary case are or were in the possession of the Nearn family at Malbaie—see Gaspé, *The Canadians of Old* (English ed. 1864) notes to Chapter IV, pp. 304, 305, from which the facts are taken. Of this work of de Gaspé's, Gagnon, *Essai de Bibliographie Canadienne* (1895) 149, truly says that it is "un ouvrage canadien qui fit du bruit a son apparition" in 1863. Of the author he says, with equal truth: "L'auteur de ce volume [Mémoires] se révéla tout d'un coup, a l'âge de 70 ans, l'un de nos meilleurs litterateurs canadiens. Ses 'Anciens canadiens' et ses 'Mémoires' sont certainement les plus beaux ornements de notre répertoire national."

M. de Gaspé adds that the cage which still contained the bone of one leg was dug up in 1850, kept for a time in the sacristy, and then taken away secretly and shown as a curiosity at Quebec,—"It was afterwards sold to Barnum's Museum where it may still (1863) be seen." It will be remembered that William Kirby, F. R. S. C., in his romance, *Chien d'Or,* makes La Corriveau, the daughter of Marie Exili, the illegitimate daughter of an Italian poisoner, Antonio Exili, and La Voisin, a Parisian witch, fortune teller, and poisoner. After a life of vice in Paris she came to Canada as an innocent *paysanne* and married Sieur Corriveau, a rich *habitan* of St. Valier. After her death her daughter, La Corriveau, married Louis Dodier, a *habitan* of St. Valier—nothing is said of a former husband. According to the novelist, in the summer of 1761, Dodier was found dead and an investigation showed that he had been murdered by molten lead poured into his ear while he slept. La Corriveau was tried before a special court convened in the Great Hall of the Ursulines at Quebec and convicted, hanged and suspended in an iron cage, buried, dug up, shewn as a curiosity at Quebec, and finally "deposited in the Public Museum at Boston."

[19] Until 1790, a woman found guilty of murdering her husband—Petit Treason—was drawn to the place of execution on a hurdle and burned at the stake—the Act of 1790, 30 Geo. III, c. 48, substituted hanging and dissection for burning—by the act of 1828, 9 Geo. IV, c. 31, sec. 2, the distinction between Petit Treason and Murder was abolished.