OBSERVATIONS

ON THE

CRIMINAL LAW OF ENGLAND,

AS IT RELATES TO

CAPITAL PUNISHMENTS,

AND ON THE MODE IN WHICH IT IS

ADMINISTERED.

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ADVERTISEMENT.

THE following Observations contain the substance of a Speech delivered in the House of Commons on the 9th Feb. 1810, on moving for leave to bring in bills to repeal the Acts of 10 and 11 Will. III. 12 Ann, and 24 Geo. II., which make the crimes of stealing privately in a shop, goods of the value of five shillings; or in a dwelling-house, or on board a vessel in a navigable river, property of the value of forty shillings, capital felonies. Some arguments are added, which on that occasion were suppressed, that the patience of the House might not be put to too severe a trial. The attempt to refute Dr. Paley in particu-

lar, is here considerably enlarged. The arrangement of these observations is certainly very defective; they contain repetitions which might have been avoided, and inaccuracies of style which might have been corrected, if the Author's occupations would have allowed of his rendering this pamphlet as little unworthy of being offered to the public as he could have wished: but to be useful, it was necessary that this publication should appear before the fate of the bills, which are now depending in parliament, was decided; and his only object in publishing it is, that it may be useful.

OBSERVATIONS, &c.

THERE is probably no other country in the world in which so many and so great a variety of human actions are punishable with loss of life as in England. These sanguinary statutes, however, are not carried into execution. For some time past the sentence of death has not been executed on more than a sixth part of all the persons on whom it has been pronounced, even taking into the calculation crimes the most atrocious and the most dangerous to society, murders, rapes, burning of houses, coining, forgeries, and attempts to commit murder. If we exclude these from our consideration, we shall find that the proportion which the number executed bears to those convicted is, per

haps, as one to twenty: and if we proceed still further, and, laying out of the account burglaries, highway robberies, horse-stealing, sheep-stealing, and returning from transportation, confine our observations to those larcenies, unaccompanied with any circumstance of aggravation, for which a capital punishment is appointed by law, such as stealing privately in shops, and stealing in dwelling-houses and on board ships, property of the value mentioned in the statutes, we shall find the proportion of those executed reduced very far indeed below that even of one to twenty.

This mode of administering justice is supposed by some persons to be a regular, matured, and well-digested system. They imagine, that the state of things which we see existing, is exactly that which was originally intended; that laws have been enacted which were never meant to be regularly enforced, but were to stand as objects of terror in our statute-book, and to be called into action only occasionally, and under extraordinary circumstances, at the discretion of the judges. Such being supposed to be our criminal system, it is not surprising that there should have been found ingenious men to defend

and to applaud it. Nothing, however, can be more erroneous than this notion. Whether the practice which now prevails be right or wrong, whether beneficial or injurious to the community, it is certain that it is the effect not of design, but of that change which has slowly taken place in the manners and character of the nation, which are now so repugnant to the spirit of these laws, that it has become impossible to carry them into execution.

There probably never was a law made in this country which the legislature that passed it did not intend should be strictly enforced. Even the Act of Queen Elizabeth, which made it a capital offence for any person above the age of fourteen to be found associating for a month with persons calling themselves Egyptians, the most barbarous statute, perhaps, that ever disgraced our criminal code, was executed down to the reign of King Charles the first, and Lord Hale mentions 13 persons having in his time been executed upon it at one assizes. It is only in modern times that this relaxation of the law has taken place, and only in the course of the present reign that it has taken place to a considerable degree. If we look back to remote

times, there is reason to believe that the laws were very rigidly executed. The materials, indeed, from which we can form any judgment on this subject, are extremely scanty; for in this, as in other countries, historians, occupied with recording the actions of princes, the events of wars, and the negotiations of treaties, have seldom deigned to notice those facts from which can be best collected the state of morals of the people, and the degree of happiness which a nation has at any particular period enjoyed. Sir John Fortescue, the chief justice, and afterwards the chancellor of Henry VI., in a very curious tract on absolute and limited monarchy, in which he draws a comparison between England and France, says, that at that time more persons were executed in England for robberies in one year than in all France in seven. In the long and sanguinary reign of Henry VIII. it is stated by Hollinshed that 72,000 persons died by the hands of the executioner, which is at the rate of 2,000 in every year. In the time of Queen Elizabeth, there appears to have been a great relaxation of the penal laws, but not on the part of the crown; and Sir Nicholas Bacon, the lord keeper, in an earnest complaint which he makes to parliament on the subject, says,

"it remains to see in whose default this is;" and he adds, "certain it is, that her Majesty "leaveth nothing undone meet for her to do for "the execution of laws;"* and it is related, that in the course of her reign 400 persons were upon an average executed in a year.

These statements, however, it must be admitted, are extremely vague and uncertain, and it is not till about the middle of the last century that we have any accurate information which can enable us to compare the number capitally convicted with the number executed. Sir Stephen Janssen, who was chamberlain of London, preserved tables of the convicts at the Old Bailey and of the executions. These tables have been published by Mr. Howard, and they extend from 1749 to 1772. From them it appears, that in 1749 the whole number convicted capitally in London and Middlesex was 61, and the number executed 44, being above two-thirds. In 1750 there were convicted 84, and executed 56; exactly two-thirds. In 1751, convicted 85, executed 63; about three-fourths. In the seven years which elapsed, from 1749 to 1756 inclu-

* D'Ewes's Journ. 234.

sive, there were convicted 428, executed 306: rather less than three-fourths. From 1756 to 1764, of 236 convicted, 139 were executed; being much more than half. From 1764 to 1772, 457 were convicted, and of these 233 were executed; a little more than half. From this period to 1802 there has not been published any accurate statement on this subject. But from 1802 to 1808 inclusive, there have been printed, under the direction of the Secretary of State for the Home Department, regular tables of the number of persons convicted capitally; and of those on whom the law has been executed; and from these we find, that in London and Middlesex, the numbers are as follows:

	Convicted.	Executed.		
In 1802	97	10	about	1-10th
1803	81	9	——	1-9th
1804	66	8	about	1-9th
1805	63	10	about	1-6th
1806	60	13	about	1-5th
1807	74	14	about	1-5th
1808	87	3	——	1-29th
Total	528	67	rather more than	1-8th

It appears, therefore, that at the commencement of the present reign, the number of convicts executed exceeded the number of those who were pardoned; but that at the present time, the number pardoned very far exceeds the number of those who are executed. This lenity I am very far from censuring; on the contrary, I applaud the wisdom as well as the humanity of it. If the law were unremittingly executed, the evil would be still greater, and many more offenders would escape with full impunity: much fewer persons would be found to prosecute, witnesses would more frequently withhold the truth which they are sworn to speak, and juries would oftener in violation of their oaths acquit those who were manifestly guilty. But a stronger proof can hardly be required than this comparison affords, that the present method of administering the law is not, as has been by some imagined, a system maturely formed and regularly established, but that it is a practice which has gradually prevailed, as the laws have become less adapted to the state of society in which we live.

There is no instance in which this alteration in the mode of administering the law has been

more remarkable, than in those of privately stealing in a shop or stable, goods of the value of five shillings, which is made punishable with death by the statute of 10 and 11 William III., and of stealing in a dwelling-house property of the value of forty shillings, for which the same punishment is appointed by the statute of 12 Ann, and which statutes it is now proposed to repeal. The exact numbers cannot, from any thing that has hitherto been published, be correctly ascertained; but from Sir Stephen Janssen's tables it appears, that after laying out of the calculation the numbers convicted of murder, burglary, highway robbery, forgery, coining, returning from transportation, and fraudulent bankruptcies, there remains convicted at the Old Bailey of shop-lifting and other offences of the same nature, in the period from 1749 to 1771, 240 persons, and of those no less than 109 were executed.

What has been the number of persons convicted of those offences within the last seven years does not appear; but from the tables published under the authority of the Secretary of State, we find that within that period there were committed to Newgate for trial, charged

with the crime of stealing in dwelling-houses, 599 men and 414 women; and charged with the crime of shop-lifting, 506 men and 353 women; in all 1,872 persons, and of these only one was executed.

In how many instances such crimes have been committed, and the persons robbed have not proceeded so far against the offenders as even to have them committed to prison: how many of the 1,872 thus committed were discharged, because those who had suffered by their crimes would not appear to give evidence upon their trial: in how many cases the witnesses who did appear withheld the evidence that they could have given: and how numerous were the instances in which juries found a compassionate verdict, in direct contradiction to the plain facts clearly established before them, we do not know; but that these evils must all have existed to a considerable degree, no man can doubt.

Notwithstanding these facts, however, and whether this mode of administering justice be the result of design or of accident, there are many persons who conceive that it is upon the whole wise and beneficial to the community.

It cannot, therefore, but be useful to examine the arguments by which it is defended. Discussions on such subjects are always productive of good. They either lead to important improvements of the law, or they afford additional reasons for being satisfied with what is already established.

It is alleged by those who approve of the present practice, that the actions which fall under the cognizance of human laws are so varied by the circumstances which attend them, that if the punishment appointed by the law were invariably inflicted for the same species of crime, it must be too severe for the offence, with the extenuating circumstances which in some instances attend it, and it must in others fall far short of the moral guilt of the crime, with its accompanying aggravations: that the only remedy for this, the only way in which it can be provided that the guilt and the punishment shall in all cases be commensurate, is to announce death as the appointed punishment, and to leave a wide discretion in the judge of relaxing that severity, and substituting a milder sentence in its place.

If this be a just view of the subject, it would render the system more perfect, if in no case specific punishments were enacted, but it were always left to the judge, after the guilt of the criminal had been ascertained, to fix the punishment which he should suffer, from the severest allowed by our law to the slightest penalty which it knows: and yet what Englishman would not be alarmed at the idea of living under a law which was thus uncertain and unknown, and of being continually exposed to the arbitrary severity of a magistrate? All men would be shocked at a law which should declare that the offences of stealing in shops or dwelling-houses, or on board ships, property of the different values mentioned in the several statutes, should in general be punished with transportation, but that the King and his judges should have the power, under circumstances of great aggravation, respecting which they should be the sole arbiters, to order that the offender should suffer death; yet such is in practice the law of England.

In some respects, however, it would be far better that this ample and awful discretion should be formally vested in the judges, than

that the present practice should obtain; for it would then be executed under a degree of responsibility which does not now belong to it. If a man were found guilty of having pilfered in a dwelling-house, property worth forty shillings, or in a shop that which was of the value only of five shillings, with no one circumstance whatever of aggravation, what judge whom the constitution had intrusted with an absolute discretion, and had left answerable only to public opinion for the exercise of it, would venture for such a transgression to inflict the punishment of death: but if in such a case, the law having fixed the punishment, the judge merely suffers that law to take its course, and does not interpose to snatch the miserable victim from his fate, who has a right to complain? A discretion to fix the doom of every convict, expressly given to the judges, would in all cases be most anxiously and scrupulously exercised; but appoint the punishment by law, and give the judge the power of remitting it, the case immediately assumes a very different complexion. A man is convicted of one of those larcenies made capital by law, and is besides a person of very bad character. It is not to such a man that mercy is to be extended; and, the sentence

of the law denouncing death, a remission of it must be called by the name of mercy; the man, therefore, is hanged; but in truth it is not for his crime that he suffers death, but for the badness of his reputation. Another man is suspected of a murder, of which there is not legal evidence to convict him; there is proof, however, of his having committed a larceny to the amount of forty shillings in a dwelling-house, and of that he is convicted. He, too, is not thought a fit object of clemency, and he is hanged, not for the crime of which he has been convicted, but for that of which he is only suspected. A third upon his trial for a capital larceny attempts to establish his innocence by witnesses whom the jury disbelieve, and he is left for execution, because he has greatly enhanced his guilt by the subornation of perjured witnesses. In truth, he suffers death, not for felony, but for subornation of perjury, although that be not the legal punishment of this offence.

If so large a discretion as this can safely be intrusted to any magistrates, the legislature ought at least to lay down some general rules to direct or assist them in the exercise of it, that

there might be, if not a perfect uniformity in the administration of justice, yet the same spirit always prevailing, and the same maxims always kept in view; and that the law, as it is executed, not being to be found in any written code, might at least be collected with some degree of certainty from an attentive observation of the actual execution of it. If this be not done, if every judge be left to follow the light of his own understanding, and to act upon the principles and the system which he has derived partly from his own observation, and his reading, and partly from his natural temper and his early impressions, the law, invariable only in theory, must in practice be continually shifting with the temper, and habits, and opinions of those by whom it is administered. No man can have frequently attended our criminal courts, and have been an attentive observer of what was passing there, without having been deeply impressed with the great anxiety which the judges feel to discharge most faithfully their important duties to the public. Their perfect impartiality, their earnest desire in every case to prevent a failure of justice, to punish guilt, and to protect innocence, and the total absence

with them of all distinctions between the rich and the poor, the powerful and the unprotected, are matters upon which all men are agreed. In these particulars the judges are all actuated by one spirit, and the practice of all of them is uniform. But in seeking to attain the same object, they frequently do, and of necessity must, from the variety of opinions which must be found in different men, pursue very different courses. The same benevolence and humanity, understood in a more confined or a more enlarged sense, will determine one judge to pardon and another to punish. It has often happened, it necessarily must have happened, that the very same circumstance which is considered by one judge as matter of extenuation, is deemed by another a high aggravation of the crime. The former good character of the delinquent, his having come into a country in which he was a stranger to commit the offence, the frequency or the novelty of the crime, are all circumstances which have been upon some occasions considered by different judges in those opposite lights: and it is not merely the particular circumstances attending the crime, it is the crime itself, which different judges sometimes consider in quite different points of view.

Not a great many years ago, upon the Norfolk circuit, a larceny was committed by two men in a poultry yard, but only one of them was apprehended; the other having escaped into a distant part of the country, had eluded all pursuit. At the next assizes the apprehended thief was tried and convicted; but Lord Loughborough, before whom he was tried, thinking the offence a very slight one, sentenced him only to a few months imprisonment. The news of this sentence having reached the accomplice in his retreat, he immediately returned, and surrendered himself to take his trial at the next assizes. The next assizes came; but, unfortunately for the prisoner, it was a different judge who presided; and still more unfortunately, Mr. Justice Gould, who happened to be the judge, though of a very mild and indulgent disposition, had observed, or thought he had observed, that men who set out with stealing fowls, generally end by committing the most atrocious crimes; and building a sort of system upon this observation, had made it a rule to punish this offence with very great severity, and he accordingly, to the great astonishment of this unhappy man, sentenced him to be transported. While one was taking his departure for Botany Bay, the term of the other's impri-

sonment had expired; and what must have been the notions which that little public, who witnessed and compared these two examples, formed of our system of criminal jurisprudence?

In this uncertain administration of justice, not only different judges act upon different principles, but the same judge, under the same circumstances, acts differently at different times. It has been observed, that in the exercise of this judicial discretion, judges, soon after their promotion, are generally inclined to great lenity; and that their practical principles alter, or, as it is commonly expressed, they become more severe as they become more habituated to investigate the details of human misery and human depravity.

Let us only reflect how all these fluctuations of opinion and variations in practice must operate upon that portion of mankind, who are rendered obedient to the law only by the terror of punishment. After giving full weight to all the chances of complete impunity which they can suggest to their minds, they have besides to calculate upon the probabilities which there are, after conviction, of their escaping a

severe punishment; to speculate upon what judge will go the circuit, and upon the prospect of its being one of those who have been recently elevated to the bench. As it has been truly observed, that most men are apt to confide in their supposed good fortune, and to miscalculate as to the number of prizes which there are in the lottery of life, so are those dissolute and thoughtless men, whose evil dispositions penal laws are most necessary to repress, much too prone to deceive themselves in their speculations upon what I am afraid they accustom themselves to consider as the lottery of justice.

Let it at the same time be remembered, that it is universally agreed, that the certainty of punishment is much more efficacious than any severity of example for the prevention of crimes. Indeed this is so evident, that if it were possible that punishment, as the consequence of guilt, could be reduced to an absolute certainty, a very slight penalty would be sufficient to prevent almost every species of crime, except those which arise from sudden gusts of ungovernable passion. If the restoration of the property stolen, and only a few weeks, or even a few days imprisonment, were the unavoidable consequence of theft, no theft would ever be committed. No man would steal what he was sure that he could not keep; no man would, by a voluntary act, deprive himself of his liberty, though but for a few days. It is the desire of a supposed good which is the incentive to every crime: no crime, therefore, could exist, if it were infallibly certain that not good, but evil must follow, as an unavoidable consequence to the person who committed it. This absolute certainty, however, is unattainable, where facts are to be ascertained by human testimony, and questions are to be decided by human judgments. All that can be done is, by a vigilant police, by rational rules of evidence, by clear laws, and by punishments proportioned to the guilt of the offender, to approach as nearly to that certainty as human imperfection will admit.

There is another point of view in which this matter may be considered; and which will make it evident that it would be more expedient that the judges should have the power vested in them by law, of appointing the punishment of every offence after it had been established with all its circumstances in proof, and of proportion-

ing the particular nature and degree of the punishment to those circumstances, than that, for such offences as I am speaking of, so severe a punishment should be fixed by law, with a power left in the judges according to circumstances, to relax it. In the former case it is highly probable that the discretion would in practice be exercised by none but the judges, that is, by magistrates accustomed to judicial investigations, fully aware of the importance of the duties which they are called on to discharge, and who from the eminence of their stations, are, and cannot but be sensible, that they are under a very great degree of responsibility to the public. According to the practice which now prevails, this most important discretion is constantly assumed by persons to whom the constitution has not intrusted it, and to whom it certainly cannot with the same safety be intrusted; by prosecutors, by juries, and by witnesses. Though for those thefts which are made capital by law, death is seldom in practice inflicted; yet as it is the legal appointed punishment, prosecutors, witnesses, and juries, consider death as that which, if it will not with certainty, yet possibly may be the consequence, of the several parts which they have to

act in the judicial proceeding: and they act their parts accordingly, though they never can, in this indirect way, take upon themselves to prevent the execution of the law, without abandoning their duty; and in the case of jurymen and witnesses, without a violation of their oaths.*

There is still another view which may be taken of this subject, and which is perhaps more important than those which have been already considered. The sole object of human punishments, it is admitted, is the prevention of crimes; and to this end, they operate principally by the terror of example. In the present system, however, the benefit of example is entirely lost, for the real cause of the convict's execution is not declared in his sentence, nor is it in any other mode published to the world. A man is publickly put to death. All that is told to the spectators of this tragedy, and to that part of the public who hear or who read of it, is, that he stole a sheep, or five shillings worth of goods privately in a shop, or that he pilfered to the value of forty shillings from his employer in a dwelling-house, and they are left in total ignorance that

* Note A.

the criminal produced upon his trial perjured witnesses to prove an alibi, or some other defence, and that it is for that aggravation of his crime that he suffers death. The example cannot operate to prevent subornation of witnesses to establish a false defence, for it is not known to any but those who were present at the trial, that such was the offender's crime; neither can it operate to prevent sheep-stealing, or privately stealing in a shop, or larceny in a dwelling-house, because it is notorious that these are offences for which, if attended with no aggravating circumstances, death is not in practice inflicted. Nothing more is learned from the execution of the sentence, than that a man has lost his life because he has done that which by a law not generally executed, is made capital, and because some unknown circumstance or other existed either in the crime itself, or in the past life of the criminal, which in the opinion of the judge who tried him, rendered him a fit subject to be singled out for punishment. Surely if this system is to be persevered in, the judge should be required in a formal sentence to declare why death is inflicted, that the sufferings and the privations of the individual might be rendered useful to society in deterring others

from acting as he has done, and drawing on themselves a similar doom. The judge would undoubtedly be required to do this if the discretion which he exercises in point of fact, were expressly confided to him by law. But unfortunately, as the law stands, he is supposed not to select for capital punishment, but to determine to whom mercy shall be extended; although these objects of mercy, as compared with those who suffer, are in the proportion of six to one. Were recorded reasons to be required of the judge, it will be said, they must be his reasons for extending mercy, which is his act, not his reasons for inflicting punishment, which is the act of the law: an additional proof of the mischief which results from leaving the theory and the practice of the law so much at variance.

In truth, where the law which is executed is different from that which is to be found in the written statutes, great care should be taken to make the law which is executed known, because it is that law alone which can operate to the prevention of crimes. An unexecuted law can no more have that effect, than the law of a foreign country; and the only mode that can be

adopted for making known the law which is executed, is that of stating in a written sentence the circumstances which have rendered the crime capital. Such written sentences, like the reported decisions upon the common law, would stand in the place of statutes. It must, however, be admitted, that it would be still more desirable, that instead of having recourse to such substitutes, the law should be embodied in written statutes.

Another consequence of the present system is, that it deprives juries of the most important of their functions, that of deciding upon facts on which the lives of their fellow-subjects are to depend. The circumstance of aggravation, whatever it be, for which the judge inflicts the punishment of death, in reality constitutes the crime for which he suffers. If, for example, the judges made it an invariable rule to leave for execution every man convicted of highway-robbery, who had struck or done any injury to the person of the party robbed, and to inflict only the punishment of transportation, for robbery unattended with such violence, the effect would be the same as if the crimes of mere robbery, and of robbery with violence offered to

the person, so distinct in themselves, were distinguished by written laws, and were made punishable, the one with death, and the other with transportation. The effect would be the same with respect to the punishments, but by no means the same with respect to the mode of trial. Because if the law had considered them as distinct offences, it would be the province of the jury to decide whether the circumstance of aggravation, which altered the nature and description of the crime, did or did not exist; whereas in the present system, it is the judge alone on whom that important office is devolved. The fact of violence may in his opinion be established, though the jury may have withheld all credit from the witness who swore it. That fact has probably not been investigated with the same accuracy as the other parts of the case, because it is to constitute no part of the finding of the jury. It is in truth altogether immaterial to the verdict which they have to pronounce, which is merely whether the prisoner be guilty or not guilty of the robbery. The same observation may be made upon every other circumstance of aggravation which decides the fate of convicted criminals; the judge necessarily acts upon his own opinion of the evidence by

which these circumstances are supported, and he sometimes proceeds upon evidence not given in open court, or under the sanction of an oath.

With all the objections, however, which there are to this mode of administering justice, it has long prevailed, and consequently it has many defenders. Among those there is none whose arguments deserve more attention than Dr. Paley, not so much on account of the force or ingenuity of those arguments, as of the weight which they derive from the respectable name of the writer who uses them. Every thing that is excellent in the works of such a man, renders his errors, where he falls into error, only the more pernicious. Sanctioned by his high authority, they are received implicitly as truths by many persons who, if they met with them in a writer of inferior merit or reputation, would not fail to canvass them, and to detect their fallacy.

Dr. Paley sets out by observing,* that "there "are two methods of administering penal justice.

* Prin. of Moral and Polit. Phil. vol. ii. p. 281. 17th edit.

"The first assigns capital punishment to few "offences, and inflicts it invariably; the second "assigns capital punishment to many kinds of "offences, but inflicts it only upon a few exam-"ples of each kind."* This implies that there are only two methods of administering penal justice, and that a government has only to chuse between invariably and inflexibly inflicting death in all cases in which the law has appointed it as a punishment; or giving to its magistrates that wide discretion which we find them invested with in this country. A terrible alternative indeed it would be, if governments were really reduced to it. But it is very inaccurate to represent these as the only methods of administering penal justice. It may be, and in most countries it is, so administered, that in general the punishment assigned by the law is inflicted, but in rare instances it is remitted by the clemency of the executive magistrate; in other words, generally the law is executed, and the non-execution of it forms an exception to that general rule. It may be, and in some countries it has for many years been, so administered,

* Note B.

that death has not in any case been inflicted because not in any case appointed by the law.

"The preference of that method," which is adopted in England, "to the other, seems," he says, "to be founded in the consideration, that "the selection of proper objects for capital pu- "nishment principally depends upon circum- "stances which, however easy to perceive in each "particular case, after the crime is committed, it "is impossible to enumerate or define beforehand; "or to ascertain, however, with that exactness "which is requisite in legal description." If this representation be correct, this is a discretion which never can be exercised by any known or certain rules; for the same rules which would govern the exercise of the discretion, might determine and fix beforehand the different gradations of offence, and the corresponding gradations of punishment. Not only, therefore, according to Dr. Paley, is this discretion necessary, but it must necessarily be exercised in the most arbitrary manner. But why, it may well be asked, cannot circumstances, which are of such a nature that they are to determine whether a man shall suffer death or not, be pointed

out prospectively and particularized in written laws? Being easily perceived after the act has been done, it cannot be difficult to express them in words before the act is committed. It is as easy to say in the form of a law, that whoever does such an act, attended with such circumstances, shall suffer death, as to say in the form of a sentence, that because an individual named has done such an act, attended with such circumstances, he shall suffer death. Dr. Paley seems to assume that it is indispensably necessary that proper objects for capital punishment should be selected by those to whom the administration of justice is intrusted. Whereas, in truth, the *only* proper objects of capital punishment are those who have committed acts which the public security requires should be punished with death, and *all* who have done such acts, are the proper objects of such punishment. The laws should be so framed, that upon none but those can death be inflicted; or in other words, that capital punishment should never be resorted to but where the public security requires it. There needs no selection of objects for punishment, in those who administer the law; the law itself has made the selection. If there is to be any selection by those who ad-

minister the law, it ought to be a selection of the few to whom mercy is to be extended, and not of a few on whom punishment is to fall.

" Hence," he continues, " although it be ne-" cessary to fix by precise rules of law the boun-" dary on one side, that is, the limit to which " the punishment may be extended."—But, in truth, the boundary on the side of severity is fixed by nature, not by law. With the life of the offender, all human power over him must necessarily cease; the legislature, therefore, which authorizes the magistrate to take away a subject's life, cannot be said to have fixed a boundary which his severity cannot exceed. When the learned author, therefore, observes, that it is necessary to fix by rules of law the boundary on one side, one can only conjecture that he meant, that it is necessary to fix by rules of law, in what cases this unbounded discretion of its magistrates may be exercised.*

* It is, indeed, not a little surprising, that this same author should in other parts of his work have said, p. 207, " In the " infliction of punishment, the power of the crown, and of " the magistrate appointed by the crown, is confined by the " most precise limitations."

" The exercise of lenity," he says, " may, " without danger, be intrusted to the executive " magistrate." Without danger, perhaps, of being too often exercised; but with great danger in such a system as he is defending, that of " laws " never meant to be carried into indiscriminate " execution, but whose severity the legislature " trusts will be relaxed as often as circumstances " of aggravation are wanting in the crime,"* with very great danger, that it may not be exercised sufficiently often. The magistrate who has the power of exercising this lenity, has also the power of not exercising it, and the non-exercise of it, is, let it be remembered, nothing less than inflicting death.

" Whose [*i. e.* the magistrate's] discretion " will operate upon those numerous unforeseen, " mutable, and indefinite circumstances, both of " the crime and the criminal, which constitute " or qualify the malignity of each offence." The circumstances then, according to this writer, upon which a criminal's life is to depend, are of such a nature, that they cannot be foreseen, fixed, or defined, and yet it is in respect of those circumstances that the forfeiture of his life is to be exacted. It is not for the offence described in

* P. 285.

the law, but for an unforeseeable undefinable crime, that he suffers death; and yet the very writer who approves of this, and justifies it, has himself told us, but a few pages before,* that "the end of punishment is the prevention "of crimes," and that "that which is the cause "and end of the punishment, ought to regulate "the measure of its severity."

"Without the power of relaxation lodged in "a living authority," Dr. Paley adds in the passage I am commenting on, "either some "offenders would escape capital punishment "whom the public safety required to suffer, "or some would undergo that punishment "where it was neither deserved nor necessary." —What the public safety requires is, that crimes should be prevented by the dread of death, whenever the dread of a less evil will not be efficacious. In no other way can the public safety require the death of any individual. For with respect to the mischief which the individual himself might do, it may always be guarded against by secure imprisonment; the real question therefore is, whether the exercise of this power of relaxing the law is better calculated to prevent crimes,

* P. 274—275.

than the constant and regular execution of known laws; and it is a question which one would suppose could hardly be of difficult solution, for those who think with Dr. Paley, that "the "certainty of punishment is of more conse-"quence than the severity."*

"—or some would undergo that punishment "where it was neither deserved nor necessary." By this distinction it should seem, that in the opinion of this writer, the punishment of death is sometimes deserved when it is not necessary, and is sometimes necessary when it is not deserved. This distinction, however, seems to be founded upon the most erroneous notions of criminal law. It is upon the ground of necessity alone, that the inflicting death as a punishment can ever be justified. What, indeed, are the ideas which this writer means to convey by the terms "deserving this punishment," and by those of "meriting the punishment of death," which he uses in the following page, it is extremely difficult to conjecture. One would suppose, indeed, that he entertained some vague notion of "the satisfaction of justice," or of "the retribution of so much pain for so much

* P. 306.

" guilt," if he had not himself formally, at the outset of his dissertation upon crimes and punishment, protested against such being in any case " the motive or occasion of human punish-" ment."*

The evil, it seems, to be guarded against, is that of the punishment of death being sometimes inflicted where it is neither deserved or necessary. Now, in whatever sense these words be used, it is most certain, that that evil still must continue where the exercise of lenity is to depend upon human, that is, upon fallible judgments. We know almost with certainty of some cases, that if they were submitted to the discretion of two different individuals, one would be for exercising lenity, and the other for enforcing the law, each acting from the best of motives, each satisfied that he had conscientiously discharged his duty, the one by executing the law, the other by extending mercy; and who shall presume to say which of them has " suffered an " offender to escape capital punishment, whom " the public safety required to suffer;" and " which has inflicted that punishment where it " was neither deserved nor necessary?"

* P. 275.

" If judgment of death," continues Dr. Paley, " were reserved for one or two species of crimes " only, which would probably be the case if " that judgment were intended to be executed " without exception; crimes might occur of " the most dangerous example, and accompa-" nied with circumstances of heinous aggrava-" tion, which did not fall within any description " of offences that the law had made capital, and " which consequently could not receive the pu-" nishment their own malignity and the public " safety required." Undoubtedly if it were intended that the laws should be executed, we should not in an age which persuades itself that humanity is amongst its peculiar characteristics, see the punishment of death affixed to so long a catalogue of crimes as appear in the English statutes; but yet no reason can be assigned, as long as death is retained in our law as a punishment, why it should not, in laws meant to be rigorously executed, be the appointed punishment for crimes " of the most dangerous example, ac-" companied with circumstances of heinous ag-" gravation." What danger could there possibly be that we should lessen the power of inflicting punishment on crimes of most dangerous example, accompanied with circumstances of

heinous aggravation, by striking out of the statute book the acts which inflict death on the crimes of privately stealing to the value of five shillings in a shop, of stealing forty shillings' worth of property in a dwelling-house, or of stealing cloth from bleaching grounds?

"What is worse," he adds, "it would be "known beforehand that such crimes might be "committed without danger to the offender's "life." If this be an evil, it is an evil that the law should be known, or that there should be any law at all; for unknown laws are the same as non-existing laws. It is a necessary consequence of knowing what actions are punishable by law, that it should also be known what a man may do without fear of punishment; and it is not a little extraordinary, that in a country in which men have been accustomed to think that one of the greatest political blessings they enjoyed, was that they lived in the security which known and certain laws afforded them, we should be told by a writer of such high character and such extraordinary merit as Dr. Paley, that it is a good that laws be not known, because if known, they might be evaded.

Undoubtedly it would be a great mischief if

actions dangerous to the public safety could be committed with impunity, and much more, if, in the language of this writer, "men could adven-"ture upon the commission of enormous crimes "from a knowledge that the law had not provid-"ed for their punishment."* But what must be the character of that code of laws which leaves enormous crimes without punishment provided for them? and what other remedy is there for this evil than that which Dr. Paley himself recommends, when he reprobates the use of acts of attainder and bills of pains and penalties? "Let "the legislature, admonished of the defect of "the laws, provide against the commission of "future crimes of the same sort."†

The terms, "enormous crimes," and "heinous "aggravations," are of so vague and indefinite a nature, that it is not possible to ascertain with accuracy in what sense they are here used; but understanding them in their common and popular acceptation to mean actions of great moral depravity, it is not easy to understand how the punishment of them is secured by the system which Dr. Paley defends. On the one hand, it is not at all evident how the stealing privately

* P. 284. † P. 239.

in a shop, or the stealing from bleaching grounds, or the stealing of sheep, can under any circumstances be considered as an enormous crime, or accompanied with heinous aggravations: and on the other it must be admitted, that sanguinary as our law is, numerous as are our capital offences, wide, to use Dr. Paley's own metaphor, wide as the penal net is spread, there are many acts of the greatest moral depravity for which neither the punishment of death nor any other punishment of great severity is provided. A guardian who has defrauded his ward of the property with which he was intrusted for her benefit, and who has besides seduced her and turned her out upon the world a beggar and a prostitute; a man who being married, has concealed that fact, and having gained the affections of a virtuous woman, has persuaded her to become his wife, knowing at the same time that the truth cannot long be concealed, and that whenever disclosed it must plunge her into the deepest misery, and must have destroyed irretrievably all her prospects of happiness in life; has surely done that which better deserves the epithet of enormous crime, accompanied with heinous aggravation, than a butler who has stolen his master's wine. It is not a great many years ago since an attorney

made it a practice, which for some time he carried on successfully, to steal men's estates by bringing ejectments, and getting some of his confederates to personate the proprietors, and let judgment go by default, or make an ineffectual defence; the consequence was, that he was put into possession by legal process, and before another ejectment could be brought, or the judgment could be set aside, he had swept away the crops, and every thing that was valuable on the ground. If for this any punishment be provided by law,* it is one far less severe than for the crime of petty larceny. That any of the actions which I have mentioned, merit the punishment of death, I certainly do not affirm. I have no criterion, and the learned author has furnished me with none by which to determine how death is deserved; but I am sure that stealing a few yards of ribbon or of lace in a shop, is an offence far below them in the scale of moral guilt.

"On the other hand, if to reach these "possible cases, the whole class of offences "to which they belong, be subjected to the

* Perhaps under the notion of conspiracy this might be indictable, but certainly under no other.

"pains of death, and no power of remitting "this severity remains any where, the execu- "tion of the law will become more sangui- "nary than the public compassion would en- "dure, or than is necessary to the general "security." This is an argument to prove that a power of pardoning ought to exist somewhere,* but that is a proposition which has not been disputed, and which has really no application to the question whether the English system be better or worse than that which prevails in other countries. The supposition, that there is no other alternative than that of excluding the power of pardon altogether, or preserving such a code of laws that pardons must necessarily be much more frequent, even in the proportion of ten to one, than the execution of the law, exists only in the imagination of this writer; and yet his whole defence of the present prevailing system is founded upon this supposition.

"The law of England is constructed upon a "different policy." Not the *law* of England, but the *practice* which in the administration of criminal law prevails in England. A practice

* Note C.

which is in truth an almost continual suspension and interruption of the law.

"By the number of statutes creating capital of- "fences, it sweeps into the net every crime, which "under any possible circumstance may merit "the punishment of death." If this be effected at all, it certainly is not by the number of statutes that it is effected. One single act, taking away the benefit of clergy from all felonies, would have done this much more effectually than a multitude of statutes, some applying to the different articles which may be stolen, and others to the different places in which the crime may be committed. But, independently of this observation, it is really very difficult to collect the meaning of this passage; admitting that the stealing of a sheep or a horse, may, under some possible circumstances, merit the punishment of death, how are we to comprehend that there are no possible circumstances that imagination can suggest, which would make the stealing of a hog or an ox deserving of the same fate? It must, too, greatly astonish one, that any person who had possessed himself of the catalogue of capital offences to be found in our law, long as it is, and who had reflected upon the actions which take place even in the ordinary intercourse of

mankind, could ever have affirmed, that there was no act of gross immorality or highly injurious to society, which might not by the present existing law of England be punished with death, or which, in the language of this writer, is not swept into the net. There is nothing surely in this sentence that any one can approve, unless it be the happy choice of the metaphor. None indeed could have been found, which could have more forcibly described the situation of a man, who, taking his notion of law from what he sees executed, and therefore thinking that the offence which he had committed could only subject him to imprisonment or transportation, finds to his surprise that he has forfeited his life. I remember hearing a person who had been present at a trial, describe the astonishment which was expressed in the language, and painted in the countenance of a wretch, who was convicted of stealing his master's wine, at finding that the sentence pronounced upon him was that of death, or to use the language of Paley, at finding himself inextricably entangled in the fatal net. Fatal indeed it was to him, for the judge left him for execution.

" When the execution of this sentence comes

" to be deliberated upon."—It should be observed, that with the exception of prisoners tried at the Old Bailey, these are not the joint deliberations of a council, or even the consideration of different cases by the same individual, who would, probably, be always governed by the same principles, but the separate deliberations of different individuals, having no common rule or standard to refer to, all, indeed, equally impressed with the importance of their duty, and actuated by the same desire to discharge it properly, but having each his own peculiar notions of the general character or particular aggravations of each offence.

" A small proportion of each class are singled " out, the general character or the peculiar ag- " gravations of whose crimes render them fit ex- " amples of public justice." But where the *general character* of the crime is such as to render it a fit example of public justice, how can the necessity for the exercise of this discretion exist? The general character of a crime surely cannot be considered as one of those " circumstances " which it is impossible to enumerate or define " beforehand," or even which cannot be " as- " certained with that exactness which is requi- " site in legal description," and yet it is upon

the supposed existence of circumstances easy to be noted after the crime has been committed, but impossible to be beforehand defined, that the writer's defence of this system is principally founded.

In what indeed consists the difficulty of marking out in general laws, the peculiar aggravations of crime which ought to be attended with aggravation of punishment, Dr. Paley has left altogether unexplained; and, indeed, a little farther on,* as if to convince his readers that there is really no difficulty in the case, he himself enumerates the several "aggravations which ought "to guide the magistrate in the selection of ob-"jects of condign punishment." "These," he says, "are principally three, repetition, cruelty, "and combination;" "in crimes," he adds, "which are perpetrated by a multitude or by a "gang; it is proper to separate in the punish-"ment, the ringleader from his followers, the "principal from his accomplices, and even the "person who struck the blow, broke the lock, "or first entered the house, from those who "joined him in the felony." Every one of the aggravations here enumerated, is undoubtedly as capable of being clearly and accurately de-

* P. 288.

scribed, in written laws, and as proper to be submitted to the decision of a jury, as the crimes themselves.

The reason, indeed, which Dr. Paley gives for considering the circumstances which he last mentions as aggravations which ought to determine the fate of convicts, shews in the strongest possible light the necessity of their being stated in written laws. It is "not," he says, "so "much on account of any distinction in the "guilt of the offenders, as for the sake of "casting an obstacle in the way of such "confederacies, by rendering it difficult for "the confederates to settle who shall begin the "attack, or to find a man amongst the number "willing to expose himself to greater danger "than his associates." Now, for this selection of offenders for severer punishment to produce the effects which are here pointed out as its objects, it is indispensably necessary, not only that the selection should be constantly and invariably governed by the aggravations here enumerated, but that this should be made known to the public, and such a constant, invariable, and notorious practice can be secured by no other means than by laying it down as a certain and inflexible rule in a public law. That all,

or that even a majority of the judges, exercise the tremendous discretion with which they are invested, upon the principles here stated by Dr. Paley, I am sure no one will pretend. That any one of them has adopted these principles is what I have never heard, and yet it is only by the principles being known, that the practice can effectuate its end.

"By this expedient," he proceeds, "few "actually suffer death, whilst the dread and "danger of it hang over the crimes of many." The *chance* of it, he should rather have said, hangs over the crimes of many. For the dread of punishment to prevent crimes, punishment must as nearly as can be effected, be the certain consequence of committing them. Whereas, all that is done by the administration of penal justice, in that method which Dr. Paley declares to be the best, is to make the punishment of death the possible, but by no means the probable consequence of the crime. The dread that the offender may have the ill fortune to be the one who suffers, and not among the nine convicted offenders who escape, will undoubtedly have some, but it will be but a feeble, influence, towards the prevention of offences.

"The wisdom and humanity of this design "furnish a just excuse for the multiplicity of "capital offences which the laws of England "are accused of creating beyond those of other "countries." It is really not a little surprising, that in this peculiar mode of administering criminal law in England, an apology should be found for the great "number of our statutes "creating capital offences." One would have imagined that one advantage of such a system, by which it is left to those who exercise the law to discriminate and to find out the circumstances which are to characterize, to extenuate, or to aggravate offences, would be, that the laws being extremely general, might be few in number, and simple and concise in their enactments. If we had adopted a system directly contrary to that which is unhappily established amongst us; if, in our anxiety to secure such important objects, as that no life should be destroyed of which the public safety did not require the sacrifice, and that that sacrifice should always be exacted where it really was necessary, we were to frame laws which should distinguish accurately the general character of different offences, and enumerate all the peculiar aggravations with which they might be at-

tended, and should leave unforeseen and unnoticed no human action which was dangerous by its example, or heinous in its circumstances, we might indeed have a good excuse to offer for the multiplicity of our penal laws.

"The charge of cruelty," continues Dr. Paley, "is answered by observing, that these "laws were never meant to be carried into in- "discriminate execution; that the legislature, "when it establishes its last and highest sanc- "tions, trusts to the benignity of the crown to "relax their severity as often as circumstances "appear to palliate the offence, or even as often "as those circumstances of aggravation are "wanting which rendered this rigorous inter- "position necessary. Upon this plan it is "enough to vindicate the lenity of the laws, "that *some* instances are to be found in each "class of capital crimes which require the re- "straint of capital punishment; and that this "restraint could not be applied without sub- "jecting the whole class to the same condemna- "tion." It may well be doubted whether this be a satisfactory answer to the charge of cruelty. To subject by law ten men to the punishment of death, because one of them

has, in the opinion of the legislature, deserved it, or, to speak more properly, has done that which makes it necessary to the public safety that his life should be sacrificed, and then "trust "to the benignity" of the magistrate to discover the nine, against whom it was "never meant "that the law should be carried into execution;" to have no better security for the proper execution of this most important office, than the benignity of the magistrate, and to afford him no light to guide him in the exercise of that benignity, is after all a very cruel conduct in those who are the makers of the law. The severity of our statutes is, it seems, to be relaxed, whenever those circumstances of aggravation are wanting which render so rigorous an interposition necessary; and yet the legislature is totally silent as to those aggravations. It omits any mention of the circumstances, without which its law is not to have the force of law. The legislature means that death shall be inflicted only in a given case, and it carefully avoids saying what that case is. While it openly denounces death for a certain crime, it really means that death shall be inflicted only if the guilt of some additional crime is added to it, and instead of particularizing that additional

guilt, it leaves it to those who are to execute the law, first to imagine what the legislature meant, and then to discover those undescribed circumstances in each particular case.

When this author tells us that the particular instances which require the restraint of capital punishment, could not be subjected to that restraint, without, at the same time, subjecting to it all the other offences which fall under the same class, but which do not require it, he assumes the very point which it was incumbent on him to prove. But even if, for the moment, we concede to him, that which is the matter in dispute, how can this afford any justification of our sanguinary laws, unless, indeed, we are to reverse what has been considered as a maxim of criminal jurisprudence, and to say that it is better that ten men who do not deserve* death should suffer it, than that one who has deserved it should escape ?†

In this short passage there is another important point taken for granted, which long has

* It can hardly be necessary to apologize for the use of this word, or to shew that it is not here liable to the objection made to it as used by Paley.

† Note D.

been, and still is, a matter of much controversy, namely, that in each class of capital crimes, there are some instances to be found which require the restraint of capital punishment. Let us take, by way of example, the crime of privately stealing in a shop to the value of five shillings. It is the opinion of many, that no instance ever occurred of that crime which rendered it a fit subject of capital punishment. The circumstances, indeed, which induced the legislature to make this offence capital, the facility with which it may be committed, and the supposed necessity of protecting by such severity industrious tradesmen in the exercise of their calling, make it hardly possible that it should be committed under any peculiar aggravations. The legislature has in this case marked out what the policy which suggested the measure induced it to consider as aggravations; that the theft was committed privately, that it was in a shop, and that the thing stolen is of five shillings value. What, to follow the spirit of the law, can possibly be considered as aggravations? Are they that the shop was very much frequented, and was crowded with customers; that the theft was committed with such extraordinary address as to elude the utmost vigilance; or that the pro-

perty stolen was of a value very greatly beyond that which is mentioned in the statute? Surely no person can contend that any one of these circumstances can make such an alteration in the offence, that with it the crime should be punished with death, and without it, should be subjected to a slighter punishment. Least of all can the value of the property stolen be such an aggravation; because the law was intended to afford a protection to tradesmen, in instances where they could not exert a sufficient vigilance for their own protection; but in articles of considerable value, they are bound to exert that vigilance. To such an instance we may apply the language which Paley has applied to another, "it will be difficult to shew, that without gross "and culpable negligence on the part of the "sufferer, such examples can ever become so fre-"quent as to make it necessary to constitute a "class of capital offences of very wide and large "extent."* In truth, none of these circumstances have, I believe, been considered by any of the judges as sufficient aggravations to warrant their suffering this cruel law to be executed. It has been executed, indeed, in instances where the offenders were of very bad character, had been tried and acquitted for other and much more heinous

* P. 286.

crimes, or had set up a false defence, and produced witnesses to prove it; yet these are all circumstances foreign to the object of the legislature in protecting retail trades, and fall not within any of the principles which Dr. Paley has upon this subject endeavoured to establish.

"The prerogative of pardon is properly re-"served to the chief magistrate. The power of "suspending the laws is a privilege of too high "a nature to be committed to many hands, or "to those of any inferior officer in the state. "The king also can best collect the advice by "which his resolutions shall be governed." Those who to every attempt at improvement are accustomed to oppose a panegyric on our law and constitution, frequently adopt a course which is very convenient for their purpose. As theory and practice are often upon these subjects very dissimilar, and are sometimes in direct opposition to each other, they select for the topic of their encomium whichever they can represent in the most favourable light; and of this we have here a very remarkable instance. In every thing which Dr. Paley has hitherto said, it is the established practice,

a practice which alters and almost supersedes the written law, which he has been vindicating; but now he suddenly takes an opposite course, and holds up to our admiration a part of the constitution which exists in theory, but is almost abrogated in practice. In every county of England but Middlesex, and in every part of Wales, this privilege of suspending the laws, high as it is, is exercised, not by the chief magistrate, but by subordinate officers in the state, and without the assistance of that best advice which the king can collect. It is true, that they exercise this privilege in the name of the king, in whose name too they administer the law; and if this fiction is to be resorted to, it may be said with as much truth, that the king decides causes, and tries prisoners, as that he exercises his power of suspending the laws.

"But let this power be deposited where it "will," adds Dr. Paley, "the exercise of it "ought to be regarded as a judicial act; as a "deliberation to be conducted with the same "character of impartiality, with the same ex-"act and diligent attention to the proper me-"rits and circumstances of the case, as that

"which the judge upon the bench was expected "to maintain and shew in the trial of the pri-"soner's guilt. The questions, whether the "prisoner be guilty, or whether, being guil-"ty, he ought to be executed, are equally "questions of public justice. The adjudica-"tion of the latter question is as much a func-"tion of magistracy as the trial of the former. "The public welfare is interested in both. "The conviction of an offender should de-"pend upon nothing but the proof of his "guilt; nor the execution of the sentence "upon any thing besides the quality and cir-"cumstances of his crime." Nothing can shew in a stronger point of view the defects of the system which Dr. Paley defends, than this single passage. He here imposes upon the judges duties which it is impossible for them to discharge. If, indeed, he had contented himself with saying, that this suspension of the law ought never to be a favour "yielded to solicitation or grant-"ed to friendship, or made subservient to the "conciliating or gratifying of political attach-"ments," no person could have disputed his doctrine, though many might have wondered that he had thought it worth while to state what was so obvious; but when he goes on to say,

that it must be considered as a judicial act, or as the adjudication of a question of public justice, he really deals with the judges no less hardly than the Egyptian tyrant did with the children of Israel, when he commanded them to make bricks, but withheld from them the materials with which they were to be made. A judicial act is the application of an existing law to facts which have been judicially proved: but where is the law of which the judge, in the exercise of this power, is to make the application? Or how can it be said that there has been judicial proof of facts, for which the criminal has never been put upon his trial, which have never been submitted to a jury, and upon which, consequently, a jury has come to no decision?

Of all the duties, indeed, which a judge has to discharge, the exercise of this discretion must be the most painful. It is true that there are no duties, however awful, no situation, however difficult, with which long habit will not render the best of men familiar; but if we represent to ourselves a judge newly raised to that eminence, just entering upon the circuit, and become for the first time the arbiter of the lives of his fellow-creatures, we shall be able to form to our-

selves some idea of the difficulties he has to encounter, and of the anxiety which he must necessarily feel. Sworn to administer the law, he is at the same time the depositary of that royal clemency which is to interrupt its execution. In danger of obstructing the due course of justice on the one hand, or of refusing mercy to those who have a fair claim to it on the other, he finds no rules laid down, or principles established by the legislature, to guide his judgment. He must fix for himself the principles and the rules by which he is to act, at the same time that he is to apply them and bring them into action, and yet he cannot but be aware, that the principles which he shall adopt will probably not be those of his successor, who will have maxims of justice and of mercy of his own, but which cannot possibly be foreseen; and at the same time he must know that it is nothing but a uniformity of practice which can make the exercise either of severity or of lenity useful to the public. In such a state of embarrassment, it is, that he is called upon to decide, and upon his decision the life of an individual depends; nay, upon the decision of a single case may depend the lives of many individuals. The clemency he shews, though it spares the life of a single

convict, may be the means of alluring others to the commission of the same crime, who from other judges will not meet with the same lenity. The execution of a severe judgment may be the means of procuring impunity to many other criminals by inducing prosecutors to shrink from their duty, and jurymen to violate their oaths.

From the foregoing observations it should seem, that the laws, which it is proposed to repeal, cannot well be defended as part of a general system of criminal jurisprudence. Taken by themselves, it seems still more difficult to justify them. They are of such inordinate severity, that, as laws now to be executed, no person would speak in their defence. They have, indeed, by a change of circumstances, become far more severe than they were when originally passed. Not to dwell on the circumstance of their severity having increased just in the proportion that the value of money has diminished, the state of the criminal law in other respects, at the time when these laws were enacted, afforded an excuse for passing them which has long ceased to exist.

When, in the reign of King William, the benefit of clergy was taken away from the crime of privately stealing, in a shop, goods of the value of five shillings, that offence was already punishable capitally on all but those who could read. The statute had no other effect, therefore, than to place men, whose crime was aggravated by the education which they had received, upon a level with those who had to urge, in extenuation of their guilt, the deplorable ignorance in which they had been left by their parents and by the state.

The same observation cannot, indeed, be made on the Act of the 12th Anne, which relates to stealing money or goods in a dwelling-house: but when it passed, only seven years had elapsed since the adoption of the law, which extended the benefit of clergy to the illiterate, as well as to those who could read: and men who had been accustomed to see ignorant persons convicted capitally, for stealing what was of the value only of thirteen-pence, in any place, or under any circumstances, could not have thought it an act of great severity, to appoint death as a punishment for stealing in a dwelling-house property of the value of forty shillings.

It is sufficient, however, to say of those laws, that they are not, and that it is impossible that they should, be executed; and that instead of preventing, they have multiplied crimes, the very crimes they were intended to repress, and others no less alarming to society, perjury, and the obstructing the administration of justice.

But although these laws are not executed, and may be said, therefore, to exist only in theory, they are attended with many most serious practical consequences. Amongst these, it is not the least important, that they form a kind of standard of cruelty, to justify every harsh and excessive exercise of authority. Upon all such occasions these unexecuted laws are appealed to as if they were in daily execution. Complain of the very severe punishments which prevail in the army and the navy, and you are told that the offences, which are so chastised, would by the municipal law be punished with death. When not long since a governor of one of the West India islands was accused of having ordered that a young woman should be tortured, his counsel said in his defence, that the

woman had been guilty of a theft, and that by the laws of this country her life would have been forfeited. When, in the framing new laws, it is proposed to appoint for a very slight transgression a very severe punishment, the argument always urged in support of it is, that actions, not much more criminal, are by the already existing law punished with death. So in the exercise of that large discretion which is left to the judges, the state of the law affords a justification for severities, which could not otherwise be justified. When for an offence, which is very low in the scale of moral turpitude, the punishment of transportation for life is inflicted, a man who only compared the crime with the punishment, would be struck with its extraordinary severity; but he finds, upon inquiry, that all that mass of human suffering which is comprised in the sentence, passes by the names of tenderness and mercy, because death is affixed to the crime by a law scarcely ever executed, and, as some persons imagine, never intended to be executed.

For the honour of our national character—for the prevention of crimes—for the mainte-

nance of that respect which is due to the laws, and to the administration of justice—and for the sake of preserving the sanctity of oaths—it is highly expedient that these statutes should be repealed.

NOTES.

NOTE A. P. 23.

The latitude which juries allow themselves in estimating the value of property stolen, with a view to the punishment which is to be the consequence of their verdict, is an evil of very great magnitude. Nothing can be more pernicious, than that jurymen should think lightly of the important duties they are called upon to discharge, or should acquire a habit of trifling with the solemn oaths they take. And yet ever since the passing of the acts which punish with death the stealing in shops or houses, or on board ships, property of the different values which are there mentioned, juries have, from motives of humanity, been in the habit of frequently finding by their verdicts, that the things stolen were worth much less than was clearly proved to be their value. It is held, indeed, by some of the judges (whether by all of them, and upon all occasions, I am not certain) that juries in favour of life may fairly, in fixing the value of the property, take into their consideration the depreciation of money which has taken place since the statutes passed, or in the words of Mr. Justice Blackstone, "may reduce the present nominal value of "money to its ancient standard."* To shew, therefore, to what an extent juries have assumed to themselves a power of dispensing with the law in this respect, it will be proper to refer to the earliest trials, for these offences, that I happen to have met with.

* Com. vol. iv. p. 239.

In the year 1731-2, which was only thirty-two years after the act of King William, and only sixteen after the act of Queen Ann, a period during which there had scarcely been any sensible diminution in the value of money, it appears from the sessions papers that, of thirty-three persons indicted at the Old Bailey for stealing privately in shops, warehouses, or stables, goods to the value of five shillings and upwards, only one was convicted, twelve were acquitted, and twenty were found guilty of the theft, but the things stolen were found to be worth less than five shillings. Of fifty-two persons tried in the same year at the Old Bailey, for stealing in dwelling-houses, money, or other property, of the value of forty shillings, only six were convicted, twenty-three were acquitted, and twenty-three were convicted of the larceny, but saved from a capital punishment by the jury stating the stolen property to be of less value than forty shillings. In the following years the numbers do not differ very materially from those in the year 1731.

Some of the cases which occurred about this time are of such a kind, that it is difficult to imagine by what casuistry the jury could have been reconciled to their verdict. It may be proper to mention a few of them.—Elizabeth Hobbs was tried in September 1732, for stealing in a dwelling-house one broad piece, two guineas, two half-guineas, and forty-four shillings, in money. She confessed the fact, and the jury found her guilty, but found that the money stolen was worth only thirty-nine shillings. Mary Bradley, in May 1732, was indicted for stealing in a dwelling-house, lace which she had offered to sell for twelve guineas, and for which she had refused to take eight guineas; the jury, however, who found her guilty, found the lace to be worth no more than thirty-nine shillings. Wm. Sherrington, in Oct. 1732, was indicted for stealing privately in a shop, goods which he had actually sold for 11. 5s. and the jury found that they were worth only 4s. 10d.

In the case of Michael Allom, indicted in February 1733, for privately stealing in a shop forty-three dozen pairs of stockings, value 3l. 10s. It was proved that the prisoner had sold them for a guinea and a half, to a witness who was produced on the trial, and yet the jury found him guilty of stealing what was only of the value of 4s. 10d. In another case, that of Geo. Dawson and Joseph Hitch, also indicted in February 1733, it appeared that the two prisoners, in company together at the same time, stole the same goods privately in a shop, and the jury found one guilty to the amount of 4s. 10d. and the other to the amount of 5s. that is, that the same goods were at one and the same moment of different values. This monstrous proceeding is accounted for by finding that Dawson, who was capitally convicted, had been tried before at the same sessions for a similar offence, and had been convicted of stealing to the amount only of 4s. 10d. The jury seem to have thought, that having had the benefit of their indulgence once, he was not entitled to it a second time, or in other words, that having once had a pardon at their hands, he had no further claims upon their mercy.

NOTE B. P. 29.

The whole of the passage in Paley, here commented on, is in the following words:

"There are two methods of administering penal justice.

"The first method assigns capital punishments to few offences, and inflicts it invariably.

"The second method assigns capital punishments to many kinds of offences, but inflicts it only upon a few examples of each kind.

" The latter of which two methods has been long adopted in this country, where, of those who receive sentence of death, scarcely one in ten is executed. And the preference of this to the former method seems to be founded in the consideration, that the selection of proper objects for capital punishment, principally depends upon circumstances, which, however easy to perceive in each particular case after the crime is committed, it is impossible to enumerate or define before-hand; or to ascertain, however, with that exactness which is requisite in legal descriptions. Hence, although it be necessary to fix, by precise rules of law, the boundary on one side, that is, the limit to which the punishment may be extended, and also that nothing less than the authority of the whole legislature be suffered to determine that boundary, and assign these rules; yet the mitigation of punishment, the exercise of lenity, may, without danger, be intrusted to the executive magistrate, whose discretion will operate upon those numerous unforeseen, mutable, and indefinite circumstances, both of the crime and the criminal, which constitute or qualify the malignity of each offence. Without the power of relaxation lodged in a living authority, either some offenders would escape capital punishment, whom the public safety required to suffer; or some would undergo this punishment, where it was neither deserved nor necessary. For if judgment of death were reserved for one or two species of crimes only, which would probably be the case, if that judgment was intended to be executed without exception, crimes might occur of the most dangerous example, and accompanied with circumstances of heinous aggravation which did not fall within any description of offences that the laws had made capital, and which consequently could not receive the punishment their own malignity and the public safety required. What is worse, it would be known before-hand, that such crimes might be committed without danger to the offender's life. On the other hand, if, to reach these possible cases, the whole class of offences to which they belong be subjected to pains of death, and no power of

remitting this severity remains any where, the execution of the laws will become more sanguinary than the public compassion would endure, or than is necessary to the general security.

" The law of England is constructed upon a different and a better policy. By the number of statutes creating capital offences, it sweeps into the net every crime, which under any possible circumstances may merit the punishment of death: but when the execution of this sentence comes to be deliberated upon, a small proportion of each class are singled out, the general character, or the particular aggravations of whose crimes, render them fit examples of public justice. By this expedient few actually suffer death, whilst the dread and danger of it hang over the crimes of many. The tenderness of the law cannot be taken advantage of. The life of the subject is spared, as far as the necessity of restraint and intimidation permits, yet no one will adventure upon the commission of any enormous crime from a knowledge that the laws have not provided for its punishment. The wisdom and humanity of this design furnish a just excuse for the multiplicity of capital offences, which the laws of England are accused of creating beyond those of other countries. The charge of cruelty is answered by observing, that these laws were never meant to be carried into indiscriminate execution; that the legislature, when it establishes its last and highest sanctions, trusts to the benignity of the crown to relax their severity as often as circumstances appear to palliate the offence, or even as often as those circumstances of aggravation are wanting, which rendered this rigorous interposition necessary. Upon this plan it is enough to vindicate the lenity of the laws, that some instances are to be found in each class of capital crimes, which require the restraint of capital punishment; and that this restraint could not be applied without subjecting the whole class to the same condemnation.

" There is, however, one species of crimes, the making of

which capital can hardly, I think, be defended, even upon the comprehensive principle just now stated; I mean that of privately stealing from the person. As every degree of force is excluded by the description of the crime, it will be difficult to assign an example, where either the amount or circumstances of the theft place it upon a level with those dangerous attempts, to which the punishment of death should be confined. It will be still more difficult to shew, that, without gross and culpable negligence on the part of the sufferer, such examples can ever become so frequent, as to make it necessary to constitute a class of capital offences, of very wide and large extent.

"The prerogative of pardon is properly reserved to the chief magistrate. The power of suspending the laws is a privilege of too high a nature to be committed to many hands, or to those of any inferior officer in the state. The king also can best collect the advice by which his resolutions should be governed; and is at the same time removed at the greatest distance from the influence of private motives. But let this power be deposited where it will, the exercise of it ought to be regarded, not as a favour to be yielded to solicitation, granted to friendship, or, least of all, to be made subservient to the conciliating or gratifying of political attachments; but as a judicial act, as a deliberation to be conducted with the same character of impartiality, with the same exact and diligent attention to the proper merits and circumstances of the case, as that which the judge upon the bench was expected to maintain and shew in the trial of the prisoner's guilt. The questions, whether the prisoner be guilty, and whether, being guilty, he ought to be executed, are equally questions of public justice. The adjudication of the latter question is as much a function of magistracy, as the trial of the former. The public welfare is interested in both. The conviction of an offender should depend upon nothing but the proof of his guilt, nor the execution of the sentence upon any thing beside the quality and circumstances of his crime. It is

necessary to the good order of society, and to the reputation and authority of government, that this be known and believed to be the case in each part of the proceeding. Which reflections show, that the admission of extrinsic or oblique considerations, in dispensing the power of pardon, is a crime in the authors and advisers of such unmerited partiality, of the same nature with that of corruption in a judge."

NOTE C. P. 42.

So much is Dr. Paley an advocate for a discretionary power in the punishment of offences, that he justifies imprisonment for debt on principles of penal law, and seems to think, that as no discretion is likely to be so well informed, so vigilant, or so active, as that of the creditor himself, he is properly by the law of England both judge and party. "Consider it," he says, "as a public punishment, founded upon the same reason, and "subject to the same rules as other punishments, and the jus- "tice of it, together with the degree to which it should be ex- "tended, and the objects upon whom it may be inflicted, will "be apparent *****. The only question is, whether the pu- "nishment be properly placed in the hands of an exasperated "creditor: for which *it may be said*, that these frauds are so "subtile and versatile, that nothing but a discretionary power "can overtake them, and that no discretion it likely to be so "well informed, so vigilant, or so active, as that of the credi- "ditor." Prin. of Mor. and Pol. Phil. vol. 1, p. 163, 164. It is true that Paley does not state this directly as his own opinion, but from the whole context it is fairly to be inferred that it is an opinion of which he does not disapprove; and yet if imprisonment for debt is to be justified on the ground of punishment, it should be observed, that in this respect it differs from the punishment of all other crimes, that a power of pardoning exists no where but in the offended creditor.

NOTE D. P. 52.

The maxim that it is "*better for ten guilty persons to escape "than for one innocent man to suffer,*" is mentioned with approbation by Mr. Justice Blackstone,* but is contested by Dr. Paley. "If by better," he says, "be meant that it is more "for the public advantage, the proposition I think cannot be "maintained. The security of civil life, which is essential to "the value and the enjoyment of every blessing it contains, and "the interruption of which is followed by universal misery and "confusion, is protected chiefly by the dread of punishment."† By the dread of punishment, it is true, but of punishment as a consequence of guilt, not of punishment falling indiscriminately on those who have not, and on those who have, provoked it by their crimes. The security of civil life is undoubtedly the first object of all penal laws; but by nothing can that security be more grievously interrupted than by the innocent suffering for the crimes of the guilty. It should seem from the animadversions of Dr. Paley, that he imagined that those who have adopted this maxim, treat the escape of ten guilty persons as a trivial ill, whereas, they deem it an evil of very great magnitude, but yet one less destructive of the security and happiness of the community, than that one innocent man should be put to death with the forms and solemnities of justice.

"The misfortune," continues Dr. Paley, "of an individual, for "such may the sufferings, or even the death of an innocent person "be called, when they are occasioned by no evil intention, cannot "be placed in competition with this object." He here speaks of the sufferings and privations endured by the victim, as if they were the only evils resulting from the punishment of the innocent. He overlooks entirely the mischiefs which arise from the consideration, that the most perfect innocence, and the most im-

* Com. b. iv. ch. 27. † Prin. of Moral and Pol. Phil. vol ii. p. 310.

plicit submission to the laws cannot afford security to those who possess the one, and practise the other. He leaves altogether out of his consideration that disrespect for the tribunals which is the necessary consequence of so terrible a failure in the administration of justice. He does not reflect how much the effect of example must be weakened by men being taught from what they have themselves witnessed, that the wretch, whom they see consigned to punishment, may be in the highest degree unfortunate, and in no degree guilty. He does not take into his account the hopes which the punishment of an innocent man ever affords to the guilty, by placing in so striking a point of view, the fallibility of our tribunals; and by shewing how uncertain it is that punishment will be the consequence of guilt. Could the escape of ten of the most desperate criminals have ever produced as much mischief to society, as did the public executions of Calas, of D'Anglade, or of Lebrun? The state of insecurity in which men were placed by some of these fatal errors in the administration of justice in France, is strongly exemplified by the saying of a man of considerable eminence in that country, who declared, that if he were accused of stealing the towers of Notre Dame, he would consult his safety by flight rather than risque the event of a trial, though the crime imputed to him was manifestly impossible.

Dr. Paley goes on to observe, "that courts of justice should "not be deterred from the application of their own rules of ad-"judication, by every suspicion of danger, or by the mere pos-"sibility of confounding the innocent with the guilty." And in this observation every body must agree with him. If courts of justice were never to inflict punishment where there was a possibility of the accused being innocent, no punishment would in any case be inflicted. In those instances in which the proof of guilt seems to be most complete, the utmost that can be truly affirmed of it is, that it amounts to a very high probability: no truth, that depends on human testimony, can ever be properly said to be demon-

strated. Human witnesses may utter falsehood, or may be deceived. Even where there have been a number of concurrent and unconnected circumstances, which have appeared inexplicable upon any hypothesis but that of the accused being guilty, it has yet sometimes been made evident that he was innocent. Nay, in some instances where men have borne evidence against themselves, and have made a spontaneous confession of the crimes imputed to them, not only they were not, but they could not be guilty, the crimes confessed being impossible. With the wisest laws, and the most perfect administration of them, the innocent may sometimes be doomed to suffer the fate of the guilty, for it were vain to hope, that from any human institution, all error can be excluded. Yet these are considerations which are calculated very strongly to impress upon courts of justice, not indeed that they "should be deterred from the application of their own "rules of adjudication," but that they should use the utmost care and circumspection in the application of those rules; that in a state of things where they are so liable to error, they cannot be too anxious to guard against it, and that if it be a great public evil, as it undoubtedly is, that the guilty should escape, it is a public evil of much greater magnitude, that the innocent should suffer. It should be recollected too, that the object of penal laws, is the protection and security of the innocent; that the punishment of the guilty is resorted to only as the means of attaining that object. When, therefore, the guilty escape, the law has merely failed of its intended effect; it has done no good, indeed, but it has done no harm. But when the innocent become the victims of the law, the law is not merely inefficient, it does not merely fail of accomplishing its intended object, it injures the persons it was meant to protect, it creates the very evil it was to cure, and destroys the security it was made to preserve.

"They ought rather," continues Paley, "to reflect, that he "who falls by a mistaken sentence, may be considered as falling

"for his country, whilst he suffers under the operation of those "rules, by the general effect and tendency of which the welfare "of the community is maintained and upheld." Nothing is more easy than thus to philosophize and act the patriot for others, and to arm ourselves with topics of consolation, and reasons for enduring with fortitude the evils to which, not ourselves, but others are exposed. I doubt, however, very much, whether this is attended with any salutary effects. Instead of endeavouring thus to extenuate and to reconcile to the minds of those who sit in judgment upon their fellow-creatures so terrible a calamity as a mistake in judicature to the injury of the innocent, it would surely be a wiser part to set before their eyes all the consequences of so fatal an error in their strong but real colours. To represent to them, that of all the evils which can befall a virtuous man, the very greatest is to be condemned and to suffer a public punishment as if he were guilty. To see all his hopes and expectations frustrated; all the prospects in which he is indulging, and the pursuits which he is following, for the benefit, perhaps, of those who are dearer to him than himself, brought to a sudden close; to be torn from the midst of his family; to witness the affliction they suffer; and to anticipate the still deeper affliction that awaits them: not to have even the sad consolation of being pitied; to see himself branded with public ignominy; to leave a name which will only excite horror or disgust; to think that the children he leaves behind him, must, when they recal their father's memory, hang down their heads with shame; to know that even if at some distant time it should chance that the truth should be made evident, and that justice should be done to his name, still that his blood will have been shed uselessly for mankind, that his melancholy story will serve wherever it is told, only to excite alarm in the bosoms of the best members of society, and to encourage the speculations for evading the law, in which wicked men may indulge.

Let us represent to ourselves the judges who condemned Calas to die, apologizing for their conduct with the reasoning of Paley. Admitting that it was a great misfortune to the individual, but none to the public, and that even to the individual the misfortune was greatly alleviated by the reflection, that his example would tend to deter parents in future from embruing their hands in the blood of their children, and that in his instance the sufferings of the innocent would prevent the crimes of those who had a propensity to guilt. With what horror and disgust would not every well formed mind shrink from such a defence!

When we are weighing the evil of the punishment of one innocent man against that of the impunity of ten who are guilty, we ought to reflect, that the suffering of the innocent is generally attended in the particular instance with the escape of the guilty. Instances have, indeed, occurred like that which I have already mentioned of Calas, where a man has been offered up as a sacrifice to the laws, though the laws had never been violated: where the tribunals have committed the double mistake of supposing a crime where none had been committed, and of finding a criminal where none could exist. These, however, are very gross, and therefore very rare examples of judicial error. In most cases the crime is ascertained, and to discover the author of it is all that remains for investigation; and in every such case, if there follow an erroneous conviction, a two-fold evil must be incurred, the escape of the guilty, as well as the suffering of the innocent. Perhaps amidst the crowd of those who are gazing upon the supposed criminal, when he is led out to execution, may be lurking the real murderer, who, while he contemplates the fate of the wretch before him, reflects with scorn upon the imbecility of the law, and becomes more hardened, and derives more confidence in the dangerous career upon which he has entered.

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