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COMMENTARIES

ON THE

LAWS OF MOSES.

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ON THE

LAWS OF MOSES.

BY THE LATE

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 ERRATA.

The Reader is particularly requested to correct with a pen the following mistakes, as they materially affect the sense.

- Page 13. line 25. *To were, prefix certainly, from the next line.*
 — 21. — 2. *for of, read of their.*
 — 30. — 17. *for discard, read abolish.*
 — 33. — 18. *for did, read could.*
 — — — 19. *for dismembered, read local and partial.*
 — 65. — 13 *for יהרהר, read יהוה.*
 — 70. — 25 *for the crime, read this crime.*
 — 102. — 26 *for strange idea, read monstrous idea.*
 — 112. — 4 5 *for law is, read laws are.*
 — 112. — 6. *dele quite.*
 — 181. — 17 *for did, read did not.*
 — 194. — 15 *for be, read have been.*
 — 205. — 28. *for Διαρεγων, read Διαρεγων.*
 — 240 — 18 *for they, read these principles.*
 — 252. — 17. *for can, read could.*
 — 260. — 8. *for imposed, read set.*
 — 270. — 7 *for house-theft, read theft committed by a ser-
 vant*
 — 278. — 11. *for kept, read had kept.*
 — 308. — 18. *for Our great Lords read Our Princes.*
 — 337. — 11. *for Indeed, read In fact*
 — 372. — 14. *for Protector, read Prorector.*
 — 380. — 16. *dele same.*

COMMENTARIES
ON THE
LAWS OF MOSES.

BOOK V. CONTINUED.

CHAPTER II.

CRIMES AGAINST GOD.



ART. CCXLV.

Of Idolatry, or the Worship of other Gods—Wherein it consists, and how it is to be distinguished from Image-Worship, which may be paid even to the true God, but is likewise prohibited by Moses in every shape.

§ 1. **A**s the maintenance of the worship of the only true God, was one of the fundamental objects of the Mosaic polity, and as that God was at the same time regarded as king of the Israelitish nation, so we find idolatry, that is, the worship of other gods, occupying, in the Mosaic law, the first place in the list of crimes. It was indeed a crime, not merely against

God, but also against a fundamental law of the state ; and thus a sort of high-treason. Among the commandments which God gave to the people of Israel, the first was, *I Jehovah am thy God, who have brought thee out of Egypt, the prison of slaves ; thou shalt have no other gods before my face ;* Exod. xx. 2, 3. It is, therefore, the more necessary that we understand the true nature of this crime, and the light in which it is viewed in the Mosaic law ; and as in the subsequent details, I presuppose that the reader recollects what I have already stated, on the foundations of the Israelitish polity, in Arts XXXII.—XXXIV., I must request that, if the contents of these Articles are not fresh in his memory, he will take the trouble to peruse them once more, before he proceeds farther.

That the political prohibition of idolatry, under the sanction of corporal punishment, was not, properly speaking, founded on the doctrine of the one true God, but on this principle, that God had delivered the Israelites from slavery, and made them a people ; and that it consequently bound even those who, though believers in polytheism, according to the then universal superstition of the neighbouring nations, were still desirous to enjoy the advantages and protection of the Israelitish government, has been already remarked under Art. XXXIII. Hence the crime itself, to which Moses annexed the punishment of death, consisted not in *ideas* and opinions, but in the overt *act* of worshipping other gods. Though a man had believed that there were more gods than one, he would not, therefore, by the Mosaic statute, have become amenable to the magistrate, nor would an *Inquisitio*

ethnicæ pravitatis have taken place. A foreigner, though he had not at once adopted the Mosaic religion, might live among the Israelites, as a stranger, in perfect peace; (Art. CXXXVIII.) And with regard either to slaves, of whom the use was allowed, or to damsels made captive in war, the lawgiver could not expect that *they* would, in consequence of such a misfortune, immediately alter the sentiments of their minds, and, laying aside all at once the prejudices of education, acknowledge the unity of God. Accordingly we do not, in the case at least of female slaves, find a single word respecting the necessity of a change of their religion; and that the rite of circumcision, to which servants were required to submit, did not imply any such change, in so far, at any rate, as the opinions of the heart were concerned, has been already remarked under Arts. CXXVIII. and CLXXXIV.

On the other hand, a person was guilty of idolatry, and punishable by the penal laws, when he either,

1. *Made* images of strange gods, or *kept* such images, so as to make it manifest that he revered them as gods; or,
2. *Prostrated himself* before strange gods to worship them; or,
3. *Offered sacrifice* to them; or,
4. *Devoted himself* to them.

We must, however, here be careful to distinguish between *two* crimes, which, by the idiom of our language, are sometimes comprehended under the common name, *Götzendienst* (*Idololatria*), and which, even when speaking about Israelitish matters, we are very apt to confound together. These are,

4 *Distinction of Idolatry & Image-Worship.* [Art. 245.]

1. The crime of *worshipping other gods beside the only true God*, to whom Moses gave the name of JEHOVAH. This was, properly speaking, the state-crime already described; and it is at the same time the greatest of all offences against sound reason and common sense.

2. The crime of *image-worship*; which is not always idolatry, because not merely false gods, but even the only true God, may be worshipped under the form of an image. Thus the Israelites wanted to worship, under the similitude of a golden calf, the God who had brought them out of Egypt; and Aaron, in proclaiming a festival on the occasion of its being set up, expressly denominated the God, in honour of whom that festival was to be solemnized, JEHOVAH; Exod. xxxii. 4, 5. Image-worship, it is true, indicated a crime against the true God; but then, it was not, if I may so speak, high-treason, or a crime against the fundamental laws of the state; nor is it so clearly and completely repugnant to sound reason, as the crime of idolatry; for as an image may serve in some measure to prevent the distraction of our thoughts, and to confine them to that object alone, which we conceive it to represent; and as, of course, it may help to make our devotion more lively and ardent, that we can in prayer address the invisible God under a certain form; and as upon the generality of mankind, accustomed as they are to sensible objects, images never fail to make a great impression; so it may, therefore, be a question in philosophical ethics, whether we ought to worship the Deity under the form of an image, or not? That much danger is connected

with such a practice ; that image-worship easily passes into superstition, and sometimes gives religion a ludicrous aspect, which we cannot again forget, and are thereby disturbed in our devotions ; is on the other hand abundantly manifest : and the question therefore wholly hinges upon this point, whether the advantage, or the risk of evil consequences, preponderates ? Now, God himself has, in Exod. xx. 4, 5., given a decision *against* image-worship ; and I think that philosophy will, after a more careful enquiry, and calling in the counsel of experience, decide in the same manner. Still, however, the point might admit of dispute ; and at any rate, image-worship, properly explained, is not a manifest outrage against reason ; but only rather a dangerous means of promoting devotion.

These two crimes, therefore, are in their nature extremely different, and the one of them is much more heinous than the other. If, however, we read the descriptions given of them by Moses, we shall not be apt to confound them ; for, to *serve other gods besides Jehovah*, or, to *serve the gods of strange nations*, and, to *make an image in order to serve it, or adore it*, must strike us at the first glance as very different modes of expression. And as our German word, *Götzendienst*, (that is, *the service of deities*,) sometimes prevents a proper distinction from being made, inasmuch as we call an image of the true God, a *Götze*, (a deity,) and sometimes even an *Abgott*, (an idol) I shall abstain from the use of it, unless when speaking of the image-worship of a false god, and call the one crime uniformly, *Abgötterey*, (idolatry,) and the other, *Bilderdienst*, (image-worship.)

Even in the Biblical history, we find the two crimes distinguished from each other. According to the account given in the book of Judges, (chap. ii. 6,—11.) the Israelites continued unpolluted by the worship of strange gods, not only during the days of Joshua, but likewise during the next generation, as long as the old people were still alive, who, in their youth, had witnessed the mighty acts of Jehovah, and the victories which he had granted to Joshua. But notwithstanding this, the circumstances related in chaps. xvii. and xviii. respecting image-worship, as quite publicly carried on, seem to belong to the earlier of these two periods, and to have *begun* to take place during the time when *the tribe of Dan had not as yet any inheritance assigned them among the Israelites*, Judg. xviii. 1. ; and yet it would appear from Josh. xix. 40,—46. that this tribe had, in Joshua's time, obtained certain cities which the tribe of Judah had before received, over and above their just share. In point of time, they seem to be prior to the story of the Benjaminitish war, detailed in chaps. xix.—xxi. of the book of Judges ; as I conclude, not merely from the order of the chapters, (which in regard to a collection of stories not chronologically arranged, would really be but a weak proof ;) but from this circumstance, that in the account of the said war, Dan is described as already the most northern boundary of the Israelites ; and *all Israel, from Dan to Beersheba*, as gathered together against the Benjaminites, Judg. xx. 1. This presupposes the conquest of *Laish*, in the most northern part of Palestine ; and its being named *Dan*, after the progenitor of the conquerors, (as related in the

28th and 29th verses of chap. xviii.) to have previously taken place. But in the time of the Benjaminitish war, Phinehas, the grandson of Aaron, was still living, (Judg. xx. 28.); and he, in the time of Moses, was already a full-grown man, (Numb. xxv. 7,—13.); so that the race that had witnessed the wondrous works of God, and the victories of Joshua, had not yet become extinct. If we add to this, that the first image-priest was a grandson of Moses*, and but a young man, we shall be satisfied that the circumstances above alluded to, and which I am now to mention, must have happened either during Joshua's life-time, or immediately after his death. They are in substance as follows :

Micah, an Ephraimite, made an image of the Deity, and, without doubt, of the true God ; for it was not only made of silver which had been consecrated to Jehovah, (Judg. xvii. 3.); but Micah expressed the greatest joy in having got a Levite to become its priest, in the expectation that Jehovah would thus do him good, and bless him, Judg. xvii. 13 †. This

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* See my Note on Judg. xviii. 30.—The Jews, to prevent any reproach on the memory of their legislator, have here corrupted the text, and absurdly put *Manasseh* for *Moses*.

† I must here take notice of a mistake in my version of this passage. In conformity with the liberty which I craved in the first part of my Translation, I sometimes, instead of (יהוה) *Jehovah*, use the word *God*, that I may not too often repeat the foreign term *Jehovah*, in German. This liberty I have craved, and I mean still to avail myself of it. But in the present instance, I am aware that I have here used it unseasonably ; for, according to my version, it is not so clear as it should be, that the image was erected to the true God ;

image, so far from being kept in concealment in his house, was actually consulted as an oracle, and soon after, publicly set up by the Danites. The grandson of Moses, from poverty, became its priest; and that office descended hereditarily to his posterity for a long period; Judg. xviii. 4,—6. 14,—17. 30, 31.

Gideon was an enemy of the worship of *Baal*; cut down the groves of that false god, and demolished his altars; but this same Gideon, from a mistaken idea of gratitude to Jehovah, as the author of his victories, made an image of the Deity, with the gold he had got in plunder from the Midianites, and set it up publicly in Ophra; Judg. vi. 25,—33. viii. 24,—27.

Jeroboam, who, for political reasons, (Art. CLXII.) wished to prevent his subjects from frequenting the high festivals at Jerusalem, set up in Dan and Bethel two golden calves, in which the God who had conducted the Israelites out of Egypt, was to be worshipped; 1 Kings xii. 26,—31. It would seem, the Israelites had such a propensity to image-worship, that he thought he could, by the erection of these golden calves, the more easily divert them from making pilgrimages to Jerusalem; for already in the desert, had the calf been the image which Aaron, when he had not the courage to prevent image-worship, gave to the true God. This worship of the calves, which continued under the kings of the ten tribes, until the Assyrian captivity, and is, in the books of Kings, termed *the sin of Jeroboam the son of Nebat*, differed

and, of course, that it implied a sin, not against the prohibition of idolatry, but against that of image-worship.

very materially from idolatry, properly so called, and is represented as a less heinous sin.—When Ahab first allowed himself to be led astray by his superstitious consort, Jezebel, and introduced the worship of Baal, we find the historian making use of the following language: *And as if it had not been enough that he continued the sin of Jeroboam the son of Nebat, he married Jezebel the daughter of Ecbaal king of Sidon, served Baal, adored him, and erected to him an image in the temple, which he had built to him in Samaria.—And Ahab did more to provoke the wrath of Jehovah, than all the kings of Israel who had reigned before him, 1 Kings xvi. 31,—33.* Concerning his son Joram, on the other hand, it is said, that *he did what was displeasing to Jehovah, though not in the same measure as his father and mother; for he caused the image of Baal, which his father had made, to be removed: Only he still hankered after the sin of Jeroboam the son of Nebat, and departed not from it, 2 Kings iii. 3.* In the ix. and x. chapters of the same book, we find Jehu shewing himself a mortal enemy and violent persecutor of the worship of Baal, which had been introduced in opposition to the fundamental laws; and as he himself expresses it, *a zealot for Jehovah*; on which account he was commended, and obtained a promise from God, that his descendants, down to his great-great-grand-children, should fill the Israelitish throne, 2 Kings x. 16, 30.—At the same time, however, it is remarked, that *from the sin of Jeroboam the son of Nebat, he had not abstained*; and the very same thing is repeated of his posterity; of his son, chap. xiii. 6.; his grandson, chap. xiii. 11.; his great-grandson, chap. xiv. 24.;

and his great-great-grandson, chap. xv. 9.—In the prophecies, also, of the *lesser* prophets, as they are called, we see the same distinction between calf-worship and Baal-worship duly observed.

ART. CCXLVI.

Of the Punishment of Idolatry.

§ 2. IDOLATRY, properly so called, was, as we have already mentioned, the greatest of all crimes against the state itself, and expressly prohibited in the very first of the commandments. Moses, besides, prohibited every thing that was likely to give any occasion or temptation to it, or to excite suspicion of its being practised; and the principal scope of his last discourses, in the book of Deuteronomy, is to warn the Israelites against idolatry, and to exhort them in the most urgent manner, to the service of the only true God. The curses also, and blessings, which he proposes to the people in the xxvi. chapter of Leviticus, and xxvii. xxviii. and xxxii. chapters of Deuteronomy, turn chiefly on the transgression or observation of this commandment.

If any individual Israelite worshipped strange gods, he subjected himself to the punishment of stoning, Deut. xvii. 2,—5. Here, as above remarked in the preceding Article, it is not mere *sentiments* of the mind that are in question, but *overt acts*; and considering that the worship of other gods generally proceeded not from any impulse of conscience, but from a view of supposed temporal advantages, and there-

fore from avarice, or fear; (Art. XXXIII.) no restraint was imposed on either opinion or conscience; and this punishment, consequently, was in no respect unjust. But was it not, I may be asked, unnecessarily severe? Should a piece of folly, that rather claims our pity, have been punished with death?

In answer to these questions, I can, first of all, only repeat what has been already very often said by others, viz. that as the only true God was the civil legislator of the people of Israel, and accepted by them as their king, idolatry was a crime against the state, and therefore just as deservedly punished with death, as high-treason is with us. Whoever worshipped strange gods, shook, at the same time, the whole fabric of the laws, and rebelled against Him in whose name the government was carried on.

But we must, besides this, consider the numberless miseries which idolatry, with all its train of superstitions, brings into the world. I mean the *present* world, for with a *future* world, when civil laws are in question, I have nothing to do. What lamentable dupes of priestcraft does it render nations! and more especially, the nearer they are to the infant state of the human race, the more unenlightened, honest, and conscientious? To what avaricious exactions does it subject them, under the pretext of sacrificing, or offering gifts to one God to-day, and to another, to-morrow? Add to this, that it torments them with numberless foolish terrors, and, by the frauds of the priests in returning answers in the name of the Deity, not unfrequently diverts them from measures politically advantageous or necessary; or involves them in

dangers, when the crafty oracle, whether in distinct, or (like Apollo, when consulted by Cræsus and Pyrrhus) in ambiguous terms, counsels them to embark in war. The idol-priest, who thus gives a mischievous oracle, perhaps does not, unless when bribed by their enemies, mean to bring any misfortune on his countrymen, and still less on himself; but then he may not know what he ought to answer, and so in his perplexity he perhaps chuses what is wrong: Nay, even when he really happens to light on what is most advisable, he may still be the cause of error by his counsels. Where any counsel is suggested by a judicious and creditable man, it may be examined and proved; but the very same counsel, as it proceeds from the mouth of an idol-priest, acquires an infallibility which is dangerous to the state, because it must be followed implicitly, and without examination, and may be so in a sense different from what he had in view. What the Pythian priestess might mean, in counselling the frightened Greeks, (whom I consider as on that occasion no better than poltroons,) to defend themselves against the attack of Xerxes, *with wooden walls*, is very uncertain. As to what these wooden walls might allude to, a variety of conjectures were formed: the most natural exposition would perhaps have been, *that they should retire into the woods, some of which in Greece are almost impenetrable*; that they should, in the first place, take possession of the pass of *Thermopylæ*, and thence, if dislodged, withdraw into the forests of the *Moræa*, in which, to this day, the descendants of the Spartans, under the name of *Manotes*, maintain a certain degree of independence against the Turks. A very different

explanation of the oracle was however adopted, and happily, the issue was fortunate. But what would have become of Greece, if that explanation had been preferred, which made the wooden walls mean an old wooden castle at *Athens*. Upon the whole, the consultation of the oracle was, in this instance, by no means very creditable to the character of the Greeks, in point of courage; at least the present king of Prussia would neither have given nor listened to it, but have at once attacked, in the plains, the great army of the Persians, of which the Greek historians have given such exaggerated and gasconading accounts; and as they certainly were not such good soldiers as the French, he would in all probability have succeeded even still more completely than he did at *Rosbach*.— But without directly specifying *Rosbach*, he would, as at *Hohenfriedberg*, have manœuvred so as to bring the enemy into the plains, and in there attacking him, have had the advantage, which, when an army exceeds an hundred thousand men, a smaller force has over a larger, from its not being possible to bring it all properly into action. Such a force, it is true, he had not against the Austrians at *Hohenfriedberg*, of whom there were but 80,000, while his army consisted of 60,000. But the Greeks and Persians were, on the present occasion, certainly in the circumstances now mentioned, unless all the accounts, which the Grecian historians have left us of the immense numbers of the Persian army, be nothing but *Grecisms*.

But to return. A pious and honest people, who by their laws ought to enjoy political liberty, may imagine that they *do* enjoy it. But the craft of those in

power, who understand how to manage superstition, while it leaves them in quiet possession of the *name* of liberty, will contrive to rule them most arbitrarily by the aid of mere superstitions, oracles, and divinations, as we see exemplified in the history of the Romans ; only it must take care, when the people begin to grow a little more knowing, not to make too frequent use of these instruments of authority, lest by the constant sameness of its measures, and their effects, the suspicions of the people should be awakened. The particular mischiefs which divination is wont to occasion, will be noticed in the sequel ; but I must here observe, in the meantime, that polytheism gives rise, not merely to *one* oracle, whose impostures may, by judicious plans and due foresight, be rendered in a great measure harmless, but to a variety of petty oracular artifices, the authors of which will, for a little gold, though often without any bad intentions, be the causes of infinite mischief.

Such, in general, is the natural aspect of that superstition which heartily believes in many gods ; but among the nations contiguous to the Israelites, superstition was combined with still grosser abominations. Of these, whoredom, and the defloration of young women before they durst be married, (both of them in honour of a false god,) were among the most tolerable ; and human sacrifices was the most horrible ; for superstition compelled parents to devote their children, not merely to death, but to the most dreadful of all deaths. Was it then too severe in Moses, to keep the people from a religion so abominable, even by the terrors of capital punishment ? Were idolatry as harmless as

some false religions are, such, for instance, as that of Mahomet, as it is adopted by the Persians, we might wonder at the severity of the Mosaic punishments. But this is by no means the case. We must always take into consideration the mischiefs which a false religion *may* occasion to the state. Even we Christians do not blame the Japanese for having prohibited the exercise of the Christian religion within their territories, under the pain of death, considering with what dangers it threatened their government, from those errors with which its preachers polluted it; although the very severe and torturous punishments annexed in Japan to the profession of Christianity, give us no very favourable impression of the character of that people, who, not satisfied with prohibiting the exercise, required besides the utter disavowal of it, or rather the blasphemous calumnation of its divine author.

When a whole city became guilty of idolatry, it was considered as in a state of rebellion against the government, and treated according to the laws of war. Its inhabitants, and all their cattle, were put to death. No spoil was made, but every thing it contained was burnt with itself; nor durst it ever be rebuilt; Deut. xiii. 13,—19. Whether the children were also to be put to death, is not expressly specified in the statute. The circumstance of their innocence is rather unfavourable to such a supposition; to which we may add, according to what has been stated under Art. CCXXIX., that children were not to suffer for the faults of parents; but, on the other hand, it must be remembered, **that, in a case like this, procedure was**

regulated by the law of war, according to which, when a city was stormed, the innocent suffered with the guilty, not even sucklings being spared; and, moreover, that in the war carried on against the Benjaminites for a refusal of justice, (Judg. xx. xxi.) the children seem to have been put to death with the rest; else would not the difficulty of procuring wives for the 600 Benjaminites that had escaped, have been so embarrassing as it proved; because they had only to wait for some years, until those of their daughters, who were then reckoned among the children, should become marriageable.—Here, therefore, I shall not positively decide.—The appropriate term, by which the punishment denounced against any such idolatrous city was expressed in the law, is, (הַחֲרִים*) *Hacharim*, to consecrate to Jehovah, or as Luther renders it, *Verbannen*, (to put under ban, to outlaw, or proscribe.) It was regarded as wholly consecrated to Jehovah, for the execution of its punishment; the people, being devoted to the sword, and the city itself consigned to the flames, by way of an offering for its sins; according to what is said on the subject of spoil in Deut. xiii. 15,—17. *It shall be consumed as a burnt-offering, of which nothing remains.* This, as I have already remarked, was much the same idea, as that which the Romans attached to the phrase, *sacer esto*, or, *Jovi sacer esto*.

It is not likely that this law was very particularly enforced; at least, in the history prior to the Babylonish captivity, we find no example of any such thing.

* The word, in Arabic, means to be sacred, to consecrate.

It would appear that the rest of the Israelites, in most cases, overlooked the crime of a city that became notoriously idolatrous, from their having themselves such a strong and general hankering after the principles of that polytheism which then prevailed almost universally throughout the earth; and thus it came to pass, that idolatry was not confined to any one city, but soon overspread the whole nation.

When it thus happened that the people, as a people, brought guilt upon themselves by their idolatry, God reserved to himself the infliction of the punishments denounced against that national crime; which consisted in wars, famines, and other national judgments; and, when the measure of their iniquity was complete, in the destruction of their polity, and the transportation of the people as slaves into other lands, Lev. xxvi. Deut. xxviii. xxix. xxxii. To a person who does not admit the divine mission of Moses, it cannot but appear strange that these denunciations were actually fulfilled.

For the crime of seducing others to the worship of strange gods, but more especially where a pretended prophet, who could often naturally anticipate what would come to pass, uttered predictions that tended to lead the people into idolatry, the appointed punishment was stoning to death, Deut. xiii. 2,—12. Concerning such prophets, more will be said in the sequel; but with regard to private seducers, although Moses in other cases was far from encouraging informers, yet such is here the rigour of his law, that it enjoins informing, without reserve, upon every such seducer; even although it were an uterine brother, a son, a

daughter, a wife, or one's best friend ; but it would seem, at the same time, that no one was bound to impeach a father, mother, or husband ; at least they are not particularized along with the others mentioned in Dent. xiii. 7, 8, 9.

ART. CCXLVII.

Human Sacrifices, a superstitious custom among the Canaanites, most strictly prohibited.

§ 3. ALL idolatrous ceremonies, and even some which, though innocent in themselves, might excite suspicions of idolatry, were prohibited. Of these, human sacrifices are so conspicuous, as really the most abominable of all the crimes to which superstition is capable of hurrying its votaries, in defiance of the strongest feelings of humanity ; that I must expatiate a little upon them. For this species of cruelty is so unnatural, that to many readers of the laws of Moses, it has appeared incredible. Against no other sort of idolatry, are the Mosaic prohibitions so rigorous, as against this ; and yet we find that it continued among the Israelites to a very late period ; for even the prophets Jeremiah and Ezekiel, who survived the ruin of the state, and wrote in the beginning of the Babylonish captivity, take notice of it, and describe it not as an antiquated or obsolete abomination, but as what was actually in use but a little before, and even during their own times. For a father to see his children suffering, is in the highest degree painful ; but that he should ever throw them to the flames, appears so ut-

terly improbable, that we can hardly resist the temptation of declaring any narrative of such inhuman cruelty an absolute falsehood. But it is nevertheless an undoubted fact, that the imitation of the neighbouring nations, of which Moses expresses such anxious apprehensions in his laws, had, in spite of all the punishments denounced against it, kept up the abominable custom of offering children in sacrifice; and hence we see how necessary it was to enact the most rigorous laws against that idolatry, which required sacrifices of such a nature. The lives of children were to be secured against the fury of avaricious priests, and the fears of silly fools; and if the punishments of the law did not completely produce that effect, we can hardly avoid thinking, how much it is to be regretted that they were not more severe.

To many, both Jewish and Christian expositors, it has appeared so incredible that the Israelites should have sacrificed their own children, that wherever, in the laws, or in the history, they find the expression, *making their sons pass through the fire to Moloch*, (for it was chiefly to that god that human sacrifices were offered,) they are fain to explain it on the more humane principle of their merely *dedicating* their sons to Moloch, and, in token thereof, *making them pass between two sacrifice-fires*. In confirmation of this idea, the Vulgate version of Deut. xviii. 10. may be adduced; *Qui lustret filium suum aut filiam, ducens per ignem*. In this way, the incredible barbarity of human sacrifices would appear to have had no foundation in truth; and I very readily admit, that of *son e* other passages, such as Lev. xviii. 21, 2 Kings xxi. 6.

xxiii. 10. Jer. xxxii. 35. an explanation on the same principle may be given with some shew of truth.—More especially with regard to the first of these passages, I may remark, as *Le Clerc* has done before me, that we find a variety of lection which makes a material alteration of the sense; for instead of (העביר) *Haobir*, to cause to pass through, the Samaritan text, and the LXX., read, (העביר) *Haabid*, to cause to serve, or, to dedicate to the service of. In my German version, I have, on account of this uncertainty, here made use of the general term *Weihen*, to dedicate, as the Vulgate had already set me the example, in rendering the clause, *De semine tuo non dabis, ut consecratur idolo Moloch*. I was the less inclined to employ the term *burn* here, because no mention is made of fire, *transire facere per ignem*, as in other passages; but it is merely said, *transire facere*. At the same time I really believe, from the strain of other passages to be mentioned immediately, that burning is here meant.—With regard, in like manner, to 2 Chron. xxviii. 3. where it is expressly said, that *Ahaz had, in imitation of the abominable practice of the nations whom Jehovah drove out before the Israelites, burnt his sons with fire*, the weighty objection may be made, that there is a various reading, and that, instead of (ויבער) *Veibor*, he burnt, almost all the ancient versions*, such as the LXX., Syriac, Chaldee, and Vulgate, had read (ויעביר) *Veiober*, he made to pass through, by the mere transposition of the second radical into the place of the first.

* The Arabic alone here follows the reading of the printed text.

The following passages, however, are decisive of the reality of sacrificing their children.

1. Ezek. xvi. 21. (where we find the first-mentioned expression,) *Thou hast slain my sons, and given them, to cause them pass through to them.* Here it is evident that, *to pass through*, or *to cause to pass through the fire*, can be nothing else than *burning*, because the sons were previously slain.

2. The passages where the word (שָׂרַף) *Saraf*, to burn, is used; and where no suspicion of any various reading can take place; Deut. xii. 31. Jer. vii. 31. xix. 5.

3. Psalm cvi. 37, 38. *Their sons and daughters they sacrificed unto devils. They shed the innocent blood of their children, and offered it to the gods of Canaan, and the land was profaned with blood.*

But that we may not only the better understand the laws of Moses against human sacrifices, but likewise be able to account for the continued transgression of them, notwithstanding their severity, during no less than eight hundred years after his death*, we must bear in mind, that the use of such sacrifices, and those too of the most barbarous description, and wherein not merely enemies or strangers, but even

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* In 2 Kings xxiii. 10. we find Josiah causing a certain part of the valley of Hinnom to be defiled, *that they might there no longer offer up their children to Moloch.* This, of course, had been heretofore the practice, down to the time of Josiah. According to the common computation, this event took place in the 822d, but according to another, supported by Josephus and St. Paul, in the 934th, year after the death of Moses.

the most beautiful and best beloved of their own children, yea even an only child, was brought to the abominable altar of the cruel Moloch, formed the peculiar superstition and frenzy of the Phœnicians, (or, as they were called in their own language, Canaanites,) and likewise of their descendants, the Carthaginians.—Many of my readers will, from their boyish days, recollect the passage of *Quintus Curtius* *, relative to the Tyrians, when they dreaded the siege of their city by Alexander; *Sacrum, quod quidem Diis minime cordi esse crediderim, multis seculis intermissum†, repetendi, auctores quidam erant, ut nempe ingenuus puer Saturno immolaretur; quod sacrilegium verius quam sacrum Carthaginienses a conditoribus traditum usque ad excidium Urbis suæ fecisse dicuntur. Ac nisi Seniores obtulissent, quorum consilio cuncta agebantur, humanitatem dira superstilio vicisset.* In order to give some idea of the rigour and absurdity of this superstition, I shall here quote a passage from *Diodorus Siculus*, in which he relates how the Carthaginians, who, as just now mentioned, were Tyrians, that is, Canaanites by descent, behaved on occasion of a calamity that befel their city. After mentioning that the Carthaginians, on being vanquished by *Agathocles*, believed that the intermission of certain religious services, in use among their ancestors, had brought down the anger of the

* In lib. iv. cap. 3. § 23.

† It is probable that during the 200 years that Tyre was subject to the Persians, they had put a stop to this abominable sacrifice, for they were such enemies to human sacrifices, that Darius threatened the Carthaginians with a war, if they did not give them up.—*Justin* lib. xix. c. 1.

gods, and this great misfortune upon them ; because in place of paying, as they originally did, the yearly tythe of all their gains to the Hercules of Tyre, they had for some time past merely transmitted him a few trifles, which had provoked his indignation ; *Diodorus* thus proceeds : “ They likewise considered the wrath
 “ of Saturn as one cause of their misfortune. For in-
 “ stead of sacrificing to him, as formerly, the sons of
 “ their most distinguished citizens, they had for some
 “ time been in the practice of buying boys privately,
 “ whom they brought up, and then sent as offerings.
 “ And now when an enquiry was made into this matter,
 “ it was actually found that some of those sacrificed had
 “ been substitutes of this description ;” that is, had
 not been sons of persons of distinction, but bought
 slaves, represented as their children. “ When there-
 “ fore they saw the enemy before their walls, they
 “ upbraided themselves in their hearts, for having in
 “ any measure departed from the religion of their fa-
 “ thers, and by way of making atonement, they sacri-
 “ ficed two hundred boys for the state, taking care to
 “ select those of the first quality for the purpose. Be-
 “ sides these, there were given up for sacrifice three
 “ hundred impeached persons ;” that is, as I under-
 stand it, persons accused of having shunned the sacri-
 fice of themselves, and of having allowed bought slaves
 to be substituted in their room. “ There was at Car-
 “ thage a brazen image of Saturn, which let its open
 “ hands down to the ground, and threw the children
 “ that were laid upon them into a pit full of fire. It
 “ would seem as if Euripides had borrowed from this
 “ circumstance what he says of the sacrifice of Iphi-

“genia in Tauris, where he introduces her addressing Orestes in the following terms :

“ But say, Orestes, when I die,

“ In what a grave shall I be laid ?”

“ To which question his reply is,

“ Low in the earth thy corpse shall lie,

“ The sacred fire thy burial bed.”

“ The Grecian fable of Saturn killing his children, seems likewise still to be realized in this Carthaginian custom.”—This account very much resembles what is elsewhere related of Moloch * ; and Moloch appears to be the Oriental name of that Phœnician deity whom the Greeks call *Saturn*, (and probably of the planet Saturn itself,) who was a principal object of veneration to the Phœnicians, and by them honoured with the appellation of *Kevan* (Chiun), or *the Just*.

Considering how much the right understanding of the Mosaic jurisprudence respecting idolatry, depends on our knowledge of the human sacrifices of the Phœnicians, and having found, in Mr. Bryant’s *Dissertation on the Human Sacrifices of the Ancients*, a large and important collection of original documents on that subject, I have taken care to have that Dissertation translated into German, and printed in the same form with the present work, that my readers (as it is not included therein, being published by a different person, viz. Mr. *Dieterich* of Gottingen,) may, if they please, procure the two sheets of which it consists,

* See *Selden*, De Diis Syris, Syntagma i. c. 6.

and bind it along with it. Its title is, *Jacob Bryant von den Menschenopfern der Alten. Ausdem Englischen, 1774.* The passages of this small but valuable Dissertation, that relate to the Phœnicians, and, of course, bear more particularly on the Mosaic law, will be found from page 26. to the end.

As, however, some authors, and *Bryant* among the number, use the phrase, *human sacrifices*, in a more extensive sense than I do, I must here explain how it is to be understood in relation to the laws of Moses.

If a person who might lawfully be put to death, as, for instance, an enemy in war, or a malefactor of any description, was devoted to the Deity, or consecrated, with the express view that the former should have no quarter given him, and the latter find his punishment irremissible, there are some who would denominate the fates of such persons, human sacrifices. I, for my part, do not; for in fact, if accompanied by no ceremonial usages, although a Roman would have said of them, *Sacer esto*, or, *Jovi sacrum esto*, such deaths were, according to the common way of thinking, by no means sacrifices. It was neither injustice nor cruelty to deprive such persons of life; and the devotement or consecration of their deaths to the Deity, was only a means of rendering their punishment irremissible. In certain cases, and on occasion of some crimes, to divest one's self of the power of pardon, is a duty which one owes to the general good. In a monarchy or aristocracy this may be done by a promise made to the people; but in a democracy, it can scarcely be done otherwise than by an oath

sworn, or a vow made, by the whole people to the Deity; and in such cases the criminal may be properly said to be consecrated. So, in like manner, may we proceed with an enemy, whose life the general good requires us not to spare. If we are to call this a sacrifice, it is at any rate one against which the strictest morality will find nothing to object, if the motives which have determined us to give him no quarter, nor to shew to certain species of crimes any indulgence, be just and reasonable. Nor has Moses prohibited the consecration of enemies and malefactors to God, in this sense; on the contrary, his own law includes an appropriate term for it, viz. *Cherem*, that which is consecrated, and its denominative, *Hacharim*, to consecrate.—See Arts. CXLV. and CCXLVI.

Were we to lead malefactors or captives to the altar, and there with certain ceremonies put them to death, as is the case in some nations, this might no doubt, according to the common usage of the term, be called *a sacrifice*; and yet, although we have a right to deprive such persons of life, this mode of doing so, would in various respects be extremely shocking. It would seem, however, as if sacrifices of this description had not been in use among the Canaanites, because their maxim was, to offer up to the gods persons of the most illustrious birth, and the dearest objects of their love. Hence perhaps it comes, that Moses nowhere speaks of such sacrifices. They are, indeed, without any express prohibition, forbidden by his law; for to strange gods nothing durst be offered, and to the altar of Jehovah no unclean animal

Art. 247.] *Punishment of Human Sacrifice, Stoning.* 27

could be brought, and least of all, a man, who was accounted of all animals the most unclean.—See Arts. CXLV. CCXV. CCXVI.

Of such sacrifices, therefore, I do not here speak ; but only of those wherein innocent men, who did not deserve death, were offered up as propitiatory sacrifices ; as was annually done by the Canaanites, who, moreover, on occasion of any calamity overtaking the state, always augmented the number of those unhappy victims.

These then are the human sacrifices interdicted by Moses, and commonly represented as a custom among the Canaanites, which the Israelites were not to imitate ; Lev. xviii. 21. compared with ver. 2, 3, 24, —30. xx. 1,—5. Deut. xii. 30. xviii. 10. And it is to be observed, that,

In Lev. xx. 2. he particularly declares that such sacrifices were not to be allowed to be offered even by foreigners ; although indeed, from the analogy of other laws, this would have been almost obvious, without any positive declaration.

The punishment of those who offered human sacrifices was stoning ; and *that*, as I think, so summarily, that the bystanders, when any one was caught in such an act, had a right to stone him to death on the spot, without any judicial enquiry whatever. *Whatever Israelite, says Moses, in Lev. xx. 2. or stranger dwelling among you, gives one of his children to Moloch, shall die ; his neighbours shall stone him to death.* These are not the terms in which Moses usually speaks of the punishment of stoning judicially inflicted ; but, *all the people shall stone him ; the hand of the witnesses*

shall be the first upon him. Besides, what follows a little after, in verses 4, and 5., does not appear to me as indicative of any thing like a matter of judicial procedure; *If the neighbours shut their eyes, and will not see him giving his children to Moloch, nor put him to death, God himself will be the avenger of his crime.* I am therefore of opinion, that in regard to this most extraordinary and most unnatural crime, which, however, could not be perpetrated in perfect secrecy, Moses meant to give an extraordinary injunction, and to let it be understood, that whenever a parent was about to sacrifice his child, the first person who observed him was to hasten to its help, and the people around were instantly to meet, and to stone the unnatural monster to death. In fact, no crime so justly authorises extrajudicial vengeance as this horrible cruelty perpetrated on a helpless child; in the discovery of which we are always sure to have either the lifeless victim as a proof, or else the living testimony of a witness who is beyond all suspicion; and where the *mania* of human sacrifices prevailed to such a pitch as among the Canaanites, and got so completely the better of all the feelings of nature, it was necessary to counteract its effects by a measure equally extraordinary and summary.

On the altar of the true God nothing unclean could be offered, of course, no human sacrifice; nothing in short, but oxen, sheep, goats, and clean birds. The blood or carcasses of all other animals profaned it. But Moses, besides this, took care to prevent the Israelites from transferring into the worship of the true God, what the Canaanites did in honour of Moloch. *When*

Jehovah, says he, in Deut. xii. 29,—31., shall have exterminated these nations, beware thou of falling into the like snare after them. Enquire not after their gods, nor ask, How they were wont to serve them. To *Jehovah* thy God thou shalt do no such service ; for all that he hates, did they to their gods ; insomuch that they burnt even their sons and daughters in their worship.—We really cannot but wonder, how it has been possible, that some of the adversaries of the revealed religion of the Israelites (or, as they call them, the Jews) should have imputed to it the use of human sacrifices, and on that account cast a reproach upon Moses. In charging the Mosaic religion with this imputation, they are guilty of much the same ridiculous piece of injustice, as were once the people of Spain and Portugal, and, more lately, those of Poland, in supposing, that the Jews drank the blood of Christian children, when, in fact, they dare not taste blood : for, according to the ideas of the Israelites, human bones profaned an altar. If, however, they only mean, that the Israelites often imitated the Canaanites, and offered human sacrifices in opposition to their own religion and the laws of Moses, they are perfectly correct ; for this fact is distinctly stated in several parts of the bible ; but then it is no ground of reproach against either Moses or revealed religion.

The words of Lev. xviii. 21. may likewise be considered as prohibitory of such human sacrifices to God, as were wont to be offered to Moloch, provided we translate them in these terms, *Thou shalt give none of thy children to Moloch, to burn them to him, nor shalt thou profane the name of Jehovah, thy God* : for here

it would seem that Moses meant to forbid the profanation of the name of Jehovah, by offering such sacrifices unto him. But I have my doubts of the propriety of this translation, and therefore I have preferred a different one. On the reasons for these doubts I cannot here fully expatiate, as, probably, but few of my readers are conversant in Hebrew; but I will so far trespass on their patience, as to make the following remarks. The phrase (הלל שם) *Hillel Shem*, may certainly signify *to profane the name*; but it may also have a different meaning, and most probably it is here to be understood in the same sense as in chap. xx. 3., where it occurs in a similar connection. But there it is certainly not spoken of those who offer human sacrifices to the true God, but to Moloch. Now, הלל signifies, 1. *to dissolve*, 2. *to discard*, 3. *to profane*. I therefore render it in both passages, *discard* (*abzuschaffen*) *the name of Jehovah*, which is equivalent to denying his name, and embracing heathenism, or doing as much as in us lies to prevent the true God from being revered, or his name mentioned.

ART. CCXLVIII.

Various other idolatrous practices prohibited.

§ 4. THE other practices prohibited by Moses as idolatrous, or as, at any rate, suspicious, on account of idolatry, are the following,

1. *The making images of strange gods.*—This was already forbidden in the case of the true God: but

the curse, in Deut. xxvii. 15. seems to be specially levelled against idolatrous images.

2. *Prostration before, or adoration of, such images, or of any thing else revered as a god, such as the sun, moon, and stars; Exod. xx. 5. xxxiv. 14. Deut. iv. 19.* But prostrations before men, not held as gods, which the Hebrews call *Hischthachavot*, (הִשְׁתַּחֲוִית) *incurvations*, were by no means prohibited; but, as we see from the writings of Moses himself, were very common. *Adorare* is the Latin term applied to the act of prostration; and the Greeks, who, out of national pride, commonly refused to pay that honour to the Persian kings, expressed it by the word *προσκύβειν*. It consisted in falling down on one's knees, and at the same time touching the ground with the forehead.

3. *Having altars or groves dedicated to idols, or images thereof**. By the Mosaic law these were all expressly to be destroyed; Exod. xxxiv. 13. Deut. vii. 5. xii. 3.; and considering the strange propensity of mankind in those days to idolatry, it became necessary to obliterate every such memorial of idolatrous practices; else, in after times, the sight of the image of an idol-god might have excited such ideas of its divinity, or, at any rate, according to the celebrated observation of the poet,

Jam tum religio pavidos terrebat agrestes

Dira Loci; jam tum silvam saxumque tremebant,

have impressed men's minds with such superstitious

* The reason why idol-temples are not mentioned here, will be found in my note upon Exod. xxxiv. 13.; and somewhat more circumstantially in my Dissertation, *De Judæis Salomonis tempore Architecturæ parum peritis*, p. 6.

terrors, as in a consecrated grove, would soon pass into prayer and veneration.

This rigour in the extermination of every remnant of idolatry, was carried so far, that by the statute of Deut. vii. 25, 26., the Israelites durst not even keep, nor bring into their houses, the gold and silver that had been upon any image, *lest it should prove a snare*, and lead them astray; because, having been once consecrated to an idol-god, considering the prevalent superstition as to the reality of such deities, some idea of its sanctity, or some dread of it might still have continued, and have thus been the means of propagating idolatry afresh among their children. Moses, therefore, declared it an abomination in the sight of God, and warned them against bringing it into their houses, lest it should, being itself accursed, bring a curse upon them. Conformable to the Mosaic prohibition is the language of a prophecy of Isaiah, in chap. xxx. 22., where he says, *The silver and gold, wherewith your graven and molten images were coated, you shall account unclean, and turn from them with aversion, as from a menstruous woman, saying, Be gone.*—Here, perhaps, the admirer of ancient sculpture will be ready to drop a tear of regret over the fine statues, and other monuments of antiquity, that must have been destroyed in consequence of the Mosaic mandate; but he may safely dry it up, for the *chef d'œuvres* of this period were not worth sparing; the wooden images being much in the same style as those which we term *Blocks*; and those of stone certainly not better than, perhaps, not so good as, the ancient Egyptian ones. Those fine specimens of sculpture, whose

destruction is more to be regretted, were of much later date, and proceeded originally from the hands of the Greeks ; and yet were we to chuse between works of art, and the suggestions of sound reason, that is, were fine statues, such even as the *Medicean Venus* herself only preserved at the manifest risk of making posterity relapse into senseless and gloomy idolatry, a wise legislator would not hesitate to annihilate *them* at once, rather than the natural religion of future ages. But I again repeat, that the statute before us annihilated no works of art ; for perhaps many a wig-block of the last century, with a human face cut upon it, looks much better than did the Canaanitish gods of those days.

IV. *Offering sacrifices to idols.*—The religion of the heathen principally consisted of sacrifices. There was little devotion in it ; for they wanted the chief materials for prayer, and did not hold converse with their dismembered deities, on the subject of eternal happiness, or to supplicate the gifts of virtue : they could at most sing hymns in their praise, or make them acquainted with their various corporeal wants ; which will always be the case where mankind acknowledge more than one god. The more effectually to prevent private sacrifices to other gods, the two ordinances illustrated in Art. CLXIX. and CLXXXVIII. were made ; the *one* enjoining them, while in the wilderness, to kill no ox, sheep, or goat, that was not made an offering to the true God ; and the *other*, only to make their offerings at one particular place, where they would be under inspection ; in order that, under

pretence of sacrificing to the true God, offerings might not be made to other gods.

V. *Eating of offerings made to idols by other people*, who invited them to their offering-feasts; in other words, attending the festivals of other gods. It is true no special law was given to prevent this; but then it is quite manifest that it must have been unlawful; because for a person to have gone to any such offering-feast, was just as solemn a declaration of his religion, and that he held the God in honour of whom it was made, to be really God, as our attendance at the Lord's supper can be, that we are Christians. In the following passage, however, this practice is presupposed as in itself unlawful; *Beware lest thou make any covenant with the inhabitants of the land, and they commit idolatry (literally, whoredom with their gods,) and sacrifice to them, and invite thee to the feast, and thou eat of their sacrifices*, Exod. xxxiv. 15.; for here it is represented as the dangerous consequence of sparing the Canaanites, and certainly therefore as something evil and forbidden. At the same time we see from this passage, wherein the crime of eating things offered to idols, which was afterwards so far extended by the Jews, properly consisted. If an offerer invited me to his feast, and I went, this was (for who ever considered it in any other light?) a participation in his religion. In 1 Cor. x. 14,—23. the apostle represents it in the very same point of view, and illustrates it from the Lord's supper, as I have just done.

But, on the other hand, where any part of what had been offered unto an idol came into my hands in a different manner, as by purchase in the public market,

or by plunder, it certainly would have been no participation of idolatry in me, to have appeased my hunger by eating it, nor any duty on my part, either to have let it spoil, or to have restored it again to the idolater, that he might himself eat it as an offering. Nor do I find in Moses the smallest trace of any prohibition so impolitic, and which in war might have been attended with such disastrous consequences to the Israelites. For had they been under an absolute obligation to eat nothing whatever, that had been offered or consecrated to idols, their idolatrous enemies had, in the time of war, only to dedicate all their fruits and cattle to their gods, or to perform idolatrous ceremonies with them, to make an Israelitish army, that was invading their country, perish with hunger. Yet to this absurd extreme did the Jews of later times extend the meaning of the Mosaic mandate, through their excessive scrupulosity; and although this is a point, of which the consideration does not strictly belong to our present work, I am nevertheless, from its importance to the right understanding of the doctrine of the New Testament on this subject, tempted to subjoin a few remarks upon it.

The first case that occurs of the extension of the sense of this law, although it is doubtful whether it proceeded from conscientious motives or not, is in the first chapter of Daniel; where we find that he and his young friends refused to partake of the flesh and wine sent them from Nebuchadnezzar's table, because offerings were commonly made therefrom to the Babylonish gods. This, it is true, was not altogether the case specified by Moses, for they were not invited

to any sacrificial banquet ; but still they were aware, as it would seem, of the flesh and wine being *offered*, before it came to the king's table. Now, they are by no means represented to us as *infallible* persons, and *prophets*, but merely as conscientious youths.—Their scruples of conscience, therefore, can decide nothing, where the exposition of the Mosaic law is in question ; but still they merit commendation, in chusing the safe side, when their conscience hesitated ; which indeed is the moral duty of every man.—In after-times, however, the matter was carried much farther. Conscientious Jews who lived among the heathen, abstained from all flesh, even though bought in the shambles, or presented at a common meal, if, on enquiry, which they always made with anxious care, they discovered that it had been offered to idols ; nay more, from *all* flesh whatever, because it *perhaps* might be of that description ; and from all wine, because in the preparation thereof, some idolatrous usages took place. For they regarded it as absolute idolatry to taste any thing that was consecrated to idols. Since, therefore, idol-offerings appeared so abominable to the Jew, (not, indeed, like other unclean meats, which he did not consider as forbidden to the heathen, but) as indicating a participation in their idolatry ; the apostles ordained, that the heathen converts should, for the sake of the Jews, abstain from meats offered to idols, Acts xv. 20,—29. How this injunction is to be understood, we see from various parts of the epistles of St. Paul, especially from Rom. xv. and 1 Cor. viii. and x. The propositions which he lays down are these :

1. Idol-offerings, eaten in an idol-temple, or at an idol-banquet, form a participation in idolatrous worship. But,

2. Exclusive of this case, it is lawful to eat of idol-offerings; for the idol is a non-entity, and has no property; for every thing on the face of the earth, even the idol-offering itself, belongs to the true God.

3. Yet ought we, for the sake of the weak, to abstain from eating of any such offering, if they are thereby scandalized, and tell us for warning, that it *is* an idol-offering.

VI. *Eating or drinking of blood.* This naturally created strong suspicions of idolatry, and was therefore absolutely prohibited; as has been already noticed at great length, under Art. CCVI. The punishment annexed to the transgression of this prohibition was extirpation from among the people; and besides that, God threatened himself to punish, and to persecute with an avenging providence, every man who eat blood.

VII. *Prophecy in the name of a strange god.* This was forbidden under pain of death, as were likewise all manner of divinations and sorceries; concerning all which, particular notice will be taken in the sequel.

VIII. *All usages and ceremonies whereby a man dedicated himself to a strange god.* These are prohibited in Lev. xix. 28. and have been already treated of under Art. CCXXV.

IX. *Prostitution in honour of an idol,* and where the wages of such iniquity usually went to the revenue of the idol and its temple. Concerning this

crime, of which some notice has already been taken in Art. XCII., we shall afterwards speak more fully, when treating of *crimes of lust*.

X. *Imitation of the idolatrous ceremonies of the Canaanites*, and attempting to transfer them into the worship of the true God.—This is prohibited in Deut. xii. 29,—31.; and the whole passage here deserves our perusal. *When Jehovah, thy God, shall have exterminated those nations, whose land thou art about to subdue, and thou dwellest in their land, beware lest thou, in imitation of them, and after they are destroyed, put thy foot into the like snare; enquire not after their gods, and ask not, how they were wont to serve their gods, in order to do the same: Thou shalt not offer any such service to Jehovah, thy God; for every thing that he hateth, did they in honour of their gods, inso-much as even to burn their sons and daughters before them.* His meaning here is not, by any means to declare every thing prohibited to the Israelites, which heathens did in honour of their gods: for it is certain, that he has prescribed them many sacrificial usages, and other ceremonies in use among idolatrous nations; and besides, this law properly speaks only of the Canaanites, whose idolatry was, by the multitude of human sacrifices, and other abominations which it enjoined, remarkably different from that of other nations. Nay, even with these very Canaanites, the Israelites had many usages in common; such as sacrifices; and probably also, the festival of the seventh day; only that the Canaanites solemnized it in honour of *Kewan* or *Saturn*, their supposed tutelary deity. His meaning rather was, to prevent the Israelites from at-

tempting to transfer into the worship of the true God any of those Canaanitish ceremonies, which were not already in use and established by law ; because there were so many of them extremely abominable and displeasing to God, (of which he himself, by way of example, specifies human sacrifices,) that Moses was afraid lest, by the imitation of them, new species of vice and cruelty might be introduced among the people, and even into their religion. No doubt, some of the Canaanitish ceremonies might be quite innocent : but still imitation was attended with danger, and, therefore, in general prohibited.

ART. CCXLIX.

Transgressions of the Levitical law which had the appearance of being a renouncement of the true God, or a Transition to Idolatry ; and in particular, Profanation of the Sabbath.

§ 5. EVERY audacious transgression of the ceremonial law, in other words, of that law which prescribed the usages of divine worship, and the different ceremonies of purification that were to be performed in different cases, was regarded as an abandonment of the service of the true God ; and, of course, as a transition to the service of other gods, punished with *extirpation*, that is, in the sense wherein the word seems *here* to be taken, *with death*. The principal passage relative to this point occurs in Numb. xv. 30, 31. where it is expressly stated as the cause of the severity of the punishment, that such transgression indi-

cates a contempt of Jehovah.—Whoever transgresseth the law presumptuously, he hath despised the word of Jehovah.

That, in this passage, wilful transgressions of all and every Mosaic commandment, cannot be meant, but only of the ceremonial law, is evident from this, that to many crimes which cannot possibly be committed *without deliberate intention*, such as theft, adultery with a woman not free, perjury, personal injury, &c. a capital punishment is not annexed. This, therefore, may be considered as unquestionable; but then, what is here meant by the term *presumptuous*, or, as it is expressed in the Hebrew idiom (כִּי־רָמָה), *with a high hand*, may perhaps admit of a doubt. I cannot think that, in a *criminal* law, this should imply the very same thing which, in theology or morals, is termed *deliberate*, or *wilful*. If a boy, for instance, had had a nocturnal pollution, or had even been guilty of self-pollution, and had from modesty, or from fear of his parents, concealed it, and consequently neglected the purification prescribed by the Levitical law, the theologian, no doubt, and the moralist, could not call this any thing else than a deliberate and wilful sin; and the greater the anguish of conscience, with which the said neglect was attended, so much the more wilful would the sin, in a moral sense, become: but to an aggravation or variation of the crime, which, like this, merely lies hid in the mind of the transgressor, and can with difficulty be discovered by a court, and is in other respects harmless, a civil legislator will never pay any attention, or at any rate, he will never apply to it the expression of *sinning with a high hand*, which

at the very least imports, that the sinner has no desire whatever to conceal, that he has trespassed the law ; nay, he will hardly say in any such case, that the person thus anxious to conceal his guilt, *has despised Jehovah*. It therefore appears to me, that transgressing the law *presumptuously*, or *with a high hand*, is here to be understood of transgressions committed publicly in defiance of the law, *in contemptum legis* ; and therefore amounting to a sort of renouncement of religion. And, in fact, the apostle Paul, in Heb. x. 27,—29., makes an application of this severe law of Moses, to those who disown the Christian religion, or, as he expresses it, *tread under foot the Son of God, and account the blood of the covenant, whereby they are purged from sin, unclean*. What I am about to observe concerning the neglect of circumcision, will be a farther confirmation of this opinion. Suffice it, in the meantime, to remark in general, that capital punishments on account of transgressions of the ceremonial law, must have been very frequent indeed, if we are to understand the phrase, *with a high hand*, as equivalent to *wilful* or *deliberate*, in a moral sense ; and yet in the Biblical history, we find but very little notice of the infliction of such punishments.

I am now to specify some examples of those transgressions, which Moses expressly mentions as coming under this description, and to which he annexes the punishment of death.

1. *The neglect of circumcision*, Gen. xvii. 14. Here it is evident that, as children were ordered to be circumcised when eight days old, and are at that age incapable of any thing like *presumption*, the punish-

ment of this neglect could not affect the child, but the parent who had been guilty of it; but, on the other hand, it is also evident, that it was not the omission of circumcision from carelessness, excess of tenderness, or groundless fear of danger, but only from absolute contempt of the law, that subjected the transgressor to the punishment of extirpation. I will not, in proof of this, appeal to the example of Moses himself, who neglected the circumcision of his son for a long time, Exod. iv. 24,—26.; for at that time, there was no Israelitish polity, nor any magistrate that could inflict punishment; and people do not usually punish themselves, at least capitally. But it is here important to remark, that the Israelites did not circumcise the greater part of the children born to them in their march through the desert; which could hardly proceed from any other cause, than from unbecoming apprehensions that it might prove dangerous to them while travelling; and, as the camp often continued for months and years in the same place, it can only be regarded as a neglect of the law, which gradually became more and more prevalent under that pretext; and yet we find, from Josh. v. 1,—9., that Moses had allowed this all along to pass unpunished.

The Jews, in later times, contrived a plan to render their circumcision imperceptible, and to form a new prepuce, when they were desirous to make the completest possible renunciation of the religion of their fathers; see 1 Macc. i. 15. Of this artificial and surgical crime, the Mosaic laws knew nothing; but according to their spirit, there is no doubt that it would have been capital.

2. *Neglect of eating the paschal lamb*, although at home, and engaged in no business, which gave a legal excuse, Numb. ix. 9, 14.

3. *An unclean person eating of a sacrifice*, Lev. vii. 20, 21.

4. *The neglect of purification after a Levitical defilement.* This became a capital crime, when in such circumstances, a person, as just observed, frequented the sacrifice-feasts, or even came to the sanctuary, Numb. xix. 20. It was considered as a profanation and contempt of both the sanctuary and sacrifice.

5. *Eating the fat pieces or blood of oxen, sheep, and goats*; Lev. vii. 23,—27. See Art. CCVI.

6. *Imitating the sacred incense*, which was to be offered to none but God, Exod. xxx. 38. Other sorts of perfumes they might make and employ as they chose; and if they made but the least variation in the proportion of the spiceries, it was no longer *sacred incense*; but to employ the very same incense which was offered to God, for any other purpose, was a capital crime; just as we now find it in some parts of India, considered as the crime of treason (*læsæ majestatis*), and, of course, subjecting the offender to death, for any person to make use of the best sort of *Calambak*, which is for the service of the king alone.

7. *Profanation of the sabbath by working.* This is in a particular manner to be numbered with those transgressions of the ceremonial law, which were punished with death; Exod. xxxi. 14,—16. xxxv. 2.

The severity of punishment, in this instance, has given offence to many people who have speculated on the laws of Moses; for they have conceived that every

one who but once worked on the Sabbath, was, without distinction, to be put to death ; and then, in contemplating the Mosaic statutes prohibitory of the profanation of the *Sabbath*, they have thought of *our* laws relative to the profanation of *Sunday*, which we sometimes call *sabbath-laws*, and which, to sanction by capital punishment, would certainly be the height of absurdity.—I shall, to clear up this point, begin with the consideration of the latter ; only I must first shew how great the distinction is, between what are called sabbath-laws, and profanations of the Sabbath.

1. The civil laws of Moses presuppose a Sabbath prescribed by God himself to the Israelites, and, of course, a law not to be altered by man. This our legislators can never presuppose ; for although it be undeniable, that for the service of God, and religious instruction, it is necessary that a certain time should be set apart, either by the community themselves, who profess any particular religion, or by the church that wishes to propagate it among their posterity ; yet the New Testament expressly teacheth us, (Rom. xiv. 1,—6. Col. ii. 16.) that at present God has to us prescribed no such time, nor instituted any Sabbath, but left all this to be regulated by men themselves. Even our celebration of Sunday, although a very early *practice*, and originating probably with the apostles themselves, is never mentioned in their epistles as a *command* ; and with the very same right, whereby we have altered other parts of the divine service of this day, as, for instance, in the abolition of the *love-feasts*, we might still, without any trespass of a divine command, appropriate any other day, or, as we actually

do, but half a day, or even less, for the public worship of God.—Should these positions be doubtful, as indeed some religious sects really entertain different ideas on this point, one thing is certain, that it is *not* in the symbolic books of the Lutheran church; for there it is quite explicitly declared, that the observance of Sunday is not an ordinance of divine, but of ecclesiastical, law.—We shall now easily see how great the difference is to be accounted, between the keeping holy a day by divine command, and only by authority of that church which happens to be protected by the state. To annex the punishment of death to its profanation, in the latter case, would certainly be very strange.

2. Add to this, as already remarked more than once, that the true God was, in a civil sense, king of the Israelites, and the founder of their government; so that to disown him was at the same time a crime against the state. But, as we have shewn in Art. CXCIV., the Sabbath was sacred to him, the God who made heaven and earth, and was to be a sign of his being the God of the Israelites; and therefore, by profanation of the Sabbath, a man seemingly denied the only true God.

3. The resurrection of Christ, that fact in commemoration of which we solemnize Sunday, is a part of revealed religion; and yet it is quite possible that a person, otherwise rational, may doubt revealed religion; for even in Christian states, those people are usually tolerated, who are not Christians, but Jews, for example, or votaries of natural religion. But what the Israelites acknowledged by their keeping the Sab-

bath, namely, the belief of the God who made heaven and earth, is a part of natural religion, and indeed a truth so evident and universal, that a person will not be apt to call it in question, from a real error of the understanding.

4. Among us, many people may, from intolerable languor, be tempted to work on Sunday, especially where refinement in doctrine represents amusements and social meetings, as profanations of that day. But this could not be the case by the Mosaic regulation, according to which, the Sabbath was at the same time a day on which amusements and feasts were authorized.

All this, however, would perhaps be still unsatisfactory, had every work on the Sabbath, undertaken from the mere love of gain, been punishable with death. I do not however believe that this was really the case here, but am of opinion, that the penal law relative to the profanation of the Sabbath, should be understood in no other sense than the other laws are, to the class whereof it belongs; that is, only of its presumptuous profanation in defiance of the law.—Had any one, out of avarice, worked privately in his own house, it could not possibly be said, that he had transgressed the law of the Sabbath *with a high hand*; particularly when we consider that this expression, in Hebrew, includes in other places the idea of what is *public* and *unconcealed*, Exod. xiv. 8. In fact, it were quite sufficient to observe, that Moses makes this restriction, with respect to the whole class of capital crimes against the ceremonial law; but it is to be remarked besides, that the principal passage in which

the punishment of the sabbath-breaker is fixt, (Numb. xv. 32,—36.) immediately follows these words: *Whoever, whether native or stranger, presumptuously transgresseth the law, despiseth Jehovah, and shall be extirpated from among his people ; for he hath despised the word of Jehovah, and broken his commandment. Such a man shall be extirpated, and to no one but himself impute thou this,* ver. 30, 31. And when we are informed immediately after, that the Israelites had discovered a man collecting wood on the Sabbath-day, &c. &c. we cannot but think the story expressly introduced in illustration of the preceding law.

The example just mentioned, is at the same time the only instance in the whole of the Old Testament, of the infliction of capital punishment, on account of a breach of the Sabbath. Considering, then, that we find the prophets frequently preaching against this crime, which of course was not a rare one, we must conclude, that the punishment of death only attended it, when aggravated by its publicity, or some other circumstance, which made it amount to absolute presumption, and perhaps to wilful renouncement of God, in honour of whom the Sabbath was solemnized.

It is likewise on occasion of the story of the sabbath-breaker, that the particular species of capital punishment annexed to the crime in question is determined, viz. stoning, (Numb. xv. 32,—36.) as already remarked ; and as Moses tells us that this offender was first put in prison, *because it was not yet fixt, or manifest, what was to be done to him,* these words have commonly been understood in reference to the death he was to die. This, perhaps, *may* be their meaning ;

although the difficulty could only have been, between the sword and stoning, there being no other capital punishments known in the Hebrew law. But when I read this story in connection with the statute that immediately precedes it, it occurs to me, that it had not been clear to them, whether the crime was to be ranked with transgressions committed through *error*, and which could be done away by an offering; or whether it amounted to that audacious contempt of the law, to which alone the punishment of death was annexed; and that, because they had not been able to arrive at certainty respecting this point, as it related to what the criminal alone could know, they had consulted God; who, as the searcher of hearts, had given for answer, that it *was* an act of presumption, and that the sabbath-breaker deserved to die. If this was the case, it adds confirmation to what has been already observed; and we shall now the more fully comprehend, how it happened that the sabbath-breaker was so extremely seldom punished with death, and that we find no other example than this one, of any such punishment. Excepting in the rare case of his explicitly declaring, or otherwise giving them to understand, that he worked expressly with a view to profane the Sabbath, and pour contempt on religion and the laws, he could not be convicted of what made the offence capital, otherwise than by his own confession. If he denied having it in view thus to outrage the law, his crime came under the denomination of *an error*, Numb. xv. 27., which might be atoned for by means of an offering; nor are we to account this an unfortunate defect in the law; for even thus the honour of the Sabbath was expressly upheld.

I really cannot help thinking that this was Moses' meaning ; and thus, although in order to preserve the respect due to the worship of the only true God, who was, at the same time, king of the Israelites, he denounced the punishment of death on the presumptuous breach of the Sabbath, and every other audacious violation of the ceremonial law ; still, to every one who did not just say, or otherwise shew too plainly, that he had it expressly in view to manifest his contempt of the Israelitish religion, he very considerably left a *salvo*, on the ground of his offence belonging to that class, to which the law applied the denomination of *errors*. A law like this could inflict but very few capital punishments, but it was not, therefore, useless ; for it prevented people from breaking the sabbath, or transgressing the ceremonial law, under circumstances demonstrative of its being their intention to insult religion, and to pour contempt on the laws.

Every trespass of the Levitical law, that did not proceed from presumption, was termed an *Error*, and was atonable by an offering. See Numb. xv. 27, 28., and Art. CCXLIV.

ART. CCL.

Image-Worship a Crime ; but not so, Painting and Sculpture.—Hieroglyphic Stones prohibited.

§ 6. Thus much concerning idolatry, and what was included in it, and accounted a denial of the true God. I now proceed to the consideration of image-worship.

All manner of image-worship, not excepting that which was paid to the true God, is prohibited in Exod. xx. 4, 5.; or if any doubt remain as to the extent of the prohibition in that passage, it is completely removed by the decision in chapter xxxii.; where we find that the worship of a golden calf, set up, certainly not as the image of an Egyptian idol, but of Jehovah, the true God, is imputed to the Israelites as a great crime. In like manner, when Moses, in one of his last exhortatory addresses, inculcates upon the Israelites a regard to the commandment of abstaining from image-worship, he brings it to their remembrance that, when the law was given on the mount, they had seen no image, but only heard a voice; and that, therefore, they ought not to make any representation whatsoever of God; Deut. iv. 15,—18. That this was not merely a moral precept, but that image-worship was a *crime*, properly so called, is manifest from Exod. xxxii. 26. 29.; where we see, that on account of their worshipping the calf, although it was meant to represent Jehovah, 3000 Israelites were, in one day, put to death. We find also, that on occasion of their swearing to their laws, they were required to pronounce a solemn curse on every person, who should *make a molten, or a sculptured, image of wood or stone, the work of the hands of the artist, an abomination unto Jehovah, and put it in any secret place*, Deut. xxvii. 15.

Although no *pœna ordinaria* is appointed for image-worship, yet it is evident, from the story in Exod. xxxii. just mentioned, that it was considered as a criminal offence, and that the punishment of the sword

might be inflicted upon it. Nevertheless, on that occasion, the punishment was not an ordinary one, inflicted in consequence of a previous judicial investigation; but the Levites, by the orders of Moses, did what must be done, when a tumult, or any such extraordinary *crisis* takes place; they went through the camp with arms in their hands, and slew every person guilty of image-worship, whom they found without his tent.

I know not how it has happened, that several writers, and among them some men of real learning, have persuaded themselves, or have, without inquiry, asserted, one after another, that the Israëlites were absolutely prohibited from making, or having any image whatever, even although it had not the most distant reference to the Deity, or to religion. But with a prohibition so absurd, and calculated almost to destroy a common characteristic of human nature, ought no legislator, who had not been known to have made his escape from Bedlam, ever to be charged; if he has not given it in terms the most explicit, and utterly unsusceptible of any other explanation. It is true, I am far from thinking, that the loss of the monuments of the art of *sculpture* in those days could have been great; although with regard to *painting*, I shall not pass the same judgment; because there will always be found some geniuses so manifestly intended by nature for painters, that, drawing only with a piece of coal, they shall, without any instruction, and even without knowing it themselves, produce pieces that must excite our admiration. But

what a short-sighted barbarian would that legislator be, who should, as far as in him lay, preclude his people from ever cultivating the arts of painting and sculpture? Independent, however, of its barbarism, any such law would be altogether repugnant to the nature of man, who, from his infancy, has such a strong propensity to painting and sculpture, that whoever thinks fit to prohibit these, must, at the same time, prohibit the amusement, the daily amusement of children, which after all will never cease. But let us consider the passages in which Moses prohibits images, in their connection with the context, and see whether any such exposition ought to be given them: We find them (for I think it best to point them all out together) in Exod. xx. 4, 5. Deut. iv. 15,—18. xxvii. 15. Now, from the connection, it is evident, that images of the Deity are alone spoken of in all these passages; and the man, who, from the detached clause, *Thou shalt make to thyself no image*, concludes, that no image durst have been painted, or scrawled upon a rock, or cut in wood or stone, might, with equal reason, detach from their connection the following words, which come immediately after the prohibition of images, *Thou shalt not raise thine eyes to heaven to behold the sun, moon, and stars*, and understand them as meant to imply, that we were never to raise our eyes to heaven and contemplate the sun, moon, and stars, but rather to walk upon all fours for ever.

If any farther satisfaction be here desired, or if by our prejudices with regard to an opinion, that we find sometimes repeated in books, we are too strongly carried away, to be convinced, by what has been al-

ready said, it may be still remarked, that Moses himself, by God's special command, caused images to be made, and that too for the sanctuary. For therein we find,

1. Two *Cherubims*, or *Sphinxes*, placed in the holy of holies, Exod. xxv. 18,—20.

2. Ornaments in the shape of flowers, on the golden lamp, Exod. xxv. 34.

3. Figures of *Cherubims* embroidered in the curtain of the *Sanctum sanctorum*, Exod. xxvi. 32.

4. The same, on the hangings of the sanctuary, and,

5. Probably also on the other hangings, which were ordered to be embroidered; Exod. xxvi. 36. xxvii. 16.

6. To this list may be added, the *brazen serpent*, Numb. xxi. 8, 9.

Now, can any one, after this, allow himself to believe, that Moses had ever meant to prohibit all manner of images? The Jews, of whose stupidity and superstition so much is said, never understood him as the author of any such prohibition. Solomon certainly did not so understand him; for in his temple, besides the *Cherubims* in the *Sanctum sanctorum*, there were all over the walls, figures of *colocynths*, flowers, palm-trees, *Cherubims*, &c. and the *Brazen Sea*, as it was called, rested upon twelve brazen oxen. Ezekiel's temple in like manner, had *Cherubims*, with the heads of men and lions. Even after the Babylonish captivity, no such prohibition was ever dreamt of. The golden lamp of the second temple, which graced the triumph of *Vespasian*, and of which a representation is still extant on his triumphal arch at Rome, has at its base

*Figures of Sphinxes**. In the roof of the second temple there were also golden vines with pendant clusters of grapes, and over its gate there was, in like manner, expanded, a golden vine with its grape†. Even the Jewish manuscripts of the Bible are often ornamented with figures of animals, plants, trees, sphinxes, &c.; from which none but a *Tychsen* will ever infer, that these manuscripts were made not by Jews, but by monks‡. *He*, however, is the first man upon the face of the earth, who has entertained such an opinion; for, before he told them, mankind did not know, that the monks of the middle ages were such eminent Hebræans: and the Jews recognise those copies of the Hebrew scriptures that are thus bedaubed with figures, as of Jewish workmanship.

I hope, therefore, this error will no longer prevail, and that no one, who deigns to consider the observations now made, will ever impute to Moses a law so preposterous, as could never have escaped the lips of the grossest barbarian. At the same time, I am ready to admit, what others have *not* remarked, that there is one species of figures which he prohibits, namely, stones with hieroglyphic figures engraven upon them, and which he denominates *Eben Maskit*, (אבן משכית) §.

* See the plate of it in *Reland's Dissertation, De Spoliis Templi Hierosolymitani in Arcu Titiano Romæ conspicuis*. The remarks also merit perusal, which *Dr. Schulze* has given, at p. 120, of his new edition of this Dissertation, (Utrecht, 1775), in confutation of the common mistake.

† See *Joseph. Bell. Jud.* v. 5. 4.—*Antiq.* xv. 11. 3.

‡ See my *Oriental. Biblioth.* part v. p. 23, 24.

§ Literally, *Lapis figuræ*. What this meant, has not been com-

The origin of this prohibition, which we find in Lev. xxvi. 1., and which was worthy of an honest legislator, who utterly detested all manner of priestcraft, and always endeavoured to keep it at a distance, may easily be deduced from that maxim of the Mosaic legislation, concerning the worship of one God, which we have illustrated above, in Art. XXXII.

In order to preserve their treasures of knowledge, and their discoveries in natural science, the Egyptian priests made use not of common writing, but of hieroglyphics. With these they inscribed obelisks and walls, even those of subterraneous vaults and galleries (*Syringes**), of one of which, that *Paul Lucas* saw, he has given us a description; and also square stones (*στειλαχι*), which very much resemble our grave-stones. Those monuments, and, if I might so call them, archives of their learning and discoveries, which were quite well understood by their *Literati*, and of which the second class of priests† were obliged to keep the key, that is, by devoting themselves to the study of hieroglyphics, were deified by the ignorant multitude.

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monly understood, and, as usual, a variety of arbitrary conjectures have been formed concerning it, without any regard to the usage of the language. In Ezek. viii. 8,—11. a subterraneous vault is described, on the walls of which were figures of quadrupeds, and creeping things, exactly like those in Egypt, which are covered with hieroglyphic figures; and in ver. 12. it is called *קדר ממשכה*, *Conclave Figurarum*. Hence *Eben Maskit* can be nothing else than a stone with hieroglyphics upon it.

* *Ammianus Marcellinus*, xxii. 15.

† The *ἱερογραμματεῖς*, or Connoisseurs in Sacred Writing, that is, hieroglyphics.

The Egyptian god of learning, to whom foreign nations gave the name of *Hermes*, or *Mercurius*, is, when they speak of Egyptian matters, denominated by the Egyptian name *Thoth*: and Jablonski* has shewn, that this same god *Thoth*, this inventor of all sciences, means nothing more, than the stones inscribed with hieroglyphic figures, which, in the language of Egypt, are so called.

Now, these stones with hieroglyphic inscriptions Moses prohibited: and although the prohibition had not the least connection with the great and primary object of his laws, it should still be highly grateful to every liberal-minded friend of learning. For why should any mystery be made of the sciences; or why should astronomy, experimental philosophy, (or as the ancients called it, *Magic*) history, &c. be veiled in hieroglyphics? Why not rather, in order to enlighten whole nations, write them in letters, that every one may read, or, if we have any anxiety for their transmission to posterity, engrave them in letters on walls and stones? Nothing, one would think, but the wicked envy of the learned, could ever have made them anxious thus to conceal their secrets from the people.

This, however, was not the only reason for their having recourse to this laborious artifice. Priestcraft had also a share in it. For, as I have already remarked, none but the priests understood hieroglyphics; and they took special care not to instruct the uninitiated, or profane. And, considering that every priest knew so many things, which other men could

* *Pantheon Egypti*, v. 5.

not know, and especially with regard to many of the *arcana* of nature, it was an easy matter to him to keep the people under subjection, by deceiving them, at one time by predictions concerning things, which, though uncommon, were yet quite natural; and at another, by pretended miracles, which yet happened entirely in conformity with the usual course of nature. Let us only think, were our electrical experiments, and the connection of electricity with lightning, secrets belonging only to a learned priesthood, and not to be found in any books, what they might be able to effect by means of them? They would work miracles in the eyes of the ignorant, and destroy infidels, and even kings, in an instant, by the lightnings of the Deity.

Now, this sole consideration would be sufficient to render so dangerous an archive of science, detestable to every real friend of mankind; and as Moses had been educated in the learning of the Egyptians, it therefore, redounds so much the more to the honour of his laws, that in this point they exhibit a perfect contrast to the policy of Egypt, and prohibit all recourse to its chief artifice. Had Moses been only a wise and benevolent impostor; had he given himself out for a divine messenger, without being so, and merely from love to an oppressed people; and had his miracles been nothing more than human devices, it is scarcely conceivable, how he could ever have gone the length of abolishing an expedient so artfully contrived, and so favourable to the views of priestcraft, for the concealment of the sciences. The legislator, therefore, who relinquished such an expe-

dient, and at the same time founded his polity on the commandments of a Deity, could be no impostor, but must have been an honest man.

But, what is more, we may see from the example of Egypt, in this instance, how imperfectly any such mysterious expedient will ever prove, for preserving the treasures of science to future ages. We have remaining at this day an immense number of Egyptian hieroglyphics, partly on stones, walls, and obelisks, and partly too on copper-plates, which have been submitted to all the literary world: but out of them all, no mortal has hitherto elicited one rational sentence, of the length of a single line; although, from the work of *Horapollo*, we know many particulars, relative to the meaning of the individual characters. The key having been once lost, it is seemingly impossible ever to find it again. The ancient learning of Egypt, which might include many things of supreme importance to mankind, could never have thus irrecoverably perished, had alphabetical characters been inscribed on these monuments. For such characters may always be decyphered; and it is a very singular phenomenon, that, whenever correct plates of the *Palmyrene Inscriptions*, which several learned men had before attempted unsuccessfully to decypher, were published in *Wood's Ruins of Palmyra*, explanations of them were at once given by two *Literati*, unknown to each other, namely, by *Mr. Swinton* and the *Abbè Barthelemy*. But the Egyptian hieroglyphics, of which there are extant, not a hundred, but a thousand, times as many, as of the *Palmyrene* monuments, will, I fear, remain undecyphered till the day

of judgment. Cursed be the priestcraft, which, from jealousy of its cotemporaries, has deprived posterity of so much knowledge; and praise to the honest man, who, though well acquainted with its artifices, would not suffer them to be introduced among the people whom he brought out of Egypt.

I must yet farther remark, that, with these hieroglyphic stones, idolatry was practised. In Egypt they were regarded as the god *Thoth*, the god of sciences, and, as late as the time of Ezekiel, we find an imitation of this species of idolatry common among the Jews, and described in chap. viii. 8,—11. of his prophecy. According, therefore, to that fundamental principle of the Mosaic polity, which dictated the prevention of idolatry, it became absolutely necessary to prohibit stones with hieroglyphic inscriptions. Besides, in an age, where so great a propensity to superstition prevailed, stones with figures upon them, which the people could not understand, would have been a temptation to idolatry, even although the Egyptians had not deified them, as they actually did.

ART. CCLI.

Blasphemy.

§ 7. AMONG most nations blasphemy is regarded as one of the greatest crimes, and punished capitally. Whether in this they act rationally, and what force there is in the objection, that blasphemy does not hurt God, I shall not here stop to inquire; as, perhaps, some notice of these points will be taken in my

proposed Essay on the Intention of Punishments ; and, therefore, I proceed to observe, that in the Mosaic polity, whereby God became both King and Lawgiver of the Israelites, and where, of course, blasphemy was a crime against the state, we find it, in like manner, considered as a capital crime, and the punishment of stoning annexed to it ; Lev. xxiv. 10,—14.

Nor was the circumstance of the blasphemer being a foreigner, to make any difference in the punishment. Indeed, this was actually the case, on the occasion of the punishment of this crime being first settled. A man, whose father was an Egyptian, but his mother a woman of Israel, had, in a quarrel with an Israelite, blasphemed Jehovah. He was, after an inquiry into the mind of God, adjudged to be stoned ; and the edict published on this occasion, concludes with these words, *One uniform law shall you all have, foreigners as well as natives ; for I am Jehovah your God.* Allowing that a foreigner does not believe in our God, although, indeed, with regard to the God of Israel this was not likely to happen, because Paganism was *syncretistic*, and did not deny the divinity of other gods ; and, besides, the Israelites believed in the God who created the world, and whom we know, and acknowledge from reason, without revelation ; but allowing, I say, a foreigner to be an infidel, still he has no right to insult the people, under whose protection he lives, by blaspheming the object of their veneration, and whose name they held supremely sacred.

Some have understood the passages in Exod. xxii. 27. (Eng. Bib. 28.) and Lev. xxiv. 15. which, literally rendered, are to this effect, *The gods thou shalt*

not curse, nor shalt thou imprecate evil on the princes of thy people, and, *Whoever blasphemeth his god, shall atone for his crime* ; as if blaspheming even the gods of the heathen had been prohibited. It would appear that both *Philo* and *Josephus* had been of this opinion. The former * thinks that the Deity should be to us an object of such sacred veneration, as that we ought not even to blaspheme what is erroneously accounted divine ; and that the heathen would, out of zeal, and by way of retaliation, blaspheme the true God, if he heard the Jew blaspheming his gods. The latter, in detailing, in his *Antiquities*, the laws of Moses, quotes this as one of them, “ No man shall blaspheme those that are accounted gods by other cities ; nor shall any man be guilty of sacrilege in strange sanctuaries, or purloin what is consecrated to a god † ;” and in his treatise against *Apion*, he has these words : “ The Jews adhere to the customs of their fathers, without concerning themselves with those of strangers, or deriding them. Their legislator expressly prohibited them from deriding or blaspheming those whom others accounted gods, and that, out of respect to the name *Gods*, which they bore ‡.”— Now, I readily acknowledge that, in many cases, such a law is rational and equitable. If people of different religions are to live together in the same country, or if they have therein civil rights, confirmed by com-

* See his *Vita Mosis*, lib. iii. p. 166. of Part II. ; and his treatise, *De Monarchia*, lib. i. p. 219.

† Joseph. Antiq. lib. iv. c. 8. § 10.

‡ ——— *Contra Apion*, lib. ii, c. 33.

pact, as is the case with the three religions of Germany, one man must not blaspheme the gods of another, or, if he does, the latter will not be blamed for avenging with his own hand such a gross insult, for which the laws afford him no satisfaction. If he will not do so, the laws will be under the necessity of appointing some punishment suited to the greatness of the insult, as he conceives it to be. Thus here in Germany, where Protestants and Catholics live together, and where the *peace of religion* gives both equal security and protection against insults, the former must never blaspheme the things which the latter count holy, although they are quite at liberty to say that they do not hold them to be so; and even a Protestant magistrate would be obliged to punish, if the Catholics complained of it, any outrage offered them, or blasphemy uttered against them. The matter becomes still more serious, where one of the two religions is merely tolerated, and where that happens to be the prevailing system, whose gods or holy things are blasphemed. For, to pour contempt upon, or utter blasphemy against, the gods, how false soever they may be, of those under whose protection we live, is one of the most unreasonable and rudest offences, of which we can be guilty against our protectors. In this very situation were the Jews actually placed, when Philo and Josephus wrote. They were subjected to the Romans, and a great many of them, besides, lived without the limits of Palestine in heathen countries; and there certainly they had no title to blaspheme the heathen gods.

To a case, however, like this, the laws of Moses

have not the most distant reference. He gave them not to a nation subjected to foreign dominion, but to a free people that were masters of their own country; and thither he had no desire to invite or attract strangers, but rather wished the people to occupy the land alone; although, at the same time, he wished strangers, who took refuge in it, treated with justice and kindness. But to no foreign religion did he give the smallest privilege, and all manner of idolatry he prohibited. If the stranger was in his heart a friend to Paganism, Moses never inquired into his private opinion. He was quite ignorant of any such thing, and gave it no legal protection. In such circumstances, his laws on the point in question, as they are susceptible of another exposition, ought not, as it appears to me, to be understood in the sense which Philo and Josephus attached to them, and which, no doubt, was sufficiently suitable to their times; but more especially considering that Moses himself, rarely indeed, it is true, but still sometimes, applies contemptuous names to the gods of the heathens; as we see in Deut. vii. 26. xxvii. 15. xxix. 16. xxxii. 16, 17.

That the statutes in question, which have thus been considered as prohibitory of the blasphemy of strange gods, do admit another meaning, is beyond a doubt. The one of them, in Exod. xxii. 27. *Thou shalt not curse the gods*, explains itself by the clause that follows; *gods* being here nothing else than *magistrates*, who, as we have noticed under Art. XXXV. No. 2., bore that name in the Egyptian style. The other passage, in Lev. xxiv. 15., *Whoever blasphemeth his God*, cannot be at all suitably understood of strange gods:

because in blaspheming them, an Israelite certainly did not blaspheme his own god. Nor had the Egyptian, whose story we noticed above, blasphemed any Egyptian god, but Jehovah the God of Israel.—Philo, who probably felt the force of this objection, found it necessary to explain this passage, of *proselytes*, who, therefore, were not to revile the gods whom they had formerly held, when heathens. But still these were not *now* their gods.—In short, the prudent Jews, who no doubt perceived not only the folly, but also the injustice, of blaspheming heathen gods, when they lived under a heathen government, and enjoyed its protection, appear to have given to the laws of Moses, about the time when they came under the Roman sway, a sense which Moses himself could never have thought of.

It is with more hesitation, and not without danger, that I venture to adopt, in regard to another law, a Jewish explanation, which has been commonly ridiculed as a piece of mere superstition. The law to which I allude, is that in Lev. xxiv. 16. which declares that whoever shall *utter the name* JEHOVAH *shall die; the whole congregation shall stone him: foreigner as well as native shall die, if he utter the name* JEHOVAH. Instead of *utter*, we may translate *curse*, for the Hebrew word *Nakab* (נָקַב), signifies both, and then we shall have the blasphemer spoken of a second time; but to this translation there seems to be this objection, that the 16th verse would thus be nothing but a needless repetition of the preceding one. Thus much is certain, that at a very ancient period, long before the birth of Christ, the Jews understood the law before

us, as if it prohibited them from uttering the name *Jehovah*, which the true God had given himself, as his *nomen proprium*, on any other than solemnly-sacred, or, at any rate, sacred occasions ; and, of course, from ever naming him at all in common life. The Greek version, ascribed to the persons called the Seventy Interpreters, and which was made at least 250 years before Christ, here renders, *Whoever nameth the name of the LORD shall die* ; and we see that, by this time, the Jews were accustomed, wherever they found the word *Jehovah* in the Bible, to pronounce, instead of it, the name *Adonai*, (אֲדֹנָי) or Lord : for, in place of *Jehovah*, (יְהוָה) the Seventy always put, ὁ Κύριος. Philo, who lived in the time of Christ, explains the passage, connecting it with the preceding verse, in the following terms, *Strange gods are not to be blasphemed, lest men should be accustomed to think meanly of the Deity. But if any one, (I do not say blaspheme, for that is not here in question, but) even so much as utter unseasonably the name of the Lord of men and gods, he shall die**. We may, therefore, approve of this explanation, or not as we please ; but we must not look upon it as a piece of superstition originating with the Jews, who lived after the destruction of Jerusalem, and whose opinions, in regard to the Mosaic law, I do not, for the most part, so much as notice.

This prohibition of uttering the name of God, whether it please us or not, does not, by any means, appear altogether improbable ; for it is in conformity

* *Philon's Opera II, p. 166.*

with the customs and legislative policy of the Egyptians, who had secret names for their gods, which it was lawful for the priests alone to pronounce; no man being permitted to do so in common life. And, in like manner, *Rhadamanthus*, who herein wished to imitate the Egyptians, would not, on occasions of taking oaths, allow the names of the gods to be mentioned, but only those of the animals consecrated to them, such as dogs, rams, geese, &c.

Nor would I be disposed to maintain, that no advantage could flow from such a prohibition. For, in the *first* place, that name of the Deity, which was considered as his *proper name*, would be, at any rate, thereby guarded from profanations and misapplications, which sometimes leave behind them ludicrous and contemptuous impressions, that can never be effaced; and, in an age when Polytheism was so prevalent, this was a matter of much more importance than at present; for then *GOD* was not, as with us in Germany, equivalent to a *nomen proprium*, but every god, whether true or false, had his own peculiar name; and hence we find Moses addressing the God who appeared to him, and who declared himself the *God of his fathers*, and, of course, the creator of heaven and earth, and the only true God; and asking him what answer he should return to the Israelites, if they wished to know what was his name, *Exod. iii. 13.*

In the *second* place, a name of the deity, which is never mentioned in common life, will have something extremely solemn in it, particularly where it is so significant, as was the word *Jehovah*. It will, of course,

in worship, in prayer, and in the case of an oath, make so much the deeper impression; and *that*, with respect to the last of these, may serve to prevent perjury, or, at least, to make it but rare: for whatever is unknown and uncommon, affects the human heart with terror and with awe.

In fact, I myself, believed that this law ought to be understood in this way, when I was translating the book of Leviticus, about three years ago; but since that time, the consideration of the great severity of the punishment has raised a doubt in my mind on this point. Moses prohibits naming the name *Jehovah*; but was that to be a capital crime? If so, where was there any gradation of punishments; stoning being thus the punishment of the blasphemer of God, and of the man also who but uttered his name?—But this doubt becomes still weightier, when we read *both* verses, namely, verses 15. and 16. of Lev. xxiv. together. And here I must acknowledge a mistake in my translation: for the words in ver. 15. *he shall bear his sin*, I rendered periphrastically, *he shall atone for his crime*, because I adhered to the common opinion, that they related to the stoning, which was adjudged as the punishment of the blasphemer. If, however, I translate the passage quite literally thus, *Whoever blasphemeth his God, shall bear his sin. Whoever utters the name JEHOVAH, shall die; the whole congregation shall stone him*; it looks as if the utterer of the name was to be punished differently from, and more severely than, the blasphemer; as, indeed, Philo has remarked, though with quite another view*. But then, it is

to be considered, farther, that the crime is not so much as distinctly expressed unless we explain the 16th verse by, and, in some measure, include it in, the one before it. The verb *Nakab* may as well mean *to write*, as *to utter*; and, therefore, even writing the name Jehovah, might seem to have been prohibited; and yet Moses has done that in every page of his writings. Let it, however, be rendered *utter*; was then all utterance of the name Jehovah forbidden? How then was it to be used, and for what purpose did God assume it? This law, then, is surely to be understood with some limitation? But with what limitation? Was the priest alone to utter the name, as the Jews think? or durst laymen also utter it, if they only did so in a holy manner? Durst it be mentioned in an oath, or in prayer? Was it permitted in instructing children? or was only the inconsiderate use of it prohibited? With regard to all this, we find nothing in this law, and yet it is the only one that treats on this subject; nor is it like other laws, illustrated by usage; for the name *Jehovah* was new, and it was Moses who first distinguished the God who sent him, by this philosophically-sublime and expressive title. Here, then, we should have *some* crime, to which the punishment of death was annexed, and yet it was not rightly understood what it was, nor wherein it consisted.

These doubts have prompted me to connect the 16th verse more closely with the 15th; so that, *to utter the name Jehovah*, becomes equivalent to *uttering it in blasphemy*; and this explanation is the more probable, because in the story which gave occasion to the law, we find, ver. 11., that the Egyptian *had uttered the name, and blasphemed*. The meaning then of the

words, of which I shall first give a literal translation thus,—*A man, a man*, (that is, any man whatever, whether native or stranger) *who blasphemeth his God, shall bear his sin, and whoever uttereth the name JEHOVAH shall die ; the whole congregation shall stone him*—will be the following: “ If any man blaspheme God, the God whom he deems *his* God, (the Israelite, the true, and the heathen a false God) it is a heinous sin. It is a sin even in the heathen, to blaspheme what, according to his own opinion, is god. Such a person shall not escape his judge; although the magistrate has no right to interfere in the matter, but must leave it to the true or false God, that he may be his own judge. It is, besides, uncertain, whom the man may have meant, when he cursed God, and here the law assumes the milder supposition. But if any one, in blaspheming, expressly mention the name *Jehovah*, so that no doubt can remain, whether he meant to blaspheme the true or a false God, *he shall be stoned to death.*”

In this way the criminal law, with respect to blasphemers, would undergo a very material alteration; nor would it be *every* blasphemy, but only that which was distinguished by a certain specific aggravation, that incurred capital punishment; all other cases being left to the judgment of God, because the blasphemer cannot be *convicted* of having blasphemed the true God, and because God is certainly able to avenge himself, if he think fit, without having occasion for our aid; Judg. vi. 30, 31. And this appears quite suitable to the spirit of those times, and is a great mitigation of the rigour of the law. In our times, a

legislator would, perhaps, grant to the blasphemer the *salvo* of not being in his right mind.—At any rate, blasphemy, inferred merely by deductions, or what is called blasphemous doctrine, could not be punished by the law. In later times, the Jews were extremely prone to construe every thing that did not please them, at once into blasphemy; and their *Zealots*, as they were called, arrogated to themselves the right of punishing on the spot, and without the smallest judicial inquiry, any supposed blasphemy; although perhaps they had stopt their ears against it, and were, therefore, but bad judges of its real nature. Both the one and the other of these measures are repugnant to the Mosaic statute. Even the utterer of aggravated blasphemy was not put to death on the spot, but taken into custody, until God could be consulted as to his fate. We must not, therefore, charge the Mosaic law with those illegal outrages, to which the zeal of the later Jews prompted them to resort.

ART. CCLII.

Punishment of the False Prophet, when convicted.

§ 8. It appears, from Deut. xviii. 20,—22. that a false prophet was punished capitally, being stoned to death; and there were two cases in which a person was held as convicted of the crime, and, of course, liable to its punishment.

If he had prophesied any thing in the name of any other god, whether it took place or not, he was, at all events, considered as a false prophet, and, as such

stoned to death; Deut. xiii. 2,—6. The doctrine of the existence of one only God, who made heaven and earth, is so evident from reason alone, that the accidental fulfilment of any prophecy cannot make it anywise dubious, or convince us that there is any other god, besides the creator of the world. Prognostications may be fulfilled, if not by chance, (which, indeed, does not so often happen) yet still by means altogether natural; and for this very reason, that the impostor, who utters them, takes care to prognosticate things which are matters of calculation, and which he has himself calculated, although they are unknown to the ignorant multitude; such, for example, as are solar or lunar eclipses, among a people quite unenlightened. On this point the reader will find some farther remarks, in my note on the passage last referred to. Now, this very doctrine, that there is no God, besides the creator of the world, was also so fundamentally established by the Mosaic laws, that, in the case of a man prophesying in the name of *another* god, no farther inquiry was made, as to his being an impostor, or a true prophet, but he was at once held to be an impostor, and a corrupter of the people. And precisely in the same way would we reason at this day, and not Christians only, but even the votaries of natural religion, if a prophet appeared speaking in the name of a heathen god. Without deigning to investigate his pretensions, we should at once declare him an impostor, or else wrong in the head.

2. If a prophet spake in the name of the true God, he enjoyed, so long as he remained unconvicted of

any imposture, those rights which were stated under Art. XXXVI., and which were founded in the constitution of the Israelitish polity; and he could not be punished: but when the event which he had predicted, did not come to pass, he was regarded as an audacious impostor, and, as such, stoned; Deut. xviii. 21, 22.

In both cases there is an obvious exception in favour of a person out of his wits; such a person not being capable of, or answerable for, any crime. This exception Moses does not, indeed, make in express terms, any more than he does in the case of other crimes; yet, as we cannot suppose the insane son who strikes his parents, as justly punishable with death, as if he were in his senses, so neither can we the insane prophet. In fact, however, the exception is implied in the expression, *the prophet is an audacious impostor*, or, more literally, *the prophet hath spoken presumptuously*: for these terms are not applicable to a madman; and, besides, we see from Jerem. xxix. 26., that in the case of prophets that were deemed insane and fanatics, capital punishments were not resorted to, but only imprisonment, just as among ourselves.

Considering the great mischief, which false prophets may occasion by their predictions, and concerning which I shall offer some observations in the next Article, capital punishments are, by no means, too severe for them; particularly when we take into the account, that this is not a crime, into which a man is hurried by the violence of passion, but which he goes about deliberately, and with systematic artifice. If, in these times, we do not punish false prophets so se-

verely, or rather, do not punish them at all, but leave them to universal contempt, the reason is, that this contempt is now always so prepared to inflict the well merited punishment on would-be prophets, that the full avengement of their insults on common sense may be safely entrusted with it ; not to mention, that now-a-days, seldom is so much heard of a false prophet, as that he can do any mischief. The world has become too rational for such practices. For this reason, wicked impostors are no longer apt to deal in prophecies, because they know that but little is to be gained by them ; and so the business is now commonly left to fanatics, like *Drabitzius*, who are rather objects of compassion than punishment, though, indeed, *his* predictions actually cost him his head ; or to deluded enthusiasts from the mountains of *Cevennes*.—In ancient times, however, and among a people, to whom true prophets were promised, matters were in all respects on a different footing. The discovery of future events was almost looked upon as a service, which religion had to perform for them ; (Art. XXXVI.) and prophets being expected, not on extraordinary, but on ordinary occasions, a false prophet was always likely to meet with encouragement ; and the world was then so credulous, that he had it in his power to do all manner of mischief. Under such happy auspices, impostors of this description played their parts, and thus often involved whole countries in calamity.

ART. CCLIII.

Remarks on the Mischiefs which False Predictions and Superstitious Divination, may occasion among a credulous people.

§ 9. CONCERNING those tremendous mischiefs, which may proceed either from the public predictions of false prophets, or from the secret practice of superstitious arts, such as fortune-telling, astrology, and divination of all sorts, I may here, perhaps, be allowed to offer some remarks, because in our times these things are no longer known in their full extent and magnitude; and hence those ancient laws, which menaced impostors with death, may appear too severe. On this occasion, however, I do not mean to speak of such impostures, as public oracles, divinations from sacrifices, and inspections of Sybilline books, &c., carried on under the superintendance of the state; and which, though they *may* be used as means for destroying the liberties and rights of a nation, do not, after all, occasion them the worst mischiefs; because they are regulated by political prudence.—Concerning impostures of this nature, I have already spoken, at the conclusion of Art. CCXLVI. At present, my business is with those of the contrary description; that is, where it is *not* state policy that regulates the oracle, but the oracle that regulates the state policy; and where the arts of divination are practised, not publicly, and under the inspection of a Roman senate; but privately, whether in low life, or in the cabinet

of a weak credulous tyrant, before whom a Roman senate must sink into the dust.

In the *first* place, then, in the case of whole nations; how great are the calamities wherewith such impostures may overwhelm them? Of this we have a very strong proof in the recent conduct of the Turkish empire; which, in opposition to all the dictates of political prudence, and trusting for success merely to prophecies and to astrological observations, to the study of which the late learned Sultan was much addicted, embarked in a war with Russia, which was likely to have terminated even more unfortunately for the Turks than it has done; and yet the peace which they have just concluded, is sufficiently disadvantageous. They may, however, be thankful, and think themselves in luck: for matters were in so desperate a state with them, that the fulfilment of the prediction of certain apocalyptic counter-prophets, who announced the immediate destruction of the Turkish empire, might actually have been looked for. The first of these prophets, a preacher in Mecklenburg, fixed the era of that event for the year 1773; others postponed it until 1774; and then appeared another fool, who gave the poor Turks yet another year's respite, and prolonged their existence until 1775.—And here, I cannot but observe, what a fine Bedlam-scene we have, in this instance, between the Turkish and Christian prophets from their respective cells; the sole difference between them being, that, among us, they can never do any mischief, because they are only laughed at; whereas to the Turks, they had well nigh occasioned complete national ruin.—The impos-

tor, who thus overwhelms a country with misery, may perhaps be withal himself a dupe, and believe in astrology; but this makes no difference at all as to the mischievous effects of his predictions.

Cræsus and Pyrrhus had the weakness to consult foreign oracles, who, not at all concerned for the interests of *their* kingdoms, but only for their own profit, and future credit, took care, if their responses were ambiguous, that they should, at any rate, be apparently flattering. The consequence was, that both these monarchs were involved in calamitous wars.

How many battles may not be lost through the fault of diviners, either by their prompting to an imprudent attack, and, perhaps, specifying a certain day as propitious for it, which makes it be hurried on, under disadvantageous circumstances; or by discouraging an army on the very day of decision, and when an engagement cannot be avoided. Perhaps *Ariovistus* might not have lost the battle, which he fought with *Cæsar*, if the Germans of those days had not been dupes to the decisions of female astrologers.

One of the most striking examples of the mischief done by these, worse than silly, arts, occurs in the history of Rome, in the circumstances that attended *Cæsar's* death. At this period the people of all ranks, in Italy, from the hovel up to the throne, were just as superstitious as they were irreligious; and put such implicit faith in those called *Chaldæans* and *Mathematicians*, that, in order to bring about any mischief, these impostors had nothing more to do, than predict it. We wonder that a soothsayer should have been able to give *Cæsar* a warning on the very day of his murder, and that

the event should have corresponded so exactly, with a premonition drawn from an art which is merely delusory. But might not the warning have actually caused the catastrophe? Many were the daggers, which discontented citizens had in readiness for Cæsar, besides those wherewith he was that day assaulted. But then they wanted courage to strike the blow, until it was now, in effect, given by the man, who declared the day inauspicious to Cæsar. Cæsar himself ridiculed the folly of divination, and went to the senate-house; but the conspirators might have believed in it; and those, to whom this appears impossible, have only to read the story of the bewitchment of *Germanicus*, (not his being poisoned, for of poison we hear not a word, but only of images and billets on the wall,) as it is related by *Tacitus*, the most rational of all the Roman authors of that period; and he will not, perhaps, be any longer of opinion, that Brutus, or his accomplices, were too sensible and judicious, to be carried away by any such nonsense. And if they were not so, the soothsayer, who warned Cæsar, certainly was, I will not say designedly, but, at any rate, accidentally, his murderer. Let us only put this case;—were numberless people on the watch for my life, and only prevented by fear from making the attempt; and were it but whispered abroad, that on such and such day there could be no danger in attacking me, and that I should then assuredly die; would not all the daggers of my enemies be then drawn, and some one or other of them dispatch me? In such circumstances, that man's life alone will be secure, to whom it is not a matter of much concern, that others are watching for the

happy moment, when they may have it in their power to take it away.

We are apt to reflect with astonishment, that for 200 years, we should, in reading the history of Rome, meet with such a succession of perfect tyrants, as the annals of no other nation of the world can perhaps parallel. It is very possible that the Roman historians may have written partially, and been guilty of exaggeration, though this reproach cannot be cast upon *Tacitus*; but after due allowance for this, thus much will still remain true, that the two centuries in question produced numerous emperors, on whom posterity has bestowed the appellation of Tyrants. But it was not at all wonderful, that this period should have given birth to so many, or even still more, tyrants, and enemies not only of Rome, but also of all the world that was within their reach. Rome, destitute of all religious principle, believed in the tales of Chaldeans and Mathematicians, whose sole object it was to make money, and who, therefore, made it their business to expiscate family secrets, and get thoroughly acquainted with the circumstances of all ranks. Exactly in the style of our modern parasites, who extol the understandings of their patrons as divine, and applaud their erotic or bachanalian poems as more exquisite even than their wines, those rascals would, to touch his money, tell one man, that he had *an imperial nativity*, and so compel him to aspire to the throne; to another they would say, that a certain day would be dangerous for the emperor, or his favourite: and such intimations seldom failed to have their effects. By such prognostications, whispered, as they were, in

the deepest secrecy, numberless machinations were set on foot against the lives of the emperors, of which some became known, and still more were suspected; and was it then wonderful, that they became distrustful, or, in other words, enemies of all mankind? But hitherto we see only one half of this mournful scene; it was never fully developed, while the emperors ridiculed those superstitious practices: but unfortunately, in consequence of the many predictions that *happened* to be verified, they too, at last, began to imitate their subjects, in giving into what we should call nothing better than *old wives' weakness*, and consulted those impostors, in order to learn, from what quarter danger threatened them. On such occasions the Chaldeans were obliged to say something or other, else could they not expect to be paid; and, therefore, they told them the dangers, and described the persons they had to dread, taking care, however, *secundum artem*, to shroud their answers in dark and ambiguous language. Thus were they safe, and received rewards from their trembling employers, who applied their descriptions alike to those whom they had, and whom they had not in view, and as we may easily conceive, upon the great principle of self-preservation, rather wished to take such people out of the way, than fall themselves into their hands. Thus they perpetrated acts of the grossest injustice and cruelty, thinking them necessary in self-defence; and, in process of time, merely from the gradual extension of their suspicions, became enemies of mankind, and tyrants, such as we can no longer breed.

Let us only figure to ourselves the state of that

mans's mind, whose situation should oblige him to have daily intercourse with people of whom he believed, that many carried daggers, or pistols, in order to attempt his life. Possessed of this gloomy idea, he would unquestionably regard all around him with the eyes of suspicion and terror; society he would detest, and hold mankind in abhorrence. And how much more so, were a pair of bullets to be ever let fly at him, and not to hit him? That would justify and augment his suspicions; though, perhaps, excepting the author of that attempt alone, not one individual of those, from whom he apprehended similar dangers, and whose society he could not avoid, ever meditated any evil against him. Yet, putting ourselves in his place, would we not think it prudent to have sword and pistols at hand, and always to be in a posture of defence? and from the influence of habitual fear, and ever suspecting the worst, would we not, in the case of seeing any one put his hand suspiciously in his pocket, though perhaps but in search of his handkerchief, rather anticipate than be anticipated, and so shoot him dead? In thus acting, we should, no doubt, be called, *not* tyrants, but madmen: but such is the madness, that astrology, chiromancy, and such like silly arts, may occasion. In this situation were many of the Roman emperors, whom we denominate tyrants, actually placed; and, perhaps, in spite of our good nature, we ourselves, might, in similar circumstances, have been just as bad. Nothing but a high degree of courage, and a contempt of dangers, both real and imaginary, such as marked the character of *Trajan*, could have kept them from becoming tyrants.

If we ride with loaded pistols through a wood, and a blackguard-looking fellow accompanying us, make any suspicious *manœuvre*, it really requires a considerable share of courage and self-command, to abstain from discharging them; particularly if a person of the same description has been previously represented to us as a highwayman.—Often were the Mathematicians banished from Italy, (just as we are told that the present Turkish Sultan has driven the astrologers from his court); but curiosity, and the desire of prying into future events, always opened a back-door for their re-admission. At the same time, the instances of their expulsion are sufficient to shew, how sensible mankind were of the mischiefs they occasioned.

The very same mischievous effects of divinations, naturally extend to families in the inferior classes of society; and we thus often find express instances, where, as *Ovid* says, *Filius ante diem in patrios inquirat annos*. In such cases, the prediction often brings about its own fulfilment. Thus, if a man has it prophesied to him, that he will die in such and such a year, the very dread of that event will induce a disease, and render it mortal. A very singular example of this occurred to *Dr. Wedeln*, who cured a disease, by demonstrating to his patient the inanity of astrological predictions of death.—People, who wish no ill to each other, become enemies, in consequence of the diviner telling each of the other, that he has reason to be afraid of him. For this he is paid, and most unfortunately the indications which he specifies, prove directly applicable.—Nuptial fidelity is violated, by the encouragement which he gives to such unhallowed

attempts; nuptial happiness blasted by the unjust suspicions he insinuates; and nuptial engagements broken off, by his merely saying, while yet he knows nothing at all about the matter, *The object of your love has no regard for you.* How great, in like manner, is the mischief he occasions, when in the case of any such crime as theft being committed, his avarice leads him, though utterly ignorant of the fact, to bring innocent persons under suspicions, to which, perhaps, they have it not in their power to reply? In such a case, it certainly would not be unjust that he should himself be subjected to the punishment of the crime, which, by his means, has been fastened on the innocent, whether he has expressly named them, or only so described them, as to make them be suspected.

The Christian religion, which, where it is taught in its native purity, rejects all such fooleries, has made our times wiser; to which also the cultivation of philosophy and natural history, have contributed their share; so that we no longer find such frequent instances of the mischiefs occasioned by the silly curiosity of prying into future events; and the Roman history, during the times of the first Cæsars, still continues the chief scene of them.

In the days of Moses, superstition was, as it were, the *sensus communis* of the human race; and all the neighbouring peoples believed in divinations: so that we cannot justly blame *him* for annexing to the practice of all such arts of imposture, severe punishments; to which, now, that instruction, contempt of superstition, and ridicule, sufficiently counteract their effects, we have no longer any occasion to resort.

ART. CCLIV.

The Mosaic Statutes against Divinations, and the Punishment of Diviners.

§ 10. To ascertain and describe the different species of divination, against which Moses has given laws, belongs more properly to antiquities, than to our present subject, and would, besides, involve philological disquisitions, with which the majority of my readers will gladly dispense. In my opinion, exclusive of what he includes under the general term *divinations*, he names several particular species; such as, divinations from *serpents*, from the course of the *clouds*, and, perhaps, too, from inspection of *entrails*; not to mention necromancy, or the *consultation of the dead*, by summoning them to appear, as in the instance recorded in the xxviii. chapter of 1 Samuel*; for which purpose, a living person, duly pre-instructed, might be stationed in some deep subterraneous passage, and give his answers in the tone and language of the dead. Of astrology Moses makes no express mention in his laws, unless the word, which I understand of *divination from entrails*, were to be understood of it, which, perhaps, it might; only that in the prophet Isaiah it appears as a Babylonian folly, Isa. xlvii. 12, 13.

* See the Notes on this chapter in my German version.

Now, all these vain arts in order to pry into futurity, and all divination whatever, unless where God was consulted by prophets, or by *Urim* and *Thummim*, (the sacred lot, kept by the high-priest) were expressly prohibited by the statutes of Lev. xix. 26. 31. xx. 6. 23. 27. and Deut. xviii. 9,—12.

In the case of a person transgressing these laws, by consulting a diviner, God reserved to himself the infliction of his punishment; the transgressor not being amenable to the secular magistrate; Lev. xx. 6.—The diviner himself was to be stoned; Lev. xx. 27.

After the law on this point had apparently gone very much into desuetude, Saul, the first of the kings, began to enforce it again with great rigour. But the power of prejudice, when once any superstition has been adopted by the generality of mankind; and the disease, (we might, in many cases, almost call it the phrenzy) of prying into futurity; are strikingly exemplified in his conduct. He had persecuted the diviners of both sexes, and put the laws against them in execution; and yet, when he was now on the eve of an engagement with the Philistines, which, it appears, he could not possibly avoid, and which was likely to prove alike decisive and dangerous, he had the weakness, to go himself to a female necromancer, and requested her to call up Samuel the prophet. This she did; and, although I cannot say that Samuel appeared (for Saul saw him not, but only the woman herself) yet he spoke with the king. In this process did Saul, who seems, by no means, to have been deficient in personal courage, spend the night before the battle; which he would have spent much better at a

council of war, or in bed, like Alexander, the night before the battle of Arbela. Samuel, whom he merely *heard*, without *seeing* him, announced to him, that he would sustain a great defeat, and be slain in the battle. It would, indeed, appear, that circumstances were such, that a defeat might naturally have been apprehended; but, allowing that they had been otherwise, still the unfavourable prediction of an impostor, who pretended to be Samuel, implicitly believed by Saul, must almost necessarily have produced it. The superstitious monarch, who, although he had to fight a battle next day, thus wearied himself out the night before in consulting the dead, in one of these deep subterraneous caverns, wherein they usually reside, fell prostrate on the ground for fear, at all his length, when he heard the voice of the pretended Samuel; came to the field quite dejected, and frightened to death; and the utmost length to which his personal courage carried him, was to impel him, without flinching, into the place of greatest dangers; that he might fall not as a fugitive, but as a combatant; since it was to be, as he knew, his fate to fall, and, along with his sons, to eat his supper in the subterraneous world. He accordingly did fall, and thereby made the enemy's victory, and the helplessness of the discomfited Israelites, so much the greater.—All this was nothing more than the natural effect of the imposture, which the female necromancer, or, as she is commonly called, the *Witch of Endor*, had practised upon him. She probably meant him no evil, but merely made the invisible Samuel, for the honour of her trade, say, in the gloom of the cavern,

what, in the present posture of his affairs, she thought highly probable; more especially after she had heard what Saul himself declared. For, with all such impostors, down to the quack-doctor, who sells medicines to the country people, the primary point is to elicit information; and with that view they generally have listening apartments, where they can over-hear every thing said by their unsuspecting dupes.

ART. CCLV.

Incantations.

§ 11. THERE certainly is no such thing as real incantation or witchcraft; nor could any thing be more foolish, or more cruel, than were those trials for witchcraft, which, before the time of *Thomasius*, were in general use almost every where, and are sometimes still carried on in defiance of sound reason; and by which any person who fell under suspicion, became subjected to an inquisition, as to his being in compact with the devil; a point which was, of course, made out, but by very strange proofs indeed.—But notwithstanding this, we cannot say, that there ought to be no laws against incantations; such, at any rate, as may prohibit knaves from tampering with the credulity of the people, and making them believe, that they possess the power of enchantment; only they ought to be levelled at once against those, who make such pretences, to frighten others; and not at every person, whom his neighbours, without any fault of his, are pleased to consider as a wizzard.

Such a pretence, putting the matter in a religious view out of the question, is, to say the least, a gross imposition upon the public; nor are they bound, how great soever their simplicity, to tolerate every one that chuses to deceive them; but more especially an impostor, who, by assuming the character of a conjurer, may make himself of great consequence among ignorant people, and thus do much mischief, both to the community, and to individuals. For how many will, through the mere fear of becoming the objects of a neighbour's incantations, suffer the most ridiculous tortures, or, in other words, be made really miserable? Now, as no man has a right thus to terrify others, we must either be, by the aid of laws, placed beyond the reach of such wanton cruelty, or else we shall return in so far to the state of nature, as not only to resort to defence, but even to revenge, against those who thus practice upon our fears. The case is much the same, as when a person puts on the dress of a ghost, in order to scare us. For fear is both an evil in itself, and the source of other evils also, insomuch as even to occasion death.—Add to this, that those who are called wizzards, occasion mischief, not by the help of the devil, but by various natural means, unknown to others; and only make use of the devil's name to conceal their artifices. The Latin terms, *maleficium*, and *veneficium*, express this species of witchcraft very distinctly.

So much then, for incantation in general, against which statutes are always the more requisite, in proportion as the ignorance, credulity, and fears of the people are greater. I have now to make some re-

marks on its different forms, and its relation to the laws, in our days and those of Moses. At present it is commonly ascribed to the devil, and termed the Devil's Art; nay, the very word expressive of *incantation*, namely, *Zauberey*, is said to be derived from *Zabel*, which is but another pronounciation of *Teufel*, (devil); and hence, zealous theologists formerly maintained the reality of witchcraft, almost as strenuously as an article of faith; only that they accounted that man a monster of impiety, who could form any compact with God's enemy. We must, however, entertain very different sentiments on this point, in reference to the time of Moses. For, in the Biblical writings prior to the Babylonish captivity, we meet with very little notice of the devil; and it would seem, that the effects which he could produce on the material world, were considered as but very trifling. The wizzards of those days rather ascribed the efficacy of their conjurations to other gods; and, therefore, in the Israelitish polity, witchcraft was commonly accounted a species of idolatry, and, of course, most severely punishable. Hence, orthodox theology, in the time of Moses, could look upon it in no other light than an imposture: for no one could maintain, that it operated preternaturally, without admitting the existence of other gods, and their power over the material world.

In the Mosaic laws, what we denominate *incantation*, or *witchcraft*, is only twice mentioned, and prohibited, namely, in Exod. xxii. 17. and Deut. xviii. 10, 11. I must here take some notice of the two names which Moses gives to this species of imposture,

and which may sometimes be used with some distinction, but are, in the Bible, usually put in a more extensive sense for *incantation* in general. They serve, however, in some measure to shew us what sorts of incantations were then most common, and so gave a name to the others.

The *first* of them is *Keschef*, (קטש) *incantation*, and hence *Mecasschef*, (מקטש) *an inchanter*, or, in the feminine, *Mecasschefa*, (מקטשה) *a witch*. The verb *Casschaf*, or, as in Arabic, it is pronounced *Casaf*, signifies, in that language, *to cut*, and hence they say, *God cuts the sun, or the moon*, that is, an eclipse takes place, during which but a part of these luminaries is visible, the remainder appearing as if *cut off*. From this circumstance eclipses of the sun or moon are themselves called *Cusuf*.—I do not, in general, appeal to the Rabbins; either to those who are introduced as speaking in the *Talmud*, or even to *Maimonides*, who is, in many respects, justly held in estimation; because they are too modern to serve as authorities on the subject of this work; I may here, however, observe, that what they say, on the point now in question, accords with the account here given, making allowance for their usual mixture of nonsense, which, in the present case, involves one great absurdity. According to them, then, *Mecasscheshim*, are those *who make nature lie, and do the reverse of what is resolved in the council of the watchers, who move the celestial spheres, whereas man ought, in justice, to leave nature as she is*. We easily see here what sort of people they are supposed to be, who occasion eclipses of the sun and moon, contrary to nature. This is a

job which every mortal ought to let alone; but the enchanter pretends to effect it, and thereby gives occasion to the concluding clause of the silly doctrine of the Rabbins.—But this is not the place to introduce tiresome Talmudical details, and I must refer the reader for farther satisfaction to Buxtorf's *Lexicon Chaldaico-Rabbinicum*, under the word כִּשָּׁף; contenting myself with this remark, as flowing from these philological particulars; namely, that the word seems in the Bible, to mean, a person who occasions solar or lunar eclipses, that is, from his astronomical prescience of their approach; making all manner of grimaces, singing songs, and so affecting to enchant the celestial bodies. Now, among nations unacquainted with astronomy, this is a common species of knavery, which gains great respect to its author, and sometimes gives him a handle for all variety of extortions from the people, that he may be prevailed upon to relieve the sun or moon from that everlasting darkness, in which by the mere power of his art, they would otherwise remain involved.

The second expression used by Moses on this subject is *Chober Chaber*, (כִּבֵּר כִּבֵּר) *the man who makes, or utters a song of enchantment*. This probably took place in most kinds of incantation; but the only case in which we find *songs of enchantment* mentioned in the later books of the Bible, *nominatim*, is where the conjuration, or *charming*, of serpents is spoken of in Psal. lviii. 5, 6. Eccles. x. 11.; perhaps, because this species of conjuration alone, being quite harmless, and mere juggling, might be tolerated, if there appeared nothing idolatrous in the songs. It is com-

mon all over the East, where there are snakes, and principally where they are most poisonous. The juggler, who means to pass for a master of the art of incantation, learns to handle the most dangerous snakes in all variety of ways, and to make them *dance*, as it is called; and is well paid for such exhibitions. If the reader wishes to see a representation of this dancing, as it is practised in India, and, at the same time, to know the way in which serpents are habituated to it, and deprived of their poison for a certain number of hours, (the latter a matter so very easy, that nothing can be more so, and *Dr. Mead*, without thinking of this account, has, in his *Treatise on Poisons*, fully detailed it,) he has only to turn to *Kæmpfer's Amœnitates exoticæ*, fascic. iii. observ. 9. *Mr. Niebuhr*, in p. 189. of vol. i. of his *Travels*, asserts besides, that some serpents are musical, and raise their heads, and the upper parts of their bodies, the instant they hear the sound of music. If this be the case, the artifice of the charmer becomes the simpler. It would seem, that the charming of serpents continued as a species of juggling; it has an appropriate name, *Lechesch*, (לחשׁ); and the person who practised it, was called *Melachesch*, (מלחשׁ).—Other sorts of charms and incantations were not so innocent.

We now proceed to specify the laws themselves. By that one, then, which occurs in Deut. xviii. 10,—14. there was to be no enchanter or charmer in Israel, that is, such persons were not to be tolerated.—Farther, by the penal statute, in Exod. xxii. 17., the witch (and, therefore, probably the enchanter like-

wise) is threatened with death. In regard to this passage, however, I have still a difficulty; not on account of the severity of the punishment, which is quite suitable to the analogy of the Mosaic jurisprudence, because incantation was a sort of idolatry, and in Deut. xviii. is considered as such; but from the mode of expression, (which, in a penal statute, is quite unusual), *A witch thou shalt not let live*; whereas the usual phrase would be, *she shall die*, or as *Dr. Luther* commonly renders it, *she shall die the death*. It has hence often occurred to me, as a question, whether in place of לֹא תְחַיֶּה, *thou shalt not let live*, we ought not, perhaps, to read, לֹא תִהְיֶה, *there shall not be*. Were this the case, the two statutes would say the very same thing.

In order to prevent a very common mistake, I must yet observe, that the celebrated *witch of Endor*, as she is called, who has given rise to so many controversies, was not properly a witch, but a diviner; namely, one of that sort which used to call up the dead to be interrogated concerning the living; and much of the same description with the *Sybil* in the sixth book of the *Æneid*, who conducted Æneas to his departed sire in the realm of shades; only with this difference, that *she* had the civility to carry this hero across the flood of hell, even to the Elysian fields, after he had plucked the golden leaf in the wood of Avernus; whereas the former, in the vulgar style of necromancy, gave the dead the trouble of revisiting the world. This said witch of Endor, therefore, has no business among those personages who have been the subject of this article, but only

among those described in the preceding one; and there due attention has already been paid her.

ART. CCLVI.

Of Perjury.

§ 12. THE Mosaic law with respect to perjury is extremely different from our German law, and still more so from that of England; approaching nearer to the ancient Roman law on the subject.

It prohibits perjury most peremptorily, as a heinous sin against God; but still it leaves to God himself, who, in Exod. xx. 7. expressly promises to inflict it, the punishment of the offence, without ordaining any punishment to be inflicted by the temporal magistrate; excepting only in the case of a man falsely charging another with a crime, in which case the *Pæna Talionis* took place in terms of the statute in Deut. xix. 19. not, indeed, as the punishment of perjury, but of false witness; and *that* with such rigour, as to hold, even where no oath was sworn, but merely a false testimony exhibited. So far, indeed, is this principle carried, that even the voluntary confession of perjury occasioned no civil infamy, but might be expiated by an offering; and, likewise, where a wife was required to swear, and *did* swear, to her nuptial fidelity, God having declared that he would, himself, even in this life, avenge her perjury in a determinate and visible manner, the magistrate had no right whatever to drag her again, when thus *marked* as a perjured person, before a court, and

punish her anew ; but was bound to leave her entirely in the hand of God.—Concerning both these cases we shall speak more fully hereafter.

Here, therefore, oaths enjoyed no *civil*, but only *religious* respect ; which, however, must have contributed, in a very high degree, to prevent those unjustifiably mild constructions, which a person who has been fain to forswear himself, and even the advocate, who would gladly help him, are apt to put upon them, in order to satisfy their consciences ; as if an oath were quite a civil matter, a mere formal assurance given before a worldly tribunal, under a conventional penalty, and nothing farther ; instead of being, as it is, a solemn call to God to punish us both here and hereafter, through all eternity, if we tell a falsehood, or do not keep our promise. As the magistrate had no concern with the oath, beyond the mere formality of its administration, it thus remained in its natural state of perfection ; an appeal to God, as a surety, and the punisher of perjury ; which appeal, as he accepted, he, of course, became bound to punish a perjured person irremissibly, without even remitting the punishment on his remorse and penitence, unless in the case of his acknowledging his perjury in regard to any matter of fact, or publicly retracting, if it was of a nature to admit retraction, his sworn promise, when he no longer meant to fulfil it. This was an awful view of perjury, but, in reality, a philosophically just one ; and in this very view did the Israelites actually regard it, not merely as a sin, but as very different from other sins, and much more dangerous. Solomon,

in the xxixth chapter of Proverbs, verse 24. says, that *the man who is partner with a thief*, or, as we would term him, *the concealer*, of his crime, *is the enemy of his own life*; because he hears the oath administered in court, and does not give information of the fact. Here, the withholding information, when an oath is tendered, is, in his estimation, a much more terrible sin, than the theft itself, just because it directly demands our life at the hand of God. On this point, the reader may also consult my remarks on Psalm cxxxix. 19,—22.

In fact, this is precisely the light in which the matter is always viewed by nations, while in their best estate, and as long as the people are honest and religious. Among the ancient Romans, oaths were held so sacred, that we find even the Greeks themselves noticing it, as a very strange point of contrast to their own national character, that a Roman might safely be entrusted with the greatest riches, without any witnesses, from its being well known, that his dread of an oath was too great, to allow him to venture on a perjury; whereas the same experiment could hardly be made on a Greek, even with the merest trifle, because he would be in danger of forswearing himself without any hesitation. In those honourable times, the Romans had no punishment for perjury, except that of the Censor marking the perjured person as a bad man*. They left it to the gods to avenge his wickedness†; and however

* See *A. Gellii Noctes Atticæ*, lib. vii. c. 18.

† On this principle, *Cicero*, in his Second Book *De Legibus*,

much in after times the fear of the gods, and the principles of honesty disappeared at Rome, still we find this rational maxim of their ancestors subsisting in the reign of *Alexander Severus*; *Jurisjurandi contempti religio satis Deum Ullorem habet.* (L. 2. C. de rebus cred. et jurejur.)—Our civil punishments certainly do not stand on a better footing than this; only they are now necessary, considering that honesty and the influence of religion are no longer so universal among mankind, and that oaths have, in a great measure, lost their respect, in consequence of their pernicious multiplication, and their including such a variety of particulars relative to things, that are, properly speaking, merely duties, and so liable to numberless violations.

And here I must take notice of another pre-eminence in regard to oaths, which the Mosaic law enjoyed beyond that of any other state, in the circumstance of the Israelitish government being founded by God himself, and thus being a *Theocracy*. This pre-eminence will be the more striking, if we compare the Israelitish state, *first*, with one having only natural religion; and, *secondly*, with one enjoying the light of the gospel, but neither of them established by the Deity himself.

In the *first* place, then, let us represent the circumstances of a people acquainted only with natural

sketches the law of oaths, in these terms, *Perjurii pœna divina, Exilium; humana, Dedecus*;—a point which affords so little scope for dispute, that, in a subsequent chapter (c. 15) it is very briefly passed over, with this one remark; *Jam de perjuriis, de incestis, nihil sane hoc quidem loco disputandum est.*

religion, but still enjoying it in all its purity and extent; that is, believing in a Providence, in the attention of the Deity to their prayers, and in a future life. To such a people, it may no doubt appear probable, but still it will not be matter of absolute certainty, that God should undertake the guaranty of the oath made in his name, and really engage to become the never-failing avenger of perjury. For, from the mere doctrine of a Providence, which suffers so much evil in the world to pass unnoticed, this does not follow; nor yet from the doctrine of a future life, of reward or punishment; for God, on men's repentance and entreaty, pardons sin, and leaves it unpunished beyond the grave; and for the same reason, which prompts him on these conditions to overlook any other lie, or breach of promise, without a public retraction, he may certainly do the like in the case of a perjury. Nor, again, does it follow from the nature of an oath. *It* indeed is an appeal to God, and an imprecation of a punishment to be inflicted by him; but then, it is not every prayer that God listens to, else would he have many strange and mischievous petitions to answer; nor is he under any more obligation to undertake a guaranty, if he has not promised it, than earthly sovereigns are, to guarantee all the compacts of their subjects, instead of having the cases in which they are or are not to do so, quite optional. Here, therefore, it is at any rate a dubious point, whether God will be the avenger of perjury; and just because it is dubious, one man will think one thing, and another, another; and the consciences of swearers, particularly where self-interest or terrors interfere, will give dif-

ferent verdicts concerning it. Many perjured persons will even entertain a theoretical hope of remaining unpunished, and at last regard an oath merely as a civil matter. I, for my own part, were I but a disciple of natural religion, would still believe that God took upon him the guaranty of oaths, because unless they be held sacred, human society cannot be happy. But all would not be of this opinion.

On the other hand, that God will be the avenger of perjury, is a doctrine of the Christian religion, not merely as it is taught by divines, but as it is contained in the Bible itself. Were not God to take upon him to guarantee oaths, an appeal to him in swearing, would be one of those foolish and sinful prayers, which he could not hear, and which men ought not to make; in other words, oaths would of course be forbidden. Yet so far is the Christian religion from forbidding them, or even leaving their moral nature undecided, that we find the apostles themselves swearing more than once, and *that* not where they are speaking merely like frail mortals, but even in their epistles, which were inspired by the Spirit of God. Nay, we see Christ himself taking an oath, which, properly speaking, was a judicial one, exactly in the manner practised among the Jews; and the Scriptures of the Old Testament, which Christ and his apostles have declared to be divine, and which consequently form a *principium cognoscendi* in regard to Christianity, and abound, moreover, in moral doctrine, speak of an oath, not merely as of a thing barely allowed, and of which it might be said, that it was one of those errors and infirmities of pious people, under the Old Testament,

which were overlooked in the times of ignorance; but they expressly and repeatedly reckon it among acts of religion. Hence, therefore, under the gospel, an oath is an appeal to God, of which he approves, and to which he will listen. He undertakes to guarantee it, and is the avenger of perjury, if not in this world, at any rate in the world to come; to which, indeed, our forms of oaths generally refer.

Here, however, *two* circumstances come to be considered, which may occasion a Christian, even one who honestly believes his religion, to hesitate with regard to oaths, and even to entertain the very contrary opinion of the one just delivered.—In the *first* place, no where does the gospel contain an assurance of God's taking upon him the avengement of perjury, so express as that contained in the third commandment, Exod. xx. 7. But this commandment cannot with any certainty be directly transferred to the New Testament and the Christian religion, because it still remains doubtful, whether it may not merely belong to the state of the theocracy, and to the civil laws of Moses, which do not concern Christians; for that the decalogue is not a digest of the eternal law of morality, but contains many things merely of a civil nature, and relating to the Israelites alone, is manifest from its contents; and such is the doctrine of our most rational divines; for example, as far at least as I know, of the theological faculty of our university; of which, indeed, the reader may satisfy himself, by perusing a Program, entitled, *Nonnulla de Decalogo Mosis*, written in their name by Mr. Consistorial-Counsellor *Ribow*, and published in 1755, on occasion of the late

Mr. *Plitt* taking his doctor's degree.—What the Christian religion teaches, therefore, with regard to God as the avenger of perjury, is not founded on an *express* assurance of the Bible, but is merely a *consequential* doctrine from the Bible; and it may happen, that a man does not perceive the *consequence*, nor perhaps ever thought of it; and on that account, considers an oath as a matter altogether of a civil nature. In fact, this is the light in which it is regarded by many lawyers, who are nevertheless good Christians; only they cannot believe, that in swearing, we appeal to God, properly speaking, as the avenger of perjury, or that we can expect guaranty and avengement from him.—In the *second* place, there is this farther circumstance to be taken into consideration, and it is rather an awkward one, that not only *individuals* among all denominations of Christians, but also whole *sects* of them, are of opinion, that oaths in general are prohibited in Matth. v. 34. Here, unquestionably, they are wrong; for in this passage, certain oaths, such as that by *heaven*, or *earth*, or the *temple*, or *Jerusalem*, or the *head*, &c. not administered in courts, but in common use extrajudicially, and liable to this dreadful abuse, that the Jews, in taking them, generally had *mental reservations*, or had it in view to deceive, not considering them as real oaths,—are either described *as* real oaths in the sight of God, or else prohibited on account of the usual reservations by which they were rendered nugatory. At the first sight, however, and to a person unacquainted with those Jewish doctrines and abuses which Christ combats in his sermon on the mount, this mistake is so far from unnatural, that it

carries a considerable degree of probability along with it; and thus, if oaths were universally forbidden, it would follow, that God does not accept the appeal made to him in swearing, and will not guarantee our oaths. So that it remains at least *possible*, that a man who entertains no doubts with regard to Christianity in general, may be guilty of perjury, and account it a sin, but still hope, that on contrition and repentance, God will forgive him, even although he do not retract it.

Here, then, the theocracy of the Israelitish government, where God himself was regarded as king, and undertook to inflict, by his providence, punishment on perjury, even in this world, gave it a considerable advantage in respect to the sacredness of oaths. God himself had commanded judicial oaths, and therefore was naturally bound to accept the guaranty and avengement committed to him; more especially as he had, in Exod. xx. 7., in one of the ten fundamental principles of the theocratic government which he established, given this express assurance, *Jehovah will not leave the man unpunished, who utters his name with a falsehood.* No Israelite who believed his religion, or, in other words, that God had sent Moses, and spoken these words from Mount Sinai, could doubt of God being the avenger of perjury, and having taken upon him the guaranty of oaths. In the case too, of a certain species of oath, namely, that which a husband had it in his power to exact from a wife, with regard to her nuptial fidelity, the corporal punishment which, if perjured, she might assuredly expect, was specified, viz. that her *belly should swell, and her*

hips vanish, so as to render her incapable of conception, Numb. v. 21, 22, 27, 28. These are the symptoms which usually attend the *hydrops ovarii*, a disease of the female sex, which is very rare; at least I am unacquainted with any other case, to which a physician could find them applicable. Thus much is undeniable, that a people to whom God himself condescended to become a civil legislator, and had declared himself, so expressly, the Guarantee of oaths, must have regarded oaths as extremely sacred and awful; and as long as they believed their religion, perjury could occur but very rarely among them.

It is probable that the custom in many nations, of swearing by *the life of the king*, may have furnished one of the first reasons for the punishment of perjury by *human* authority, and the hand of the secular magistrate. The violation of this oath was perhaps considered as amounting to a sort of treason, because it had the appearance of wishing evil to the king, or at least of not taking that hearty interest in his welfare and safety, which a dutiful subject ought to feel; thus forming what the law of England would term *disaffection*. Nay, there may have been princes so timid and superstitious as to imagine, that any such strange perjury might render them unfortunate, and to entertain this strange idea of the divine justice, that it might let fall on them the curse by which the oath was sanctioned. Thus among the Romans, swearing falsely, *per genium principis*, or *per salutem Cæsaris*, was accounted criminal, and punished as a contempt of the emperor; and among the Persians, *Thevenot** tells

* See his *Suite du Voyage de Levant*, l. 2. c. 11. p. 332.

us, that no oath is more sacred than that which is sworn *by the king's head*. In fact, we see, from Gen. xlii. 15. that oaths of this description were not altogether unknown in the time of Moses, but in common use in Egypt long before; only among the Israelites, as long as the plan of their polity settled by Moses subsisted, they could have no place, nor form an exception to the rule of perjury not being punishable by the magistrate, as the Israelites had no king but God. No doubt when they came to have kings, swearing by the life of the king became common*; but whether perjury by such an oath was considered as treason, I cannot, for want of historical documents, ascertain. It is, however, here a matter of indifference, as the question does not properly belong to the Mosaic law. They swore also by the *holy cities*, that is, those cities wherein God had had his habitation, such as *Sichem, Hebron, Bethel, Shiloh, Jerusalem*. The literal meaning of the much misunderstood clause in Psal. cxxxix. 20. נִשְׁוֹא לִשְׂוֹא עִרְיָךְ, is, *They utter thy cities* (that is, their names) *with an untruth*; in other words, *they swear falsely by thy cities*. It is the very same expression which we find in Exod. xx. 7. *to utter the name of Jehovah with untruths*. They swore likewise by the *temple, the altar* †, &c. &c. These oaths, however, by no means implied maledictions of these sacred places. They were rather figurative modes of expression, and, by the *Metonymia continentis pro contento*,

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* Psal. lxiii. 12. 1 Sam. xxv. 26. 2 Sam. xiv. 19.

† Matth. v. 34, 35. xxiii. 16,—22. comp. with ver. 29.

understood as referring to the God who dwelt in them, just as we say *heaven*, instead of *God*. They could not, therefore, involve any criminality, or be considered as injurious to the places in question.

It was God, then, and not the magistrate, who was the avenger of perjury. There was, however, a method prescribed, whereby the man, whose perjury wounded his conscience, might expiate his guilt.—This was by first making an acknowledgment of it, and then presenting a trespass-offering, by way of an *abolitio criminis* *. This acknowledgment was attended with no civil infamy, and the crime was done away by the offering.

It may be hoped that no philosopher, even although he does not believe in the divine establishment of the Israelitish polity, will term this, superstition and priest-craft. For hitherto every philosopher has held it to be either certain, or highly probable, that the Deity is disposed, on the conditions of repentance and amendment, to remit the punishment of sins; and that, although in the case of perjury, he may, in consequence of his undertaking to guarantee oaths, be limited in this respect, he will nevertheless be inclined to remit the guilt of that crime also, if it can be done without prejudice to the rights of the man to whom the oath was given; that is, if the perjury shall be publicly acknowledged and retracted, and the real truth made known. By this very acknowledgment, the object of the guaranty is attained; and therefore the Deity thus just

* Jac. Gutherius *de vetere jure pontificio urbis Romæ*, lib. ii. c. 3. takes notice of something of a similar nature among the Romans.

as much exonerated as a human surety would be. If, indeed, it was an *oath of promise* that had been broken, then, no doubt, in order to release the Deity from his obligation, it would, in *statu naturali*, be farther requisite, that the violator of the oath should be delivered into the hands of the person, to whom he made it, and await his punishment : but in a state of civil society, this requisition becomes superfluous, because he is already in his power ; and the injured party, who, the instant he became a member of that society, renounced all right to avenge his own wrongs, may, on his confession, commence an action of damages before the magistrate, provided the violation of the engagement sworn to, has occasioned him any loss.

The appointment of a method of retracting a perjury, thus unattended with any degree of infamy, was highly important, towards the maintenance of the sanctity of oaths. From the impulse of passion, perhaps, or self-interest, or the fear of punishment, or the power of persuasion, or from mere levity or infatuation, a man is led to swear falsely ; and he contrives, for a while, to confound or delude his conscience. But a time comes, when passion and delusion vanish, and rational reflection takes their place. Then awakens conscience, who is a very arbitrary personage, and so far from being, on such occasions, obsequious to our wishes and inclinations, that the more we strive to silence her, the more violent becomes her opposition, until it terminates either in melancholy or madness. The unhappy man has now no rest either day or night. The reproaches

of conscience break even his sleep; for it is in the silence and solitude of the night, that she raises her awful voice to its loudest pitch; and thus he is at last led to wish, that he had it in his power to retract his perjury. But if he cannot effect this, without subjecting himself, (I will not say to a judicial punishment, such as the loss of his two fore-fingers; in which case his guilt might be remitted, but) we shall suppose, to the mere loss of reputation only; this is a victory which conscience will but rarely be able to atchieve, where a man is actuated by the principle of honour. He will rather wait the tardy vengeance of God, and either wish for it at all hazards in this world, or lay his account with it hereafter in hell, than submit to the total loss of present reputation, and more especially, by thus robbing himself of it, as it were, and surrendering what is entirely in his own power. Present good and evil weigh more with us, than what is future and distant. That, indeed, ought *not* to be the case, but so it is; and in this very thing consists that corruption of ours, of which not only theologians, but also the philosopher must be sensible; I mean, that to men, whose nature is thus constituted, civil laws are given, and oaths required of them! We ought, therefore, to have an outlet, through which the perjured may, by the mere retractation of their oaths, escape without either civil punishment or infamy: and this is what Moses has done, and what we also find the case in the Roman laws. If there *is* such an outlet, the unceasing disquietude of conscience will very often bring the truth to light; if there *is not*, perjury will seldom be

retracted ; the majority will become unconscionable, and learn to despise an oath, so that, at length, perjury will cease to be disgraceful ; others again will grow melancholy and hectical, in consequence of their conscientious scruples, which are any thing but irrational ; and some few (of which I know one instance, though I am not at liberty to mention it,) will shoot themselves, or put an end to their miserable lives in some other way. The first of these consequences is the most formidable, as it comes in the end to infect whole nations ; and it is a disease under which they must ultimately sink. As our present political system is constituted, the revenues of the state are the first sufferers, and that to a fearful extent ; and their deficiencies, thus arising from the contempt of oaths, can only be prevented or compensated by rigours, which introduce slavery, and become intolerable. But if the disease happen first to prevail among those whose province it is to inculcate the duties of religion, and from their example, extend to the army, the misfortune is unspeakable. Of this last effect of it we as yet know nothing in Germany ; but Rome, under the emperors, that striking contrast to ancient oath-revering Rome, presents us with an awful example.

There is this farther advantage resulting from a law so constituted as was the Mosaic, and the ancient Roman, that perjury is rendered very dangerous, and thereby prevented ; because every one must be led to suppose, that his conscience may one day compel him to do what he sees done by others, that is, to retract his perjury, which is not a very pleasant business ;

or, what is worse, that his accomplices may, from the agonizing stings of conscience, hasten to acknowledge their guilt, and present the accustomed offering. There are many perjuries that require more than one man's oath, and those concerned must understand one another; but if a road to repentance and confession is open to them all, the seeds of mutual suspicion, being thus happily sown *in limine*, between accomplices, serve directly to hinder them from becoming so; and, supposing that they do conspire together, and swear falsely, still each must be afraid of the others conscience misgiving him. If but *one* own his perjury, and expiate it by an offering, the rest become known as perjured also, and it is now too late for *them* to save their honour, by a confession and expiation of their crime. To be sure, by the Mosaic law they were not punishable, and, perhaps, their offering, late as it was, might be accepted; for I find no law to the contrary: but then the universal opinion of the public would, without any reference to the law, at once make the proper distinction, between the man whom conscience prompted to a disclosure of his guilt, and those who, as it were, only came hobbling awkwardly after him, and, in presenting their offerings, made but a virtue of necessity. Their crimes, no doubt, are alike abolished; and, in a civil view, they are on a footing in point of honour, with their fellow citizens; but all his countrymen will agree in thinking, that the first alone has not forfeited his character and their confidence.—I should really wish that some imitation of the Mosaic or Roman law on this point could be adopted at present; not,

indeed, that no civil punishment should be annexed to perjury, for in our unconscientious times such punishments are but too necessary, and they should, if we wish to prosper, be in every case most rigorously inflicted, without respect of persons; but that every one might, without becoming infamous, or having any reason to dread the smallest reflection upon his honour, have some means put in his power, to exonerate himself spontaneously from the burden of a perjury. To restore oaths to a greater degree of that reverence in which they were held by ancient nations, is a grand *desideratum* in legislative policy.

The expiation, or confession-offering was appointed, not only in the case of perjuries, properly so called, but also in that of rash and inconsiderate oaths, that remained unfulfilled.

I. Under the former were included,

1. The oath of false witness, not that by which an innocent person was criminated, but where the swearer did not declare against the guilty all that he knew; or, as Moses expresses it, (Lev. v. 1.) *when he heard the voice of the adjuration* (for we must remember, that he did not speak himself, but the oath was pronounced to him, and then he was adjured by it) *and was a witness, and with regard to what was to be testified, had himself seen, or otherwise knew it; and yet did not declare the truth.* The passage lately quoted from Prov. xxix. 24. illustrates this point by an example. *The thief-screener, when he swears, is an enemy to his own life; inasmuch as he hears the adjuration pronounced in court, and yet does not declare what he knows of the theft.*

In my Annotations on Lev. v. 1. I have already remarked, that this sort of perjury is represented as a sin of *omission*, and on that account it was not a sin-offering, but a trespass-offering, that was made for it ; for it consisted merely in the non-declaration of a known fact. Hence it follows, that an offering could not be made in the case of asserting against an innocent person, a crime which he had not perpetrated : for such an assertion was manifestly a sin of *commission*, for which a sin-offering was required. In such a case the law of retaliation operated (Deut. xix. 19.) ; and the false witness was punished, not as a perjured person, but as one who, by the falsehood of his testimony, had wished to subject another to punishment.

2. Swearing falsely with regard to the charge of theft, or denying upon oath, any thing found, or promised, or entrusted to one's care, &c. ; Lev. vi. 1,—5. ; or, according to another division of chapters, v. 20. 24. In these cases likewise, the person sworn heard the form of the oath pronounced as before, without speaking, and was guilty of a sin of omission, in acknowledging nothing.

II. But for rash and inconsiderate oaths, which a person had forgotten, or which it was impossible or unlawful to fulfil, it was also necessary to make an offering, whenever their non-fulfilment became a matter of consciousness, Lev. v. 4. But in this case likewise, the offering, properly speaking, was not made for the rash oath ; (for then it would have been a sin of commission, and a man might not have so many lambs in his flock, as that he could offer one every time that he inconsiderately, or unnecessarily,

exclaimed, *As sure as God is in heaven, or, May God damn me ;*) but for its non-fulfilment. This served very effectually to maintain the honour of oaths, inasmuch as every oath, however inconsiderate, or unlawful, or impossible, was considered as in so far obligatory, that it was necessary to expiate its non-fulfilment by an offering ; and it was, at the same time, the best possible means of weaning the people from rash oaths ; because the man who had become addicted to that unbecoming practice, would find himself too frequently obliged, either to keep his oaths, how great soever the inconvenience, or else to make offerings for their atonement.

ART. CCLVII.

No Law given against Unnecessary Swearing and Cursing.

§ 13. ON the other hand, there was no civil law prohibitory of useless and thoughtless oaths ; nor was any punishment appointed for them. Moses made no such enactments, as they have in England, against cursing and swearing, by which, for every idle *damn*, the penalty, I think, of a shilling (eight good *groschen*) is incurred ; nor, in fact, do they serve any good purpose, but to betray holy zeal, without any knowledge of the world ; for they can never be enforced. These English laws, which were made in times of great zeal are still unrepealed ; and some years ago we had an instance mentioned in the papers, of a fellow who was prosecuted, and actually obliged to

pay, for a pretty large number of curses ; yet there is, perhaps, no country in the world, in which one hears so much cursing as in England ;—a clear proof, that those who enacted the law in question, which, methinks, is coeval with their Sabbatical laws, though, no doubt, very pious men, were yet quite miserable legislators.

Some, from misunderstanding the two passages, Lev. v. 1. and Prov. xxix. 24., have been led to imagine, that idle oaths and curses had been punished by the magistrate ; and this mistake may, in some instances, have influenced the tenor of our laws in Christian countries. In the preceding Article I have explained both passages ; and here I shall only ask, whether we can possibly suppose Moses or Solomon so irrational, as not merely to regard idle swearing as punishable by a human tribunal, but also to require every man to give information to the magistrate of every curse he hears ? This would be to convert the whole people into downright informers ; and yet we shall soon see that Moses, by no means, patronized persons of that character. If the meaning of Lev. v. 1. were, that the moment we heard an idle oath uttered, we were bound to give information of it, or if we did not, to make a trespass-offering, we should have nothing else to do all our lives, than run to the court with our informations ; and the richest man in the kingdom would scarcely have lambs enough to expiate his curses. Were I in London, under such a law, I should never leave home, because I would be sure to hear more curses, than I could possibly de-

denounce, and might expect my reward from the people, as well as from the law.

Upon the whole, we are under no general obligation to notify every bad thing that comes under our observation ; and such unmeaning curses as, the *God damn*, of an Englishman, or *der Teufel hole*, (the devil take) of a German, do so little harm, that we can conceive no reason, why they should be noticed for any such purpose. Could Solomon, in the description which he gives of the thief-screener, with the express view of representing his baseness, mean nothing more, by saying, *he hears the thief adjured, without declaring the fact*, than merely to compare him to the man, who hears his neighbour curse, without informing upon him ?—I imagine, that none of my readers can exonerate himself from the sin of omission in this point ; for the man who should attempt to denounce every curse he heard, to the magistrate, would merit a place in one of those small apartments, in which my work has not the good fortune to be read.

CHAPTER III.

CRIMES OF LUST.



ART. CCLVIII.

Unnatural Sins.

§ 1. The unnatural crimes of lust mentioned in the laws of Moses, and subjected to punishment, are sodomy and bestiality. The statutes respecting them, are found in Lev. xviii. 22, 23. xx. 13, 15, 16. ; as also, to a certain extent, in Deut. xxiii. 18, 19. xxvii. 21.

Moses, in his history of the earlier times, describes the former of these, as that abominable vice, which was so prevalent in Sodom and Gomorrah, that God destroyed these cities on account of it, Gen. xviii. xix. ; and hence it is, that theologians have given it its present name, which, however, is used by lawyers in a different sense. In the Mosaic law, the person who submits to sodomy, is called *Keleb* (כֶּלֶב) *a dog* ; or, if he hires himself for that purpose, *Kadesch* (קִדְשׁ), that is, *consecrated* ; or, as a Roman would have expressed it, *puer sacerrimus* ; because sometimes in the consecrated groves of the heathen deities, there were brothels of this description established, for the benefit of the priests. For the person who committed the

crime in question, we do not find any particular name.

Bestiality is termed *Thebel* (תביל) that is, *disease*, or *insanity* *. Both sorts of it are expressly noticed and described; *Crimen et maris agentis, et feminae patientis*.

It would seem that both these crimes had not been then uncommon among the Egyptians and Canaanites; and hence Moses specifies them among those practices of these nations, which the Israelites were not to imitate, Lev. xviii. 3, 4, 22,—28. Concerning the Egyptians, we know, for certain, that in some of their religious services, bestiality was publicly practised.

In Lev. xx. 13, 15, 16. the punishment of death is appointed for both these crimes; and it was probably inflicted by stoning, although that is not expressly specified in the law. If we reflect on the dreadful consequences of sodomy to a state, and on the extent to which this abominable vice may be secretly carried on and spread, we cannot, on the principles of sound policy, consider the punishment as too severe. For if it once begins to prevail, not only will boys be easily corrupted by adults, but also by other boys; nor will it ever cease; more especially as it must thus soon lose all its shamefulness and infamy, and become fashionable, and the national taste; and then depopulation and national weakness, for which all remedies are ineffectual, must inevitably follow; not perhaps in the very first generation, but certainly in the course

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* See my Dissertation on the Mosaic Marriage Laws, p. 65. or Art. CII. of this work.

of the third or fourth. It is, moreover, a substitute for marriage (and indeed for whoredom too, of which, however, children may sometimes be the consequence) and, as such, it will be resorted to by the man, who does not chuse to maintain a wife and a family, and would be forced to live more sparingly, if he had not this resource. In this way, it diminishes the number of marriages; and when that takes place from such a cause, (we need only call to mind the state of Rome, in this point, under the emperors,) it becomes impossible to reintroduce them into fashion, until the country shall be at last subjected to a people untainted with this vice; of which it is farther to be observed, that it is always accompanied with an increasing aversion to the female sex, which generally ends in absolute impotence. But its direful consequences are not confined to one sex: for the other sex, as they must, for the most part, either remain unmarried, or be betrayed into marriages where their natural desires are not duly gratified, soon learn to avenge themselves by the practice of unnatural lusts, *Lesbiam scilicet venerem inter sese exercentes, vel castratos amplectentes*; and thus they, in their turn, conceive an abhorrence of their husbands, and become perfectly profligate; and the consequence is, what we also see in the case of Rome under the emperors, a still greater paucity of marriages, and, of course, a still greater depopulation of the country. To these evils may be added yet another, viz. that the constitutions of those men, who submit to this degradation, are, if not always, yet very often, totally destroyed, though in a different way from what is the result of whoredom.

Whoever, therefore, wishes to ruin a nation, has only to get this vice introduced; for it is extremely difficult to extirpate it, where it has once taken root, because it can be propagated with much more secrecy than whoredom, which generally betrays itself by children; and when we perceive that it has once got a footing in any country, however powerful and flourishing, we may venture, as politicians, to predict, that the foundation of its future decline is laid, and that, after some hundred years, it will no longer be the same populous and powerful country it is at present.

In regard to this crime, Moses acted as several other legislators have since done. He punished it capitally. No doubt, in many countries both of Europe and Asia, the laws against it are more mild; and this diversity of punishment may, perhaps, be suggested by considerations respecting climate; or proceed from other causes, such as the prevalence or rarity of the crime, or its extent in neighbouring nations; or even be regulated by the physical and constitutional strength of the people. One thing is very certain, that it is a more common vice in southern countries, and thence usually imported into northern; and it has besides been remarked by physicians, that those people whom nature has gifted with greater powers of virility, have more violent desires for natural gratifications, and are not so apt to fall into it; whereas, on the other hand, where nature has been less liberal in this respect, a greater propensity to this unnatural lust, and indeed from causes altogether physical, has been observed to prevail. Hence, in southern countries, its punishments should be more severe,

if it is intended that they should have any effect, or that the laws should not prove too weak to counteract its progress. In no country, perhaps, was it ever punished capitally with such rigour as in Holland, about 40 years ago. There was, however, a special reason for this. It had been introduced from other countries, and had become very prevalent. In England, where it is notoriously execrated, and the people, from the nature of their food and mode of life, are more robust than those of most other nations, perhaps a punishment less severe than the usual one, of hanging, might suffice.

In order to excite the greater abhorrence of bestiality, Moses ordered the beast with which that crime had been committed, to be put to death. As we have the same practice in our laws, it is unnecessary here to say any more concerning it, than that the dispatching any such beast, is a manifest suggestion of prudence, to prevent the effects of temptation in other cases.

ART. CCLIX.

Concerning Adultery—What we are to understand by that Word.

§ 2. ADULTERY, according to the common usage of the Hebrew language, but especially in the Mosaic law, does not mean every violation of chastity of which a married person, whether husband or wife, is guilty; but only the carnal connection of a wife with any other man than her husband; and the terms equiva-

lent to *adulterer* and *adulteress*, are *Noef* (נֹעֵף), and *Noefet* (נֹעֶפֶת). The connection of a married man with a single woman, was termed only *whoredom*, and is not included in the crime of which I here speak, and which Moses punished with death. In fact, this distinction was suitable to the whole analogy of the Mosaic marriage-law; according to which, the husband and the wife had not, as among us, an equal right to prevent each other from having impure intercourse with strangers; for the former might marry other wives, and take concubines and slaves to his bed, nor had the latter any legal title to insist that he should belong to her alone. If, therefore, a married man had to do with a woman who was neither his wife nor his concubine, nor his slave, in other words, with a common strumpet, this was no doubt a breach of chastity, but not such a one as gave his wife any legal reason to complain of the infringement of her rights; and consequently there was here no violation of his matrimonial engagements; nothing, in short, that could be called adultery, in the more comprehensive sense in which some use the German word, *Ehebruch*, (marriage-breach.) He had indeed acted contrary to the dictates of both philosophical and theological ethics; but to his wife, by the acknowledged principles of the Hebrew civil law, he had done no wrong that she could resent or complain of. At the same time, in their use of the term equivalent to adultery, the Hebrews are so accurate, that even crimes which, in respect to their punishment, are put on a footing with adultery, (such, for instance, as that of a widow, destined for her husband's brother, in being connected

with any other man, which was a capital offence), are termed only whoredom; and that not merely in the *laws*, in which words are always used very definitely, but also in the historical style, as we see from Gen. xxxviii. 24.

But though any doubt should remain with regard to the meaning of adultery in common life, it is at any rate certain, that in criminal jurisprudence, it is understood in no other sense than according to the definition which I have given above; for in the only statute in which its punishment is fixed, (Lev. xx. 10.) it is expressly said, *Whoever committeth adultery with a married woman, who is the wife of another man, shall die therefor; and not only he, but the adulteress;* or, if we wish to have a more literal version, *The man who committeth adultery with a man's wife, who committeth adultery with the wife of his neighbour, shall die, both he and the adulteress.* Here, in the only penal statute on the subject, it is *twice* stated that only that species of adultery is meant, which is committed with a wife. If any reader be curious to know what the word which I render *Ehebruch* (marriage-breach, or adultery) means etymologically, (a question, on which one naturally enough lights in the case of a *legal* term, but which, as I have already remarked, is in Hebrew more difficult to answer in that case, than in any other,) I may add, that, in my opinion, the radical Arabic word properly means, *to quench one's thirst with the wife of another,* (Prov. v. 15.)

These observations may, perhaps, in the opinion of some, appear repugnant to what Christ says in Matth. xix. 9. that *whoever dismisses his wife without sufficient*

cause, and marries another, is guilty of adultery. But we must distinguish between the sense which a word has in *law*, and that which may be given to it in *ethics*. Thus the moralist may call many things *murder*, which are not so in law, as, for instance, when a man intentionally vexes another to death. It is clear that Christ uses the word *adultery* not in its forensic sense, and according to the Mosaic law, but as a moralist, when he says *,

1. That the man who puts away his wife, causes *her* to commit adultery; yea,

2. That *he himself* does so when he marries another woman, Matth. xix. 9.

These were absolutely things for which the Mosaic law not only did not appoint any capital punishment, but which it even authorised on civil grounds; and the latter, with which we are here more peculiarly concerned, presupposes polygamy to be morally wrong, though it was not prohibited by any civil statute. At present, I speak of adultery merely in the sense in which the word is used in criminal law.

In order to constitute adultery, it was necessary, by the Mosaic law, that there should be, not merely denudation, or any other such obscene procedure, but real carnal intercourse, properly so called, *cum emis-*

* In the first edition, here stood also these words, *Whoever marries a woman separated without sufficient reason from her husband, commits adultery.* Matth. v. 32.; which I now purposely omit, because my present opinion is, that they refer to the case of a man marrying a woman who had separated herself from her husband, and run away from him, as Herodias, for instance, did. Now, to marry such a woman was adultery, even in the *Mosaic* sense of the word.

sione, scil. et immissione seminis; this is clear from Numb. v. 12, 13. 19. 20.; particularly when we inspect the original text; where in ver. 12. the words וישכב איש אתה שכבת זרע, literally rendered, are to this purpose, *Effuderitque vir in eam effusionem seminis*; and in ver. 20. ויתן איש בך את שכבתו, *Dederitque vir effusionem suam in te*, that is, *semen suum in te effuderit*. For the sake of those who understand a little Hebrew, but not enough to perceive how I come to translate in these terms, I must remark, that the verb שכב, properly signifies *effundere*, or *effundi*. This is manifest from the Arabic, in which (only changed in pronunciation into *sacaba*) it signifies *to pour out*, or *shed*, as in *Sura Ivi. 30.* of the *Koran*. In like manner, in *Lev. xv. 16, 17.* *Schichbat Sera*, (שכבת זרע) can mean nothing else than *Effusio Seminis*.

In the case of a wife being guilty of any other obscene practices, we do not find it ascertained in the Mosaic law, to what punishment she subjected herself: but it does not thence follow, that she was not punished at all; because her punishment may have been determined by usage, or left to the pleasure of the judge, or even of the husband, who enjoyed much greater rights over his wife than with us, and had it, besides, entirely in his own power to give her a bill of divorce, whenever he chose.

ART. CCLX.

Of the Punishment of Adultery.

§ 3. THE punishment of adultery was death, and that, as I shall by and by shew, by stoning; *Lev.*

xx. 10. I must, however, previously inquire into the justice of those people's arguments, who complain of that punishment as too severe and barbarous.

Now, no one can justly object to it, who does not equally disapprove of theft being capitally punished; for the crime of adultery, as soon as it gives birth to a child, becomes a theft so great, that one more heinous can scarcely be committed. All the expence of maintenance and education, which the deluded husband bestows on such a supposititious child, and all the share of inheritance which it receives, and which may amount to thousands, or to tons of gold, are stolen from the rightful heirs; and even when adultery is not followed by any child, it is still a wicked attempt to commit this monstrous theft. Now, if a thief meets with no injustice in being hanged, the adulterer and adulteress are still more deserving of death, when we consider the great and manifold injury which the husband receives in addition to his loss; an injury, indeed, of such a nature, that by the laws of most countries, he is held justified, or, at any rate, excused, if, *in justo dolore*, as the phrase is, he avenge it on the spot, by stabbing the man dead, whom he happens to catch in the act of inflicting it. This presupposes, that avengement, to that extent, is not considered as disproportioned to the crime.

If it be objected, that the violent impulse of passion is so strong a temptation to adultery, that we cannot but pity the man whom it enslaves, I must observe in answer, that if we *do*, we totally mistake the design of punishments. For if they are meant to deter from

crimes, it is evident, that the stronger the inclination to any crime is, the more severe must be its punishment. If again, they ought to serve as a counterpoise to our wicked propensities, where these are but weak, mild punishments *may* suffice; but where they are more violent, we must put the greater weight of punishment into the opposite scale of the balance, in order to preserve the *equilibrium*.—As to the objection drawn from beauty, and the gallantry of the crime, I think it scarcely entitled to the least notice. It is to secure us against such gallantries, that we unite in civil society, and that, instead of living in promiscuous concubinage, we enter into matrimonial engagements, guaranteed by the laws of that society. In a state of nature, a man has undoubtedly a right to defend his property, and, of course, his wife, who became *his* by her own consent, and to avenge himself to the utmost on the person who has injured him in this, the nicest of all points; in order to deter others from similar attempts. This right will be the less disputed, that we see even some of the brute creation exercising it. Now, in that ill-regulated state of civil society, in which, after, having surrendered our right of self-avengement, we could not obtain adequate protection against such injuries, in consequence of their being considered as gallantries, it certainly would not be very desirable to live; more especially if it, besides, constrained us to leave at our death, unto our wife's children, so long as it remained unproved, that they did not belong to us, our property in whole or in part, after having, while we lived, maintained and educated them as our own.

In addition to these *general* considerations, from which, however, I by no means wish to infer, that adultery ought to be universally punished with death, (for that would, in many countries, as we shall see in the sequel, be far from expedient) but only that the adulterer cannot justly complain of the severity of such punishment; we have now to take into the account, those *particular* circumstances, which would naturally influence a legislator of the Israelitish nation, in adopting and sanctioning it. In southern countries, jealousy is commonly more violent than in northern; and, therefore, adultery a grosser injury to a husband, and one for which he will naturally desire and inflict severer revenge. A wise legislator must always contemplate injuries in the light in which they appear to his people, if he wishes to restrain them from avenging their own quarrels. In a country, for instance, where a man thinks that he ought to revenge a slap in the face, with his sword; or a flogging, with his pistol, the legislator must not think of punishing these outrages in the same style, in which he would proceed among a people, who accounted a slap, or a lash, as nothing more than what they physically are. If he does not attend to this, nor punish offences according to the notions which the people entertain of them, the injured will never apply to justice for redress, but take revenge at their own hands.—On this point, however, I shall not here enlarge; as I may probably take notice of it, in the concluding Essay on Punishments.

Of the nature of jealousy among the Israelites, we may form some idea, from what Solomon says in the

vi. chapter of Proverbs, ver. 28,—35. ; and, no doubt, it was of a very different description from what we find it, among the more accommodating husbands of our climate and day, who very readily accept a gift to appease their vengeance. But still it was moderate indeed, compared to what we read in *Chardin**, of *Persian* jealousy, as inflamed by a single distant glance, and countenanced by a set of the most tyrannical and murderous laws. Whoever, in Persia, has the misfortune to see, or the imprudence to look at, the wife of a man of rank, were it but as she travels on the road, and at ever so great a distance, is sure to be severely beaten by her eunuchs, and perhaps put to death ; and to meet any of the king's concubines, is such a capital crime, that, on a certain occasion, when the favourite queen happened during the chace to be overtaken by a storm, and under the necessity of taking refuge in a hamlet, not one of the people would let her majesty in, that they might not have the misfortune of seeing her. This, however, is certainly not natural jealousy, but the artificial jealousy of southern countries, carried, by the influence of luxury and pride, to absolute insanity ; yet it is in perfect unison with other features in the portrait of an opulent Asiatic nation, in which polygamy prevails ; and we must moreover remember, that in Persia, the Mahometan religion, which deals so very gently with adultery, as to inflict upon it only the punishment of blows, has long been the established faith. If, then, this Persian usage, so repugnant to the tenets of Islamism, be taken into the ac-

* See his *Voyage en Perse*, tom. vi. chap. xiii. p. 236.

count, we shall easily be convinced, that Moses would not only, in the *first* place, have acted very *unjustly* towards his fellow citizens, who did *not* look upon adultery as only a venial sort of gallantry, which any husband might overlook: but likewise, in the *second* place, very *impolitically*; and only have opened a door to self-avengement, and that too by assassination, if he had appointed any lesser punishment for adultery than death. Add to this, that where jealousy is so keen, and revenge goes such lengths as Solomon describes; and where it is in vain to hope that any husbands will be found, like the one mentioned in a late French story *, who, catching a stranger in bed with his wife, in order to prevent reproaches to his family, had the prudence to let him jump quietly out of the window, that he might be able to tell the servants waiting at the door, that he had found nobody; we may almost as naturally conjecture of an adulterer, as of a thief coming in the night, that he will take care to be well armed for his own defence, and, as the saying is, go out prepared to murder, as well as to rob.

* I am informed that *Luther*, in his *Table Talk*, Part XXIII. p. 1790. of *Walch's* edition, tells a similar story, and concludes it in these words, *He would not have found so much foresight and wisdom in me.* Some people may, therefore, be almost tempted to think, that this French story is only an old one warmed up. With that point I have nothing to do; but I had the story from some French officers of distinction, who mentioned the name of the injured and prudent husband, and that he was a person of very high rank. That name, however, even if I had not forgotten it, I should not think it fair to repeat, because it would seem to be a matter of some moment to the gentleman though he was an *Acteon*, not to be thought so.

This, then, is the most important consideration; but still those which follow, are not entirely to be overlooked.—The Mosaic laws were intended to promote marriage, and thus to augment the population of the country; but in order to the attainment of these objects, it is requisite, above all things, that marriages be held sacred.—Among the Israelites too, succession to landed property went entirely by birth. A father could, in his testament, make no settlement respecting it, because it fell invariably to those who were regarded as his sons; and as the people, from an idea which it was advantageous to the state to encourage, were led to seek for immortality of name, in the genuineness of their descendants; the injury inflicted on a deluded husband, both by the adulterer and the adulteress was, on both these accounts, still greater than among us, and merited, of course, a severer punishment.

The argument now stated, has so much influence in determining the punishment of adultery, that to punish it with death among a people in different circumstances, might be attended with very bad effects, and would only serve to give the crime a sort of impunity. This certainly would be the case in Germany, and still more so, in France.—Let the reader only attend to the two following distinctions :

1. The people of northern nations seldom carry revenge, out of mere jealousy, so far as those of southern. They do not usually demand that blood shall be shed; or, at any rate, the blood of the adulteress, (for, according to our manners, the husband himself would be disgraced by *her* execution); but are satis-

fied with obtaining satisfaction, and punishing the offender, with less severity. No trait in our manners can be more striking than this. Numberless duels arise from the most trifling injuries; and adultery is not unfrequent among those, who enforce the point of honour in duelling with the utmost rigour; yet so far are they from being over rigid here, that we very seldom hear of an injured husband wishing to preserve his honour, by a duel with his wife's paramour, particularly in France. Where nothing more than a wife is in question, the most feeling duellist would seem to be a man, exactly according to the words of the sermon on the mount, taking them in their strictest sense, and without any explanation,—*a man who never retaliated evil.* The French anecdote above mentioned, I have heard related, even by Frenchmen, as an instance of very exemplary presence of mind; and with such approbation, that I was sometimes almost tempted to think, the relater had wished to have had the honour of setting such an example. In Paris, a capital prosecution, in a case of adultery, would scarcely be attempted, for fear of *Moliere*; and the man who should commence it, would require a good deal of courage to withstand the universal ridicule to which he would be subjected. Now, where such is the natural way of thinking, the legislator may regulate his procedure by it, with the very same propriety as did Moses *his*, by the temper of the Israelites; nor ought he to appoint punishments twice or ten times as severe, as the injured party requires. If he does, he only excites pity; complaints cease to be made, and the crime is committed with impunity.

2. A crime punishable with death, justly requires very strong proof, and such almost as leaves not the shadow of a doubt behind it. Now such a proof can rarely be brought in the case of adultery, particularly where a distinction, stated above, is made between the crime itself as actually committed, and those indecencies which but lead to it. The consequence of this may be, (and sometimes has actually been,) that adultery remains altogether unpunished, because it cannot be proved with that strict accuracy, which, where life is at stake, it ought in justice to be. Now to obviate this difficulty, Moses enjoined the exaction of an oath from the wife, and contrived that oath in such a manner, that hardly more than one adulteress of a hundred, would have ventured to take it, and perhaps not even she. Concerning this point, more will be said by and bye. In the meantime, I shall only observe, that his procedure here, would not suit that equality of rights, which married persons have among us, unless where the proof were so strong, that a court might adjudge the party accused, to undergo the purgation which he enjoined; and besides, as our governments are not Theocracies, and we have not such express and definite promises and threatenings of the divine vengeance on perjury, the oath in question would not be so effectual for the discovery of deep-hidden truth, as it was among the Israelites.

ART. CCLXI.

A Digression illustrative of the Mahometan Law respecting the Punishment of Adultery, which the Reader, who has no curiosity on the subject, may pass by.

§ 4. I HAVE already had frequent occasion incidentally to mention the Mahometan laws. To treat of them expressly I never proposed, nor are they mentioned in the title of my work; but with regard to the subject now under consideration, the contrast between the Mosaic and Mahometan law is too striking, and the question of too much importance to the philosophy of jurisprudence, to allow me to leave it unnoticed. Here we see a people living under the same climate with the Israelites, (indeed rather a more southern one;) having the very same origin with them, (for the Ishmaelitish Arabs, of whom Mahomet was one, and the Israelites, had one common ancestor, Abraham;) and at the same time extremely jealous and vindictive; and yet punishing adultery only with blows, and these too accompanied with no loss of honour; in other words, punishing it much more mildly than we do ourselves. This is a case which seems not merely to authorise, but even to demand, a digression, in order that some light may be thrown upon the origin and reasons of the Arabian law.

A suspicion will naturally occur at the very outset, that Mahomet, from a sense of his own weakness, may have been inclined to have some sympathy with his fellow-adulterers, and not to punish with too much

severity in others, a crime, in regard to which, he was conscious of his own guilt. He was indeed subject to epilepsy, and such people usually have not the gift of continence. But this suspicion entirely vanishes, when we inspect the passages of the Koran relative to adultery; and it is always the more completely dissipated, the more impartially we go to work; by reading them in the original itself, and accounting the explanations of the Mahometan theologians, of just as little authority, as we hold those of our own theologians to be, in respect to the Bible. For the fact is, that Mahomet no where fixes a punishment for adultery, but abides by that previously in use, without so much as once naming it.—The case stands thus :

In *Sura* iv. 19. Mahomet gives a law, which is commonly understood, according to *Boysen's* translation, p. 74. thus : *If women shall be guilty of adultery, ye must prove this crime against them by four witnesses ; and then you may imprison them in separate apartments of the house, until either death deliver them, or God put into their power a means of escaping from confinement :* but concerning this law, the Mahometans believe, that it is repealed by a subsequent law in this very same chapter, which we shall hereafter state, and which appoints blows as the punishment of adultery. It would, however, have been very strange to give a law in the 19th verse of a chapter, and to repeal it again at the 30th. No doubt Mahomet *did* contradict himself very often ; and, in order to excuse his inconsistencies, maintained this doctrine, that “ *he is no prophet who does not contradict himself ; and that this happens from the devil occasionally whispering some-*

“ thing in his ear, as he writes or speaks ; although
“ God is always so true, as to say the contrary in
“ some other place.” But here, should both verses,
according to the opinion of the Mahometans, be from
God, and had *he* altered a punishment of his own ap-
pointment, within the short space of dictating eleven
verses, it would have been a very sudden alteration
indeed ; and as in ver. 30. we find not a word of
blows, we may add, a very *obscure* one also. Putting,
however, all this out of the question, we need only re-
peruse the law, to be convinced, that if it referred at
all to adultery, it was a very imprudent law, or rather,
a complete dispensation *for* adultery. Could it pos-
sibly be supposed, that women, when they meant to
commit adultery, would call *four* persons to witness
the crime ? *Two* or *three* were sufficient in the case
of other capital offences ; and as it is but very seldom
indeed that adultery can, in every requisite circum-
stance, be proved by the concurring testimony of even
two witnesses, where no less than *four* were necessary,
it must have been impossible ever to prove, or to
punish it at all. It really *would* seem as if the devil
(whom, however, I, for my part, look upon as entirely
innocent,) had whispered this law to the prophet ; if
its true meaning be what we thus make it. But be-
sides ; with respect to the punishment, as it is stated
in *Boysen's* translation, who here follows *Sale*, we must
observe, that, according to the Arabic original, there
is no mention at all of *separate places of confinement*,
nor indeed could there be such places in the houses or
tents of the poor Arabs ; it is merely said, *Keep them
in your houses until they either die, or God shew them*

how to escape. But would it not have been a very strange punishment for a wife's adultery, to give her husband the trouble of maintaining her in his house as long as she lived? He would certainly always have preferred turning her about her business; and he might have done so safely, as the Koran itself gave him the right of divorce.

In fact, however, neither wives nor adultery are mentioned in this law, which, if accurately translated, is to this effect: *When any of your females are guilty of unchastity, take four among you as witnesses against them, and when these have testified, confine the culprits to your houses, until death take them hence, and (or) God make a way for them.* In my opinion, this law does not at all refer to the punishment which husbands might inflict on their wives for the crime of adultery, but to that which parents or brothers might inflict on their daughters or sisters, for unchastity, and which was formerly a very cruel one. *Arvieux* * has remarked that, in Arabia, parents and brothers do, at this day, look upon themselves as far more dishonoured by the unchastity of their daughters and sisters, than husbands by the infidelity of their wives; because, as they say, a husband may put away his wife, but daughters and sisters never cease to be such; and he adds, that in spite of the Mahometan law, the revenge of an Arab against a daughter who thus dis-

* See chap. xix. of that part of his Travels, in which he describes the Arabs of Palestine. The whole passage will be found in my *Syntagma Commentationum*, part i. p. 58. where a comparison is instituted between the Arabian notions on this subject, and those which are suggested in Gen. xxxiv. and 2 Sam. xiii. xiv.

graces him, sometimes carries him the length of killing her with his own hand ; relating the story of a Bedouin, who, concealing his design, carried his daughter, whom he found pregnant, out of the city, and when they came into the desert, put her cruelly to death. Those who are not inclined to credit *Ar-vieux*, upon whose fidelity some persons unacquainted with Oriental manners have cast unjust aspersions, will probably pay a little respect to the following passages from *Niebuhr's Description of Arabia*. “ A respectable man of the tribe of *Montefidsi*, had married his daughter to an Arab, at *Korne*. Not long after the marriage, an Arab of another tribe asked him in a coffee-house, with a sort of sneer, whether he was the father of the young and beautiful wife of N. N. This made him conjecture that his daughter's honour had been suspected, and he instantly left the company, to take off her head ;” p. 31.—“ I understood that a husband durst not himself put his wife to death for adultery, but that her father, brother, or any other kinsman, might do so with impunity, or at least for a trifling fine : because it was considered, that by her improper conduct she brought the greatest disgrace upon her friends. Instances of this at Bassora and Bagdad were recollected by my informants. In the latter of these cities, a rich merchant had caught a young man with one of his female relations ; and not only did he cut *her* in pieces on the spot, but by means of witnesses and money, he contrived to get the young man, who was the son of a respectable citizen, hanged, by the sentence of the magistrate, the very same night.

“ As a proof that a Mahometan could not himself put
 “ his wife to death, I was informed at Cairo, that a
 “ man of fortune, who had dispatched his wife, was
 “ persecuted on account of it by her relations and
 “ the magistrates, as long as he had any property re-
 “ maining ;” p. 39.

These ideas of disgrace, Mahomet found already prevalent among his Arabs. *They grew pale, as he says, and changed colour, when they got accounts of the birth of a daughter**, and hesitated whether they should bring her up, or bury her ; viz. from the father's dread of her one day bringing him to shame. From the same cause, parents and brothers before, and in the time of, Mahomet, carried the spirit of resentment so far, as actually to bury daughters alive, who had thus degraded them. To this inhuman severity, Mahomet seemed desirous to set some bounds, and, with that view, ordained the following procedure. In the *first* place, parents and brothers were not to persecute daughters with suspicions ; but their guilt required a proof by *four* witnesses. This applied also to the case of whoredom, the act of which it was not necessary for the witnesses to have seen, but only to testify that

* See *Koran*, Sura xvi. 59, 60, 61. In this passage, Mahomet means to combat the opinions of the heathen Arabs, who worshipped the three daughters, as they were called, of God ; and says, “ To God they give daughters ;—and when any of them is informed of the birth of a girl, his face becomes black, and he mourns : On account of the evil tidings, he will see nobody, and hesitates whether he will keep the infant, or bury it in the earth.”—Some farther remarks on this subject will be found in my father's Dissertation, entitled, *Ritualia Codicis Sacri, et Cerimonie illustrata*. § 8.

the woman was pregnant, or brought to bed; and in Sura xxiv. 4. Mahomet actually requires the same number of witnesses, when any person has accused an unmarried woman of whoredom, and does not chuse to bear eighty blows for the injury thus done her.—In the *second* place, the punishment appropriated for whoredom, was not fixed by the passage now under consideration, but by the 2d and 3d verses of the Sura just quoted, where it is decreed that it shall consist of a hundred blows, and that no man who has not been guilty of the same crime, or who is not an unbeliever, shall be allowed to marry the woman who has thus been debauched. In confinement to a particular apartment of the house, or what might be properly called a *carcer domesticus*, we never can imagine that it could consist; for the greater number of those Arabs to whom Mahomet gave his laws, were *Bedouins*, who lived in tents, and could have no such domestic prisons; nor has the house of a poor man so many apartments, that he can always spare one for such a purpose. Add to this, that the word *keep*, (*Amsicuhonna*) is, in other passages of the Koran, used in a good sense, and put in opposition to the *casting away* of children, and here, therefore, to turning a daughter adrift upon the world. Thus far, however, it *does* imply punishment, that the unfortunate woman must keep within doors, and might be compelled to do so; and farther, that she must remain in the house of her parents, because no honourable Arab would marry her. And in this situation she continued, either till death removed her, or till God shewed her some other means of deliverance; that is, till some

Arab, who, because he had himself been guilty of the crime of whoredom, durst not marry a woman of honour, and was, therefore, obliged to be satisfied with a whore, had occasion for a wife, and delivered her from the thralldom of her situation.

This explanation, which is entirely new, I do not give as absolutely certain, nor do I blame those who have expounded the passage otherwise. It appears, however, to me, the most probable; for I find very great difficulty in believing, that the punishment of adultery is here spoken of.

The other law, in verse 30th of the same *Sura*, and which is to this day explained by the Mahometans according to their tradition, does not properly fix any punishment of adultery, but presupposes it as well known by national usage: for it merely inflicts on the unchastity of a *married slave*, one half the punishment of a *free-born wife*; and how *Boysen* has been led to render the passage thus, *If, however, after marriage, they be guilty of adultery, they shall suffer the same punishment which is denounced against free women*, I am at a loss to conceive. Perhaps he did not find the word *half* in that MS. of the Koran, to which he refers in his preface, and has, therefore, left it out. But even had this been the case, I, for my part, should not, in the case of a passage, which has been explained by so many ancient commentators on the Koran, have followed a single MS., which may, after all, be quite modern, and in which a single word may have easily been omitted by mistake of the transcribers. At any rate, I should be glad to know, for what reason *Boysen* has so translated, and in what MS. he found

the word *half* wanting.—Thus much, however, is evident, that the appointed punishment can neither be death, nor yet perpetual imprisonment; (for how is the half of either to be determined?) but that it must have been blows. As to their number, I cannot, as a reader of the Koran, specify it; but the Mahometans traditionally explain the law, as if for adultery in a free woman, 100 blows were to be inflicted, and in an unfree, 50. In this way, the punishment of adultery would not be more severe than that of whoredom, by *Sura xxiv.* 1,—4.

We ought not, therefore, to put this gentle punishment of adultery to Mahomet's account, nor ascribe it to his sympathy with adulterers; for he does not so much as mention it, but only presupposes it as well known, from the more ancient usage of the Arabs*. And, therefore, so much the more strange is the question, in reference to the philosophy of legislative policy; *How came two peoples, related to each other, and living quite contiguous, under the same climate, to light upon punishments, in the case of adultery, so directly opposite in point of severity?* And to this question, the answer that occurs to me, is the following:

It is not climate that effects every thing respecting laws, nor should we, because in many instances its influence is great, make it, as it were, omnipotent: for national ideas, which may be accidentally started

* According to a saying among the Mahometans, their Prophet is said to have *required*, in the case of Jews, that they should punish adultery with stoning, according to their own laws. See *Sale's Koran*, p. 37. Eng. edit.; for the German translation of it is not worth buying.

and strengthened, are also to be taken into account. Among the Arabs, the parents and relations of a woman, who has been unchaste, deem themselves thereby more dishonoured, than even her husband, who can turn her out. The latter will, of course, require less satisfaction; and consequently, the punishment of adultery need not be so severe; more especially, as he has, at any rate, the right of divorce, which is just the very same punishment, which our courts usually inflict. And it is quite sufficient to render the woman perfectly miserable. For whither can she now turn? Not certainly to her vindictive relations, who, according to the Arabian spirit, would rather take pleasure in depriving her of life? For, least of all things, has she any reason to look for that sympathy, which a divorced wife among us sometimes meets with from her friends. And if we take also into consideration, the poverty of this desert country, where she cannot hope to find any other protector, we must perceive that her misfortune is, in this respect, a degree worse than among us, where a person in such circumstances may turn her crime into a means of livelihood.

The result of the whole inquiry turns out sufficiently strange; namely, that by the Mahometan law, adultery and whoredom are both punished in the same manner; with 100 blows, where the woman is free, and half that number, where she is a slave.—Mahomet certainly was not happy, nor did he shew much penetration, in many of his laws.—I have only to add, that I hope this digression into the Arabian law, which has proved rather extensive, may nevertheless be for-

given, as I mean in the sequel to apply it, in illustrating the Mosaic jurisprudence, to which I now return.

ART. CCLXII.

The Species of Capital Punishment inflicted on Adultery was Stoning.

§ 5. IN answer to the question which has arisen, with regard to the particular species of capital punishment appointed by Moses for adultery, I should satisfy myself with saying, in one word, *stoning*; were it not, that from the dispute relative to the story of the adulteress, in the viiith chapter of John, it has acquired so much importance, that I imagine the greater number of my readers would rather wish to have a circumstantial inquiry, than such a summary decision concerning it. For, as in the 5th verse of that chapter, the assertion of the Jews, that *Moses commanded such persons to be stoned*, does not coincide with the doctrine of *Maimonides* and the modern Rabbins, who follow him; some have hence been disposed to conclude, that the whole story, in which many people imagine that they find something objectionable, and have, therefore, omitted it in transcription, is not real, and did not come from the hand of the evangelist.

Moses does not specify their particular punishment, but only says, that both the adulterer and adulteress *shall die*, (מות יומת); or as *Luther* generally renders it, because the word is twice repeated, *shall die the*

*death**. As, however, the Israelites had only *two* sorts of capital punishments, namely, *stoning* and the *sword*, we are under the necessity of fixing upon *one* of them; and it were most probable, that it was *stoning*. (See Art. CCXXXIII.) But the Talmud, which is here followed by *Maimonides*, and most of the latter Rabbins, establishes this rule; that when the capital punishment is not specified, but it is merely said, *he shall die the death*, we are to understand it of *strangling*, as the mildest sort of death; and which consisted in putting the criminal up to the knees in dung, and then taking two linen handkerchiefs, a coarser and a finer, which were thrown over his head, fastened about his neck, and drawn from one side to the other, until he was dead. In reference to this rule, the Talmud, and, indeed, the *Mischna* †, insists that adulterers and adulteresses were to be strangled; and the *Pseudo-Jonathan*, as he is called, a Chaldee translator of the Pentateuch, considerably more modern, has inserted the very same doctrine in his version. Most of the Rabbins, as I have said, here follow the Talmud; although, indeed, as *Cocceius* has already remarked, *David Kemchi*, in commenting on Ezek. xvi. 40. departs from it, and holds stoning to be the punishment of adultery. According to a Mahometan story, there must also have been a dispute on this point among the Jews in Arabia ‡, which Mahomet, who understood nothing of

* Lev. xx. 10. Deut. xxii. 22.

† See *Massechat Sanhedrim*, cap. 10. § 1. in *Surenhusius'* edition of the *Mischna*, part iv. p. 25 †

‡ See *Gelaleddin* on *Sura* iii. 22.; or, according to others, 23. The passage occurs at p. 107. of *Marracci's* Koran, or p. 37. of *Sales*.

Hebrew, had, from Moses, decided in favour of stoning. For my own part, I do not think that the passage of the Koran thus explained, has any thing to do with that point; but as a great many Jews lived in Arabia, there may be thus much truth in the story, that *they* were not unanimous in their exposition of the law respecting the punishment of adultery.

Which then of the two are in the right, the Jews, as they speak in John viii. 5. or the Talmud?—If the passage really be, as I think it is, of John's writing, we cannot take his divine inspiration into the account, but only judge according to the common rules of historical probability; yet, even *then*, when both opinions are thus put on the same footing, no doubt can remain. John lived while Jerusalem yet stood, and the Jews had a government and laws of their own; and he was at Jerusalem when the circumstance took place, which he relates in his viiith and viiith chapters. The *Mischna*, on the other hand, was collected after Jerusalem was destroyed, and there was no longer any Jewish polity. Now, the contemporary writer, especially if an eye-witness, is, in a point of history, to be preferred to the author of a later period, who takes his account, not from original documents, or even books, but merely from the oral traditions of masters to scholars, as delivered in their lectures; and still more, when the question relates to a punishment common at the time, is the information furnished by the former, preferable to the decision of a lawyer of a much later age, who does not so much declare, what had then been the practice, as what he takes to be right. This, however, cannot be said with respect

to the man who declares the story of the adulteress supposititious ; although thus much still remains clear, that it had been very early read in John's gospel, and that it was more ancient than the *Mischna* ; and, consequently, if it was not of John's writing, still in any matter regarding the customs of the Jews before the destruction of Jerusalem, it was entitled to equal credit with the *Mischna*, if not to more. I will not, however, enter into this dubious controversy, but only offer the following observations, which lead more immediately to a decision.

1. The rule on which the Talmud founds, namely, that *where כוּתֵי יוֹמֵת, he shall die the death*, stands without any addition, we are to understand not stoning, but strangling, is incorrect ; for in Exodus, xxi. 14. and xxxv. 2. it is said of the profaner of the sabbath, *he shall die the death* ; and yet we find, from Numb. xv. 32., that a man who was caught violating that sacred day, was, by the express command of God, and according to God's authentic exposition of the law, put to death by stoning. This remark, with some of those that follow, I take from my father's Dissertation *De pœnis capitalibus in sacra scriptura commemoratis*, § 12. where the reader will find more concerning the incorrectness of the said Talmudical rule.

2. Strangling is not a punishment of the Mosaic law, but merely a Rabbinical fiction fastened upon it, concerning which not a single word is to be found in the Bible.—On this point also, the Dissertation just quoted, should be consulted. I have only to add, that I can gather from Josephus nothing concerning this

punishment, which, according to the description given by the Rabbins, was a very strange one.

These remarks were perhaps sufficient, and the reader would dispense with any farther detail ; for if strangulation is no Mosaic punishment, then Moses never appointed it in the case of adultery. But I will yet add, *ex superabundante*, the following observations, because authors, one after another, are continually insinuating very whimsical objections against the story in John viii., and very illogically putting the opinions of the Talmudists on a footing, in point of authority, with historical evidence.

3. Crimes of unchastity, not amounting to adultery, but only approaching to it, were punished with stoning ; as, for instance, when a young woman falsely gave herself out for a virgin, and deceived her husband, or when a bride suffered herself to be debauched, Deut. xxii. 20,—24. And can we then believe that the punishment of absolute adultery was less severe ? It no doubt appeared strange to the reader of the preceding Article, that the Arabs should have made so little distinction between adultery and whoredom ; but still they did not punish the latter more severely than the former. But that Moses estimated the difference as very great, we shall soon see. On whoredom, he in general imposed no punishment at all ; but in the two cases, related in Deut. xxii., as just quoted, in which he punishes it capitally, it is clear that he regards it as an injury to the husband, and as partaking strongly of the nature of adultery.—What *Grotius* says of adultery being more mildly punished, than whoredom in a bride, because the husband himself has his wife under his own care and

inspection, whereas the bride is still under that of her parents, is altogether singular, and repugnant to the common ideas of mankind.

3. If what I have advanced in No. 1. of Art. CCXXXV. be correct, stoning had been the usual punishment of adultery, even before the time of Moses.

4. In Ezek. xvi. 38, 40. stoning seems to be considered as the established punishment of adultery. To Judah, who is represented in a fable as an adulteress, and murderer of her children, God says, (ver. 38.) *I will punish thee, as adulteresses and those who shed blood are punished*; and how that was, we see from ver. 40. *They will stone thee with stones, and cut thee in pieces with knives.* But to this passage alone, which to others has appeared so illustrative, I would not here appeal; because it is a complication of the crimes of adultery and infanticide, which is spoken of; and with the punishment of stoning, is united another punishment, probably the *Dichotomia* * of the Chaldæans, which is not known in the Mosaic law. (But we must remember that Ezekiel lived among the Chaldæans, on the banks of the river *Chaboras*.) Taken, however, in conjunction with other proofs, it has its weight.

As a collateral remark, I annex what follows. In the story of Susanna and Daniel, *Jerom* found something relative to the stoning of false witnesses; on whom, however, the very same punishment was ordered to be inflicted, which they had meant for the person whom they falsely accused. In commenting

* See my father's Dissertation, already so often quoted, *De penis capitalibus*, &c. 23.; and compare with p. 29. of part iv. of my *Oriental. Bibliothek*. If I could command time to republish the said Dissertation, I should take the opportunity of enlarging on this point.

on Jer. xxix. 23. he says, *Sed id quod dicitur, frivit eos Rex Babylonius in igne, videtur Danielis Historiæ contraire; ille enim asserit, eos ad sententiam Danielis a populo fuisse lapidatos.* I do not chuse to number this as a *sixth* argument, because the two Greek versions of this story mention a different punishment; and we know not how far *Jerom* may be right in saying, that the two false witnesses against Susanna were stoned. The story is at any rate not only fictitious, but also most clumsily forged.

For these reasons now given, I have nothing to object against the story of the adulteress; which to me, indeed, is as satisfactory, as to others it has been objectionable. Some of the Scribes and Pharisees, who had begun to suspect, that Jesus was declaring many of the Mosaic laws abrogated, and who on that ground wanted to ensnare him, brought unto him a woman caught in adultery, and told him that the fact did not admit the shadow of a doubt; observing also, that Moses had commanded such persons to be stoned, and requesting to know what they should do in the present case. This question was impertinent, and merited no answer, as there was nothing dubious in this case;—nor did Jesus deign to make any reply, but bowed down, and wrote with his finger on the sand; which might perhaps be meant to insinuate, *Do what Moses has enjoined; ye know what is written in your law.*—As, however, they still continued to teaze him, thinking, perhaps, that he was at a loss for an answer, he at last turned to them, and said, *Let that man among you, who is himself innocent, throw the first stone at her;* and then bowed himself as before, and continued

writing; by which means he gave them an opportunity of doing, unobserved by him, what they soon did. His answer might be much to the following import: "Your question concerning a matter so clearly defined, is indeed very strange; and it almost looks as if you had very peculiar motives for sympathising with this woman. If there be any among you who has not, and who is not himself conscious of adultery, let *him* take the lead in the fulfilment of the law of Moses, and cast the first stone at her."—Their consciences thus brought many things to their remembrance; and as Jesus continued writing, they were no doubt apprehensive, lest he might know more than was convenient for them, and might perhaps write down suspicious words, or even stories, concerning them; and therefore, when his eye was no longer directed towards them, they disappeared one after another. When Jesus again raised himself, he asked the woman, *where her accusers were?* and, *whether any one had pronounced judgment upon her?* To which, when she replied in the negative, *Neither do I,* said he, *condemn thee; but commit not this sin again.*—What is there, I would ask, wanting here? Jesus was neither public prosecutor nor judge, and had as little to do with the woman's guilt, as any other person. He was merely asked for his opinion, much in the same way as a lawyer is with us; but the enquirers had dispersed, and did not wait for any answer. It did not then certainly become his duty to be the woman's accuser; and he was not a judge. But the best part of the whole story is its issue, where we see that those very persons, who wished to accuse him of depreciating the Mosaic law, were themselves brought

into such a predicament, that they could not put it in execution ; while he, without expecting any reproach, evinced by what he did, that he had no wish to shew himself a zealot for the enforcement of laws, that were drawing to their end. The whole story is so excellent, that we must be inclined to wish that it *were* true, even though, as critics, we might doubt its authenticity ; which, however, I, for my part, cannot bring myself to do : but if it be fictitious, the person, whoever he was, that forged it, and fathered it upon the evangelist John, must really have been a man of abilities.

ART. CCLXIII.

Of the Oath of Purgation.

§ 6. THAT the proof of adultery will always be difficult, it is natural to suppose. But here the Mosaic law furnished an important help to husbands, in authorising them, when they had any suspicion of the fidelity of their wives, to exact from them an oath of purgation, which they were obliged to take in a very solemn and awful manner. The statute respecting this oath, is recorded in Numb. v. 11,—31. ; and concludes with declaring, that *the husband, in such a case, has no reproach or blame* ; that is, the wife, if she has taken the oath of purgation, can raise no action against him for calumniating her character.

We here perceive, at the very first glance, a striking difference between the Mosaic law and ours ; according to which, an oath of purgation can be exacted of

no one, who is not already pretty strongly convicted of this crime. The foundation of the distinction lies in this; that, among the Hebrews, the husband and wife were not, as among us, on a footing of equality; but the wife was considered as the property of her husband, on whom lay no obligation of nuptial fidelity, or of any other kind, excepting only that of maintenance and cohabitation; for he might, if he chose, take more wives; and, in most cases, wives were actually bought. Among us, a wife, whose husband wanted to exact the oath of purgation, might, if she had the weakness to be jealous too, insist, in her turn, that he should also be sworn. But for such a demand, there could never among the Hebrews be any ground, because a husband never promised to confine himself to any one wife; so that she could, in a *civil* sense, have no right to be jealous, how strongly soever *nature* might stir up that passion in her breast. In this way, husbands certainly had matters made very easy to them; while, at the same time, the dread of the oath of purgation, served very strongly to promote nuptial fidelity on the part of wives.

Besides, this oath was perhaps a relie of some more severe and barbarous consuetudinary law, whose rigours Moses mitigated; as he did in many other cases, where an established usage could not be conveniently abolished altogether. Among ourselves, in barbarous times, the *ordeal*, or trial by fire, was, notwithstanding the parity of our married people, in common use; and this, in point of equity, was much the same in effect, as if the husband had had the right to insist on his wife submitting to the hazardous trial of her purity,

by drinking a poisoned potion ; which, according to an ancient superstition, could never hurt her if she was innocent. And, in fact, such a right is not altogether unexampled ; for, according to Oldendorp's *History of the Mission of the Evangelical Brethren, in the Caribbee islands*, part i. p. 296. it is actually in use among some of the savage nations in the interior parts of Western Africa. His words are, “ If a husband has any suspicion that his wife has been unfaithful, he endeavours to ascertain the point, by means of a purgation-drink, which she must receive from the hand of a priest, and drink off. This drink is naturally fatal. In Congo, it is prepared from the bark of the *Buhuda* tree, of which the seeds are so poisonous as to kill fishes that swallow them. An innocent person” (that is, one perhaps previously prepared by the priest, by means of an antidote, or some emetic of instantaneous operation,) “ will vomit it up, without suffering any inconvenience, but the guilty immediately swell on drinking it.” Oldendorp relates this from the information of slaves purchased in those countries.

Now when, in place of a poisoned potion like this, which few husbands can be very willing to have administered to their wives, we see, as among the Hebrews, an imprecation-drink, whose avenger God himself promises to become, we cannot but be struck with the contrast of wisdom and clemency which such a contrivance manifests. In the one case (and herein consists their great distinction), innocence can only be preserved by a miracle ; while, on the other, guilt is,

not by any miracle, but by a particular providence, revealed and punished by the hand of God himself.

By one of the clauses of the oath of purgation, (and had not the legislator been perfectly assured of his divine mission, the insertion of any such clause would have been a very bold step indeed;) a visible and corporeal punishment was specified, which the person swearing, imprecated upon herself, and which God himself was understood as engaging to execute. It was, *that her thighs might waste, and her belly swell*, ver. 21, 27.; and, as we gather from the converse of the case, in ver. 28. *that she might become incapable of conception.* What particular disease was here meant, expositors have seldom troubled themselves with enquiring: but, as far as I can judge, we have in these words the most striking symptoms of what is no doubt a very rare disease, the *hydrops ovarii*. That in this disease the belly swells, will naturally be concluded; but it is observed, at the same time, that the thighs become quite wasted, and the patient, by reason of the intolerable pain it occasions her, is at last utterly incapable of coition. I find that *Josephus* had also actually considered it as a peculiar sort of dropsy; only that he does not specify its medical name so accurately; and he moreover mentions some circumstances, concerning which Moses says not a word; such, for instance, as that of the woman, if innocent, having a child in *ten* months, which is really a very impertinent observation. For, supposing her husband to have taken it into his head not to sleep with her, or that he were, by age or otherwise, incapable of procreation, was she, in such a case, to have a child,

in testimony from heaven of her innocence and nuptial fidelity? Moses says no such thing; but only that she would not be incapable of conception.

I have already observed, that to have given so accurate a definition of the punishment that God meant to inflict, and still more one, that consisted of such a rare disease, would have been a step of incomprehensible boldness in a legislator, who pretended to have a divine mission, if he was not, with the most assured conviction, conscious of its reality. How often is it possible to prove adultery, I do not say, *legally*, but yet to the public in general, in a manner so logically probable, and approaching so nearly to certainty, that if, in any such case, the oath of purgation had been taken, and yet the accused remained unaffected with dropsy, all the world would not notice the fraud of the pretended prophet, and look upon his religion and laws as mere falsehood? Even the adulteress herself, who at first trembled on taking such an oath, would, in the event of not experiencing the threatened punishment, soon look upon religion as an arrant imposture, and, in process of time, become impudent enough to avow her crimes publicly, and to state particulars, merely with a view to prostitute religion, and bring it into disgrace. At any rate, she would be very apt, in private with her paramours, to make merry at the expence of Moses and his divine laws, and thus a contempt of religion spread more and more widely every day.—For these reasons, perhaps, some of my readers may already be trembling for his credit: and, in fact, we find the Rabbins (of course, since the destruction of Jerusalem) very much con-

cerned for him indeed, and so extremely kind, as, out of complaisance to him and God, to have devised a piece of law-chicanery, in order to save their reputation; affirming, that the imprecation-water, or, as it is commonly called, the *bitter water*, which the wife was obliged to drink on taking the oath of purgation, would have its effect *only* in the case of the husband having never, on *his* part, violated nuptial fidelity; for that, had he himself been guilty of the same crime, it would do his wife no manner of harm; and that hence, under the second temple, this trial became quite nugatory, and went into desuetude, because all husbands were adulterers.—Now, of any such *conditional* efficacy, Moses says not a word; but promises absolutely and explicitly, that God would guarantee the oath; and the story told by these Rabbins, who lived after the destruction of Jerusalem, merits not the least attention, both as it is a circumstance in itself quite incredible, that all husbands should, without exception, have been adulterers; and as Josephus, who lived in the times of the second temple, and mentions the oath of purgation, takes no notice whatever of any such circumstance, although, on other occasions, he is not sparing, in his details of the extreme corruption of morals that prevailed among the Jews of his own day.

Seldom, however, very seldom, was it likely that Providence would have an opportunity of inflicting the punishment in question. For the oath was so regulated, that a woman of the utmost effrontery could scarcely have taken it without changing colour to such a degree, as to betray herself, and give the

priest who administered it reason to say, *For God's sake, Madam, stop; you are swearing falsely.* Nor could she, methinks, if conscious of guilt, fail, in the same instant, to *imagine* at least, that she already felt some strange sensations in her belly, and, of course, to exclaim, *I cannot proceed.*—To be sensible of the likelihood of this, the reader has only to go over the ceremonial of the oath, which was very judiciously so protracted, as to occupy a considerable time.

In the *first* place, it was not administered to the woman in her own house, but she was under the necessity of going to that place of the land, where God in a special manner had his abode, and took it there. Now, the solemnity of the place, unfamiliarized to her by daily business or resort, would have a great effect upon her mind. In the *next* place, there was offered unto God, what was termed an *execration-offering*, not in order to propitiate his mercy, but to invoke his vengeance on the guilty. Here the process was extremely slow, which gave her more time for reflection than to a guilty person could be acceptable, and that too, amidst a multitude of unusual ceremonies. For the priest conducted her to the front of the sanctuary, and took holy water, that is, water out of the priests' laver, which stood before it, together with some earth off its floor, which was likewise deemed holy; and having put the earth in the water, he then proceeded to uncover the woman's head, that her face might be seen, and every change on her countenance during the administration of the oath accurately observed: and this was a circum-

stance, which in the East, where women are always veiled, must have had a great effect; because a woman, accustomed to wear a veil, could, on so extraordinary an occasion, have had far less command of her eyes and her countenance, than an European adulteress, who is generally a perfect mistress in all the arts of dissimulation, would display. To render the scene still more awful, the tresses of her hair were loosened, and then the execration-offering was put into *her* hand, while the priest held in *his* the imprecation-water. This is commonly termed the *bitter water*; but we must not understand this, as if the water had really been bitter; for how could it have been so? The earth of the floor of the tabernacle could not make it bitter. Among the Hebrews and other Oriental nations, the word *bitter* was rather used for *curse*: and, strictly speaking, the phrase does not mean *bitter water*, but the *water of bitternesses*, that is, of curses. The priest now pronounced the oath, which was in all points so framed, that it could excite no terrors in the breast of an innocent woman; for it expressly consisted in this, that the imprecation-water should not harm her, if she was innocent; and the crime was so distinctly specified and described, that no woman could have any reason to be startled at the oath, from excessive scrupulosity of conscience in regard to what a moralist, perhaps, would call adultery; I mean, the secret indulgence of evil desires and imaginations, or the recollection of suspicious intercourse, and even of indecent liberties: or, in a word, from any thing short of actual adultery; and in that case, it would thus be only so much the

more terrific.—It would seem, as if the priest here made a stop, and again left the woman some time to consider, whether she would proceed with the oath. This I infer from the circumstance of his speech not being directly continued in verse 21st, which is rather the *apodosis* of what goes before ; and from the detail proceeding anew in the words of the historian, *Then shall the priest pronounce the rest of the oath and the curses to the woman ; and proceed thus.*—After this stop, he pronounced the curses, and the woman was obliged to declare her acquiescence in them by a repeated *Amen*. Nor was the solemn scene yet altogether at an end ; but rather, as it were, commenced anew. For the priest had yet to write the curses in a book, which I suppose he did at great deliberation ; having done so, he washed them out again* in the very imprecation-water, which the woman had now to drink ; and this water being now presented to her, she was obliged to drink it, with this warning and assurance, in the name of God, that if she was guilty, it would prove within her an absolute curse. Now, what must have been her feelings, while drinking, if not conscious of purity ? In my opinion, she must have conceived, that she already felt an alteration in the state of her body, and the germ, as it were, of the disease springing within her. Conscience and imagination would conspire together, and render it almost impossible for her to drink it out. Finally, the execration-

* The Hebrews wrote with a fluid substance, which might more properly be called *black* than *ink*. It was the liquor of the cuttle fish, which is of a very deep black, and which they also used for colouring.

offering was taken out of her hand, (methinks she must, if guilty, have let it fall long before,) and burnt upon the altar.

Now, how few women would have the assurance to swear out a false oath, under all these awful formalities? Blushing, trembling, involuntary agitation, and, perhaps, fainting, would, in most cases, betray their guilt; and although they might not instantly acknowledge it from agony of conscience, still it would be an easy matter to bring them, by persuasion, to an oral confession of what their behaviour demonstrated, by such a variety of unequivocal indications. Certainly, therefore, we have here a master-piece of legislative wisdom, in the prescription of an oath so terrific to the guilty, and yet from which the innocent could fear no harm.

I cannot but think, that under the sanction of such a *purgatorium*, perjury must have been a very rare occurrence indeed. If it happened but once in an age, God had bound himself to punish it; and if this took place but once, (if but one woman, who had taken the oath, was attacked with that rare disease which it threatened,) it was quite enough to serve as a deterrent to all others for at least one generation.

ART. CCLXIV.

Of the Punishment of Adultery in Bond-women.

§ 7. WE have hitherto spoken of the punishment of adultery, when committed by a free-woman, who was a wife, in the proper sense of the word. Where,

however, the guilty person was a slave, the punishment was very materially mitigated, both to herself and her paramour. The statute on this point, which we find in Lev. xix. 20,—22., and in the words of which there is some ambiguity, I shall here give in the words of my own version. *If any man mingle carnally with a slave, who has a husband, and is not redeemed, nor has her freedom given her, death shall not be inflicted on the crime, because she is not free, but only blows; and the man (Mannsperson) shall, as a trespass-offering, present a ram unto Jehovah, before the convention tent. With this offering the priest shall expiate the sin of which he (Sie) has been guilty, and it shall be remitted unto him (ihr).* I must begin by noticing an ambiguity in the last clause in my own version, occasioned by my previously employing the word *Mannsperson*, which is of the *feminine* gender. A reader of German would naturally refer the pronouns *sie* and *ihr*, to the slave, to whom, however, they cannot be referred, because in the original the pronouns are *masculine*. I did not chuse in verse 21. to say the *Mann* (that is, either husband or man) *shall present, &c.* because this also made an ambiguity, and is not, besides, in the usual style of our laws; and as in place of *Mann*, I used *Mannsperson*, I thus fell into another ambiguity, without at first observing it.

In this law we clearly see, that the woman spoken of is a slave; and farther, that she is not a single woman: and consequently, her breach of chastity is not barely whoredom, but a sort of adultery, which, judged by the rigour of the law, would have deserved death. The whole difficulty lies in the Hebrew words

Necherefeth leisch, (נְחֵרֶפֶת לַאִישׁ) which, not being perfectly certain of their meaning, I have periphrastically translated, *who has a husband*. Some render it, *whom the man despiseth*, that is, whom her master regards with such contempt, as not to take her to his bed; just as if it had been incumbent upon him to embrace all the slaves in his house. In this case, however, the connection of the slave with any other man would not even have had a semblance of adultery; but have been only whoredom. Most of the ancient translators render it *betrothed*, or *promised to a husband*; but how the Hebrew word should have this meaning, it is not easy to discover. The verb, חָרַף (*Charaf*) however, besides the various significations thus unhappily applied to it in this passage, means likewise to *pluck fruit from a tree* (*carpere, decerpere*); and therefore, I would here render, *decerpta Viro*; borrowing an expression from the Latin, as the German language affords none exactly suitable.—The slave, then, methinks, was one, whom her master either used himself as a concubine, or (according to Art. LXXXVII.) had given as such to his son; and thus she was not, properly speaking, a wife. At the same time, the word *may*, perhaps, include the case of a bond-woman living in *contubernio** with a bond-man; which, however, still left her without the rights of a wife. But of this I am any thing but certain; and, indeed, can scarcely imagine any such case in view; and, therefore, I abide by my first explanation; although I have translated the phrase in such general terms, that it may comprehend several cases.

* See Art. CXXIII. No. 3.

Wherefore the punishment is here mitigated, and does not extend to death, it is easy to perceive. The concubine is not truly a wife, but only a slave taken to her master's bed; perhaps without her own voluntary consent, and merely because she must do what he commands. The breach of fidelity to him, therefore, forms a sort of intermediate crime between adultery and whoredom; and although, in so far as it compels him to rear up and provide for another man's children as his own, it does *him* in fact the very same injury as adultery, still there is for *her* this excuse to be made, that no *pactum liberum* had been, or could be, entered into between them, in regard to cohabitation and nuptial fidelity, inasmuch as she had no will of her own, being only his slave. This, in my opinion, is a better reason than that of the slave not having had so good an education as the free woman, which is sometimes assigned, to account for her guilt and punishment being less. For, not to mention, that many slaves, especially in great families, are better educated than free persons among the poor, the statute has no reference whatever to the birth, but merely to the present condition, of the woman. If she had obtained her liberty, she did not enjoy the benefit of the law; and yet her manumission, granted her perhaps after cohabitation with her master, could not in the smallest degree alter her previous education; and the man who had had to do with a married slave, enjoyed the benefit of the law, although the circumstance of inferior education could not be urged in *his* vindication.

The reader will recollect, from Art. CCLXI., that the punishment of adultery in a slave, was, among the Arabs likewise, only one-half of that inflicted on a wife, properly so called. Now, in both nations, that punishment consisted in blows; with this difference, however, that among the Hebrews, these blows seem to have been given with a whip or scourge, as has been already remarked in Art. CCXXXIX.; and that their number, by the statute of Deut. xxv. 2, 3. could not exceed *forty*. The man, likewise, as an *abolitio criminis*, (Art. CCXLIV.) made an offering to God, and thereby obtained a remission of his punishment; but whether this consisted in his being only exempted from the *pœna ordinaria* of death, or from all manner of punishment whatever, and of course receiving not even stripes, I cannot with certainty say; but, from the analogy of the Arabian law, as well as from the dictates of natural justice, the former appears to me the more probable opinion. Where slavery is legal among a people, and where a husband has at the same time a right to take slaves for concubines, concubinage thus *civilly* authorised, must also be adequately protected by the laws; and, of course, the man who violates the rights of (I shall not call it marriage, but only) concubinage, ought not to escape, without any punishment whatever. If we adopt the *latter* opinion, the intention of the law might be to make concubinage with slaves less frequent, and indirectly to compel the master, when he gave a slave to his son as a concubine, to grant her at the same time her freedom; and in fact we find Moses, on other occasions, interested

for the welfare of slaves in that situation*. In this view, the law is to be numbered among those expedients of legislators, to which some have applied the term *stratagemata*.

ART. CCLXV.

Of Incest—its forensic Names—and its Punishment.

§ 8. CONCERNING marriages prohibited on account of too close relationship, I have already treated, both in this work, and in a particular Dissertation *on the Mosaic Marriage Laws*; and I now come to the consideration of the crime and punishment of those who either married, or extra-nuptially cohabited, with persons too nearly connected with them. In Germany, we term this crime *Blutschande* (blood-shame—incest.) In the writings of Moses, it is defined to be, *the uncovering, or beholding the nakedness of a near kinswoman*. The Hebrew term for such a person, is *Scheër Basar*; and concerning its real import, there has been a great deal of controversy: but seldom, indeed, among those even moderately conversant with Oriental languages. The question, however, thus only becomes the more extensive and uninteresting; and as my readers in general will have no taste for philological enquiries, (and the investigation of the meaning of *Scheër Basar* must be philological, and neither theolo-

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* See Exod. xxi. 9, 10, 11. Deut. xx. 10,—14.—See also Art LXXXVII. LXXXVIII.

gical nor philosophical, if we wish to examine it to the bottom, and do not chuse to be satisfied with mere guess work,) I therefore here refer to the second chapter of the Dissertation just mentioned, § 11,—18. It is from this same chapter that I now select the following brief remarks upon incest, omitting the details and the proofs, more especially as, in Art. CII., I have already had occasion to take some notice of the meaning of the different terms, by which the different species of this crime are discriminated in Hebrew law.

I. *Incest with a wife's mother* is called *Zimma*, that is, criminal intercourse with a person under our protection, and whom, from a regard to our own honour, we are bound to defend against violence or seduction, and take charge of, with that view*. This term, however, is sometimes also applied to other crimes; as, for instance, (I.) in the books of the law, to that of *Lenocinium* in a father, who, instead of being the guardian of his daughter's chastity, himself keeps her engaged in prostitution, Lev. xix. 29.; and, (II.) in the other sacred books,

1. To criminal intercourse with a daughter-in-law, (Ezek. xxii. 11.;) which is a crime very like the preceding, but which has a particular forensic name of its own.

2. To the crime of rape on a stranger travelling along, who, by the laws of hospitality, which among the Orientals are very comprehensive, is under the protection of the city where she lodges, Judg. xx. 6.

3. To the crime of *Lenocinium* in a husband, who

* See Lev. xx. 14. and Dissert. § 19.

permits his wife to play the adulteress, or at least looks through his fingers, and connives at her guilt; Ezek. xvi. 43.

4. In a moral and political sense ; in order to represent, in the blackest possible colours, the crime of seducing the wife of a friend ; who, in her husband's friend, ought undoubtedly ever to find the most vigilant guardian and protector of her honour.

II. *Incest with a daughter-in-law* is very properly called *Thebel*, that is, *madness*, Lev. xx. 12. The same term is elsewhere, *in* the law, applied to bestiality ; but *out* of it, it may perhaps be used, in a more extensive sense, to denote close incest in general ; particularly in poetry.

III. *Incest between brothers and sisters* is called *Chesed*, that is, *love* ; the word being taken in a bad sense, Lev. xx. 17.

IV. Marriage with a brother's widow is, in Lev. xx. 21. termed *Nidda*, which means (but I speak doubtfully,) either *marriage with two persons alike near* ; or perhaps, *rival-marriage* ; because, if such an union be possible, the one brother will be a rival to the other, whose wife happens to please him ; and even during his brother's life-time, he may endeavour to seduce her.

V. Besides these species of incest, the Arabians distinguish *marriage with a stepmother* ; by the term *Nicahh-Elmakt*, or, *the marriage of hatred*. We do not find this term in the writings of Moses ; but it is probable that this, and several other species of incest, had had their particular names in Hebrew, although we are unacquainted with them.

I now come to speak of the punishments of incest ; and here I must divide incestuous connections into four classes ;

I. *Those which were punished capitally.* These are, 1. Incest with a father's wife. 2. Incest with a daughter-in-law. 3. Marriage (whether simultaneous or successive) with a mother and her daughter ;—all three prohibited in Lev. xx. 11, 12, 14.—In the two former cases, the particular punishment is not specified : it is merely said, in general terms, *they shall die*. In such a case, the Rabbins, according to their rule lately mentioned, understand *strangling* to be meant, which, in their opinion, was the easiest sort of death ; but as the Mosaic law knows nothing of any such punishment, it is probable that incestuous persons of these descriptions were stoned.—Concerning marriage with a mother and daughter, it is said, *They shall burn them with fire, both him and them*. This, however, was not done, while the criminals were yet alive ; but only (as we have already remarked in Art. CCXXXV.) after they had been previously stoned to death. With regard to the last word, *them*, (Germ. *sie*) which I cannot here express clearly in our language, because *sie* means either *her* or *them* ; but in Latin, the clause would be, *illum et illas comburent igne* ; its meaning cannot possibly be, that they were to burn *both wives* ; for the first was in all probability innocent, and highly indignant at the other becoming her rival ; but only that *either of them*, if guilty of entering into a union so unnatural ; the mother by marrying the husband or widower of her daughter, or the daughter by marrying the husband or widower of her mother ; was to be first

stoned to death, and then burnt, the more to testify the abominableness of the crime.

II. *Those which were punished with extirpation.*—These are, incest or marriage between full brothers and sisters, or between half-brothers and sisters, Lev. xx. 17. But what is meant by extirpation as the punishment of incest, whether *death* or *exile*, or *forfeiture of civil rights*, I cannot determine. It is one of those very dubious points, on which I have already expatiated in Art. CCXXXVII. The phrase here employed, *they shall be extirpated before the eyes of their people*, by no means decides the question; for it may, instead of implying death, only mean, *they shall no more be seen before the eyes of their people, but shall go into exile*. But what it actually imports, and what the term *extirpation* signified in the days of Moses, is a point altogether obscure, and hid in the depths of the most remote antiquity.—According, however, to the analogy of the Mosaic law on other points, I cannot but think capital punishment, in the present case, rather too severe to be supposed; because not only *brothers* and *sisters, full blood*, are in question, but *half blood* also. Now, as Abraham himself had married his *half-sister*, although Moses prohibited such a connection among the Israelites, yet, as it was not properly one of those, which he termed *the abominations of the Canaanites*, that is, one of those abominable practices which were peculiar to those nations, we can hardly suppose that he would annex to it the same severe punishment as he did to incest of the first kind, or (to repeat his own words,) to *the abomination of the Canaanites, on account of which the*

land was spewing them out. If, however, it be maintained, that extirpation here meant death; then, as there were but two kinds of capital punishment, the sword and stoning, I could understand it of nothing but the latter of these: in which case, Abraham had lived in a matrimonial connection, which might have been just as well prohibited under the penalty of stoning, as any one of those which Moses reckons among the distinguishing abominations of the Canaanites.—Now is this credible?

III. *Those which were punished with unfruitfulness.* These were, 1. marriage with a paternal uncle's widow; and, 2. with a brother's widow; excepting only the case of Levirate-marriage, which was commanded, in order that seed might be raised up to the brother, or paternal uncle, who had died childless. But here, unfruitfulness does not imply, that from such connections, whether nuptial or extra-nuptial, no issue should never proceed, which it would indeed have required a perpetual miracle to effect; and still less does it imply, according to the barbarous idea of some, that the pregnant mothers should always perish, together with the fruit of their wombs; but only, that the children of such marriages should not be ascribed to the natural father, but to his deceased brother, or paternal uncle; by which means the second husband, unless he took other wives, (which every one's circumstances do not permit,) lost his inheritance, (Art. XCVIII.) and his presumed immortality in the genealogical tables. If the reader wishes to know the grounds on which this explanation is given, he will find them in § 76. of my *Dissertation on the Mosaic Marriage-Laws.*

IV. *Those whereof the punishments are nowhere specified.* Of this description, there were some belonging to class I., for which, according to the analogy of the law in other cases, nothing less than stoning could have been appointed; such as *that* between a father and a daughter, or a son and his uterine mother; and others belonging to class III. to which the punishment of unfruitfulness could not be annexed, because it was impossible to ascertain, to whom the children should be ascribed; marriage, for instance, with a father's or a mother's sister. It would appear that these marriages were indeed prohibited; but had no special punishment yet affixed to them, because, in the time of Moses, no example of any such transgression of the law had occurred: and, therefore, the future magistrate, if he found that the bare prohibition of such marriages was not sufficient, and that the laws began to be contravened, was left at liberty to ordain such punishments, as existing circumstances might render expedient.

ART. CCLXVI.

Of Rape.—No Special Punishment annexed to this Crime.

§ 9. It appears very singular, that for rape, *as rape*, we find no punishment appointed by the Mosaic law, while yet scarcely any other crime seems so deserving of the severest possible punishment; because, in the *first* place, it is one of the grossest conceivable violations of natural liberty, accompanied with a misfortune destructive of all the happiness of life, and,

indeed, to be estimated as equal to death itself; and, *secondly*, because where it is not sufficiently avenged by the law, recourse must naturally be had to private revenge, which is always attended with very dangerous consequences, from its being exercised not only by the suffering individual, but by her connections likewise. In a word, when we reason upon it *theoretically* and *a priore* only, without taking the world as it goes, but, in honest zeal for the rights of the female sex, it cannot but appear to us, as it did to the ancient German law, by which the king or emperor reserved its punishment to himself, as that crime, of all others, which requires to be punished in the most severe and exemplary manner. The *practice* of nations, however, though for what reason I know not, is, in general, quite the reverse; even of England itself, where the law of rape has naturally a most formidable aspect; inasmuch as the oath of the woman, even though a prostitute, if she be not convicted of any inaccuracy in her evidence, or if the man whom she accuses, cannot prove an *alibi*, or her own consent, is quite a sufficient proof of the crime; and its punishment is capital. And yet in that country we seldom see any man hanged for a rape. Even Lord Baltimore himself, whose trial is now before me, and whom the public voice so universally condemned, that he found it expedient to leave his native country, was acquitted, because in the fair Quaker's evidence against him, something came out, that seemed to mitigate his offence.—But it is a still more remarkable phenomenon to find a law, in which, for the crime in question, there is no punishment at all.

It will, indeed, be said, that in Deut. xxii. 25. there is a statute respecting rape, which denounces the punishment of death against it. And, no doubt, it does so ; but then it is not against rape, *as rape*, but only against that crime as committed on a bride. If a woman in that situation allowed herself to be seduced, both she and her seducer were ordered to be stoned ; but if she could construe the matter into a rape, from its happening in the fields, where she was not heard, when she called out for help ; and declared that it *was* a rape, the perpetrator only suffered death, she herself remaining unpunished. Here, therefore, death was not the punishment of rape, (for the law would have equally punished the offence, even if the bride had fully consented to it,) but only of dishonouring a bride, that is, of *quasi-adultery*.

Indeed, the ascertainment of the punishment due to the crime of rape, appears to me one of the hardest problems of legislative policy. What were the best law respecting it, I do not pretend to decide : nor am I at present concerned with the subject any farther, than to attempt accounting for the silence of Moses, and for his omitting to denounce any punishment at all against this gross and barbarous outrage.

And here *three* circumstances appear necessary to be taken into consideration. In the *first* place, That of the deep debasement of the female sex where polygamy prevails, and wives are bought. Under such circumstances of humiliation, the forcible violation of a woman's chastity can never be regarded as an injury of that magnitude, which we justly account it to be.— In the *second* place, That of the man being (as we

shall find in the sequel) obliged not only to pay a sum of money to the father of the damsel whom he had debauched, but also to marry her, and, if he had used any violence, not properly amounting to rape, to keep her as his wife all his days, without enjoying the usual right of divorce. This was a sufficient preventive of rape ; more effectual, perhaps, than any capital punishment. For where such a punishment impends over the crime, a proof must be led, which is very rarely possible, under circumstances known, perhaps, only to heaven ; not to mention, that the very least failure of determined resistance on the part of the woman, and her yielding at last, even though to inevitable necessity, will be taken into consideration : whereas by the Mosaic statute nothing more was requisite to be proved, than the mere fact of *coitus*, and, perhaps, of some degree of violence, or, indeed, of seduction only, having been used. Among us, however, the law which thus proved so effectual a preventive of rape, would not answer ; because our manners require equality of rank in marriage, and to a young woman of distinction, it would be but poor satisfaction for such an injury, to be married, perhaps, to some fellow as mean as he is worthless. But in Israelitish marriages this equality of rank was never an object of the least consideration. Add to this, in the *third* place, That, as among us wives are not bought, neither would that part of the law answer, which ordained the father to be paid for his daughter, and, if he did not approve the marriage, to receive from her seducer, the purchase-money of a wife, by way of penalty for his fault. And it is farther to be remem-

bered, that as among us the husband *has not* the power of divorce, he cannot *lose it*; so that, upon the whole, any such law would not prove so effectual in deterring from divorce, as it did among the Israelites; and yet I believe that *Lord Baltimore* would rather have hesitated about doing what, even after he was acquitted, obliged him to leave England, if he had known before-hand, that although rape was not a capital crime, still, on proof of the least violence towards the fair Quaker, he must absolutely have married her.

I do not, however, think myself authorised to decide on any point of this matter with perfect certainty, because, we must remember, that Moses did not compose a system of jurisprudence, but only gave occasional laws. It might, therefore, be very possible, that by the more ancient law of usage, which remained in force, where he did not alter it, some punishment, even that of death, might have been annexed to the crime of rape. In fact, I do not see, how the private revenge of injured mothers and brethren could have been repressed, or such scenes as we read of in Gen. xxxiv. and 2 Sam. xiii., prevented, unless some satisfaction had been judicially attainable: for a father was not likely to think it his interest, in every case, to give his daughter to the man who had ravished her, and she herself might be averse from seeking satisfaction for the injury done her, by a marriage with such a man.—But here I readily own, that I speak with uncertainty.—Only, upon the opinion here adopted, will depend, in part, the judgment which we form of the story in the passage of 2 Samuel just al-

cluded to. Here we find that David did not punish Amnon for the rape he had committed, and which, as it was committed on his half-sister, Tamar, of course, involved also the crime of incest; and the consequence was, as might, indeed, naturally be expected, that Absalom, her uterine brother, put him to death. This, however, David regarded as absolute murder, and Absalom was obliged to leave the country. It was not, therefore, thought that the point of honour justified him in avenging the disgrace of his sister, when the king, who, in other cases, exercised the right of *Goël*, did it not.—David, unquestionably, had a very good pretext for leaving Amnon unpunished, because the law of Moses had not, in such cases, expressly prescribed any punishment; and as, besides, usage fixed nothing of the kind, the *pretext* was so much the more plausible. Still, however, I only term it a *pretext*, because he might legally have punished him for incest, if he had had a mind. There is also this singular circumstance to be noticed, that in the very artfully-managed intercession, made for Absalom in the subsequent chapter, we do not find a single word of his having *obtained* no satisfaction for the grievous injury and disgrace he had sustained, and his having, therefore, *taken* it at his own hand, as a man of honour ought to do.—In fact, this again looks, as if no punishment whatever had been annexed to rape, not even by the law of usage; and if this was the case, it ought always to be taken into consideration, in judging of David's conduct in this instance; nor ought he here to be tried by our laws.

ART. CCLXVII.

Of Whoredom, unaccompanied by circumstances of aggravation.

§ 10. For mere whoredom, unaggravated by any circumstances of additional guilt, no punishment at all was inflicted on the woman, but only on her seducer, who was compelled to marry her, and was, therefore, in certain cases, punished with sufficient severity. The statutes to this effect occur in Exod. xxii. 15, 16. and Deut. xxii. 29.

The cases, therefore, wherein the man was obliged to marry the woman, were,

1. Where he had *enticed* a virgin, and *seduced* her, Exod. xxii. 15.—Here it would seem, that no exception was made, although the woman had been enticed by, and had received presents, or money. The man ought not to have enticed her at all.

2. When he had *laid hold* on a virgin, and *debauched* her, Deut. xxii. 29.—This appears to imply the use of some degree of violence, though not such as amounted strictly to rape. If the woman made some resistance, and in so far defended herself, as not to give her willing consent to the crime, the case came under the terms of this law.

To the case, therefore, of the woman running after the man, and enticing him, or where the guilt was equal on both sides, the law does not seem to extend. And where the woman had not been a virgin, (which however, she was always presumed to be, if there

was no proof of the contrary) the following remarks are not applicable.

In the *first* case, then, that of mere enticement and seduction, Moses ordained, that the seducer should marry the woman, and pay for her to her father. If, however, the father did not chuse to let him have her, still the seducer was obliged to pay him the sum usually paid as the price of a virgin purchased for marriage.

In the *second* case, where some degree of force was used, the very same obligation lay on the seducer, but with this addition, that he had to pay the father of the woman the sum of *fifty shekels*, that is, the highest price that was usually paid for a virgin (Art. LXXXV.), and that he forfeited, at the same time, the right of ever dissolving the marriage, or giving a bill of divorce; and, of course, was obliged to keep her as long as he lived. This, as I have remarked in the preceding Article, was a pretty effectual means of preventing a man from resorting to any thing that could be construed into force; or, if he did, the woman, by way of reparation, obtained a marriage with him, on a very different footing from what she could otherwise have expected; for it was, like what ours are, indissoluble by arbitrary divorce.

The opinions formed respecting these Mosaic statutes will be very different.—That the woman should have remained altogether unpunished, will appear nothing less than impious, to those zealots, who insist upon ecclesiastical penances, and public disgraces, or if she be rich, on a high fine, to buy off the shame, and (what is still better, to) fill their own coffers.

Here, however, sound reason must really approve the procedure of Moses. For the woman, who, in such a case, alone suffers the corporeal and visible consequences, and the disgrace of illicit intercourse; who is ruined for life, and cut off from all hopes of a suitable match; and who must either remain an old penitent, in celibacy, or put up with any man who will take her as she is, cannot but be deemed sufficiently unfortunate, and is rather to be pitied than punished. And, if all the miseries thus attendant upon incontinence, with loss of honour, and of all hope of a desirable settlement, are insufficient to deter a woman from yielding to temptation, no punishment, of the nature of those penances above mentioned, will ever have that effect. Punishment, therefore, is here of no avail, and only superfluous and misapplied suffering, which no punishment should ever be. But besides this, such punishments do mischief instead of good, by making the infamy of the unfortunate woman quite public; and thus, where shame, as in many instances, gets the better of every other consideration, hurrying her to crimes still more heinous, such as child-murder, or the procurement of abortion. And hence, in those countries where legislative policy is more perfect, the infliction of public ecclesiastical punishments on women who have gone astray, and likewise the exaction of those penalties in lieu of them, which went into the coffers of the liege-lord, have of late been altogether abolished, and orders given to the clergy to admonish such persons privately, and with the secrecy of confessors, but to let nothing whatever be brought into public view. It is not from Moses that this plan has

been taken by legislators; and now, perhaps for the first time, they hear, quite unexpectedly, that there was any thing like it in his laws; yet such is really the fact.

Indeed, in his time and circumstances, there were still more reasons that suggested the expediency of resorting to lenient measures with the victims of seduction. Parents and brothers considered themselves as so much disgraced by the dishonour of a daughter or a sister, that the legislator really found it necessary to manifest a peculiar degree of compassion towards unfortunate females, who were thereby rendered miserable in a degree far exceeding the enormity of their crime. For they were already more severely punished by the hatred and contempt of their relations, than it was in his power to punish them; and therefore rather merited from him lenity and relief; which indeed he afforded them, not only by subjecting them to no punishment, but also, in the case of their having been either seduced, or in the smallest degree forced, helping them to husbands. Nor could the lenity and non-infliction of punishment have any tendency to corrupt the morals of young women; all danger of that effect being counteracted by another law, concerning which parents would naturally take care, in due time, to apprise their daughters, and which subjected the bride who imposed on her husband, by falsely pretending that she was a virgin, to the punishment of being stoned to death. Every woman, therefore, knew, that if she had allowed herself to be debauched, she had no alternative left her, but to inform her parents, that they might insist on her seducer marrying her.

If, however, she had neither been seduced nor forced, or if there was no child in the case, and the matter remained a secret with herself, it was in her own choice, whether she would either,

1. In the *first* place, confess her guilt, and take any husband who chose to take *her*, that is, a very bad one, and such as she certainly would not otherwise have accepted; and at the same time, by such confession, to bring upon herself the hatred and contempt of her relations, to a degree of which we can have no idea; or again,

2. In the *second* place, never marry at all, for fear of a discovery, and thus, for one forbidden gratification, remain all her life in the situation in which nuns are with us; or again,

3. In the *third* place, run the risk of being immediately after marriage sent back to her parents, subjected to an inquisition, and, when the truth was discovered, stoned to death.

Among a people who attend to the *signa virginitatis*, and make them the subject of judicial investigation, the chastity of females, while in the houses of their parents, will be much more effectually preserved, without any civil penalties, than it can possibly be, even by the severest punishments, in a nation where the law on this point is not regulated by the principles of nature and physiology, or where it is admitted as a maxim, that the *signa virginitatis* are merely accidental, and ought not to be insisted on.

It may here be still objected, that the unchastity of daughters ought, after all, to have been punished more severely among the Hebrews, than among us,

because parents and brothers were more disgraced by it, and might be inclined to take revenge at their own hands, as from Art. CCLXI. we have seen was the case among the Arabs. But, in answer to this, we may remark, that, on the one hand, the revenge of kindred in such cases did not perhaps carry them to such lengths as among the Arabs; and on the other, that as a legislator ought not to yield to principles or practices of unnatural revenge in his people, but to oppose them as far as it is practicable, so we here actually find, that the Mosaic law made, in the present case, a provision directly to counteract its effects, by immediately obliging the seducer to marry the victim of his lust, and thus taking her at once out of the house and the power of her parents.

ART. CCLXVIII.

Concerning (1.) Public Prostitution; (2.) Lenocinium Patris; (3.) Whoredom in honour of an Idol; and, (4.) Whoredom in the Daughter of a Priest.

§ 11. THERE were several circumstances that constituted what I have called *aggravated* whoredom, and might make it cognizable even by criminal law. Of these,

1. 2. *One* was, where a woman was not merely seduced, but became a common prostitute for hire; and *another*, where she was obliged by her parents to prostitute herself for their benefit. This last is what Moses, in Lev. xix. 19. denominates *Challel Bitho*, (חלל בתו), which properly signifies, *solutam*, id est,

communis juris et publicam facere filiam suam ; and he at the same time applies to the father's crime the term *Zimma* (זימה), that is, *the dishonouring or corrupting the woman whose chastity we ought to protect* ; of which term we have already treated in Arts. CII. and CCLXV. ; but more fully, in § 19. of the Dissertation on the Mosaic Marriage Laws.—In the passage just quoted, we find, indeed, only a prohibition, without any punishment annexed ; and in Deut. xxxiii. 18. in like manner, this farther prohibition, that there should be *no public prostitute among the daughters of Israel* ; which, however, must at all events have given the magistrate a right to banish any such person of Israelitish descent. At the same time it is probable, that the *Lenocinium patris*, by which a daughter was obliged to prostitute herself, was not permitted to pass with impunity ; although Moses, who did properly compose *a system* of laws, nowhere specifies his punishment. Here, therefore, we must acknowledge *another* chasm in our knowledge of the Mosaic law ; which, however, if we might venture to fill up from analogy, we should, from the forensic term *Zimma*, applied to this crime, conclude that it had been punished in the same manner as other species of *Zimma*, that is, by stoning to death, and afterwards burning, Lev. xx. 4. The conclusion, however, would be uncertain, because it is possible that two crimes might bear the same forensic epithet, and yet be differently punished. Here, therefore, I rather chuse to acknowledge my ignorance.

With respect to those common prostitutes who were not of Israelitish descent, but foreigners, I do not find any express law ; for both of those statutes already

quoted, manifestly speak only of the daughters of Israelites; and it is possible, that a legislator might be very solicitous about preserving the honour and chastity of the daughters of his own people, without interdicting foreigners, for whose characters he was not interested, from carrying on such a disgraceful trade. Nevertheless, from the silence of a legislator on a point like this, in what we may call a *collection of several occasional edicts*, I would not just hastily conclude, that common prostitutes, of foreign extraction, had been tolerated for the prevention of greater evils. It is no doubt true, that in a state where polygamy is permitted, more may be said for the toleration of such persons, than in monogamous countries like ours; and the philosophical opponents of polygamy have very justly remarked, that it renders the toleration of brothels almost necessary, in order to prevent worse consequences. Besides, considering this matter, not in a moral, but merely in a political view, and as a Board of health would consider it, it was not, in the times that preceded the discovery of America, an object of such serious danger as it has become, since the Old World has received the *Lues venerea* from the New, and now that common prostitutes propagate one of the most inveterate of all infections. But though Moses permitted polygamy on civil grounds, on account of the hardness of his people's hearts, he was any thing but a favourer of it; nor would he, therefore, in the present instance, have accommodated his enactments to it; and besides, from Lev. xv. 3., it is highly probable that there had then actually existed a *Gonorrhœa virulenta*, which may afterwards have disap-

peared, and which did not make its appearance again till about the latter half of the 16th century; when the violence of the *Lues venerea*, which had been brought from America at the end of the 15th, began to mitigate, and, from a much more formidable disease, became *Gonorrhœa virulenta*. In the time of Moses, therefore, there might have been the very same political dangers attending the toleration of common prostitutes, which there are at present; although during the whole period in which we have Greek and Roman writers and laws, and during the first fourteen centuries and a half of the Christian æra, they had vanished. It is likewise improbable that *foreign* prostitutes should have been tolerated, for this reason, that Moses was so apprehensive of Canaanitish women seducing the Israelites into idolatry. But whatever may have been the Mosaic statute on this point, we see very clearly from other parts of the Bible, that, in later times, perhaps through the fault of the police, and perhaps too from the impossibility of guarding against every species of evil, common prostitutes had been to be found in the land of Israel, just as well as among the Canaanites and Philistines. Between the existence of any evil, however, and its non-removal, and its complete toleration, there is always a great distinction to be made.

3. Among many heathen nations, whoredom became a sort of religion, and was practised in honour of some deity, to whom, or rather to whose priests, its profits accrued. To crush this practice, we find the prophets labouring with great zeal on many occasions, as in Hos. iv. 14, It is not here my design, because

it were rather more suitable to the subject of antiquities, to give a collection of quotations relative to this abominable practice, which was not unknown among the Greeks, though principally in fashion among the Phœnicians; but there is one passage in illustration of it, which we find in Herodotus, book i. ch. 187. (or *Wesseling's* edition, ch. 199.) and of which I shall here give *Goldhagen's* version. It relates to the Babylonians, and is as follows: "The most shameful custom among the Babylonians is this, that every native woman must once in her life prostitute herself to a stranger in the temple of Venus. Many, however, who in the pride of wealth think it unbecoming to mingle with others, come to the temple in close carriages, attended by a number of servants, and stop hard by it; but the generality proceed thus: They sit within the temple, wearing on their heads garlands of flowers, intertwined with a thread. Some are ever coming, and others are going away. Between the places where they sit, there are long passages, through which the strangers walk up and down, to pick out whomsoever they fancy. Having once taken her seat, a woman is never allowed to return home, until a stranger has thrown some money into her lap, and led her to a place of retirement without the temple. On throwing her the money he must say, *I invoke the goddess Mylitta*, (מולדתא), which is the Assyrian name of Venus. Whether the sum be great or small, she must not refuse it: for it is brought to the sacred treasury. She must follow the first man who offers her money, and not reject any one as unworthy of her. After she

“ has paid the tax of love, and so done honour to the
 “ goddess, she returns home.—Those who are beauti-
 “ ful soon return ; while the ugly have to wait a long
 “ time, some of them perhaps three or four years ;
 “ because they have it not sooner in their power to
 “ fulfil the law.—There is a similar custom at a cer-
 “ tain place in Cyprus*.” From this species of sacred
 prostitution, a common prostitute was among the
 Hebrews, or rather, previously among the Canaanites†
 termed *Kedescha*, (קדשה) that is, *consecrated*. Moses
 does not fix a punishment for it by particular statute,
 but as it was a species of the worship of strange gods,
 it is obvious from the analogy of his law, that it was
 punished capitally. In fact, we find in Numb. xxv.
 one instance, though, no doubt, an extraordinary one,
 where this was the case. The Midianites, it would
 seem, had a shameful custom of obliging their mar-
 riageable daughters to surrender their virginity in
 honour of Baal-peor‡, at a particular festival ; to which
 they invited the Israelites, of whom some accepted the
 invitation, in open contempt of their own laws. One

* That this Babylonish custom is mentioned even in Jewish writings, namely, in the Apocryphal Epistle of Jeremiah, verse 42, 43., has been remarked by *Wesseling* in his Notes ; in which also there are two quotations given relative to Cyprus. Indeed, the pollutions of the Cyprian temple have a still closer reference to the Mosaic law, because they were probably of Canaanitish origin : for Cyprus, long before the time of Herodotus, had received colonies from Phœnicia, that is, from Canaan. See my *Spicil. Geogr. Hebræorum ext.* p. 106,—109.

† See Gen. xxxviii. 21, 22. Deut. xviii. 18.

‡ The probable reason of this is stated in Art. XCII.

of the most audacious of the transgressors was, when in bed with a Midianitish woman, stabbed along with her, by Phinehas, who, by his conduct on this occasion, gained himself great honour.

In order to prevent the worship of the true God from being ever profaned by such deeds of shame, or any thing of the like nature from being on any pretence introduced by avaricious priests, it was enjoined by the statute of Deut. xxiii. 19. that the hire of a harlot should never enter the house of God; not that only of one considered as consecrated; but of any one whatever; so that, although a penitent, to ease her conscience, had ever wished to dedicate, by a vow, the wages of her past iniquity to the sanctuary, it could not be accepted. All these precautions of the legislator, however, were not sufficient to prevent consecrated harlots in honour of strange gods, but even consecrated boys for Sodomitical purposes, from being at last kept even in the temple itself. Of this we have an account in the second book of Kings, chap. xxiii. 7.

4. When the daughter of a priest *profaned herself*, as Moses expresses it, (or *became common*) by committing whoredom, her disregard to the sacred character of her father, whose office she thus disgraced, was considered as such an aggravation of her crime, that she was ordered to be burnt; Lev. xxi. 9. But this burning, I must again observe, I do not conceive to refer to the living body, but to the dead body, after having been stoned to death. (Art. CCXXXV. No. 1.) The practice, therefore, which prevailed among many Arabian tribes, of punishing capitally,

and even burying alive*, daughters, who, by their incontinence, brought disgrace upon their parents, held good in the Hebrew law, in so far as regarded the capital punishment of a priest's daughter; only that the manner of it was different, burying alive being no punishment of the Mosaic law. Perhaps too, this circumstance came into consideration, that the shame of that crime did not merely affect the profession of the father, and, in some degree, religion itself; but also that, in the case of a priest's daughter becoming a common prostitute, a way might be opened for transferring the abominable rites of the heathen, (who worshipped their gods by debaucheries, and made their temples and sacred groves, brothels) into the service of the true God.

With respect to the crime itself, which incurred this severe punishment, a doubt may be started. Did it mean a single act of incontinence on the part of the unfortunate woman, or did it apply only to her be-

* See my father's Dissertation entitled *Ritualia quædam Cod. Sacr. ex Corano illustrata*, § 13. As this dissertation is no longer to be had, and many readers may be desirous to have a more particular account of so strange a law, I here transcribe the whole passage, in as far as it can be done, with the omission of the Arabic. *In Corani capite LXXXI. 8, 9., Dies extremi judicii inter alia his verbis describitur. Et cum puella, quæ viva sepulta est, interrogabitur, ob quodnam delictum interfecta fuerit? Ad quem locum Abu Muhammed Elhosain, cognomine Elkara, in commentario MS. Arabico, qui olim Collegii Orientalis Theologici in hac academia fuerat, nunc vero Bibliothecæ Orphanotrophei Halensis insertus est, tradit, solitos fuisse Arabes, filias suas si stupram admississent, vivas in terra defodere. Idemque Jac. Golius, (Lex. Arab. p. 2605. seq.) de paganis quondam Arabum quibusdam, e. g. Kinditis, refert.*

coming a common prostitute? The expression, *to be profaned**, or *to become public*, may admit a milder and a harsher meaning. In the statute explained under No. 1. of the present Article, it is used to denote a woman of the latter description. The later Jews † endeavoured to mitigate, in some degree, the unaccountable severity of the punishment, (for in that light they considered it,) by adopting the notion of the law having only a reference to women that were betrothed; but in that case it were quite a superfluous law, besides being introduced into a wrong place, amidst the detail of the duties and sanctities of priests; for every betrothed woman, who committed a breach of chastity, was stoned, as we shall see immediately; so that it was nothing that required to be particularly noticed, in the case of a priest's daughter being guilty of the crime.

* תחול. The ancient versions here differ very much; the word being susceptible of more than one exposition. 1. Some render, *when she begins to commit whoredom*; thus the Syriac, Erpenian Arabic, and Samaritan. 2. Others, *When she becomes profaned*; thus the Seventy, Onkelos, and the Polyglot Arabic; but the word in this last is scarcely applicable to any but a strumpet. 3. The Vulgate has, *si deprehensa fuerit in stupro*; which is either an indefinite paraphrase, or from another Lection.

† See the later Chaldee version of *Pseudo-Jonathan*.

ART. CCLXIX.

Concerning Whoredom (5.) in a Levirate-widow ; (6.) in a Woman betrothed ; and (7.) in a woman who afterwards, on her marriage, gives herself out for a Virgin, and thus deceives her Bridegroom.

§ 12. THE three following aggravations of whoredom are of a different description from the preceding.

5. The widow of a man who died childless, was, by the Levirate law, obliged to wait for his brother, or nearest relation (Art. XCVIII.) ; and if, in that situation, she committed whoredom with a stranger, she was, by an ancient consuetudinary law of the Hebrews, of greater antiquity even than the time of Jacob's residence in Palestine, considered as an adulteress, and consequently punished with death. The reader will immediately recollect the story of Thamar ; and how he ought to understand the punishment of *burning*, which Judah denounced against her, we have of late had repeated opportunities of observing. This law Moses neither confirmed nor repealed ; and, therefore, it remained the law ; although I am rather inclined to think, that it was not very rigidly enforced, or rather, indeed, that it may have gone into desuetude ; as the Israelites seem to have sometimes considered the Levirate-law as burdensome, and were not very zealous about its observance. Whoever reads the third chapter of Ruth will scarcely believe, that it would at that period have been a capital crime

in Ruth to have been connected with any other man ; at least we do not usually praise a woman for not committing adultery, in the style in which she is praised.

6. A woman betrothed, who had yielded to seduction, without being able to plead a rape, was, in like manner, considered as an adulteress, and stoned : but if she could construe her misfortune into that crime, the excuse was sustained, and she escaped death ; but the seducer was subjected to the punishment of stoning, whether he had used violence or not. The statute on this point occurs in Deut. xxii. 23,—27., and as it is extremely precise, I shall satisfy myself with quoting it. *If a damsel be betrothed, and a man meet her in the city and debauch her, ye shall stone them both before the gate of the city ; the woman, because, although she was in the city, she did not call out for help ; and the man, because he hath dishonoured the bride (properly, the wife) of another man. Such deeds of shame shall not be suffered among you. If, on the other hand, a man meet a betrothed damsel in the fields, and force her ; he alone shall die. The damsel shall suffer nothing ; for she deserves not death ; in as much as this matter is the same, as if a man should attack another and slay him : he met her in the fields : she called out for help ; but there was no man there to come to her aid.*—I certainly think, that a rape, in the strictest sense of the term, is but very seldom possible : but where a woman was attacked in the fields, and compelled by threats or blows, to submit to disgrace, the case was really similar to that of murder or robbery ; nor could she, in such circumstances, be supposed

capable of defending herself, like a female dragoon, with all her strength and advantages, and at the risk of her life, or even of personal injury.

7. When a bride pretended to be a virgin, though previously guilty of whoredom, and thus deceived her bridegroom, her crime was regarded as equivalent to adultery, and she was stoned to death before her father's door; Deut. xxii. 20, 21. It was not properly her whoredom that was here punished; but her deceit; which is, no doubt, to a husband an injury equally dangerous with actual adultery; because he can never be secure of the fidelity of his wife, and runs so much the greater risk in future, that he knows not his *precursor* in her affections, and, of course, is not in a situation to be upon his guard against him. If, therefore, a young woman, who was conscious to herself of previous incontinence, though unattended with its usual consequences, wished to be secure from the risk of stoning, she had nothing more to do, than avoid deceiving any man. However humiliating it might be, it was her duty and her wisdom, to own her previous fault, and then leave it to her suitor to take her on these terms or not, as he might think fit; in which case she might, no doubt, get a husband, though not one of the best perhaps, and to such, indeed, she could have no title; or else, if she did not chuse to be so honest, she might, perhaps, by the mediation of her parents, patch up with her bridegroom a compromise relative to the *signa virginitatis*, amounting almost to a confession of her previous unchastity, but by which he dispensed with all right of inquiry, on the footing of either their accidental loss, or their non-appearance

in consequence of a family peculiarity. If she chose to do neither of these, she might live and die if she pleased, with the character of a virgin, which was not much in the Hebrew style ; but she must not attempt to impose upon a husband. Thus far all seems to be quite proper, nor can much objection be made to the punishment of the actual impostor, as an adulteress : but then might not the punishment of the Mosaic law light upon a person really innocent ? Before the reader peruse what I have now to offer in answer to this question, I must beg him to read over the whole of Art. XCII. a second time.

ART. CCLXX.

Concerning the law of Deut. xxii. 21, 22. which denounced the punishment of Stoning on the Bride, who falsely pretended to be a Virgin.

§ 13. I BEGIN by quoting the words of the law, which are these ; *If, however, it be true ; and he hath not found her a virgin ; then they shall bring the damsel to the door of her father's house, and the people of the city shall stone her to death, because she hath done a deed of shame in Israel, and committed uncleanness in her father's house ; nor shall ye suffer such deeds of shame among you ;* and it may be remarked by the way, that this law is framed upon the principle of her being considered as grossly disgracing her father, just as, according to the Hebrew and Arabian notions, happens when a daughter violates her chastity ; but the father, by her punishment being inflicted before

his door, was not to deem himself insulted, but rather avenged.

But now for the objections against the law, which will naturally occur to every one, and the consideration of which I reserved, in Art. XCII., till we should come to treat of criminal law. The man who is not sufficiently good natured to take a bride without the *signa virginitatis*, for good and all, will, no doubt, readily admit the propriety of her being returned to her parents. But the great question is, Ought she for that defect alone to be stoned? May there not be *three* cases, in which she would be altogether blameless, or any rate, too hardly dealt with, by such a punishment?

1. If she really were, what I have in Art. XCII. called a monster, and had naturally had no *hymen*; of which monsters, though perhaps there is not one to be found among a million of women, still that one ought not to suffer innocently. Or, again, if she were, what, however, only alters the case a very little, and would still bring her under the above denomination; were she circumstanced like the girl mentioned by *Haller*, in the Article just quoted. In fact, this first case would be of so rare occurrence, that a legislator might dispense with paying any attention to it. The whole Mosaic œconomy might have come to an end without its once occurring. No doubt it were to be lamented, that one innocent person should suffer death by the rules of law: but while we have judges that are not omniscient, but must judge according to the laws, it is what cannot absolutely be avoided, unless we are to let all crimes pass with impunity.

What if witnesses conspire to swear falsely? Or what if there unfortunately happen to be such strong indications of the crime, although, in fact, not committed, that no judge, who is not omniscient, can avoid pronouncing the sentence of death on the accused? It is certainly to be regretted that thus it should ever be; but still we are safe to say, that from this cause, and from the imperfection of all laws, not administered by an infallible judge, and which God himself, unless he were to impart his omniscience to human judges, cannot remedy, there are certainly in every country, not excepting Germany itself, where the criminal jurisprudence is the best in the world, more people innocently sentenced to punishment, than there could possibly be young women innocently stoned to death, on account of the natural defect of a *hymen*. The first objection, therefore, is perhaps thus done away, through the unavoidable imperfection of human justice; and yet I cannot help feeling, that it would be a much more tolerable evil, that *ten thousand* deceivers of their husbands should remain unpunished (I do not mean *undisturbed* in the prosecution of their imposture, but only, as I have said, *unpunished*) than that *one* unfortunate damsel, naturally destitute of a *hymen*, and in that respect a monster, however beautiful otherwise, should be innocently stoned. This first objection, therefore, retains somewhat of its force.

2. But that which is next to be noticed is rather more serious. It has been already observed in Art. XCII., that a young woman may, without actual sexual intercourse, obliterate the *signa virginitatis*,

in which case, if a husband sends her back, she has only her own misconduct to blame. And yet, if, which is quite possible, she was not conscious of the laceration of the *hymen*, and really deemed herself a virgin in the physical sense of the word, nor had any intention of imposing upon her husband, it would seem to be rather hard both on herself and her parents, that she should be put to death for a sin of ignorance, thoughtlessly committed in the days of uninstructed infancy.

3. If by a fall, or any other personal injury, a young woman had really ruptured the *hymen*, and no one had had the prudence to remark, that such an accident *might* happen; ought she, in this case, to be subjected to stoning? Here again, we have a case of very rare occurrence, but yet not absolutely impossible.

In fact, I do not think, that the mere defect of the *signa virginitatis* should have subjected a woman to death, unless there had been farther evidence of her guilt, or she had herself confessed it. It might, no doubt, have afforded sufficient ground for sending her back to her parents, and for farther investigation of the fact, but not for a sentence of immediate condemnation. The statute, indeed, is so framed, that a person unskilled in law would, at first hearing it, imagine, that she would be instantly stoned; and this might have its use, as a warning to young women, who heard the law publicly read over every seven years, and who would naturally be instructed by their mothers, and even by their companions, as to the danger in question, without having access to hear at the same

time, the chicanery and evasions, that might be had recourse to respecting it. But we must suppose, in the *first* place, that here Moses only speaks *incidentally* of the punishment of young women not found virgins, and that he is really and properly giving a law to counteract the attempts of husbands to criminate their wives unjustly, on the footing of not having found them virgins; and, therefore, could not be expected to give a particular detail of the *modus procedendi* against the woman in the case of her guilt; and we must, in the *second* place, take the following circumstances into consideration;

1. That among a people who attended to the *signa virginitatis*, stricter attention would unquestionably be likewise paid than among us, to prevent them from being lost without actual whoredom; and the Israelites must have known more of this point, than I have been able to state under Art. XCII. They would, of course, although they could not insist on the husband keeping his bride, examine more fully into the circumstances of the case; and her parents, particularly her mother, both from natural affection, and from a regard to their honour, would naturally think of every possible reason that could be urged in her vindication. The circumstance of the husband returning her, if he did so publicly, and not in a private manner, would, no doubt, give ground for an inquisition; but if it was conducted on principles of equity, and due regard always paid to the protection of innocence, there was much more likelihood of ten guilty persons escaping, by pleading a different excuse, than of one innocent person being condemned.

2. Moses seems by no means to presuppose, that a woman could, or would be stoned merely for wanting the *signa virginitatis*, without the farther evidence of a subsequent inquisition; else must he, in terms of the law of retaliation in Deut. xix., have decreed the punishment against the man, who falsely accused his bride on that account. Yet this was not the case; for such a man was only subjected to stripes and a fine.

3. By the Mosaic law, no one could be put to death, but upon the evidence of two or three witnesses. In the present case, this could never have been procured, unless, indeed, where the woman confessed guilt herself. To the proof of the fact of her non-virginity, it was also requisite, that the marriage had been fully consummated; and of this, in like manner, unless where she herself might admit it, there could be no evidence, but that of her accuser. To him, credit was in so far given as her return to her parents was concerned, but not in the matter of her being adjudged to die. But allowing that she did acknowledge the consummation of the marriage, still there was here no evidence to testify the manner wherein she had lost the physical *signa virginitatis*; and thus she had still sufficient room left for either legitimate, or artful evasions.

Upon the whole, therefore, the matter appears to me to stand upon this foot. No woman was punished for the mere want of the *signa*, but only sent back to her father's house; but then she was liable to an inquest, and from the circumstance of her parents being so much disgraced by her dismissal, she had to undergo a very strict examination from them, and

in the event of her proving guilty, could have little hope of escaping punishment. Nevertheless, Moses does not enjoin any *ex officio* inquest to be made, when at any time it happened to be hinted, that a wife had happened to be dismissed for the cause now under consideration; for, according to the connection of the statute, it would seem, that this only took place, when she herself had had the effrontery, or her parents the imprudence, to commence an action against the husband for calumny, in consequence of which the truth came out. To the person, therefore, who was not perfectly conscious of her innocence in every respect, a more rational advice could not be given, than to be quiet when her husband dismissed her, and make no complaint against him. And this advice she would herself be most likely to take, and to suggest to her parents; and then, I do not see from the tenor of the law, that the magistrate could have had the least ground for inquiring into the matter; unless where the parents, deeming her guilty, insisted upon an inquisition, from the unnatural wish of revenging, upon their own child, the reproach she had brought upon them.

This criminal statute, therefore, will not now appear quite so formidable, as it did at first. It was, however, a powerful means of deterring daughters not only from whoredom, but also, if their mothers only explained to them their danger, from all manner of obscene practices; and in the worst supposeable case, it served to prevent parents, when smarting under the idea of family disgrace, from being themselves, in the spirit of revenge, the murderers of their

daughters, as in the instances mentioned by *Arvieux* and *Niebuhr* (Art. CCLXI.) among the Arabs, instead of leaving it to the magistrate to be their avengers.

ART. CCLXXI.

De Concubitu cum menstruata.

§ 14. *Concubitus cum menstruata* is prohibited in Lev. xx. 18. ; and, as is commonly supposed, under the penalty of death to both parties ; but this admits of a doubt. It is probable that this prohibition, which we find also among the Arabs *, is more ancient than the time of Moses, because in such a warm climate there exists a peculiar necessity for it, from its effects upon health ; and it is, besides, closely connected with another prohibition, in like manner, more ancient, namely, that mentioned in Art. CCXIV., respecting the Levitical defilement, proceeding from the same cause.

The two reasons usually assigned for the supposed sinfulness of *Concubitus cum menstruata*, namely, (1.) that the issue of such intercourse will be epileptic, and, (2.) that no issue *ever* follows it, are at variance with one another. If the latter be only in so far correct, that it is very seldom fruitful, then the former

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* Koran, *Sura ii* 223. or in *Hinckelmann's* edition. 221. Mahomet, however, is here properly treating of a case of conscience, proposed to him by the Arabs, and to which the angel Gabriel furnishes him with an answer ; but no penal statute is given by the prophet.

can only be a piece of theory unfounded in experience. No doubt, in *Medicina forensi*, the truth of the latter reason is by many admitted as so certain, that they maintain, that the declaration of a woman, charging a man as a father, and yet not denying her connection with him to have taken place under the circumstances in question, ought absolutely to be rejected. But not to mention, that such people build this hypothesis chiefly on arguments *a priore*, which, in real physics, are not of much account, it would appear, that they do not make that sufficient distinction between different periods of the *catamenia*, which others do, who allow the probability of conception, towards their commencement and conclusion, and thus steer, as it were, a middle course between the doctrine just mentioned, and that of Pliny; in whose Natural History we find it asserted, with perhaps equal extravagance, that, *incipiente hoc statu, aut desinente conceptus facillimi traduntur*. Mr. Vice-president *Von Puffendorf* wrote me (Oct. 14, 1763) on occasion of my 10th question to the Arabian travellers, that a woman who had nursed some of his children, assured him, *sese ex uno tantum inter menses concubitu concepisse, partumque sanum edidisse*. In such a case it is not easy to see, what could have tempted her to lie; and in a point of medical jurisprudence, at any rate, the testimony of this great civilian is of some weight. We have also in the History of France a royal proof of the point in question, but connected with the peculiar circumstance of previous sterility; namely, in the case of *Catharine of Medicis*; who, in consequence of a suggestion of *Fernel* the physician, to *Henry II.*, de

concubitu, scilicet, inter menses peragendo, had that misfortune removed. For the knowledge of this fact, which we find in *Bayle's Dictionary*, under the article *Fernel*, Note K., I am indebted to the elder Professor *Murray*, who likewise informed me of it, on occasion of the question before alluded to. The periods, at least, of the *Catamenia*, seem therefore to require to be distinguished in reference to this point; and it is, upon the whole, without Biblical authority, and contrary to the dictates of sound philosophy, that the doctrine of the sinfulness of *concubitus cum menstruata* has been adopted, and merely in consequence of the assertion of some fathers of the church, who founded it only upon this *simile*, that men do not sow their fields, but in the hope of reaping a crop.

For the reason, however, of the Mosaic prohibition, sanctioned, as it moreover is, with so severe a punishment, we are not to seek, in any universal moral impropriety in the thing itself, so much as in the nature of southern climates; in which physicians know (and to them I must refer my readers for more circumstantial information), that *concubitus cum menstruatis*, proves, in many cases, highly prejudicial to health, sometimes to that of both parties, and is followed by very bad consequences. In Italy, these are so notorious, as to be thus far attended to by the police, that in great cities, where the stews are under its superintendence, the strictest precautions are taken to prevent them; *cubiculis menstruantium vel signo notatis, vel oclusis, nequis fortasse ingrediatur*. Nor is this done from moral considerations, because these would prevent all resort thither, but merely to prevent the

dangerous effects of the practice in question, which, the farther we go south, are always the more formidable. It is at the same time strange, that, disgusting as it is generally considered among us, it would, in southern countries, appear to be pursued with peculiar ardour. Mahomet, that very Mahomet who prohibits it in his Alcoran, is said, nevertheless, in those conversations of his, which his disciples hold sacred, to have prescribed to those who practise it, an antidote against its effects, which, however, I cannot here specify. But one thing is evident, that the more inveterate the appetite was for such perverse gratifications among the people of those countries, so much the more necessary was the prohibition, if the consequent evil was of a medical nature.

If, besides this, there be any ground for what *Astruc* says, in his book, *De Morbis Vcneris*, (lib. i. c. 9. § 3.) that the *Lues*, which, among us, is communicated only by infection, but which, nevertheless, must, unless we chuse to make an infinite series of the infected, have somewhere or other had its first origin without infection, might have arisen under the torrid zone, *ex concubitu cum menstruata*, accompanied with some peculiar circumstances in the constitutions of the parties, the Mosaic prohibition became, on this ground also, the more necessary, although Palestine be not properly under the torrid zone, but only considerably to the south. I have already observed, in Art. CXXII., that the *Gonorrhœa virulenta* seems to have existed at the time when Moses gave his laws, but to have been in its decline, and at a pretty low stage; such, perhaps, if *Astruc* has prophesied truly,

as that at which it would be found in Europe in the 19th century, were no fresh infection to be received from America, its original seat. Now, if such was the case in the time of Moses, legislative policy would have required the prohibition of a practice, which experience had shewn to be instrumental in originating and in preserving that disease. But this is an enquiry which I should have left to *Astruc* himself, if he were not already dead, after as long a life as any mortal can reasonably desire. I shall only here repeat what I have already remarked in my 10th Question, that *Hundertmark*, in his Dissertation, *De Ozana Venerea*, asserts, that even in Europe, there sometimes arises *ex concubitu scorbuto laborantis cum menstruata*, a disease of the *Verenda* resembling the *Lues*; a circumstance which serves to confirm *Astruc's* conjecture.

If, in the time of Moses, circumstances had been entirely as they appear to me, with respect to the existence of the *Gonorrhœa virulenta*, but in that state of decline, of which *Astruc* has predicted the medical probability in our own times; and if the effects of the prohibited intercourse had been remarked among persons of certain complexions, such as those affected with leprosy, scurvy, *fluor albus*, &c. and found to be instrumental in keeping up the infection; it would be very easy to account even for the punishment of death having been denounced against it, however difficult it might be to put it in execution, from the probable defect of information or evidence on most occasions. But I am uncertain whether the extirpation annexed to it by Moses, implies a capital punishment, or only that of exile.—See Art. CCXXXVII.

CHAPTER IV.

C R I M E S O F B L O O D.



ART. CCLXXII.

Suicide not so much as mentioned in the Mosaic Law.

§ 1. AMONG what are called crimes of blood, suicide generally occupies the first place ; and therefore the reader will immediately expect to hear what punishment Moses annexed to it, together with his other commandments respecting it. But here I can give him no other satisfaction than just to observe, that Moses does not so much as mention it at all. We have, indeed, in Josephus a very beautiful and rational harangue, which he himself delivered, to dissuade certain of his countrymen from suicide, and in which, among other things, he says, “ Know ye not, that the fame
“ and the posterity of those endure, who leave this
“ life in conformity to the laws of nature, and restore
“ to God what he has only lent them, whenever he,
“ the Giver, requires them ; that their dutiful souls
“ remain pure, and go to dwell in the most holy re-
“ gions of heaven, from whence, after the lapse of
“ endless ages, they will again be transplanted into

“ pure bodies * ? Know ye not, on the other hand,
 “ that the souls of those who have laid violent hands
 “ on themselves, go into the darkest places of hell,
 “ and that God, who is their father, punishes such
 “ despisers of their father † over again in their chil-
 “ dren. This crime, therefore, is odious in the sight
 “ of God, and punishable according to the decision of
 “ the wisest of all legislators. Hence among us, it
 “ has been judged right, that self-murderers should be

* This is a description of the resurrection of the dead dressed up in the heathen style, and such as would naturally lead a Greek reader to think on the transmigration of souls. Josephus pretty frequently has recourse to similar expedients, either from a desire to gain the approbation of his foreign readers, or to prevent himself and his nation from becoming objects of ridicule. The Greeks, though on all other subjects, full of penetration, and the illuminators of other nations, yet in philosophising on religion, more irrational, perhaps, than savages, laughed when they heard of the resurrection of the dead, because that doctrine was not fashionable among them; Acts xiii. 32. But when they were told, that human souls might one day animate cows, oxen, asses, &c. they were less disposed to impugn such a notion, because it was not so strange to them, being taught by the Pythagoreans. In this way, then, Josephus gained some advantage, by representing the doctrine of the resurrection in such a manner, as to lead his Greek readers to think of the *Metempsychosis*.

† In the Greek we have the words, *τὸς θεῶν ὑβριστὰς*, which convey no meaning suitable to the subject and connexion. *Havercamp*, instead of *θεῶν*, ventured to read *πατρῶν*; and him I have followed half-way, in adopting *πατρὸς*, which is quite consonant to the scope of the passage. Josephus had said, *God is their father*; the man, then, who kills himself, and goes out of the world without God's leave, is a despiser of his father. I must, however, add, that it has also occurred to me, whether we might not read *θεῶν*, sooner, thus: *quicquid sibi manus inferunt*; only there would still be something to clear up with regard to *ὑβριστὰς*.

“ cast out of their houses, and allowed to remain un-
 “buried until sun-set; while yet we do not withhold
 “the rites of sepulture even from our enemies.”—
 This speech, of which we have here the original materials perhaps, but certainly not the very terms in which it was delivered, but only as they were afterwards clothed in the more artificial language of Greece, Josephus addressed to forty Jews, who were shut up along with him in a castle, when they begged him not to surrender to the Romans, and expressed their desire rather to put one another to death; offering *him*, for that purpose, not only their swords, but if he would employ them, their hands, also.

It is, however, observable, that not a word of all that he here says, is to be found in Moses; nor does he himself, indeed, insinuate that such are the doctrines of the Mosaic law; but only that the Jews of his own time (*ταρ̄ ημων εκριναν*) thought such and such procedure proper; that is, that the punishment which he mentions, took place in conformity to the judgment of the Rabbins, or the command of the magistrate. What he previously says of the wisdom of the legislator, refers not to any punishments appointed by Moses, but only to those, which God himself (whom he means by the *wisest of all legislators*,) has reserved in his own hand the power of inflicting on self-murderers in the other world, and on their children in this. With respect to what he says of the divine punishment of their children, he perhaps had in his view that passage of the decalogue, which occurs in Exod. xx. 5., although it does not properly treat of suicide; conceiving, that if God, in general, threatened to *punish the*

sins of the fathers on the children of his enemies, unto the third and fourth generation; it would, in a more especial manner, take place in the case of that sin, wherein the vengeance of heaven becomes the more necessary, in consequence of the sinner escaping, by his self-destruction, every punishment which an earthly judge could make him feel.

Moses, then, annexes no punishment to suicide; and from the example of Ahitophel, who, when he saw that Absalom's rebellion, of which he was the instigator, was likely to terminate unfortunately, dispatched himself, to escape the punishment he deserved, but not until he had previously made his will, (2 Sam. xvii. 23.); we see, that the Suicide did not forfeit the right of bequeathing his property, and that his latter will was as valid, as, according to *Lauterbach**, it is among us. Of this same Achitophel, we are also told, that *he was buried in the sepulchre of his father*; so that even the punishment of exclusion from a hereditary burying-place, was not inflicted on suicide. But what is still more, Moses has nowhere prohibited suicide; for to drag the sixth commandment, *Thou shalt not murder*†, into a prohibition of this crime, of which there is not a word in it, is a very arbitrary mode of explanation, and much of a piece with our *Spiritual Expositions*, (as they are called) of the ten commandments‡. The defender of suicide

* *Collegium Theoretico-practicum*, lib. 48. tit. 21. § 4.

† Not, *Thou shalt not kill*.—See Art. CCLXXIII.

‡ My reasons for not adopting these spiritual explanations, will be found in § 104,—107. of my *Dissertation on the Mosaic Marriage-Laws*. The rejection of the *spiritual* sense was, at that time, by many

would always say, "It is no murder, although the Germans call it so, because I have a right to dispose of my own life as I chuse; and it is not *all* killing, as, for instance, that of criminals, or enemies in war, but only *murder*, that is, illegal killing, which is prohibited in the sixth commandment"

It will here occur to every one to remark, that the punishments of self-murder are generally of little more avail than to vex those connexions, or children, whom the Suicide has disgraced; the very persons who are at any rate most injured and afflicted; while he himself neither feels nor knows aught about the matter; and farther, that there is strong reason to suspect, that the greater number of Suicides are deranged in their minds, and, of course, not properly objects of punishment; and that it is very rarely to be ascertained, with perfect certainty, whether the person who destroys himself is, at the time of his attempting that rash act, in the full possession of his understanding, and not under an aberration of insanity. But it is better that *ten* guilty persons should escape with impunity, than that *one* innocent should suffer.

But why, it will be asked, does not Moses forbid suicide? And, as a prohibition, without a penal sanction, signifies little in civil laws, why does he not, as a lawgiver sent from God, threaten that God will punish the Suicide, not indeed in his children, for that were hard, considering that they are the greatest suffer-
 thought very strange; but it is hoped, that no one will, in the *present day*, deem it heretical, after so many members of the Theological Faculty of this place, have asserted, even in their writings, that they disapprove of these spiritual expositions,

ferers at any rate, but upon himself in another world? In answer to this question, there are two observations which it occurs to me to offer.

I. In the *first* place, Moses does not usually threaten punishments in another world, nor could he indeed, as a civil legislator, with any propriety do so * ; although he shews himself perfectly acquainted with a future state of rewards and punishments, and, in his writings, presupposes it as well known † ; and, indeed, inculcates it more fully in a book, of which, although it bears not his name, he was in all probability the author, I mean, the book of Job ‡. If, then, he had made an exception in this instance, and, in the name of God, threatened the Suicide, who cannot in this world be punished so as to feel, with a punishment in the world to come, it would have been an exception of a very singular kind ; and, however much might be said for it, in the case of laws given by God himself, by an inspired messenger, still it would to me appear severe, for this very reason, that I look upon it

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* See Art. XIV.

† This is undeniable from the passage in Gen. v. 22,—24. alone, in whatever light we regard it ; whether as relating to Enoch's death, or his ascension into heaven. I, for my part, refer it to his death.—The reader may consult my German translation, or, if he wishes to see more passages on the subject, my *Argumenta Immortalitatis Animarum ex Mose collecta*

‡ The reasons which almost *compel* me to believe that Moses was the author of the book of Job, I shall hereafter detail more fully in my German *Prolegomena*. In the meantime, my readers must be satisfied with what I have stated in my Latin *Prolegomena in Jobum in Usum Auditorum*.

as a real act of goodness on the part of God, that we nowhere in the Bible find an explicit decision of the question, whether suicide be a sin; this very interesting question being left entirely to the decision of philosophical ethics, and to the common sense (shall I say?) or the conscience of every individual. Many persons of a melancholy temperament are so irresistibly and incessantly tempted to suicide, that they are at last overpowered. Had then the Bible any where distinctly explained its mind on the subject, such persons would then be guilty of a deliberate sin, and die miserably; but its wise and gracious silence makes it possible, that this act, to the perpetration of which they are not indeed mechanically and involuntarily constrained, but still hurried and overpowered by strong passions, anxiety, dread of impending evils, or deep despondency, may, in such cases, be only a sin of ignorance; for they persuade themselves, that we are masters of our own lives, and may take them away when we find it necessary.

Whether the man, who is determined to destroy himself, be, in the decisive moment of death, guilty of a deliberate sin, or only a sin of ignorance, no theologian, nor indeed any philosopher, will regard as one and the same thing; and, considering the silence of the Bible, which here leaves us in uncertainty or ignorance, for the same reason as God, under the Old Testament, suffered many sins of ignorance, polygamy, for instance, in the patriarchs, without revealing them to them;—and as he certainly must still to every one of us, overlook sins of the same description, which, if we knew them, they would not be;—it is possible, that some

Suicides, who even prepared themselves conscientiously for the great step they meditated, are now in heaven, (God not imputing to them their sins of ignorance,) who must have been damned, if the Bible had been written in the style, which many zealous and well-meaning moralists would wish. If the reader is a little conversant in the ecclesiastical or literary history of a period not very ancient, he must recollect the instance of a clergyman well known for his exemplary piety, who committed suicide, and whom he would scarcely think of looking for again but in heaven ; whose whole countenance, overcast with melancholy, and, upon dissection, the state of his whole frame, form powerful apologies for his conduct.— Every one acquainted with family-history will recollect many more such examples of religious Suicides. Let the reader consider this, and then ask himself this question, whether it was likely that Moses, or God who sent him, should make a law of such import as this, *Thou shalt not take away thy own life ; for Jehovah thy God will not leave him unpunished who destroys himself.*

Add to this, that such a prohibition would have no effect at all upon those, who do not believe in religion ; while, in the case of a conscientious person, who firmly believes that a man dying by suicide must be damned to all eternity, the state would have reason to apprehend the still more horrid consequence, of his first murdering another, that he might thus be put to death himself ; after, however, having time allowed him for what is called repentance and conversion. This is a

ease which actually occurred in Denmark so frequently, that it obliged the legislature to have recourse to the enactment of a peculiar law upon the subject, after two previous blunders attended with bad consequences. They were extremely desirous to make wilful murderers of this description suffer death, as they perhaps deserved, with much more severity than that of the usual capital punishment; and for this purpose, condemned them to be broke alive upon the wheel. Now, no injustice was here done them; for they had believed that they deserved hell, and had, in order to escape it, murdered not themselves but others; and what are the tortures of the wheel, compared to eternal damnation? Too violent punishments, however, are of no avail, and only serve to harden; at the same time, the sight and cries of the unhappy wretches became insufferable to others, and the universal voice of compassion besought the king to order the *coup de grace* to be given them at once. Well, the punishment of murder was thus mitigated; but still it proved no counterpoise to that horrible crime, in those who were disgusted with life, and to whom death was the very thing they wished. At last, the idea happily occurred to the legislature, of refusing the punishment of death to such murderers, and forcing, as it were, upon them that existence which they so much detested; making them, however, suffer severe corporal punishments, amongst which, one was an annual whipping.—This is the only means by which the safety of their neighbours can be secured against the attempts of those who are weary of life, and yet are afraid of hell, if they kill themselves.

II. In the *second* place, it would appear that Moses had omitted the prohibition of suicide, for the very same reason which induced Solon not to punish, not to prohibit, not even to mention, parricide in his laws; namely, *because he did not anticipate the perpetration of any such unnatural crime* *. In his time, suicide must either have been unexampled, or, at any rate, extremely rare; in which case, it is better to regard it merely as the consequence of insanity, than to make it be thought a crime, in order that people may not think of committing it; for it is sometimes the prohibition that makes the transgressor †. In some nations, suicide is endemic; in others, unknown; nay, even among the same people, it has, if I may so speak, its periods. The usual causes of its prevalence are,

1. *Certain superstitious errors*; such, for instance, as the idea of its doing God good service, or the hope, which the African slaves that are sold in America, entertain, of its restoring them again to their native country; in reference to which, *Labat* gives an account of a very happy expedient hit upon by a French planter, who had a great many slaves, and who, to counteract the effects of that notion, when he found them going into the woods to hang themselves, followed, instead of stopping them, and only told them to proceed; nay, that he had brought a rope with him, and meant to hang them himself; *because he had a sugar plantation*

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* Cicero, *pro Roscio Amerino*, c. 25.

† In § 96 of my *Dissertation on the Mosaic Marriage-Laws*, the reader will find other examples of crimes, which it might be expedient to leave altogether unnoticed in the laws.

in Africa, on which he wished to employ them. This made them instantly lose all desire to hang themselves; and from that time he lost none of his negroes from that cause.

2. *Absolute want of religion*; such as at present prevails among the Suicides of France. The man who believes in nothing beyond the grave, will naturally rid himself of life, whenever he feels it a burden, or when he dreads poverty and misery; particularly if he can procure death without pain; for which purpose the people in southern climates have still easier expedients than with us.

3. *Strange philosophical notions*; such as were common among the Greeks and Romans.

4. *False ideas of honour*; as when suicide is accounted fortitude, whereas it is in reality cowardice. Among the Romans and the English, we find this mistaken notion of honour, epidemic at some periods of their history.

5. *Maladie du pays*, or that longing after home, which is manifested by those who are obliged to spend their lives in a state of inactivity, at a distance from their native country, and particularly in a damp climate. This is observed to be particularly the case among soldiers.

6. *The natural propensity to a melancholy temperament*, observable in certain nations. Some will have it, that such is the case of the African negroes, among whom suicide is so common. But in their case, there are many other causes, which concur to produce that effect.

7. *The alteration occasioned in the natural tempera-*

ment, by too much indulgence in a flesh diet, and in drinking heavy nutritious ale. This is probably the case in England, where the defenders of the poor, as they are called, consider very strong, fattening ale, as what every man ought in justice to have; not considering that it is quite an artificial drink; that man is naturally a water drinker, and when he is so, seldom fails to be chearful and healthy; and that his first stage in the descending scale, is to become a drinker of wine.

8. That *style of education*, in which children have not their inclinations at all thwarted, and are not accustomed to experience the disappointment of their wishes; and hence,

9. *Great and sudden revolutions of fortune*, in consequence of bankruptcies and gaming.

On the other hand, the belief of a good and rational religion, which inspires the hope of a futurē state of retribution, and must make the Suicide at any rate dread, that God *may* punish him; together with temperance, and that good education which accustoms us early to understand, what we must certainly experience in life, that we cannot always expect to be gratified in every wish; generally makes suicide rare.

Now, to apply these remarks to the Israelites in the days of Moses. They believed in their religion, and I might indeed say, it was not merely *faith* with them, but *vision*. Their self-will had, in their youth, been pretty well subdued in Egypt; they were travelling through a drier country than they had previously been accustomed to; drinking water only, and eating but little flesh, and a great deal of manna; and it

would seem, at the same time, as if they had been very much afraid of death ; and that, in these circumstances, no individual had, during perhaps the whole forty years in which they traversed the wilderness, committed suicide, is not very much to be wondered at. In fact, for a long period subsequent to this, it continued very uncommon ; for in the Old Testament we find only two examples of it, those of Saul and Achitophel. Afterwards, indeed, it became more frequent ; and in the war that made an end of the Jewish polity, in the reign of Titus Vespasian, the Jews manifested a rage for suicide, altogether in the *Saguntine* style, and far surpassing any thing that we find in the Roman history. They destroyed themselves by hundreds ; and the conclusion of the war was only a scene of downright suicide ; as, for instance, at the siege of the supposed impregnable fortress of *Masada*, where they dispatched themselves one after another, that they might not fall into the hands of the Romans. At that time, suicide was the fashion among them ; at present, on the other hand, they are quite guiltless of this crime.

By the way, if the reader wishes to know what ideas Moses, who, as a civil lawgiver, is thus silent on the subject of suicide, had entertained respecting it, he will perhaps find some satisfaction from perusing the 15th and 16th verses of the viith. chapter of Job, in my translation, and weighing my remarks on that passage ; for in all probability the book of Job was of Moses' writing.

ART. CCLXXIII.

Concerning Murder ; of which the Punishment was Death ; and Homicide, which, according to circumstances, was punished either by Exile, or not at all.

§ 2. DEPRIVATION of life, or *Homicide*, in the general sense of the word, is naturally divided into two genera, which are very different.

I. *Homicidium dolosum, qualificatum*, or murder ;

II. *Homicidium Simplex*, or man-slaughter, properly so called ; which last is, in like manner, of two species ;

1. *Homicidium culposum*, where it happens through the fault of the man-slayer ; as, for instance, among the ancients, where a person killed another by an imprudent bow-shot ; or, among us, where the same effect takes place by the rash discharge of any kind of fire arms.

2. *Homicidium casuale vel fortuitum*, (chance-medley) ; where it is merely an unfortunate accident, as in the case of the axe of a person while cutting wood, flying off from the helve, and killing another.

Both these genera are likewise distinguished by Moses, who, to the first, annexes the punishment of death ; and to the second, that of exile, or confinement to a city of refuge, until the death of the high-priest ; only that the line of distinction between them does not seem, in all points, drawn with sufficient accuracy to us, who live at the distance of some thousand years from his day ; and that there remains a pretty con-

siderable intervening space undefined, comprising all that our lawyers denominate *Homicidium simplex, dolosum*. In order to express myself with more brevity, and to avoid long Latin circumlocutions, I shall call that crime which Moses punishes capitally, *Murder*, and that which he does *not* punish capitally, *Homicide*; thus taking this latter term in such a sense, as to make it, not one of the two *genera* above specified, but a *species* contradistinguished from murder.

We find several general expressions, that seem to comprehend both species, such as, *to smite a man, that he die—to smite a man's life*—or merely, *to smite a man, &c.* Even the word רצח, (*Ratzach*) which originally has a more limited signification, is sometimes used in so extensive a sense, as to include not only inconsiderate and fortuitous homicide*, but even the killing of a malefactor, such, for instance, as a murderer; which was permitted, and even commanded†. At the same time, however, it is also used, in its more limited sense, and applied to murder alone‡; as where, in contradistinction to unpremeditated homicide, it is said of a person, who has deserved death, *The man who killeth any person, in such and such a way, is a Rotzech (רועה); he shall die*. If the reader should, as is often the case, where legal terms are in question, happen to be desirous of information with regard to the etymological meaning of the word רצח, I might, perhaps, half-satisfy him by saying, that in Arabic it signifies, *to overwhelm with stones, to stone to*

* Numb. xxxv. 11. 25,—28.

Deut. xix. 5, 6.

† Numb. xxxv. 27. 30.

‡ Numb. xxxv. 16,—19.

death, to smash a serpent's head with a stone. Now, in the state of nature, and before men have any artificial weapons, most murders are perpetrated by throwing of stones; those, at any rate, which are to be contradistinguished from acts of homicide. Where two people *then* fell a quarrelling, and the one struck the other dead, without having any such intention, it was done with the hand, by a blow; from which we do not usually look for such an effect. Throwing of stones, on the other hand, is always more likely to prove fatal, and every one who attempts it, must know as much; and hence the malicious and deliberate murderer, who durst not make an open attack, but lay in wait, determined to kill his enemy, would naturally throw a stone at his head. Stoning too, we may remember, was the most common capital punishment among the Hebrews. Here, then, for once, we have an instance of the derivation of a legal term, from the artless state of nature, exactly as might be expected, in a very ancient language.

As it is not possible to suppose, that in the sixth commandment, *killing* in general can be interdicted, else should we not have any right to kill fleas, lice, sheep, goats, oxen; or to put enemies, robbers, malefactors, to death; so we are unquestionably to take the words, לֹא תִרְצַח, (*Lo tirzach*) not in the more limited sense, and to translate them, *Thou shalt not kill*, but, *Thou shalt not murder*, or *commit murder*.

I. First, then, of murder.—The accessory circumstances, whereby Moses describes it, and which express the marks that distinguish it from homicide, are the following.

1. When it proceeds from *hatred* or enmity ; Numb. xxxv. 20, 21. Deut. xix. 11.

2. When it proceeds from *thirst*, that is, from desiring the death of another, or wishing to satiate revenge with his blood. The Hebrew term is צַדִּיָּה, (*Zedijja*), (Numb. xxxv. 20.) and for the reason, why I do not render it, with other translators, *way-laying*, but *thirst*, most of my readers will rather chuse to consult my second *Commentatio ad leges divinas de pœna homicidii*, § 28., than have the detail here interrupted, by the repetition of a long philological investigation. Besides, as no court can examine the heart, or discern, whether the man who has killed his neighbour with a deadly weapon, or a stone, had it merely in view to wound him, or to put him to death ; and as, of course, almost every murder would escape unpunished, and no man be secure of his life, if it were enough, that the murderer *denied* the intention of killing ; so, I am inclined to believe, that where only the intention of wounding was manifest, the act was considered as proceeding from *Zedijja*, and as sufficient to constitute murder, *Homicidium qualificatum*. Such a person manifested a *thirst* for his neighbour's blood, and although he only said in his justification, *I should not just have required ALL his blood to extinguish my thirst, but have been satisfied with what had flowed from one good wound*, still this, according to the etymology of the word, was a *Zedijja*.

3. When it is committed *premeditatedly and deceitfully* ; Exod. xxi. 14. This expression seems not applicable to every murder, but only to the worst species of that crime, namely, *assassination* ; and, by

the Mosaic law, the assassin was to be dragged even from the altar itself, to die in his turn. The fate of Joab, who had been twice guilty of assassination*, and who was put to death even *at* the altar†, by the grand-provost-marshal, Benaiah, who was at the same time high-priest‡, may be considered as an example illustrative of this case.

4. When a man *lies in wait* for another, falls upon him, and slays him; Deut. xix. 11. This, indeed, may be assassination; but it may also be different, and somewhat more honourable; as, for instance, where a man, (which is the common way in cases of enmity among the Arabs) lies in wait for another, till he find him, in the place where he wishes to have him, in order to be sure of killing him; but *then* employs not, like Joab, the cunning of an assassin, but has recourse to open violence against him. In general, such way-layings, as well as assassinations, properly so called, are more usual in southern countries, than with us, and the mistaken avengement of blood multiplies the examples of both.

II. Homicide is discriminated by the following adjuncts and descriptive circumstances:

1. That it takes place, *without hatred or enmity*, Numb. xxxv. 22, 23. Deut. xix. 4. 6. In the *former* of these passages are added, the explanatory circumstances of its being done *undesignedly*, or *by the throwing of a stone*, which has unfortunately hit the man and killed him; *while yet the slayer saw him not*,

* 2 Sam. iii. 26, 27. xx. 8,—10. † 1 Kings ii. 28,—31

‡ See Art. CCXXXII.

nor sought to harm him. In the latter, is specified the circumstance of its being done, *without his knowing of it*; so that in these passages, it is merely an unlucky accident, a *homicidium fortuitum*, that is spoken of. And this I remark, because without such an explanation, the phrase, *without hatred and enmity*, might seem to comprehend the crime of homicide committed in consequence of a sudden quarrel, or paroxysm of rage, or in a drunken fit; which, however, is not what Moses means on the present occasion, or indeed ever speaks of.

2. When it takes place, without *thirst*, without *Zedijja*, Exod. xxi. 13. Numb. xxxv. 22. In the first of these two passages, it is added in explanation, *where God lets him come before his hand*; that is, so orders events, that he must unfortunately be in such a situation, as that the other's hand, without his either knowing, or intending it, happens to hit him; as, for instance, where the one is hewing wood, and the other runs directly upon the axe.

3. When it happens from *mistake*, Numb. xxxv. 11. 15.

4. In the case of which Moses gives the following as an example; Deut. xix. 5. *Where a man goes with his neighbour into a wood to fell trees, and while he strikes with his axe, the iron slips from the handle, and hits the other.*

The great chasm between what I have termed murder and homicide, or between *Homicidium dolosum qualificatum*, and *Homicidium fortuitum vel casuale*, as formerly mentioned, every person skilled in law will immediately perceive, and, of course, ask, *Where did*

Moses class homicide arising from rage, or from a sudden fray, (duelling he needed not notice, as the Hebrews had no such thing) or from drunken fury? Did he count it murder and punish it with death; or mere homicide, which incurred a less severe punishment? In answer to these questions, I have to observe, that, on this point, I find in the writings of Moses nothing decisive; but his very silence may sometimes be of weight in our present jurisprudence; because some people have fancied, that, by the divine laws, with which even the supreme power can, in a Christian state, have no right to dispense, murder never ought to be pardoned, but in every case to be invariably punished with death; because the commandment in Gen. ix. 6. applies to all the posterity of Noah for ever, that is, applies to all mankind. I am not, however, of this opinion, but believe, that that commandment was merely an *interim*-statute, for the immediate descendants of Noah, before they were under civil government and laws. The reasons of this opinion I have stated in another place*, and as the matter does not directly belong to the Mosaic law, I shall not here repeat them: observing only, that every one who does not account it a sin to eat blood, nor believe that God had given *praecepta positiva universalia*, and required the observance of them, even from nations who could not possibly have had any information with regard to any such *positive laws*, must admit, that the arguments I have adduced are valid. There are, however, many prudent, conscientious people, who deem

* See my *Commentatio prior ad divinas leges de poena homicidii*.

the eating of blood sinful; and there are, methinks, still more, not so prudent and conscientious, but more the slaves of prejudices, who believe in *universal positive laws*; persons of both these descriptions will think differently from me concerning the above passage of Genesis; and if they should happen to have any share in the pronouncing of a capital sentence, it may be worth their while to remember, that that sort of homicide which proceeds from *rage, sudden frays, and drunken fury*, is altogether undefined by Moses, and left *in medio* between murder and chance-medley, or homicide strictly so called; and that, in such cases, therefore, on their own principles, and without prejudice to the force of Gen. ix. 6., human laws alone, as established in each particular state, ought to interfere.

Indeed we see from Exod. xxi. 17,—19., that when a man was wounded in an affray, and died of the wound; but was not killed on the spot, but became bed-ridden for a time; if he recovered so far as to go abroad with the help of a staff; the person, who had given him the wound that *subsequently* proved fatal, was entirely free from all inquisition, and criminal prosecution, and only incurred the expenses of the cure, with the payment of an estimated compensation for the injury and the pain he had occasioned his neighbour. But how the procedure was to be regulated, when the wounded man did *not* arise from his bed, or was killed on the spot, Moses leaves altogether undetermined; for the expression, *life for life*, (Exod. xxi. 23.) does not apply to the case of people quarrelling together, but to that of their injuring a

pregnant woman, or the fruit of her womb. Now, between the two cases, there is manifestly a very great difference. The pregnant woman is a *third* party, unconcerned in the quarrel; and if *she* loses her life, the matter merits quite another style of cognizance from what it would merit, were one of the two quarrellers to lose *his*; because he might have been the cause of the quarrel, or at any rate had done all in his power to deprive the other of *his* life; so that it depended merely on chance, and a cast of the dice, which of the two should be the slayer, and which the slain. Besides, pregnant women, and the fruit of their wombs, do, on account of their defenceless state, and because they are left entirely to the protection of the laws, deserve to experience that protection in a pre-eminent manner; and injuries done them ought to be punished with peculiar severity.

To return then to the consideration of murder.— Besides enmity, Moses deems it as essential to this crime, that it be caused by a *blow*, or a *thrust*, or a *cast*, (or whatever else it be that occasions it,) of such a nature, as that it must in reason be considered as what was likely to prove fatal; as, for instance, where it is perpetrated by an instrument, a deadly instrument. The passage in Numb. xxxv. 16,—21., where different ways of killing are enumerated, either has this meaning, or else it is nothing better than idle *verbiage*, of which it is quite contrary to its author's general practice and character, to suppose him guilty. Let the reader only peruse it in its full connexion with the context, and he will be sensible, that it is the design of Moses to discriminate between murder, of

which the punishment was to be death, and homicide, for which there was to be an asylum provided in the cities of refuge; and that, in pursuance of this distinction, he specifies as decisive proofs of murder,

1. The use of an *iron tool*, without any explanatory addition; it being obvious that, in general, any instrument of iron may prove fatal.

2. The use of a *stone*, or a *piece of wood*, with this addition, *such as may kill*. Here it is manifest that the word *may*, is not to be understood of a *mere physical possibility*; (for *that* is always *proved* whenever a man is actually killed; and the addition, in this sense, would be perfectly useless;) but that it is expressive of the constant probability of death ensuing from the cause in question.—For example, if a man throw a *small stone* at another, or strike him with a *thin rod*, from neither of which it could be previously supposed that the blow would prove fatal, although it unfortunately happens that, in the present instance, such is the case; this, even if done not from rage, but purely from hatred and enmity, is not murder, but only homicide.

3. *Striking a man, out of enmity, with the fist, so as to cause his death*, ver. 21. I have already remarked, that blows or pushes given with the hand, without any other instrument, may be, or may become, fatal; as, for instance, when they hit the temples, and, in some cases, the belly or the breast, &c. At the same time, a person, in striking, has his hand more in his own power, than any instrument whatever; and therefore, if a blow given out of enmity, (for here quarrelling and sudden passion are out of the question,) shall

prove fatal, it is presumable, that the person who gave it, meant it to be so; but allowing that he did not, but only meant, out of spite, to give a right firm blow, (which, however, is a private intention, which he can never prove to a judge;) still, as reason must have taught him that such a blow might very probably be fatal, so, unless he can clearly shew that it became so merely by an unfortunate accident, such as that of the other man's bowing to avoid it, and thus making the blow light upon a more dangerous part of the body than what was aimed at, it cannot well be regarded in any other light than murder; else, to the very great insecurity of men's lives, almost all murders will escape unpunished.

4. *Pushing a man, so as to occasion his death*; as, for instance, when I (not in a rage, which is not here in question, but out of hatred) push another person down stairs, and he breaks his neck; or when I push him off from a narrow footpath into a deep hole; or, to take an example truly Oriental, from the flat roof, on which it is usual to walk, down to the ground. In such cases, every one must be aware that he endangers his neighbour's life; and it is, besides, highly probable that he has it in view, not merely to hurt, but actually to kill him, when it happens, not in the heat of a quarrel, but out of sheer enmity.

5. *Throwing any thing blood-thirstily at a man, so as to occasion his death*, ver. 20. The design of the limitations here, is very manifest. Where the personal injury of his neighbour, to which a man was prompted by enmity, was of such a nature that, without anticipating every possible case of ill luck, it

could never have been suspected that it would cause his death; it was not to be deemed murder, but merely homicide.

The example related in my second *Commentatio ad leges divinas de pœna homicidii*, § 30. of a man killed by a tobacco-pipe, seems a very proper illustration of this case: only I have not there stated it with perfect accuracy, not having been able to find it in any book, and merely relating from memory, after the lapse of many years, what I had heard during my early residence at *Halle*. I now, however, know the circumstances of the story more correctly, and shall here give it in terms of the account which Mr. Counsellor *Beckmann* has had the goodness to communicate to me concerning it. It happened in the year 1738, at the village of *Kölpin* in Mecklenburgh. A peasant who was smoking tobacco, took the pipe out of his mouth into his hand, and, striking another peasant with the back of his hand in the face, the mouth-piece of the pipe, which projected between his fingers, went into his eye, penetrated to his brain, and occasioned his death within *six* hours. It was not, therefore, with the *hand* that he was killed, but with the pipe, an instrument that could never be considered as a deadly weapon. Besides, having been done in a passion, it was not murder, *homicidium dolosum qualificatum*; and the author of it was accordingly condemned only to suffer two months imprisonment, and to be fed on bread and water. The very same thing, however, might unfortunately happen from the influence of hatred. For, from a mere fillip on the nose, given him by an enemy, in order to affront him, a man might die, if he hap-

pened to be in such a posture as to fall backwards, and so fracture his skull. Of such a catastrophe, many examples might be given. Now, what Moses ordains in such cases is in itself equitable and rational; and it may even be still applied usefully in our law, if we are of the opinion, that the divine command, *Whoever sheddeth man's blood, by man shall his blood be shed*, in return, is still obligatory upon us. But although we do think so, we must not expound it more rigorously than Moses himself has done.

Besides the two crimes now illustrated, *murder*, which was capital, and that sort of *homicide* which incurred the penalty of confinement to a city of refuge; there were yet two species of homicide, to which no punishment was annexed. One of them was morally lawful; and the other, though morally unlawful, was nevertheless tolerated, on account of that hardheartedness which, in respect to *it*, formed a *point d'honneur* among the people.

1. If a man caught a thief breaking into his house by night, and killed him, *it was not blood-guiltiness*, that is, he could not be punished; but if he did so when the sun was up, it was *blood-guiltiness*; for the thief's life ought to have been spared, for the reason annexed to the law; (Exod. xxii. 2, 3.) viz. because then the person robbed, might have it in his power to obtain restitution; or, at any rate, the thief, if he could not otherwise make up his loss, might be sold, in order to repay him. That here, it is not the resistance made against a highwayman, who attacks us by day in the open field, that is spoken of, but merely that made against the attempts of thieves, is quite ob-

vious; and indeed the reason that accompanies the law, implies as much; for from the highwayman, whom I do not know, and whom the magistrate has not in his power, I cannot hope for restitution, or that he should be sold for a slave. Whether, on the other hand, the man who killed a thief after sun-rise, suffered death in his turn, or escaped with a less severe punishment, the law does not say.

From the analogy of this law, however, it clearly follows, that resistance was lawful in other cases. For if, in defence, or for the recovery of our *property*, we may put the *nocturnal* thief to death, who is not by any means going out to murder, but between whom and the *diurnal* thief there is merely this distinction stated, that, from the latter, our property is recoverable by a prosecution, but from the former, as being unknown, not so; still more must we be authorised, in defence of our own *life*, to resist, and even to kill, the robber who attacks us in the public highway, where we can have no protection from the magistrate; or the man who offers us any personal violence, or who attempts by force to violate our chastity. In this respect, the Mosaic law seems to coincide pretty nearly with the penal code of Charles the Fifth. Nor does it require, what we find sometimes enjoined in the Roman law, that a man should call three times to a nocturnal thief before he killed him. It was sufficient that he caught him in the fact.

2. The other case was of a different nature; and a species of homicide, which Moses appears on *moral* grounds to have disapproved, was yet, from *civil* considerations, and on account of the people's hardness

of heart, permitted, and incurred no punishment. For although the man who had the misfortune, undesignedly and unwittingly, to deprive another person of life, against whom he entertained no enmity, might, by the law of Goëlist, be put to death in his turn, by that person's nearest relation, with impunity; yet, according to the law of Moses, this was morally wrong: it was shedding innocent blood, and if the nation did not do its utmost to prevent such enormities, it brought blood-guiltiness upon itself, Deut. xix. 10. If, however, the *Goël* fell in with the innocent homicide, before he reached a city of refuge, and killed him, *while his heart was hot*, it was considered as done in justifiable zeal, (Deut. xix. 6. ;) and even if he found him, at *any* rate, without the limits of his asylum, and slew him, he was not punishable, Numb. xxxv. 26, 27. In these points, Moses yielded to the natural point of honour, or, as we may say, to the hardheartedness of the Israelites. This has been already illustrated in Art. CXXXVI. ; to which the reader is referred.—It was under this pretext, of his duty as *Goël*, that Joab, with a very different object in view, assassinated Abner. It was not, however, admitted; for he was regarded as a murderer; because Abner had slain *his* brother, in war, and in defence of his own life; and with regard to those who were slain in war, no right of blood-avengement was allowed to be exercised in peace, 2 Sam. ii. 19,—23. iii. 26,—34. 1 Kings ii. 5, 6, 28, 34.

Before concluding this Article, I must yet take notice of the expressions, *He has shed blood*; and, *it is blood*; which mean, it is regarded as blood-guiltiness;

and *it is not blood*; that is, it is not deemed blood-guiltiness, and incurs no punishment. The phrase which occurs in Numb. xxxv. 33. *The land is defiled with blood*, that is, become unclean and criminal in the sight of God, so that he will no more regard it as holy, and vouchsafe it his protection, but rather punish it, if ye let murder escape with impunity, the reader will find philologically illustrated in my *Commentationes ad leges divinas de pœna homicidii*, § 21, 22.

ART. CCLXXIV.

Of the Punishment of Murder.

§ 3. THE punishment of murder was death, without all power of redemption.

By the *Point d' honneur* of *Goëllism*, the nearest relation of the murdered, unless he chose to be considered as a mean fellow, felt himself bound, and by a very ancient usage, which Moses kept up and confirmed, he was empowered, to put the murderer to death, without ceremony, wherever he might find him, except in the holy places; even the magistrate was directed to afford him aid in this duty, and if, after investigation, the fugitive was proved guilty of real murder, to deliver him up to the *Goel*, that he might put him to death in his turn. (Art. CXXXVI.) Where no *Goel* appeared, or where he was dilatory in the pursuit of avengement, it became the business of the magistrate himself to punish a murderer; and thus we find that David deemed this his duty in the case of Joab, and that Solomon, in obedience to the intreaty of his

father, when on his death-bed, actually discharged it, by putting that murderer to death, 1 Kings ii. 5, 6. 28,—34. In the case likewise of bloodshed by a person unknown, the rulers of the nearest city were obliged to purify themselves and their city, by certain ceremonies, to be described in the sequel, and to make a solemn avowal, that they were ignorant of the perpetrator of the crime; Deut. xxi. 9. And, in order to make the Israelites still more vigilant in the discovery and punishment of murder, God, moreover, declared, that the land, wherein he wished to dwell among them, would become polluted by the shedding of innocent blood, and could only be re-purified by the atonement of the blood of the murderer, (Deut. xxxv. 33,—35.); in other words, he actually threatened to abandon the land, that is, not to protect it, nor to exercise his gracious superintendance over it, but rather to punish its inhabitants, if it should ever become common among them to overlook murderers, and let their crimes pass unpunished.

In order to render human blood still more sacred, and to represent murder to the view of the common people, who must ever be governed by sensible impressions, as a crime peculiarly abominable and unpardonable, it was ordered, that even an *ox*, if he had gored a man to death, should be stoned; Exod. xxi. 28, 29. In this passage Moses only mentions the ox; but this was his practice on many occasions, when he meant his laws to apply to other animals also; (Art. CLXVI.); and it is scarcely to be doubted, that where a *goat* pushed a child to death, or a *dog* bit any person, these animals were subjected to the same

punishment as the ox. This was in so far a punishment, or at least a loss to their owners; and it obliged every one to be careful in preventing his oxen, dogs, &c., from injuring his neighbours; as we shall have occasion to notice more particularly afterwards. But it was, at the same time, a seeming punishment on the animals themselves; and a relic of the law, formerly given to mankind while yet in their infancy, and in a state of extreme rudeness, and guided solely by their senses; *Whatsoever creature sheddeth human blood, be it man, or beast, by man shall its blood in like manner be shed*, Gen. ix. 6.; for, according to the tenor of the preceding verse, where beasts as well as man are mentioned, and where God had said, that from men as well as beasts, he would require the blood of man, not, indeed, *immediately*, but, as he expressly declares, by the instrumentality of men, to whom he assigns the duty of avenging it—the sixth verse is to be rendered not *whosoever*, but, *whatsoever sheddeth human blood*, so as to include beasts as well as man. This passage is more fully illustrated in my *Commentatio prior ad leges divinas de pœna homicidii*, § 15.; and I have only farther to observe, that to the list of those expositors, certainly not very numerous, who thus explain it, I here now add *Ephrem Syrus*, who, in commenting on ver. 5. quotes the law relative to the stoning of the ox, that gored a man to death.

That other nations besides the Israelites inflicted punishment not only on beasts, but also on inanimate things, for the shedding of human blood;—that *Plato*, philosophising upon laws, theoretically proposed this plan;—that *Draco* actually ordered the stone, sword,

or club, wherewith a man was slain, to be prosecuted, when the real murderer remained unknown;—that *Solon* caused the dog who bit any one, to be bound, and delivered over to justice;—that a *statue at Athens* which fell and killed a man, who had insulted it, was punished as a murderer;—and that even so late as the year 1540, a *sword* wherewith a murder had been committed at *Thoulouse*, was, by a sentence of the parliament, hung upon a gallows, because the murderer himself could not be discovered;—are facts which I have already stated in § 16. of my *Commentatio* just quoted. Here, therefore, the laws of Moses ordain nothing unusual among other nations, or with other legislators, although it be a departure from our customs. Whether the infliction of such allegorical punishments upon animals be expedient, (I do not here speak of the removal or death of dangerous beasts, such as the goring ox, or the biting dog, for that is *unquestionably* reasonable,) is a point which may admit a difference of decision, and depends on the national way of thinking: While the human race are in the state of infancy, or where murder and homicide have previously been crimes, as it were, of daily occurrence; in other words, in the circumstances wherein mankind were after the flood (*Gen. ix. 5, 6.*) and must always long continue, it is highly adviseable, and, indeed, almost indispensable; in order to introduce an abhorrence of bloodshed, and an idea of the sacredness of human life. Among a people not far removed from the natural state, and still strongly influenced by objects of sense, it is likewise useful, and always the more so, in proportion as their temperament is vindic-

tive. But when a nation have learned to reason, such a measure would be apt to excite ridicule, and, of course, be productive of effects the reverse of those intended. I certainly should not recommend the use of it here in Germany. Our very peasants are in most places too rational for it, and so little governed by sensible impressions, or attracted by ceremonials, that on such occasions, (which would not be the case in England, where the people are more curious to see criminals tortured,) even spectators might be wanting; many would regret the creature's fate, and others would laugh. And hence the same laws can never answer for all nations. Their differences in the way of thinking, render what is expedient in one country, hurtful in another.

ART. CCLXXV.

The taking of a pecuniary compensation for Murder was prohibited.—The right of Pardon, on the contrary, allowed and exercised.—The different Influence of these two Species of Remission, on the Security of Human Life and the Character of a Nation, considered.

§ 4. AMONG those eastern nations, where the right of blood-avengement is allowed, the *Goël* will sometimes accept from a murderer a certain sum of money, settled by a regular negociation, on the payment of which, all farther punishment is superseded. The acceptance of this pecuniary expiation, which the Hebrews termed כֹּפֶר, (*Kofer*) Mahomet, who was a

very short-sighted legislator, not only permitted, but, as we have stated in Art. CXXXIV., even recommended as an act of mercy, pleasing in the sight of God. But here the law of Moses is directly the reverse of that of Mahomet, and in Numb. xxxv. 31., expressly prohibits the remission of murder, on any such terms; declaring no atonement sufficient, but the death of the murderer. The design of this prohibition is obvious. The lives of men would be but badly secured, and more especially those of the poor against the violence of the rich, were it in the power of the nearest relation, (who might be either indigent or avaricious,) thus to screen a murderer from the punishment of death. And besides, in the acceptance of any such ransom for the blood of a near relation, a father, perhaps, or a son, there appears something so mean and indelicate, that the character of a people, among whom such a mode of satisfaction for murder becomes common, must either be shockingly debased, or, to say the least, they must be devoid of all delicacy and sensibility. I appeal here to the feelings of any reader. What would he think of the son, who should accept a recompence in money for his father's blood? Even among the Arabs themselves, in spite of the shameful doctrine of the Koran, this is reckoned among the two vices, which they denominate *La-im*, that is, *vulgar, canailleux*; and as to the light in which it appears to a German, unaccustomed to any such thing, even while under the power of his enemies, and unprotected by law, and where the recompence is offered in the handsomest manner, I have lived to see an example here in Gottingen, so very

very remarkable, that I must here relate it as a curiosity.

In the late war, a French soldier shot a shoemaker at Gottingen dead. The French officers, unacquainted with the noble way of thinking entertained by German women, even of the lowest station, at first conceived the whimsical idea of giving the widow satisfaction, by making the soldier marry her; but they were immediately told, that such a proposal would be rejected with abhorrence and contempt. In time of war the French are extremely remiss in the punishment of murder, so that the soldier escaped with life; but the officers were unanimously desirous to present the woman, as a sort of atonement, with the sum of 100 *great dollars*, (about 150 *rix-dollars* of our money) which, at that time, when the money was bad, and yet could be issued for good, was equivalent to from 300 to 400 *rix-dollars*, and, of course, a small capital to such a person. But here likewise, they shewed their ignorance of the *point d'honneur*, as felt in Germany, even by the meanest of the people; when they imagined, that 600 *livres* were the same thing to the wife of a shoemaker among us, as they would, perhaps, have been thought in France. In short, no persuasions whatever could prevail with the woman to accept the money; and, in my opinion, she acted nobly, and just as I should always wish to see my country-women act. The clergy attempted to influence her, but in vain; at last, however, she yielded to the proposal made her by our theological faculty, of assigning it over to the Gottingen orphan-house, and to that institution it was actually paid by the French

officers. Now, there was here nothing of an *artificial* point of honour—nothing of custom, ancient usage, &c. &c.—but the *natural point d'honneur* of that noble-mindedness, which holds money in contempt, where it ought to be so; accompanied, at the same time, with true conjugal affection.—But to return.

It does not, however, follow from the prohibition of pecuniary expiations, that the punishment of murder should in *no* case be remitted, nor the perpetrator pardoned. Between the remission purchased from the nearest kinsman, and the pardon granted by the king, or by the power invested with supreme authority, and as such enjoying the right of pardon, there is a three-fold distinction to be made of great importance.

1. A purchaseable remission exposes the lives of poor persons, and who happen to have poor relations, to very great danger; and if it be but *possible*, a rich man who has any temptation to commit a murder, will not be deterred by the fear of losing his life for it. But there can be no such risk, under a right of pardon, if it be rationally exercised; nor can even a criminal of the highest rank look for the forgiveness of a murder, from a wise and gracious sovereign, unless very peculiar circumstances should interfere, to recommend him to mercy.

When Lord *Ferrers*, in the year 1760, shot his steward, (trusting perhaps that his rank would secure his pardon) George II., notwithstanding the very earnest intreaties that were made him, did not pardon him; nor has any other nobleman, since that time, ventured upon a similar outrage; whereas, had the steward's nearest relation had it in his power to dispense with

the punishment, his Lordship's money might have been irresistible ; and then more such *villainies* (for this was a *villainy*, in the literal sense, having been committed against a defenceless servant) might have ensued, and the nation, by degrees, become accustomed to proceedings of the same nature. A pardon is granted, after the circumstances of the case are duly weighed ; but a pecuniary remission is the result of a private bargain, without any regard to circumstances at all. It is seldom that the king, or the person who has the right of pardon, will be partial to a murderer : but the man who receives money, thereby becomes partial, and to attempt offering it, is much the same as openly attempting to bribe a judge.

2. To an impartial sovereign, mistaken morality, or honour, will scarcely preach up the duty of remitting a murderer's punishment, where no weighty consideration interferes ; nor will they merely keep silence on the subject, but rather remind him of the nature of the office he holds ; and the sovereign who pardons a downright murderer, unless for very momentous reasons, must be ashamed of himself, if he has any feeling ; and if he has not, his subjects must despise him at heart, and foreigners will do so openly. If we only read the parallels which, on occasion of Lord *Ferrers* execution, were drawn, in the English newspapers, between George II. and a certain foreign potentate, who is said to have thrice pardoned a murderer of rank, for three most atrocious murders, we shall not require any farther illustration of this point, but be convinced that the king, who entertains becoming respect for the sentiments of the public, and wishes to avoid that punishment

which, in the voice of public disapprobation, reaches even a sovereign, will not be apt to abuse the right of pardon. It is quite otherwise where the matter rests with the nearest kinsman. A misconception of moral duty, or a stupid religion, such as is the Mahometan, in the point in question, may delude him into the idea, that he ought to be merciful and forgiving; and, among a people not vindictive, but magnanimous, honour itself may interfere, and represent to him, as the injured person, how noble it would be to intercede for the murderer; in either of which cases, men's lives would be but very imperfectly secured indeed.

3. Finally, when a man, for a sum of money, remits to a murderer the blood of his father, his son, his brother, or, in general, of his nearest relation, he is guilty of a very mean action. It looks as if he were the slave of avarice; and many, in such cases, actually shew themselves to be so. The character of the nation, at last, becomes tainted, where numerous examples of such baseness are exhibited. Whereas, in regard to the exercise of the right of pardon, the case is, as before, quite different; for it is obvious that pardons are granted *gratis*, and will not be *sold* by a prince, as if he were in want of money to relieve his hunger. If, for example, a king pardons the man who has stabbed another in a duel, it proceeds from consideration of the circumstances in which a duellist is placed, and of the unfortunate weakness and inefficiency of the laws.

That the Israelitish monarchs exercised the right of pardon, appears certain, from the history of Absalom's pardon, in the sixth. chapter of 2 Samuel. Had this

been nothing more than a father pardoning his son, it might be said, this was quite a singular case, in which paternal love set aside the law ; and this is the light in which expositors have commonly viewed it, and then made theological remarks, from the consequences of the pardon, as to its legality ; but let the reader attend to the whole story, and then judge for himself. Absalom, had, after long premeditation, insidiously perpetrated the crime of murder, indeed, of fratricide : and as his father would not pardon him, he was under the necessity of fleeing from his native country, and he found protection from his maternal grandfather, the king of Geshur. Joab, who wished to reconcile him with his father, but durst not attempt to intercede for him directly himself, endeavoured, first of all, to obtain for another pretended fratricide a pardon, which he might afterwards apply to the case of Absalom. For this purpose, a widow, whom he had previously instructed how to play her part, fell at the king's feet, and represented to him, in all the bitterness of grief, that she had had two sons, who quarrelled in the fields, while no one was near, and that the one had slain the other ; and that now the whole family were clamorous for the punishment of the slayer, and would thus, as she expressed it, *extinguish her last spark*. Now Joab, in planning this scheme, must have known that the king claimed, and sometimes actually exercised a right of pardon, else it would have been a very strange method indeed, for procuring Absalom's forgiveness. It would seem, that he only meant to move him by this fictitious tale, and, at the same time, to make him sensible, that it was neither repugnant to his

honour, as the father of the murdered Amnon, nor yet to his love of justice, as a king, to do that for his own son, which he would have done in the case of an entire stranger, where he was quite impartial. Nor was Joab deceived in his expectation : for David pardoned the pretended fratricide. The woman upon this, in a very piteous style, expressed her fears of the blood-avenger still circumventing and killing her son, notwithstanding the royal pardon ; but David told her, she had only to let him know of any person, who dared to speak *one* word on that subject, and he would take sufficient care, that he should not repeat it. Not satisfied, however, with this, she still importuned the king with her pretended fears for her son, until at last, he *swore* an oath, that he should be safe. She now, it would seem, had obtained what she aimed at ; for she instantly proceeded to apply her story to the case of Absalom ; telling the king that the whole people of Israel had been doing for him, what she had done, and had besought the king to pardon him ; but that he had hitherto acted like a cruel blood-avenger, and sought his blood. In short, she effected what Joab hoped for, the pardon of Absalom*.—No doubt, we might say, with regard to this fictitious case, of one brother slaying another in the field, that it might admit a question, whether by our laws it would have amounted to a *homicidium dolosum qualificatum* ; and

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* See more on this point, in the Second Edition of my Dissertations *De Pœna Homicidii* (in the first part of the *Syntagma Commentationum*) § 34,—37.

this would depend upon circumstances : but we see, at any rate, that it was a murder, to which, according to the common law of those times, the punishment of death was annexed, else it would not have required a pardon. The murder, however, to which the pleader made the application, was not only a *homicidium qualificatum* in the utmost sense of the term, but even a most insidious assassination, perpetrated at the distance of two years from the time of the injury that prompted it, and not by the hand of Absalom himself, but by his servants, when the wink was given them for the purpose. True it is, that Absalom had been deeply injured by Amnon in the dishonour of his uterine sister ; for which Amnon (and here we must say, David shewed too much lenity,) had not been punished : but then Absalom had not complained : and, at any rate, assassination was still assassination. Nevertheless, David, by his indulgence to Amnon, in not taking cognizance of his crime, had so great a share in the blame of all the misery to which it gave birth, that if he *had* the right of pardon, there were here, to all appearance, good reasons for exercising it.

That the kings thought themselves possessed of this right, is undeniable, from the story now related ; but, whether they were correct in thinking so, might, perhaps, admit of a question : nor can I bring forward any thing decisive on the subject. That there should exist a right of pardon somewhere in the government, appears almost obvious, because (as we have noticed in Art. X.) extraordinary cases may occur, which require pardon. Moses, it is true, says not a syllable

concerning such a right ; and it is as true, of course, that he has nowhere conferred it upon the king : but then this is neither wonderful, nor are we to draw any conclusion from it ; because he did not establish any king, but left the people with a mixed government, partly democratical and partly aristocratical. And under such circumstances it was better for him to say nothing concerning a right of pardon, unless he meant to condemn it, even in the most extraordinary cases ; because in the hands of the people it is a very dangerous weapon indeed, in consequence of their being too apt to exercise such rights in too arbitrary a manner, and under the influence of favour and partiality, often proceeding from causes utterly unaccountable. *Wilkes* might have committed as many murders as he pleased, had the mob of London (I do not say, *the people of England*—and, besides, as I write this in 1774, the case may now, in the course of six years, be very different) possessed a *jus adgratiandi* ; for they would have pardoned him them all. Under such circumstances, the most atrocious criminal, who happens to have popular relations, or who can only excite pity, or whose advocate understands the art, (and to courts, and for the purposes of deliberate justice, it is a most mischievous art,) of moving the passions, will be sure to escape with impunity. Where a government, therefore, inclines to democracy, it were better that the people (though they may have it) knew of no right of pardon, but regarded the laws as absolutely indispensable : for they will, notwithstanding, exercise it, when any extraordinary case occurs, and, in all probability, do so but too often. In the hands of a

king, however bad, it is not liable to such abuses. Perhaps, indeed, where a king is too weak and good-hearted, and wishes to be gracious *par force*, it may *sometimes* be abused; but still *never* so frequently, or so far, as in a democratical government.

From the perfect silence of Moses on the subject, and from the confidence with which it was believed in the time of David, that the kings possessed the right of pardon, even in cases of murder and homicide, we would almost be led to suppose, that it had been conferred upon them by the capitulations entered into between king and people, which were mentioned under Art. LV. At the making of the first of these, Samuel assisted, by God's command; and thus it would appear, that it was not contrary to the will of the Almighty legislator of the Israelites, in whose name Moses had acted, that such a measure had taken place.

ART. CCLXXVI.

The mode of punishing Murderers undetermined, and left in a great measure to the pleasure of the Goël.

§ 5. How the punishment of death was to be inflicted on a murderer, I find nowhere prescribed by Moses: and, therefore, it would seem, that it had been, in a great measure left to the pleasure of the nearest kinsman, whose duty it was to be its executioner.

According, indeed, to the spirit of the law in other instances, the *jus talionis* (as explained in Art. CCXL.) might seem to have operated here: so that the mur-

derer would have had to undergo the same death, which he had inflicted on the murdered; and this, no doubt, speaking of the matter merely in a theoretical way, might, by no means, be an improper law, in the view at least of deterring those who perpetrated murder, from being at the same time guilty of cruelties in doing so. But then it can never go beyond theory: for seldom, indeed, can the fatal blow, or wound, be accurately imitated, so as at the same time to prove mortal. In many cases we cannot know *what* the murdered person, who can no longer speak, suffered, nor *how long* he suffered; upon which, however, the matter chiefly depends; and, besides, a murder is sometimes perpetrated in such a painful and horrible manner, that were its tortures anticipated, and to be repeated in cold blood, they would be infinitely aggravated—to a pitch, indeed, disgraceful to humanity, productive of public disapprobation, and calculated at last only to harden the feelings of the people; and where these effects take place, punishments no longer attain their end. Let the reader call to mind, what I have already observed, when treating of the law of retaliation, concerning the high degree to which sensibility is increased, when the pain of blows, or any other punishment, hangs, as it were, over the criminal's head.

We must recollect too, that the *Goël* was authorized, and, by the *point d'honneur*, even obliged to put the murderer to death, wherever he found him: and as the latter, when attacked, would not probably always submit quietly to be butchered, and without making any resistance, the former, of course, could not requite

him like for like ; but would be glad to dispatch him with whatever wounds he could inflict, however speedy and painless his death might prove. This may often have taken place among the Israelites, even, where the murderer was, by a judicial deliverance, given up to the vengeance of the *Goël*. Such, at least, is the case in the East at this day, where relations are the executioners of capital punishments. For *Chardin*, in the Second Part of his *Persian Travels*, p. 300. relates, that a man, who murdered a young husband, because he would not join him in some shameful crime, was instantly attacked by his wife, mother, and sister, who dispatched him with daggers, and, out of revenge, drank his blood. And he also relates p. 109., that a man, who had killed his wife, having been delivered into the hands of his father-in-law for execution, the latter proceeded, as if he had been to slaughter an ox, holding him by the head, while the mother-in-law cut his throat with a knife.

The infliction, however, of exquisite and tedious torments had not, in all probability, been permitted to the *Goël*, when the magistrate delivered the murderer into his hands ; except, perhaps, in the case of his having himself inflicted them on the murdered ; in which case I certainly should not consider them, on the principle of the *jus talionis*, as by any means unsuitable to the spirit of the Mosaic law : and, indeed, without any reference to that law, it seems both natural and reasonable, that the murderer, who kills his neighbour by painful and exquisite tortures, should be punished with more severity than the man, who, without putting him to much pain, dispatches

him as quickly as possible. If no such distinction is made, we shall sometimes find that robbers will take pleasure in prolonging the tortures of the unfortunate victims of their barbarity: and the only means of deterring from the practice of such cruelties, is by regulating the punishment, according to the nature of the murder; and by observing the law of retaliation, if not with perfect strictness, which would, in some cases, be almost too horrible, at any rate, by approximating to it in similarity of punishment to a certain degree.

But what if there was nothing of all this in the case?—if the wound was very simple, and the murderer happened to be delivered up to a *Goel*, who had no inclination to butcher him? What happened in this case? He took off his head perhaps? I should scarcely think so; for this is a punishment which requires more skill and practice in executions, than the blood-avenger might happen to possess. It is more probable that he ripped him up, in the good Japanese fashion; for this was a process that seems to have been pretty common among the Israelites, and in which, of course, they were very dextrous; and as murders may have been frequently perpetrated in this manner, the punishment of ripping up would be a proper retaliation.—For farther particulars on this subject, the reader is again referred to § 27. of the Dissertation, *De pœna homicidii*, already so often quoted.

ART. CCLXXVII.

An Exception to the Severity of the Law, in the case of a Servant or a Maid.

§ 6. ALTHOUGH a man had struck any of his slaves, whether male or female, with a stick, so as to cause their death, unless that event took place immediately, and under his hand, he was not punished. If the slave survived one or two days, the master escaped with impunity: it being considered, that his death might not have proceeded from the beating, and that it was not a master's interest to kill his slaves, because, as Moses says (Exod. xxi. 20, 21.), *they are his money.*

In general, slaves have not equal political rights with free citizens in any country; and hence we find that, by the laws of the *Koran*, which Mahomet principally adopted from the more ancient usages of the Arabs, the retribution of capital punishment, in cases of murder, only takes place, when a free man kills a free man, or a slave a slave, but not when a free man kills a slave*. This alone, however, amounts only to a mitigation of the punishment, and not to absolute impunity. But it is farther to be observed, that it is the master who is here spoken of as beating his own slave, and that the instrument of chastisement is specified, viz. a stick; so that the law does not extend to the case of his punishing him in a manner utterly unusual, such as that, for instance, of running him

* *Koran*, Sura ii. 173.

through the body with a sword, or breaking his skull with an axe. In every nation where slavery is established, a master must have a right to chastise his slaves. If they are obstinate, and provoke him into a passion, his blows may prove fatal, contrary to his inclination; but a predetermination to kill a slave, will not be imputed to him; because slaves are worth money, and when they die he is a loser. And even if through passion he has exceeded the legal degree of discipline, he is sufficiently punished in the loss of his slave.

If the slave died under his master's hand, while beating him, or even during the same day, his death was, as Moses says, *to be avenged*; but in what manner he does not mention; nor can I suppose that it was by a capital punishment; because, on the one hand, the abovementioned law of the Arabs, who were so nearly related to the Israelites, stands in opposition to such an idea, and leads us rather to conjecture a more lenient procedure; besides, that, on the other hand, to have punished the master capitally, would really have been unjust. For if he has a right to beat, and to beat severely, (and without such a right, slavery can hardly subsist, particularly where captives taken in war are enslaved,) as there may be slaves who rebel under correction, and by their insolent language provoke him to such a degree that, in the excess of his rage, he may happen to give one of them such a blow with his stick (certainly not in itself a murderous weapon,) as to kill him on the spot; it were very hard indeed, that, for a mere excess in a permitted act, he should be condemned to atone with his life. I there-

fore suspect, that in such a case, the Israelitish master was subjected only to an arbitrary punishment, which, according to the variation of circumstances, was regulated by the pleasure of the judge.

The law, moreover, seems to apply only to perfect slaves, not to those of Israelitish descent; for the Hebrew servant, as we have seen in Art. CXXVII., was regarded not as a *servant*, but as a day-labourer, hired for six years, and previously paid for; and so did not lose his civil rights, nor durst his master harshly lord it over him; and consequently, the legislator did not, as in the case of the foreign slave, presuppose the existence of the master's right to beat him, and to beat him severely; although neither did he, by any express law, deprive him of it. A lawyer would perhaps say, he did not *know*, that the master can beat him; and if any misfortune ensued from his chastisement, it of course exceeded what, all circumstances considered, was usual. The servant's nearest kinsman, or, in other words, his *Goël*, who, in matters of blood, was so formidable a character among the people of Israel, would not, at any rate, forego his right, nor could the master, who had killed his servant, be secure from his vengeance, unless he fled to a city of refuge; and even then, whether he would be there admitted and protected, depended on the investigation of the circumstances of the case. I suspect, therefore, that masters were thus pretty much put on their guard against beating their Israelitish servants to death.—Some other particulars connected with this subject, but relating more immediately to the opinions of the Rabbins, and probably, therefore,

less interesting to most of the readers of the present work, will be found in § 29. of my *Commentationes de pœna homicidii*.

That the person who killed a thief in day-light was punished, but probably not capitally, has been already noticed in Art. CCLXXIII.

ART. CCLXXVIII.

Of the Expiation of an unknown Murder, and the People's Solemn Acknowledgment of their Ignorance of the Perpetrator.

§ 7. IN order to increase their abhorrence of murder and homicide, and to represent it as polluting both the land and the people ; or, in other words, in order not only to deter them from murder, but (much as informers, in other cases, were discountenanced,) to make every man, who knew any thing of a murder, disposed to give every information concerning it, there was, in the case of a murdered person being found in the fields, and his murderer remaining unknown, a certain ceremonial ordained, by way of expiation ; in which we can trace *some*, but yet not a perfect, resemblance to the purifications in use, in such cases, among other ancient nations. The statute relative to it is recorded in Deut. xxi. 1,—9. Such ceremonies must ever be adapted to the circumstances of the climate and the times ; but it would appear, in general, that the people of the more southern countries of Asia must be more influenced by sensible impressions than we are ; and that the more the world, or a nation is in a

state of infancy, in other words, the more ancient the times are, so much the more necessary do such impressions become.—I now proceed to detail the particulars of the ceremonial in question.

When a person was found murdered in the fields, his murderer remaining unknown, and suspicion attaching to no individual, the first thing done, was to ascertain, by a mensuration, to which city the corpse lay nearest; after which, the elders of that city, or, as we would say, the magistrates, were obliged to expiate the guilt of the murder in the following manner; not indeed by any peculiar offering, (for offerings could only be made in the sanctuary, Art. CLXXXVIII. ;) but by something resembling an offering; and they were at the same time obliged to make a solemn avowal of their utter ignorance of the murderer.

They had first to seek out a stream that never dried up throughout the whole year, and whose bed, of course, could never be plowed nor cultivated. Now, in Palestine, and still more in Arabia, there are many streams that are quite dry in summer, and many which, though flowing at that season, nevertheless dry up in October, and do not begin to flow again until November or December; and there are many dales of considerable breadth, which, though in the rainy season they convey streams of water, are at other times cultivated*. All such streams and dales were here

* To prevent the reader from thinking that I may here have made a mistake, I must make some remarks on the weather in these countries. There is no rain almost through the whole summer, so that many streams dry up; but those, of which the sources are in deeper-lying springs, hold out perhaps till September; in the course of

excepted, and the elders had to look out for a perennial stream, perhaps at a considerable distance from the city, and there to perform the ceremonial; which was, taking a heifer that had never worked, either in plowing, or drawing a yoke, and slaughtering her over the stream, in such a manner as that the water might float away the blood, and leave none of what represented the impure blood of the murderer, to pollute the land. This done, the elders were, in the presence of the priests, who accompanied them thither for the purpose, to wash their hands in the stream, over the slaughtered heifer, and say, *Our hands have not shed this blood, nor have our eyes seen it shed; forgive it, O God, to thy people whom thou hast redeemed, and impute it not as blood-guiltiness to Israel.*

Among us, a ceremony like this would be quite useless; for even upon the common people, at least in Northern Germany, ceremonies make no very strong impression. They are more given to reasoning, and rather disposed to censure them. But if a corpse be found in the fields, it is instantly made known by a variety of accounts from the *press*; and the neighbouring magistrates required to give information, if

which month, and of October, there is usually *some* rain, but so little, that it cannot reach the springs; and hence still more of the streams are drying up every day; so that in the month of October none are to be found, except those that are truly perennial. With us, there is generally more rain in October; but in dry seasons, our brooks are generally smallest in September, if not quite dried up. The reader *here*, may recollect the state, in ordinary years, of a stream in the immediate vicinity of Gottingen; that, namely, which runs between our city and *Wehnde*.

suspicion of having been the perpetrator, lights upon any particular individual. No such thing, however, could then take place, in those times, when the world had neither printing nor newspapers, nor any of the modern means of communicating intelligence; and least of all, under a democratic government, in which, moreover, every city was in some measure a free republic, and not so closely connected with the rest, as is the case with us. These ceremonies, therefore, were then useful, in contributing to place men's lives in greater security.

ART. CCLXXIX.

The Punishment of unintended Homicide was Relegation, and Confinement in a City of Refuge.

§ 8. FOR an act of homicide, that took place accidentally, and without any injurious design, there was appointed a punishment, not only necessary, according to the *then* notions of the point of honour, for the security of the unfortunate manslayer; but likewise useful for the better prevention of all such rash and imprudent actions, as might endanger the lives of other men. Whoever had the misfortune to deprive his neighbour of life, either by his axe slipping from off the helve, or by any similar accident, was, in order to avoid the vengeance of the *Goël*, who had a right to kill him, obliged instantly to flee into one of the six cities of refuge, and there to remain, until the death of the high-priest; when an amnesty of the transgression took place, and the right of blood-avenge-

ment ceased. But if at any time previous to this event, he went beyond the limits of his *asylum*, that is, beyond a thousand ells from the city-walls, the Goël, if he met him, had a right to kill him, without incurring any punishment. The statutes on this point are recorded in Exod. xxi. 13. Numb. xxxv. 9,—35. Deut. xix. 1,—13.

This was not a very pleasant predicament to be placed in. In fact, it was a sort of *relegation*, or exile from his home, and the more attended with inconvenience and disadvantage, that, in general, every Israelite had his paternal field in his possession; which, of course, he could, in such a case, no longer cultivate himself, but would be under the necessity of selling its crops to another, to the loss both of the profits he might derive from his own labour, and of the money that he might otherwise be in the way of making. In fact, he was obliged to leave house and home, and to hire himself out in some one of the six sacerdotal cities, which were the places of refuge, and there labour for his bread, instead of consuming the fruits of his industry with his family, and among his relations.—Nor could the society to be found in such a place, and consisting of entire strangers, and persons of quite a different class, or of fugitives, like himself, from different corners, be very agreeable; and indeed, if I may judge from my own feelings, that species of confinement which precluded him from venturing more than a thousand ells without the walls of a little town, unless at the risk of his life, could not fail to be the most vexatious circumstance of all. So that even his security in this asylum was, without doubt, most irksome;

and equal to a severe punishment ; and I suppose, those who were obliged to put up with it, would be very apt most heartily to wish the high-priest at his life's end.

The state of things, however, really rendered compliance with these disagreeable restraints absolutely necessary ; for the unfortunate manslayer, in consequence of the *point d' honneur* of *Goëlism*, could not have been safe out of a city of refuge, whatever provision besides the legislator had made for his security. (Art. CXXXI.—CXXXVI.) In order, therefore, to prevent new acts of *real* murder, and homicide, which the laws could not punish, Moses was under the necessity of punishing *accidental* homicide with exile in a city of refuge ; just as in Portugal, when a man injures his neighbour in a way that, according to the point of honour in that country, requires to be avenged, he must make his escape, and go abroad, if he wishes to save his life, because no man, in such a case, is allowed to forgive.

Thus far, therefore, relegation to a city of refuge was merely a matter of necessity ; but it would appear that the legislator applied this necessity to farther purposes, and to the better prevention of all such inconsiderate proceedings, as might be likely to endanger human life. Confinement within the narrow limits of an *asylum* is no doubt a severe punishment for a mere piece of inadvertence, which happens to prove fatal to a neighbour ; but according to the national ideas of honour, it was impossible to make it milder. Among us, perhaps, such inadvertences are but too slightly punished ; and hence we see too many instances of unfortunate and fatal accidents, particularly by playing with

fire-arms.—But whatever was the design of Moses here—whether to punish the manslayer for his inadvertence, so sensibly, as to make *all* cautious and considerate; or whether to prevent all acceptance of pecuniary expiation of bloodshed, which he expressly disapproved; or again, whether it was that he conceived that the manslayer, even though he *paid* such an expiation, would never be in perfect security;—he prohibited all pecuniary negotiation for liberty to him to return to his home; and therefore such a man, if he wished to live in safety, had no other alternative than to submit to exile in a city of refuge, until the death of the high-priest; Numb. xxxv. 32.

ART. CCLXXX.

Of inexcusable Carelessness, as chargeable with the blame of another Man's Death.

§ 9. WHEN a man, without having himself given the fatal blow, was, in consequence of gross carelessness, the cause of his neighbour's death in any other way, he became liable to the cognizance of the law. The principal passage relative to this point, is that concerning *the pushing ox*, in Exod. xxi. 28,—32.; according to the analogy whereof, it is probable, that procedure was also regulated in the case of any other beast previously known to be dangerous, such, for instance, as a biting dog not taken care of by his owner, and occasioning a man's death. I shall here give the words of Moses himself, because it is impossible to state the case more briefly and distinctly. *If*

an ox push a man or a woman, and death ensue, the ox shall be stoned, and its flesh shall not be eaten ; but the owner can not be impeached. (He suffered, however, the loss of his ox.) *But if the ox has been before given to pushing, and this has been notified to his owner, and he has not kept him secure ; the ox, if he gore a man or woman to death, shall be stoned, and the owner shall also die.* *If, however, a ransom-price be imposed upon him, he shall, for the redemption of his life, pay whatever sum may be demanded.* *The law is the very same, if the ox has gored a child, whether male or female.* *But if he has gored a slave, either male or female, his owner shall pay to the slave's master thirty shekels of silver, and the ox shall be stoned.* Here again, it may be remarked, by the way, that the life of a slave was not, in point of value, placed on a footing with that of a citizen.

In the verses immediately following, Moses ordains, that the man who *does not cover his cistern*, shall, if an ox or ass fall into it, and be killed, pay for him to the owner, and have the dead beast to himself. What was here to happen, if a man was killed by falling in ; whether, if a slave, he was paid for at the rate of *thirty shekels*, as before ; or, if a free man, the owner of the cistern had to answer for his life with his own, with the privilege, however, of saving himself by a ransom, —cannot be discovered from the analogy of the law, because the case here is not parallel. For a man may take heed, and not tumble into an open cistern ; but a beast cannot. No doubt, the owner of an uncovered cistern had to answer very seriously for his carelessness in the case of such fatal accidents ; but it would appear, that Moses left the case, in so far as it re-

garded the death of a man, and which, indeed, might be of all cases the most dubious, to be decided afterwards, according to the judgment of legislative authority; because it could hardly occur in the wilderness, where the people yet wandered about, without possessing any property, and, of course, without any of them having cisterns of their own. It is only the clearer case of the animal, that he previously decides; leaving the decision of the other to future legislators, according to the circumstances which they might have laid before them, when the people were settled in their land.

The injunction in Deut. xxii. 8. to raise a parapet around the roof of a new-built house, that people might not tumble down, has been already considered in Art. CCXXIII. If a man neglected to raise such a parapet, and any person fell down, and was killed, the law declared that the owner had brought the guilt of blood, not upon himself indeed, but upon his house. Whether, and to what extent, this offence was to be cognizable by the secular magistrate, Moses, in like manner, left it to future times to determine; when the Israelites should have houses, which at present they had not in the wilderness. But his very silence on the points now mentioned, is just of that sort which we might expect, in the case of laws given in the wilderness; and it is to be numbered among the internal evidences of the high antiquity and authenticity of the Mosaic writings.

ART. CCLXXXI.

The Punishment of Corporal Injuries.

§ 10. THE statutes relative to corporal injuries are recorded in Exod. xxi. 18,—27. Lev. xxiv. 19, 20, 22. Deut. xxv. 11, 12. and include the following particulars.

If the injury happened in consequence of a fray, where it may always naturally be supposed that both parties are to blame, even though the beginner of the quarrel, or the first aggressor, *was* known, it was to be considered, that when a fray was once begun, he had to defend himself, and had not either his blows or his passions in his own power; and therefore no farther punishment was inflicted on the injurer, than that of being obliged to pay the expenses of the other's cure, and of his *bed*, that is, probably, the loss of his time arising from his confinement; Exod. xxi. 18, 19. This is a much milder punishment than our laws usually inflict in such cases.

If, however, a pregnant woman was hurt, in consequence of a fray between two individuals, the matter was taken up much more seriously; in the *first* place, because she was no party in the fray; and, *secondly*, because the law must protect a woman in that helpless situation, and also the fruit of her womb, with pre-eminent care. If the consequence only was her premature delivery, the author of her misfortune was obliged to give her husband a recompense in money, according to his demand; but in order that

his demand might not be unreasonable, if the payer thought it too high, it was determined by the decision of arbiters. On the other hand, if either the woman or her child was in any part hurt or maimed, the law of retaliation operated, in the manner stated under Art. CCXL.; *an eye being paid for an eye, a tooth for a tooth, a hand for a hand, a foot for a foot, a burn for a burn, a wound for a wound, a bruise for a bruise*; and, as we have seen in Art. CCLXXIII. it went the length of even *life for life*; Exod. xxi. 22,—25.

If one hurt another, without having for an excuse that it happened in a fray; in other words, by either assaulting him openly, or by any insidious attack, the law of retaliation operated likewise in this case to the full extent; Lev. xxiv. 19, 23. It is observable that on occasion of giving this law, Moses expressly declares that both foreigners and natives were to have equal rights in this respect; and that therefore, if an Israelite assaulted a foreigner, the law of retaliation was to operate in the very same manner, as when the case was reversed. This is contrary to the usage of many Oriental nations, and more conformable to ours.

This equality of the law, however, did not extend to slaves, because a master had a right to beat them; and our blows are not always in our own power, but may, contrary to our intention, hit our slave in the eye. If, however, a master thus knocked out the eye or tooth of a slave, in return for this injury, the slave received his freedom; but no farther punishment was inflicted on the master, Exod. xxi. 26, 27. We have already remarked, in Art. CXXVI., that this rule was probably applicable to the mutilation of the other

organs of the body, and that the eyes and teeth are merely specified as examples.

In Deut. xxv. 11, 12. mention is made of a practice, at once extremely dangerous, and altogether repugnant to decency, which must, however, have been very common among the Israelitish women, when they wished to relieve their husbands, on seeing them overpowered, in a fray, by their adversaries. They laid hold of the victor by the *Verenda*, and thereby compelled him to let go the vanquished. To put a stop to this indecent outrage, Moses ordered it to be punished by chopping off the hand.

CHAPTER V.

CRIMES AGAINST PROPERTY.

ART. CCLXXXII.

Restitution, or Slavery, the Punishment of Theft.—General Observations on this Law.

§ 1. ON the crime of theft, Moses imposed the punishment of *double* (and, in certain cases, still *higher*) restitution; and if the thief was unable to make such restitution, he was ordered to be sold for a slave, and payment to be made to the sufferer, out of the purchase-money, Exod. xxi. 37. xxii. 3.—Before I proceed to speak of the more special applications of this law, to the different cases wherein restitution was to be made, from *two* to *five* fold, I beg leave to offer *two* general remarks on this species of punishment.

I. In the *first* place, while I think on theft alone, and not as preceded by actual murder, I must look upon restitution as the most equitable and rational of all punishments, and what will most effectually deter from the commission of the crime, if it can only be effectually enforced; that is, if either the thief have property, or if slavery be established. It is much more proportioned to the nature of the offence, as well as much more terrific, than the punishment of

death, which we so often inflict upon it. This is an idea which the Persians, whose law on this subject pretty much resembles that of the Israelites, expressed to *Chardin*; and I shall first let *him*, or rather *them*, speak for themselves, and then take the liberty to annex my own independent opinion concerning it.

Speaking of a great theft, for which restitution had been made, *Chardin* thus proceeds: *C'est la bourse in Perse, qui porte la peine de tout. Il n'y a que les derniers des miserables, qu'on châtie corporellement: ceux qui ont de quoi se tirent de toute affaire. Les Persans disent, qu'il faut prendre les mechans par cet endroit, où ils sont si sensibles, et que s'ils les punissoient autrement, il se commettrait mil fois plus de mal: car, disent ils, les gens perdus sont peu sensibles aux peines corporelles, parce qu'elles ne durent qu'un moment: ils ne le sont point à l'infamie, qui les accompagne, parce qu'ils n'ont point de vertu; mais ils le sont infiniment à la pauvreté, et à la misère, à cause que la ressource en est longue et malaisée, sur tout dans les Pais policez, comme celui ci, où les vols sont à la verité assez faciles à commettre, mais tres difficiles à couvrir*.*

Let us only consider the motives that in general make a man a thief, without reference to any of those *artificial* points of honour, such, for instance, as the payment of gaming debts, that drive unfortunate wretches to the highway. It is seldom from real hunger, and which he cannot otherwise keep at a distance, that a man steals; else would he, in ordinary cases,

* See *Chardin's Travels*, part ii. p. 104. edition of 1711, in large 8mo.

deserve to escape without any punishment; in conformity to the indulgence manifested to thieves of this description, by the *criminal code* of Charles the Fifth; —that truly venerable monument of legislative wisdom and clemency, of which Germany has reason to be proud. But although we might be inclined to punish theft, committed from hunger, capitally, it would be of little avail; for any man would prefer being hanged or beheaded, to dying of hunger by inches. It is quite a different thing whether, in cases of extreme famine, or during a blockade, or after a shipwreck, we have a right to shoot, or stab, and then perhaps to roast and eat, the man, who compels us to do so for the preservation of our own lives, and who wishes to seize the food belonging not to him, but to us; for in such circumstances, this is nothing more than the defence of our own property, and allowable by the very same law, which gives a hungry dog a right to worry, even to death, another dog who attempts to seize his morsel. But of rare cases like this, which always form exceptions, and which, when they do occur, require to be regulated by the police, laws say as little, as of what is to happen at the last day. Hunger, therefore, as a prompter of theft, may be put out of the question.

In general people steal, I will not say from avarice, for thieves are generally spendthrifts, but from the desire of gain, or from the love of luxuries, and because they wish for more of them than they can earn by industry, or from aversion to hard and unvaried labour.

Now, to theft from the desire of gain, legislative

wisdom cannot possibly devise a better counter-check than that of manifold restitution, to be regulated according to the variation of circumstances, and to be always increased in proportion as the difficulty of detection is greater, and, of course, the chance of the thief securing what is stolen, in such and such a number of instances, before *one* theft be found out. *Chardin* remarks, in the passage above quoted, that, in his time, it was become extremely difficult to steal in Persia, without detection, because every body cautiously avoided buying any thing, in regard to which he conceived it but barely possible, that it might have been stolen. This, no doubt, proceeded from the dread of pecuniary punishments, which the greedy magistrate regulated not by the greatness of the crime, but by the weight of the culprit's purse; and the consequence was, that theft became very rare, because the probable amount of the restitution to be exacted, was a formidable consideration to the thief. For the man, however miserly, or greedy of gain he may be, who thinks with himself, *For every dollar I steal, I may have two to repay*, will, from motives of economy, let stealing alone; indeed the true miser will be apt almost to shake off his hand, to prevent even the dust of any suspicious article from sticking to it; and though God will not perhaps reward him in *heaven*, for this scrupulous conscientiousness in keeping the eighth commandment, because it is not virtue; our property on *earth* will nevertheless be safe from any danger of his invading it.

The idler, again, who is averse from working with his hands, will perceive that, if he steal, slavery awaits

him; in which he will be compelled to work, by the power of blows; and therefore, that he may not have to submit, as a slave, to triple or quadruple labour, he will do something, as a free man, to earn his bread.—The same dread of slavery will operate also upon those who wish to live luxuriously; and even upon the vigilant *Chevaliers d' Industrie*, who care not a fig for their lives, but, above all things, love liberty, and those vagrant and idle habits, which give them numberless opportunities of labouring with as much industry as they chuse, in their own vocation. A man of this last description will, at any rate, rather steal in a country where he is sure of the gallows, than where he will be condemned to slavery. It is no objection to this doctrine, that the punishment of *transportation*, which, by the laws of England, was annexed to certain sorts of theft, and which subjected the culprit to servitude for the first seven years, if he could not pay his passage, did not prove sufficiently effectual; for the punishment of servitude in America, wanted the most essential of all requisites for rendering any punishment answer its proper purpose,—*it was not visible in England*, and therefore did not operate sufficiently, *in terrorem*; and besides, the culprit was only carried to a country, to which multitudes had an inclination to emigrate, of their own accord, and where he would suppose he might have it in his power to make a great fortune; never thinking, however, of the hardships to which he would infallibly be subjected, if he landed in it without money. Seven years slavery, on the other hand, in England itself, would have had more

effect than even the gallows, with which the highway-man may there lay his account at last.

The punishment even of manifold restitution, is, besides, so little severe, that it will be regularly put in execution; whereas the punishment of death, which, among us, is annexed to so many kinds of theft, often deters from prosecution, especially in cases of house-theft; or, at least, because it is better to let a hundred thieves escape, than hang one innocent man, it makes trials so difficult, that many notorious offenders are always sure to be acquitted.

The milder punishment of restitution for theft, is attended with this farther advantage over our capital punishments, that a thief will not be so apt to proceed to murder; whereas if he knows that his crime may cost him his life, should any of the members of a family be so unfortunate as to awake and surprise him, he will not spare them. The very same remark is applicable to highway-robbery. In *Chardin's* time, murder along with theft was scarcely ever heard of; which is to be ascribed, not, as he thinks, to the more humane manners of southern nations, but to the superior mildness of their punishments.

And now, the reader will perhaps expect, in the *second* place, to find me preaching it up, as an incumbent duty on us Christians, to imitate here the clemency of the Mosaic laws, and to abolish the punishment of death for theft. But though such laws are, along with slavery, most efficacious, it is manifest that they will never answer in a country wherein perfect and severe slavery is not established.

Nay, where restitution is to be the punishment of theft, it is plainly presupposed that a thief must always have some property, (at any rate his own person,) whence he can make restitution. Now, among the Israelites, he generally *had* some such property, exclusive of his person; for, by law, every man had his paternal field, the crops of which might be attached. Then, again, in consequence of the law of slavery, he might sell his wife, his children, and at last himself, to raise money; and in the case of theft, it would appear that this might be done, not for *six* years only, to which period the sale of a Hebrew servant was limited; but for as long a term of years as was requisite to make up the amount of the restitution adjudged, and, of course, perhaps for life.—*We* have nothing like complete slavery, and where we see any appearance even of imperfect slavery, we strive to abolish it; and we see those countries flourish, in which it is abolished. It is therefore to be hoped, that we will never, out of mere clemency to thieves, be anxious to re-establish the hard slavery of ancient times; and, of course, our punishments for theft must be of a different nature from those of ancient nations.

ART. CCLXXXIII.

The Punishment of Theft was probably more severe before the time of Moses, particularly in Egypt.

§ 2. II. THE *second* general remark which I have to make upon the Mosaic statute respecting theft is, that the punishment annexed to that crime by Moses,

which was so mild, and yet so effectual, and so well adapted to the circumstances of his people, does not appear to have been retained from any more ancient consuetudinary law, but to have been instituted in the place of one more severe, that was in use in Egypt, and perhaps in Palestine likewise. The story related in the xlvth. chapter of Genesis, seems to insinuate as much.

Joseph, whom his eleven brethren knew not yet as their brother, but only as the all-powerful prime-minister of Egypt, and who had a great inclination to detain his uterine brother, Benjamin, under a good pretext, without letting the rest of the brothers know his design, or suspect the connection*, made the silver cup, out of which he himself had drunken, when they sat with him at table, be secretly conveyed, at their departure, into Benjamin's corn-sack; on purpose that, for this theft, which could thus with such probability be charged upon him, he might, first of all, have it in his power to detain him as a slave. The Egyptian law, therefore, could not then, like that of Moses afterwards, have merely required two-fold restitution, as the punishment of theft; for although, from the rarity of silver in those days, a silver cup may have been more valuable than a gold one is at present, yet the eleven brethren, and their father, with whose circumstances Joseph was well enough acquainted, were sufficiently opulent to have been able to pay the cup ten times over. Besides, Joseph had himself played silver into their hands, to greater

* See the Notes to this chapter, annexed to my German translation

amount probably, than the weight of the cup, and silver too, to which, though he might have kept it, he renounced all claim ; namely, the price of two cargoes of corn, which they had carried out of Egypt*. He had not, however, it would seem, the most distant apprehension of their having it in their power, by any existing law, to employ it for the purpose of procuring, by a double, or a higher restitution, an exemption from the consequences of their crime. His steward was ordered, soon after their departure, to pursue them, and charge them with stealing the cup ; and as we find, that in answer to this charge, their very first proposal was in these terms, *With whomsoever of us the cup is found, let him die, and let all the rest be my lord's servants* ; we must conclude, that the law, as they knew it, required something more than even multiplied restitution, and that even the punishment of death was not unheard of. The steward, in obedience to his master's orders, did not *altogether* accept their proposal, but only *thus far*, that the person in whose possession he might find the cup, should be his servant. On proceeding to search, the cup, to their universal grief, was found in Benjamin's sack. To offer restitution, even ten-fold restitution, and in the mean time, a hostage, until it should be made good, (although, indeed, they had actually silver enough in

* For the price of the *first* cargo, which had been slipt into their sacks, they had brought back, in order to pay it again, but it was not accepted ; and now, in like manner, the price of the *second* cargo had been put into their sacks, and thus distributed among them, as their lawful property.

their sacks, to which no claim had been made,) never once came into their thoughts; and, therefore, there could be no such common law; but, in their embarrassment, they offered themselves *all* as slaves, because without Benjamin, they durst not return to their father; yet neither was that offer accepted.—With the moving scene that followed I have here no concern; only thus much we see, that the Egyptians had inflicted severer punishments on theft than the law of Moses inflicts. The political evil of slavery existed among them; but instead of making it, as we have seen that it *may* be made, subservient to the establishment of a most excellent alternative in the penal law of theft; and enacting, *that the delinquent should have his choice of either slavery, or two-fold restitution*; they inflicted on that crime the punishment of death, which, under such circumstances, was too severe.

ART. CCLXXXIV.

A more particular specification of Restitution, according to its several gradations, as applicable to the different circumstances of Theft.

§ 3. I now return to the consideration of the Mosaic statutes respecting theft.—The most gentle punishment, then, of this crime, when not voluntarily acknowledged and pointed out by the thief himself, was, if no circumstances of aggravation interfered, *two-fold restitution to the owner*, who thus obtained a profit for his risk of loss; Exod. xxii. 3. This punishment was applicable to every case, in which

the article stolen, remained unaltered in the thief's possession ; that is, was neither sold nor slaughtered ; and he was considered as only standing on the lowest step of the ladder ; where repentance, and the restitution or abandonment of his prey might always be hoped for.

If, however, the article stolen was already alienated or slaughtered ; and, of course, the apologetic conjecture,—that he might yet, by the impulse of conscience, be disposed to restore it, as soon as he found an opportunity to do so, unnoticed and unexposed—no longer possible ; the punishment was more severe ; being *four-fold restitution*, in the case of a sheep, and probably also of all other animals, except in that of an ox, where it was *five-fold*, Exod. xxi. 37. : this higher degree of punishment being annexed to the theft of oxen, for the purpose of more effectually securing their owners against the danger of having animals, so indispensable in the rural œconomy of the Israelites, killed when stolen : for, as the reader will recollect, from some of the preceding Articles, the Israelites used no horses in their husbandry, but only oxen. The ox did every thing on their farms. He plowed ; he threshed out the corn, either with his feet, or by being yoked to a threshing-wain ; and he drew it when threshed to the barn. If, therefore, the theft of an ox was more severely punished, than that of any thing else, it was upon the same principle, on which, in some places, an increase of punishment is inflicted on the crime of stealing from a farmer his plough, or any part of the apparatus that belongs to it. It is amusing, however, to find some expositors

supposing, that the reason why the ox was to be restored *five-fold*, and the sheep only *four* was, that the one was dearer than the other; just as if the proportion between *one* and *four*, were not the same as between *one thousand* and *four thousand*.

If the thief had nothing to pay, he was sold as a slave, (Exod. xxii. 2.); probably for as many years as were necessary for the extinction of the debt; and, of course, perhaps, for life; though, in other cases, the Hebrew servant could be made to serve only for six years. (Art. CXXVII.) But it will here be asked, "Could a purchaser be looked for? Who would have chosen to buy a thief for a servant?" Among us, no doubt, nobody would chuse to do so; for we have only hired servants, over whom we cannot lord it with such severity, as would be requisite with a thief; and if they steal, we must directly apply to the magistrate for justice against them as our equals, and, therefore, we generally prefer discharging them at once. But where rigorous slavery is established, the master himself can inflict punishment on his slaves, and sufficiently deter them from theft by blows; or he can lock them up in work-houses, where there is nothing to steal, and where stolen goods cannot be concealed; and which, though as public institutions, they may be very expensive and uneconomical, yield a profit, under the superintendance of a private master. For then meat and drink are generally supplied them, that profit *may* come out.

If a thief, after having denied, even upon oath, any theft wherewith he was charged, had the honesty to retract his perjury, and, from the impulse of con-

science to own his guilt, instead of double restitution, he had only to repay the amount stolen, and one-fifth more; Levit. vi. 1,—5. Concerning the trespass-offering ordained to be made in such cases of perjury, I have already treated in Art. CCXLIV.

With regard to the case of theft committed from pure hunger, we find in the Mosaic laws no ordinance, similar to that which I already noticed with approbation, in the penal code of Charles V.; but it seems to be obvious from the analogy of the laws mentioned in Art. CXXX. and CLXI., that the man who stole out of real hunger, had his fault overlooked. The laws of hospitality, which are very powerful among the Orientals, would, at any rate, say, *If he is a stranger, or a traveller, thou shouldest give him food*; nor, indeed, are the people of the East very apt to neglect this duty. At the same time, it would appear, that in Solomon's time, the man who stole from hunger had been punished; Prov. vi. 30, 31. In this passage, however, Solomon certainly does not speak of the case of a man, who has absolutely no means whatever of appeasing the calls of hunger, but theft; for it makes him, besides manifold restitution, give up the *whole substance* of his house; so that he must be supposed to have had *some* property belonging to him.

ART. CCLXXXV.

The Punishment of Theft, in Solomon's time, augmented.

§ 4. THE passage just quoted from the book of Proverbs, farther shews, that in Solomon's time, the punishment of theft had been augmented. In the days of David, no other than the Mosaic punishment was known, even when circumstances of aggravation were to be taken into account. Thus, in a case represented to that king, not of simple theft, but of violent robbery, where a rich man took by force from a poor man, his only sheep, which he kept and tamed for his amusement, and not with any intention of killing it; much as David's passions were moved at the detail, he denounced against the offender nothing more than fourfold restitution. For if the reader supposes, from the account of this case in 2 Sam. xii. 1,—5., that David condemned the thief to suffer a double punishment, *first*, that of death, and *then*, that of quadruple restitution; he will see, from the conclusion of Art. X., that it appears to me, at least, in a different light. Instead of this, however, under the reign of Solomon, we read of *sevenfold* restitution, as a matter quite well understood, even in that case of theft, which of all others admits the best excuse, viz. when it proceeds from hunger. For he says in Prov. vi. 30, 31. *We do not overlook it to the thief, that he steals to fill his belly, when he is hungry. If he be caught, he must pay sevenfold, and even give up all that he hath in his house.* Yet, after all, this increase of

punishment was not *then* to be wondered at. For in process of time, so many ways are devised of concealing theft, and parrying the charge of it, that those moderate terms of restitution which were once sufficient to deter from this crime, prove at last but an insufficient counterpoise to the hope of committing it without detection, and of thus abundantly retrieving any loss that the necessity of occasional restitution may cause. Stolen goods can be much more easily secured against discovery, in a country where there are great cities, and where extensive commerce is carried on; both which circumstances took place under Solomon. Add to this, that commerce requires greater security against thefts, and yet presents additional temptations to thieves; whom we nowhere find more numerous than in trading cities, and at fairs. I am therefore so far from wondering at this sevenfold restitution, which was introduced in the time of Solomon, that I should rather, considering the increase of trade and luxury, have expected, that the punishment of theft would have been still more augmented.

ART. CCLXXXVI.

No Statute relative to Highway-Robbery, or Burglary.

§ 5. CONCERNING highway-robbery and burglary, whereby the life of the person robbed is endangered, if he does not surrender his property without resistance,—a circumstance which aggravates the crime far beyond that of simple theft,—I find nothing mentioned in the Mosaic laws; for although the passage

in Exod. xxii. 1, 2. speaks of *breaking in*, yet this may take place where there is no intention of violent robbery, but only of secret theft. Here, therefore, there is a chasm in our knowledge, and in the written law of Moses, which, however, must have *then* been easily supplied from the law of usage. But in fact, in the wilderness, where the people lived so close together, violence in robbery could not often be possible; and that may be the cause of this chasm. With regard to foreign *banditti*, who attacked travellers, or made inroads into the land, there was no occasion for any special laws; because against them the laws of war operated, which permitted the infliction of far more unlimited punishments than we dare to inflict on our fellow citizens; for with the latter, we must fix by law what punishment they have to expect, when they commit any crime, and we have no right to punish them beyond the law. It is this, indeed, which makes the distinction between a citizen and an enemy; who is a person not under the protection of our laws, and whom we may warrantably endeavour to annihilate, when he does us any injury. The Amalekites, a predatory people of this description, were ordered to be exterminated, as we have seen under Art. LXIII.

ART. CCLXXXVII.

Of Sacrilege.

§ 5. CONCERNING what we usually denominate sacrilege, there is, in like manner, no specific law to be found in the Mosaic writings. In the case, no doubt,

of a person purloining any part of that species of *Cherem* described in Art. CXLV., and to which I might apply the epithet *sanctissimum*, the punishment of stoning was inflicted upon him, as a robber of the sanctuary, as we see from the instance recorded in the viith. chapter of Joshua. But between this species of *Cherem* and other holy things, there was a great difference; and neither from the letter nor from the analogy of the Mosaic law, should I know what judgment to have pronounced upon the man, who had stolen any part (for instance) of the flesh or wine of an offering, or of the tithes, or of the articles belonging to the sanctuary; those, at least, in its courts, and not within the holy place, or the holy of holies. Had he, from the impulse of his conscience, made a voluntary acknowledgment of any such theft, in all probability nothing more would have been required of him, than the restitution ordained in Lev. v. 14, 15. with one-fifth more, and an offering. This, however, is only an analogy, and not the letter of the law; for the passage now quoted, refers not to things stolen, but to sacred things, such as tithes and firstlings, either not paid, from carelessness, or purloined and withholden, from avarice; for the offering ordained to be made for them, is only a trespass-offering, that is, the offering appointed for sins of omission.

Let it suffice that I have here taken an opportunity of mentioning the statute relative to the purloining or withholding of things due to the sanctuary; because I shall not, in the sequel, have any occasion to treat particularly on the subject.

ART. CCLXXXVIII.

Man-stealing punished Capitally.

§ 7. AGAINST the crime of man-stealing, committed on an Israelite, that is, where any one stole or seized a free-born person of Israelitish descent, either to use him as a slave himself, or to sell him as a slave to others, the punishment of death was expressly denounced; and *that* with such a degree of rigour, that the alleviations which operated in the case of other thefts, as when no alienation had taken place, or when there was reason to look for repentance and restitution, had here no effect in mitigating the punishment. For the man-stealer was absolutely doomed to die, whether he had already sold the person stolen, or whether he still had him in his own hands, neither alienated nor used for service; Exod. xxi. 16. Deut. xxiv. 7.

The design of man-stealing, and what seems to discriminate between it and other crimes that approach unto it, is clearly stated in Deut. xxiv. 7. to be, either the using the person stolen, as a slave, or selling him as such to another. Where such thefts are frequent, and require the interposition of legislative authority, the latter is the purpose most commonly in view; because it is but seldom that man-stealers can have it in their power to make use of their prize within their own country, since, as he can speak, he has only to make himself known, in order to be free; for if locked up, he can be of no use. To this, to be sure, there *are* exceptions; for in very large cities, such as Lon-

don, child-stealing may be carried on, without much risk of detection; and rich people, who have work-houses for their servants, may keep them therein locked up; but here, again, exceptions take place; for the rich who have servants by hundreds and thousands are very few in number; and of great cities there were none in Israel for several centuries after the days of Moses; nor indeed do such cities ever arise during the period of a nation's first establishment, but only gradually, in after times, and in consequence of unforeseen events. The most common, and the safest species of man-stealing therefore is, when the persons stolen, can be immediately sold into foreign countries: and this is at present sometimes practised in London, Amsterdam, and the vicinity of Hamburg, by the *kidnappers*, as they are called, who contrive immediately to transport the unfortunate wretches whom they seize, to the East or West Indies; and it is thus too that America is supplied with Negro slaves from Guinea, or Western Africa, by merchants, of whom, for all the money they make, I, for my part, should not chuse to be one.—Of this sort of man-stealing, Moses himself relates an instance in the book of Genesis, where we read first of the sale of Joseph, by his brothers, to a company of merchants passing by, and then of his being re-sold by them in Egypt.

Although a person had aided a slave in his flight from his master, or had concealed him, or given him food, or let him labour voluntarily for it;—that this was not *man-stealing*, is almost obvious, if we attend only to the term *stealing*; but should any etymological scruple yet arise, (which, so far from wishing to

deny that there may be ground for it, I most readily allow the etymologist the gratification of here making,) I have to observe, that this is a case, to which the statute above mentioned, did not apply; and that the laws of Moses were even favourable to runaways; Art. CXXII. If a person had carried off a damsel either to gratify his lust, or to marry her, neither was this man-stealing, unless he used her as a slave. In the former case it was rape, of which we have treated in Art. CCLXVI. CCLXVII. In the latter, it was indeed an act of violence, but so rare a one, that no notice is taken of it in the laws; although, indeed, there occurs in the Israelitish history, one example of it, pretty much akin to the rape of the Sabine virgins, and which, on account of the extreme necessity of the case, was proposed to the Benjaminites by the supreme authority itself, as a means of obtaining wives; Judg. xxi. 19,—23.

The *first* of the two statutes in Exod. xxi. 16. speaks of man-stealing without limitation to any particular people; but the *second*, in Deut. xxiv. 7., expressly limits it to the case of a person *stealing an Israelite, one of his brethren*; so that this crime was only capital when committed against an Israelite; and, of course, as every Israelite was free-born, and even if he sold himself for a slave, regained his freedom in the seventh year, it was not capital when committed against a true and perfect slave; who, with the exception of one very rare case, could only be a foreigner. Hence we see, that in the case where Moses ordained the punishment of death for this crime, he had not that theft in view, by which a per-

son has his servant stolen from him. No doubt such a proceeding is wrong ; for even to *covet a neighbour's servant, or maid, or any thing else belonging to him*, is forbidden * in the tenth commandment. But what punishment was annexed to that theft, or to the crime of stealing a free-born person of any other nation, in friendship with the Israelites, we do not know. Probably it was not a capital punishment, but only restitution to a certain extent, according to ancient and established usage.

We shall now be able to comprehend the origin of the great difference between the Mosaic law on this point, and the most ancient Roman law ; which has indeed been noticed in Tit. XIV. of the *Collatio Mosaicarum et Romanarum Legum*, but without any philosophical glance at the cause of this distinction. In the earliest times of Rome, the crime of *plagium*, as it was termed, incurred only the punishment of a fine, which was found quite sufficient ; because, as Rome had but little foreign commerce, man-stealing was not very prevalent. It was difficult to commit it, and more difficult to conceal it, because those who were stolen, could not be hurried away, and sold to distant countries. In process of time, however, a more severe punishment was inflicted on this crime ; a plebeian being *at first* condemned to die, or to labour in the mines ; and a patrician, to exile for life, with the loss of half his property. *At last*, it was made a capital crime to *all* without distinction ; and thus the Roman law here came at length to resemble the Mosaic, only

* Exod. xx. 14. Deut. v. 18.

that the Romans had different capital punishments from those of Moses. Their cruel punishment of crucifixion kept the sufferer alive for several days, in the agonies of pain and intolerable thirst; whereas stoning, which was the severest of the Mosaic punishments, could scarcely last beyond a few minutes.

Moses, from the first, punished man-stealing with death; for in the country to which he gave laws, that punishment was absolutely necessary in order to place adults, and, still more, children, in a state of security. Palestine was at that time the country where, of all others, man-stealing could be most easily carried on, being the seat of the whole trade of the world. For, in the *first* place, the caravans from Asia passed through it, in their way to Egypt; and the person who had stolen a man, could thus easily make money of him, and have him carried into a foreign country, where he would never be heard of, as the sons of Jacob had already done with their brother Joseph.—In the *next* place, the Phœnicians extended their maritime commerce to the most distant regions, to which no other Asiatic people had access; and, in fact, as we see from the example of Joseph, and from Moses repeating his law a second time, man-stealing had become a very common practice. The punishment of fines, would, therefore, have been quite insufficient to repress it. Kidnappers would have laughed at them, and carried on their trade with great advantage: for before they were so unfortunate as to be *once* discovered, they might have realized the profits of selling a hundred men. Under such circumstances, nothing short of death could sufficiently operate *in*

terrorem ; nor would any one look upon that punishment as too severe, but the man whose mind was only suited to servility, and such a man would, at all events, prefer being a slave. To us, freedom is as dear as life ; and slavery, particularly in a strange land, is often worse than death. Even the very negroes, that are sold into America, have this idea ; and hence suicide, far from rare, is, on the contrary, quite common among them ; and we sometimes find instances of several of them combining together, and going into the woods to hang one another.

I have yet farther to remark, that the word *Plagium*, is of more extensive signification, than the Mosaic crime of man-stealing, with its capital punishment ; because it included the case of stealing a foreign servant, or seducing him to run away, or aiding his escape, or concealing him. These, however, were crimes punished only by fines*, at least, by the *Fabian* laws. But Moses, as we have already observed, speaks only of the crime of stealing an Israelite, that is, a free-born person.—The two species of theft are very different ; for by the one, the master of a slave only loses a commodity, which, though worth money, may be abundantly repaid him ; but by the other, a free man loses what is of inestimable value, his liberty and himself.

* *Ejusdem legis capite secundo tenetur, qui alieno servo persuaserit, ut dominum fugiat, quive alienum servum invito domino celaverit, vindiderit, emerit dolo malo, quive in ea re socius fuerit ; jubeturque populo sestertium quinquaginta millia dare. Mosaic. et Roman. Legum Collatio ; Tit. xiv. at the end.*

ART. CCLXXXIX.

The crime of denying any thing taken in trust, or found.

§ 8. WHERE a person was judicially convicted of having denied any thing committed to his trust, or found by him, his punishment, as in the case of theft, was double restitution; only that it never, as in that crime, went so far as quadruple, or quintuple restitution; at least, nothing of this kind is ordained in Exod. xxii. 8.

If the person accused of this crime had sworn himself guiltless, and afterwards, from the impulse of his conscience, acknowledged the commission of perjury, he had only one-fifth beyond the value of the article denied, to refund to its owner; Levit. vi. 5. or (according to some Bibles) v. 20. Of the offering to be made in cases of perjury, we have already treated in Art. CCLVI.

CHAPTER VI.

CRIMES OF MALICE.

ART. CCXC.

Informers odious in the eye of the Law.

§ 1. BEFORE I proceed to observe that false accusers ought to be punished, I must, in justice, premise, that Moses was so far from imposing on the Israelites any obligation, to make known every transgression of the law, which came to their knowledge, that he rather interdicted unnecessary and malicious informations. His prohibition on this subject, we find in Lev. xix. 16,—18., and it deserves to be here transcribed at length; *Thou shalt not creep about as an informer among thy people, neither shalt thou appear against thy blood. I am Jehovah! Thou shalt not secretly hate thy brother. If he does any thing bad, thou mayest warn him; so thou shalt not make thyself a partaker in his sin. Thou shalt not be vindictive or spiteful against the man, who belongs to the same people with thyself, but shalt love thy neighbour as thyself. I am Jehovah!*

I. From this passage it is evident, in the *first* place, that in the case of common crimes already committed, and, in some instances, even of those that were punished capitally, such as adultery, no Israelite was under

any obligation to become an informer. It was only in the case of idolatry, that an express exception was made * ; though, indeed, from the law illustrated under Art. CCLXXVIII., we might almost conclude it to have likewise been the wish of Moses, that not only the magistrate should make inquiry into the circumstances of an unknown murder, but also that every other person who knew any thing about it, should give his assistance towards the discovery of the murderer. But in the case of other common crimes, informing was not to be a general practice ; nor did the law given, either require or approve of any one but the person injured, giving information, without some particular call to do so. And as there will always be people, whose consciences, from ignorance of the nature of civil law, are so extremely contracted, as to impress them with the notion of its being their duty to publish all the wickedness they know of, that they may not be partakers of other men's sins ; to remove the scruples of such people, Moses, in the law just quoted, says in effect, *Information of crimes is not required of you ; but if you wish to do any thing for the prevention of any wickedness, warn the man who has done it, and exhort him to amend.*

Any penal law against false accusers, must be founded on the non-obligation of informing ; for were every one bound to notify to the magistrate every crime that came to his knowledge, it would, in *many*, I might perhaps say, in *most* cases, be both unjust and absurd to punish false accusers. Before a court of

* Deut. xiii. 7, 8, 9.—See also Art. CCXLVII. towards the end.

justice, every accusation must be deemed false that cannot be proved; and, of course, the accused must be acquitted. Yet many a man may know the fact of a crime, without having proof, at least *full* proof, of it in his power, because it was not committed before several witnesses; and were he then bound to notify what he knew, he certainly ought not to be punished, if he could not verify his accusation; else would he be liable to punishment for doing what the law enjoined. Should *he*, however, remain unpunished, then, as man cannot see into the heart, every one who is wittingly guilty of false accusation, will likewise necessarily escape with impunity, as long as he remains unconvicted of having wittingly and wickedly calumniated his neighbour. Yet this would be a most unfortunate circumstance; under which, even the most innocent man could never be secure of his life, or at any rate, of his reputation and his peace; because every false accusation leaves some unfavourable impression behind it, if the accuser be not exemplarily punished; and such would always be the consequence, were the doctrine of every man being bound to give information of every bad thing he sees, which some people take into their heads, and even ascribe to Moses, in spite of him, ever to be adopted by the civil law.

“But who are they,” I shall perhaps be asked, “who father this doctrine upon Moses?” And my answer is; those who explain Lev. v. 1. in such a manner, as if it were incumbent on a man to make a trespass-offering, every time he heard such a curse as, *Devil take me*, and did not give information of it. Now, such an explanation would make rational people,

if they were conscientious, and wished to regard Moses' supposed doctrine, absolute fools, and insufferable in the community; and therefore it becomes the more necessary to notice, how little Moses patronised informers. That it is not actually attended with such effects, proceeds from this, that many conscientious people are not so rational as to survey the consequences of any doctrine; that many rational people are not conscientious; and that many, who are both rational and conscientious, know nothing of the false explanations of this passage, and perhaps have never read it since they were children.

II. It appears, in the *second* place, that Moses attaches a certain degree of blame to unnecessary information of those crimes, that do not concern us, particularly where it proceeds from malice; still, however, not in that case only, but also where we inform upon a person, whom we might have it in our power to warn, and so to amend; in other words, a person to whom we ought to shew friendship. To be sure, he imposes no punishment on such a proceeding, nor could he in justice do so, if the information were not a false accusation; but still thus much follows from his law, that a rational magistrate has a right to give officious informers a rebuke for their pains, and to pay no regard to their informations, unless where, for other reasons, he looks upon an enquiry as necessary.

In a matter, where it was impossible for a legislator to specify, with legal accuracy, every case that might occur, and where he was under the necessity of admitting a mixture of *moral* doctrine; nothing could be more judicious than the clause of *loving their neigh-*

bours as themselves, which we find added to this law ; although the connection in which it stands, and the application thence depending, has not been commonly attended to. For the rule whereby, keeping this passage in my view, I ought, if not the injured party, to regulate my procedure, as to informing, or not informing, is plainly this ; *If thou findest fault with no one, not even the man who loves thee, for giving information against thee, then thou mayest inform upon others.* Now this would naturally be, where the laws expressly required it ; (Deut. xiii. 7,—9.) or where one might think that the land would be polluted in the sight of God, by reason of unpunished blood-guiltiness ; (Num. xxxv. 33. Deut. xxi. 8, 9.) or that he was bound to give information of any gross and crying outrage, of which an unknown person had been guilty, to the person who had suffered it, if he did not otherwise obtain such information ; or finally, that the public safety required him to notify a crime, that might otherwise be continued. *But, on the other hand, where thou lookest upon it as reasonable, that the man who loveth thee, should not give information of thy crimes, until he be questioned concerning them in a court of justice, there do thou also hold thy peace.*—A rule more equitable, and at the same time, for every man who honestly consults his own heart, more clear and intelligible, it is, methinks, impossible to devise.

ART. CCXCI.

Of the Propagation of defamatory Untruths.

§ 2. THE publication of false reports, affecting the character of others, is prohibited by Moses in Exod. xxiii. 1., although he does not annex any punishment to it. Whether *that* was left to the pleasure of the judge, or whether it was, that no punishment whatever was inflicted on it, I cannot tell. This last is often the case with respect to the greater number of extrajudicial offences, during the infancy of nations; which approaches closely to a state of barbarism and lawlessness, wherein mere verbal attacks on reputation are not so highly estimated, nor yet even violent outrages so strictly interdicted, as afterwards; but, on the contrary, a person thus injured, is permitted to avenge himself on his traducer, if only he does not beat him to death, or render him a cripple*. If the wicked action, which a man related concerning his neighbour was true, he incurred no punishment whatever; for the *exceptio veritatis* then operated in full force.

There was only one single case wherein Moses imposed a punishment, and *that* a pretty severe one, upon the publication of calumnious falsehood; and that was, where a man falsely accused his bride of not having proved a virgin on the wedding night, Deut. xxii. 13,

* The reader will recollect, from Art. CCLXXXI., that in cases of affrays, wherein no bodily organ was injured, or rendered useless no punishment was awarded.

—19. Here, regard was had, on the one hand, to the gross reproach cast upon the woman herself, her parents, her brothers and sisters, and her whole family* ; and, on the other, to the two following circumstances ; *first*, that the woman, being defenceless, and in the power of her accuser, neither could nor would avenge herself, as any other injured person might do, and, of course, required the more ample protection from the laws ; and, *secondly*, that a wife can never have the means of exculpating herself to the world, from the disgrace of a charge, that relates to the secrets of the marriage-bed, unless a court of justice enquire into the case, and award her a satisfaction proportioned to the greatness of the injury she has sustained.

The punishment of the husband, in such a case, was threefold ;

1. *Corporal*, or stripes.—The literal meaning of the words of Moses is, *They shall chastise him.*—See Art. CCXXXIX.

2. *Pecuniary* ; a fine of a hundred shekels being paid to the woman's father ; which was the highest fine imposed by the Mosaic law.

3. The *forfeiture* of the right of divorce ; so that the woman, by way of satisfaction, lived with him for life, in a matrimonial state precisely like ours.—From a perusal of the following Article, it will probably occur to the reader, that the punishment here had been milder than the analogy of that part of the Mosaic law, which admitted the *lex talionis* in cases of false

* See Art. CCLXI.

accusation, demanded that it should be ; because the woman, if found guilty, was condemned to be stoned. This, however, really was not the case ; for, in the *first* place, the question here is, not concerning a husband who judicially impeaches his wife, nor yet concerning a false witness ; but concerning a person who brings an evil report upon her ; and between the propagation of injurious untruths, and actual false accusation, or actual false witness, there is a distinction to be made. In the *next* place, it has been already remarked, under Art. CCLXX., that the mere want of the *signa virginitatis*, without any farther proof of whoredom, was in all probability not accounted sufficient to authorise the infliction of the punishment of stoning*.

ART. CCXCII.

Of False Accusation, and False Witness.

§ 3. ALL manner of false witness, in judgment, was prohibited ; as well that whereby an innocent person was aggrieved, as that whereby a guilty person was acquitted, and a crime, really committed by him, denied ; or what, in a Hebrew tribunal, was the same thing, where a witness concealed the truth, after being solemnly adjured to declare it. In a particular manner, we find the legislator exhorting the Israelites not

* I perceive, that by what I have here written, the second argument employed in the passage referred to, for the more mild exposition of the law in question, becomes not a little weakened ; and I consider it my duty to notice this circumstance.

to follow the multitude, in testifying a falsehood, and swerving from the truth, nor yet, out of compassion to a poor man, to give a partial evidence in his behalf; Exod. xx. 13. xxiii. 1,—3.

Yet no punishment was annexed to this last species of false witness, although it redounded not to the loss, but to the advantage of the person accused: in other words, the denial, or concealment, of a crime, well known to the witness, incurred no punishment. For here the legislator merely availed himself of the aid of the conscience of the witness; who, if he had a mind to disburden himself of a perjury, and did not chuse to await the vengeance of God on account of it, had no other alternative in his power, than to retract the falsehood of his testimony, and to present, as an atonement for his guilt, the trespass-offering mentioned in Arts. CCXLIV., CCLVI.

On the other hand, when a false testimony was given against an innocent man, the matter was ordered to be investigated with the utmost strictness, and, as a species of wickedness altogether extraordinary, to be brought before the highest tribunal, where the priests and the judges of the whole people sat in judgment: and, after conviction, the false witness was subjected to punishment, according to the law of retaliation, and beyond the possibility of reprieve; so that he suffered the very same punishment which attended the crime, whereof he accused his innocent brother; Deut. xix. 16,—21.

According, likewise, to this same law of retribution, it is probable, that malicious false accusers

were dealt with ; not those, however, who, having been injured, erroneously accused an innocent person ; but only those, who were convicted of having given false information, respecting crimes committed by others, and whereby they were not themselves injured.

CHAPTER VII.

CRIMES AGAINST PARENTS AND RULERS.

ART. CCXCIII.

Heinous Crimes against Parents, such as Cursing, or Striking them, punished with death.

§ 1. I HAVE already remarked, in treating of the rights of fathers, in Art. LXXXIII., that the most heinous offences of children against their parents were punished capitally; and these were, (1.) *Cursing* their parents, Exod. xxi. 17. Lev. xx. 9.; and, (2.) *Striking* them, Exod. xxi. 15.

By the term *cursing*, we are here to understand, not only what may be peculiarly so termed, that is, *imprecating* evil on a parent, but probably, *all rude and reproachful language* used towards him; at least, the Hebrew word לָקַח, (to which I cannot find any German term altogether equivalent; and the Latin, *maledicere*, which more nearly resembles it, has rather a wider range of signification;) would seem to comprehend as much, according to the common usage of the language.

An example of this crime, and, indeed, one altogether in point, is given by Christ, in Matth. xv.

4,—6. or Mark vii. 9,—12.; where he upbraids the Pharisees with their giving, from their deference to human traditions and doctrines, such an exposition of the divine law, as converted an action, which, by the law of Moses, would have been punished with death, into a vow, both obligatory and acceptable in the sight of God. It seems, that it was then not uncommon for an undutiful and degenerate son, who wanted to be rid of the burden of supporting his parents, and, in his wrath, to turn them adrift upon the wide world, to say to his father or mother, *Korban*, or, *Be that Korban* (consecrated) *which I should appropriate to thy support*; that is, *Every thing wherewith I might ever aid or serve thee*, and, of course, *every thing, which I ought to devote to thy relief in the days of helpless old age, I here vow unto God.*—A most abominable vow indeed! and which God would, unquestionably, as little approve or accept, as he would a vow to commit adultery or sodomy. And yet some of the Pharisees pronounced on such vows this strange decision; that they were absolutely obligatory, and that the son, who uttered such words, was bound to abstain from contributing, in the smallest article, to the behoof of his parents; because every thing, that should have been so appropriated, had become consecrated to God, and could no longer be applied to their use, without sacrilege and a breach of his vow. But on this exposition, Christ not only remarked, that it abrogated the fifth commandment, but he likewise added, as a counter-doctrine, that Moses, their own legislator, had expressly declared, that *the man who cursed father or mother deserved to die.* Now, it is

impossible for a man to curse his parents more effectually, than by a vow like this, when he interprets it with such rigour, as to preclude him from doing any thing in future for their benefit. It is not imprecating upon them a curse in the common style of curses; which but evaporate into air, because neither the *devil*, nor the *lightning* are wont to be so obsequious, as to obey our wishes every time we call upon the one to *take*, or the other to *strike dead*, our adversaries: but it is fulfilling the curse, and making it to all intents and purposes effectual.

That the Hebrew legislator looked upon it as a very important point, to secure obedience to parents, we see from the severity of the punishments annexed to offences against them. In order to render this duty the more sacred, we find God, as the lawgiver and king of the people of Israel, distinguishing it still farther by the following procedure: *first*, giving it a place among those *ten* commandments, which he himself immediately published from mount Sinai, and, indeed, the *first* place among those of them, which determine our duties towards men; and *secondly*, annexing to it a promise in these words; *that, in the land which Jehovah thy God is about to give unto thee, thou mayest live long, and attain a good old age*;— words, which, while they remind us of St. Paul's remark in Eph. vi. 5. that this is *the first commandment with a promise annexed to it*, at the same time convey, to the man who violates this command, a threatening, that he may dread the contrary fate. God, therefore, inasmuch as he was king of the Israelites, and had promised to exercise among that people a

particular providence in respect to temporal rewards and punishments, took upon himself the sanction of this commandment, just as he did of those commandments of the *first* table, which include man's duty to himself; in regard to which we find him likewise promising rewards and denouncing threatenings, in Exod. xx. 5, 6, 7.

I may here observe, in passing, that *Philo*, who, to be sure, philosophises, in general, rather too artificially and *platonically* on the laws of Moses, has, in his Book *περι δεκα λογικων*, a long remark in illustration of the circumstance of the commandment relative to the duty which we owe to parents, standing in the *middle* between those of the *first* and *second* table; and obedience to parents, being, in some measure, inculcated as obedience towards God himself. This remark contains some truth, but is, as usual, carried too far by his philosophical subtilties and refinements. The reader who chuses to take the trouble of perusing it, may consult *Mangey's* edition of his works, part ii. p. 198., &c.

The promise added to the fifth commandment has as little reference to mankind at large, as the decalogue in general; which contains many things addressed only to the people of Israel. The very expression, *in the land which Jehovah, thy God, is about to give unto thee*, shews this; for that land was Palestine, in which we of these times have no desire to live and grow old; but most willingly leave it to *Dahir*, and other personages of the same cast, whom the newspapers at present tell us of, to torment and kill one another on this account. The promise in

question was never given to us, but to the Israelites, as long as they should, as a people, fulfil their duty towards God. Since, then, we find no trace of the fulfilment of the sanction of the fifth commandment, we must consider it as a matter in which religion is not concerned ; that it held only in that particular state, to which God himself gave civil laws, and that it was a part of the theocracy.—But still we cannot, after all, help thinking, that even yet, on some occasions, Providence would seem to fulfil it. On this point, however, I leave it to every one to collect observations for himself, for it does not belong to my present subject to shew, that God, in order to render the duties owing to parents more sacred among other peoples, may sometimes do among them, what he only expressly promised and threatened to the people of Israel, whose civil sovereign he was. Every nation in which the duties of children to their parents become grossly neglected, and where the legislative authority allows that to be the case, will *naturally*, and without any particular interposition of Providence, be sure, *ipso facto*, to render itself miserable.

ART. CCXCIV.

The Drunkard, whom his Parents were unable to keep in Order, and who, in his cups, endangered the lives of his neighbours, was punished with Stoning.

§ 2. THERE is still another statute, which inflicts the punishment of death upon an undutiful son, and which we find in Deut. xxi. 18,—21. It applies

however, at least as far as I am able to understand it, not so much to the punishment of any particular crime against parents, as to the case of parents having a son addicted to drinking, and in his drunken fits apt to pick quarrels, and to disturb the public peace, whom they could not controul, nor, of course, prevent from endangering the safety of others. The words themselves, indeed, shew this; *If a man have a son mischievous* and disobedient, who heedeth not the words of his parents, and, though they have actually chastised him, yet hearkeneth not unto them; his father and mother shall bring him to the gate of the city before the elders, and say, This our son is always engaged in wicked deeds; he is refractory, and disobedient; a profligate and a drunkard, &c. &c.* Here it is, at any rate, evident, that Moses is speaking of a person addicted to drinking, and habitually guilty of mischief; and whom his parents, finding admonitions in vain, have *chastised*; (and, from the connection, that can hardly mean any thing less than *actual discipline*;) though it has produced no good effect upon him. In such a case, the incorrigible drunkard, from whose

* As the explanation of this passage depends chiefly upon the word סורר, (*Sorer*) which others render only *undutiful*, I must here remark, that it cannot grammatically come from the verb סור, (*Sur*) to deviate, because then the participle of *Kal* would be סר, (*Sar*) and of *Piel*, מסורר, (*Mesorer*); but from the verb סרר, (*Sarar*) Arabicé, *Scharar*. This verb is, in Arabic, used of *evil deeds*; and hence *Sorer* comes in Hebrew to signify *maleficus*, and *Sara*, (סרה) *maleficium*. I cannot here enter farther into philological illustration, because my printer has no Arabic types, and because to most of my readers it would be irksome.

outrages the lives and limbs of his neighbours were in continual hazard, when his parents had in vain tried every possible method to prevent him from doing mischief to others, was to be stoned to death.

This was no doubt a severe punishment; but certainly not more so, than we should inflict in the state of nature. For, let us suppose ourselves in that state, and without magistrates; and that there were among us a person who frequently got drunk, and had the misfortune of becoming very quarrelsome in his cups, attempting to kill every one he met, and revenging imaginary insults with his sword; and that he had been repeatedly warned, and even soundly beaten, but without any effect; is it to be supposed, that we would still continue to run such risks from him? I hardly think so; but that we would, without farther ceremony, take his life, in order to save our own.— Let us suppose farther, that his parents were still alive; that they had been previously applied to; had admonished him; and had even in his sober moments, and before he had absolutely rebelled, actually corrected him; but all to no manner of purpose, and without being able to wean him in the least from that intemperance, which proved so dangerous to his neighbours; we certainly should think, that he had thus experienced all the lenity and forbearance that was due to him, and that we could not have any reason to reproach ourselves, although we rid the world of such a troublesome fellow, by shooting, stabbing, or *stoning him to death*. Now, it was this last punishment that was inflicted on the drunken son by the Mosaic statute; not, however, as in the state of nature would

have been done, *in the very act of outrage* ; but with all proper solemnity, and as an example to others ; *that others in Israel might hear, and be deterred from the like wickedness* ; and not until his parents had found themselves compelled, after many unsuccessful efforts with him, *judicially* to acknowledge, that they were not capable of keeping him in order, and answering for the safety of the neighbours. That such an acknowledgment would be made but very seldom, and only in cases of the most extreme necessity, and where the father himself was called to account for his son's misdeeds, I need not mention to any one who is a father, and feels the power of paternal affection.

It will, however, still be thought a severe procedure, because, though we might not perhaps condemn it in a state of nature, we nevertheless, in civil society, proceed with more clemency towards the man who enjoys the title of a *citizen*,—that title, which conveys the idea of so many rights and privileges, and may be considered as a recommendation to mercy. But we must not forget, that to those means which we, as members of civil society, have for securing such dangerous citizens, the Israelites, in the days of Moses, and long afterwards, were just as great strangers, as a people in the state of nature. Prisons, my readers will recollect from Art. CCXXXVIII., they had none ; and none of them, I hope, entertain those new-fashioned ideas of compassion, which, by way of avoiding capital punishments, condemn delinquents to be cast into dungeons, and there fed ; for, not to mention the question, *Who is to bear the expense ?* this, like most of the *tender mercies* of those who seek to avoid capital pu-

nishments, would be much more cruel than any death to which a felon could be subjected. In the infant state of architecture among the Israelites; which, indeed, continued for many centuries after Moses so little improved, that the temple of Solomon itself, though extolled as one of the wonders of the ancient world, did not surpass our larger sort of private houses; the generality of habitations were probably no better than what we call huts, or cottages, and of course had no conveniences for the confinement of unruly sons; or if the more opulent had such conveniences, they would not be likely to have complained, but would have locked them up, and so have prevented all cause for inflicting the punishment of the law.

With all this, however, the just remark of *Montesquieu* still claims our attention; that in *southern* countries, drunkenness is attended with far more formidable consequences than in *northern*, and must be regarded by a legislator in a different light. Among us, the case of a drunkard doing mischief is really not very frequent. No doubt, we see instances of people under the influence of liquor; but then they are neither so determined on mischief, nor yet half so extravagant, as in warmer climates. How it comes to pass, I know not; but we certainly often find them quite rational, friendly, and affable; and there are men of particular temperaments, on whom, if we wish to make any impression, we must previously ply them with drink.—In no place whatever, have I had it in my power to make remarks on people overcome with liquor, in such numbers, as in London; and I shall now mention how they appeared to me, not by tens;

but by thousands. In the vicinity of that metropolis, though I have on a Sunday walked some miles, through long strings of them returning from the country, yet not one of them ever said a word to me; so that I had much amusement in making such experiments on the harmlessness of their intemperance, the reality of which I had no difficulty in ascertaining, as they staggered lustily along. Once only was I addressed by a person, who pointed to the sun sinking in the west, and very politely begged to know what it was. A friend who accompanied me, was indeed rather more unlucky; for happening, out of the abundance of his benevolence, to call to a very drunken rider, that his horse was in some danger or other, the man appeared to take it much amiss; though nothing more serious followed, than his exclaiming after him, *Damn your blood*, perhaps a hundred times, as he rode along. So harmless is northern drunkenness.—Our great lords, too, may no doubt sometimes drink a little more wine than a court-chaplain would approve or advise; but to such scenes as took place at the table of Alexander the Great, or, as we read of in Chardin's Travels, as occurring at Ispahan, when the Schah of Persia, contrary to Mahometan orthodoxy, got himself drunk, we are utter strangers; indeed we know nothing even of such intemperance as that of Philip, after the battle of Chæronea, which was more moderate. For this, we have natural temperament in a great measure to thank; not, however, as if it were always the case, that those of the keenest tempers become, when drunk, the most unmanageable and extravagant in their conduct; for the very reverse is probably the truth; for those who, in their sober

hours, are the most sedate and patient, become, when drunk, the most dangerous; and besides, constitutional vivacity does not increase, as we proceed southward; but we *first* meet with pensive melancholy, and *then*, in still warmer countries, where there are no mountains to modify the heat, a *phlegmatic* temperament, which is visible even in the youngest children. Is it then the case that the people of southern countries, who are in other respects so peacefully inclined, have thus a temperament which impels them, when drunk, to commit the greatest excesses; or is the reason this, that in a warm climate a much greater quantity of wine is requisite to produce inebriation, than in a cold one, where impeded perspiration renders a man sooner intoxicated? These questions I leave it to physicians to answer. It is sufficient for my purpose, to have observed that a climate, wherein liquor produces more formidable effects than with us; and a people, whose confined habitations preclude them from the means of securing drunkards, and preventing them from doing mischief, must have different laws from those which we require.

ART. CCXCV.

Of gross Verbal Injuries towards the Magistrate; Crimen læsæ Majestatis.

§ 3. REPROACHFUL words or curses uttered against persons invested with authority, are prohibited in Exod. xxii. 28.; and indeed under an express declaration, that the crime is regarded as an offence against

God himself, whose place the magistrate fills in the seat of judgment; *Thou shalt not curse the gods**, nor imprecate evil on the rulers of thy people; that is, *The gods, or rulers of thy people, thou shalt not curse.* This, at any rate shews, that gross verbal injuries against the magistrate were deemed highly criminal by the legislator, and were not to be suffered to pass with impunity. Their punishment, however, he has not specified; nor indeed can it be universally the same. It must be left to the decision of the judge, because it ought to be different, according to the extent of the crime, and the rank of the magistrate, whether supreme or subordinate. Most probably it generally consisted of stripes. As long as the Mosaic polity remained unaltered, the crime of (*læsæ majestatis*) treason could not be committed against any mortal sovereign, but only against God himself, who was regarded as king of Israel; for during that period, none of the rulers possessed royal authority. Afterwards, however, when kings were established, the crime of treason appears to have been punished with death. This we see from the story in 2 Sam. xix. 22,—24., where *Shimei* is pardoned by David; though *Abishai* supposed that could never happen, and that he must die without mercy, *because he had cursed the Lord's anointed.* At the same time, it would appear, that the wound which, according to the Asiatic way of thinking, the reverence due to kings had suffered, by the long delay of the punishment of this treason, was, in the judgment of David himself, extremely dangerous,

* See Art. XXXV. No. 2.

and that, in conformity to David's counsel, his successor, who was bound to no promise to Shimei, put him to death, for what certainly was a very trifling act of disobedience, viz. the violation of a promise he had given upon oath, that he would never go without the walls of Jerusalem; and which was construed into a forfeiture of his former pardon; 1 Kings ii. 8, 9. 36, —46.

The very circumstance of Moses appointing no king, serves to account for our finding, in his laws, so little notice of other crimes of a treasonable nature. When the Israelites, however, were under royal authority, it would appear to have been a maxim in their law, *that the person of the king was inviolable, even though he might be tyrannical and unjust*, (2 Sam. xxiv. 5,—8.); and, in fact, this maxim is necessary, not only to the security of the king, but also to the welfare of the subject; for it is the dread of assassination and treacheries, that usually makes kings tyrants, and novices in tyranny absolute despots. Even the Amalekite who told David the improbable, and probably untrue, story, of his having put the mortally-wounded Saul to death, at his own request, that he might not fall into the hands of the Philistines, was, merely on this his own confession, ordered by David to be instantly dispatched, *because he had laid his hand on the Lord's anointed*. This, however, was not authorised by the Mosaic law; and may partly have been a measure dictated by policy; at least, David could not have taken a more prudent plan to clear himself of all suspicion, and to secure the life of the king in future. On this point I shall enlarge, in my Notes upon the books of Samuel, or

in my *Life of David*; but at present, I am looking forward with anxiety to the conclusion of this work, which has extended far beyond the limits within which I meant to confine it.

With regard to verbal injuries towards fellow citizens, or, as Moses would have expressed it, *cursing a neighbour*, I find nothing in the law, except what has been stated under Art. CCXCI. It is probable that, as was often the case among other ancient peoples, they remained unpunished; though perhaps a retaliation of abuse, or the avengement of it by blows, when a person was too much provoked, may have been allowed as a civil right.

CHAPTER VIII.

OF JUDICIAL PROCEDURE.



ART. CCXCVI.

Little is known relative to Judicial Procedure.—Wherefore Moses has given so few directions concerning it.

§ 1. WITH regard to judicial procedure, or the *form of process*, as it may be called, concerning which I am aware, that many of my readers of the legal profession, and among them, persons eminent for their knowledge, have been anxious to obtain information, I really can say but very little, and that little is almost all purely of a negative nature. The blame, however, here lies not with me, but with Moses himself, who is, for the most part, silent on the subject; prescribing scarcely any rules for legal proceedings, and, at any rate, nothing like a form of process, properly so called.

Hence, in the *first* place, I infer, that judicial procedure was very summary. This, indeed, is commonly the case in Asia, and it has both its advantages and its evils; but among a people at their first establishment, it must have been still more summary, than we now find it in other parts of that quarter of the globe. Let the reader place himself, in idea, among the Israelites of those days. Hitherto they had not been a

distinct, at least a free, people ; but oppressed slaves, over whom the Egyptian overseers exercised a very compendious sort of justice. All at once they obtained their freedom, and, as brethren who had experienced the hardships of oppression in common, they entertained strong feelings of national attachment to each other. They likewise had a high sense of honour and honesty, and a peculiar abhorrence of oaths. They were under the guidance of a leader, whom they revered as an immediate messenger of the Deity. They saw his miracles with their own eyes ; and therefore his look, or his word, was in most cases sufficient to discover the truth, and bring the guilty to a confession of their crimes. In such circumstances, it is evident, that judicial procedure must have been very summary ; and indeed, if it had not been so, it would have been impossible for Moses to have continued, as he did, for a month, or six weeks, as the sole judge of such a numerous people ; Exod. xviii. 13,—26.

Add to this, in the *second* place, that it would have been quite premature to have thought of a *complete* form of judicial procedure, while the people were yet but beginning to be established. That legislator acts with most prudence, who, in such a situation of affairs, leaves judicial procedure in its original simplicity, and, as much as possible, in the way wherein it was regulated in the patriarchal state ; and who satisfies himself with repressing any particular abuses that may make their appearance. This simple arrangement will, for a time, answer much better than any new form of process, however carefully contrived. Afterwards, indeed, such a form will become indispensable, not

only from the chicaneries that will be devised by delinquents, and particularly by those who are experienced in crimes, and have made themselves acquainted with legal proceedings, in order to carry on their wicked practices with impunity * ; but also, from the false accusations that will be made, and the unjust or precipitate decision of judges. But how it is even then to be framed, must depend entirely on the nature of the chicaneries that are practised, or the acts of injustice, &c. that prevail among the people. Not unfrequently will a single individual of an inventive genius, who has succeeded in his chicanery, or in overwhelming an accused person whom he did not favour, have so many followers in the same track, as to render a change of procedure absolutely necessary. —Let the reader, then, transport himself again to the Mosaic times. The people of Israel were not yet come into the country, wherein they were to dwell ; but were encamped, as they marched through the desert, so closely together, that witnesses could seldom be wanting on any occasion. They were in some measure under martial law, and quite unaccustomed to the quirks of barristers ; for these were not yet to be found among them. This, then, surely was not the proper time for giving them a form of process that should be useful throughout future ages ; nor do I go too far when I assert, that the Deity could not then have prescribed any such form. He, it is true, perfectly knew

* Instances of this, we not unfrequently observe among the *banditti* that appear before our courts of justice ; and we cannot but wonder at that knowledge of criminal jurisprudence and procedure, which culprits often display, when on their trials.

all the chicaneries, acts of injustice, and abuses, that were ever to exist among them; but to have prescribed a form of procedure adapted to counteract such things, at so early a period, while the people were yet in a state of honest simplicity, would only have been to render the administration of justice tedious and troublesome, where it was expeditious and easy, and at the same time could only have served to make them acquainted with, and lead them to the practice of, many pieces of chicanery, to which they were yet strangers, much sooner than would otherwise have been the case.

It is, moreover, to be remarked, that acts of chicanery and villainy do not always continue the same, but are perpetually changing. Those that are now practised, perhaps require a new law, in order to drive the culprit out of his cover; and a century afterwards, this law comes to be abused by a judge, out of ill-will to some unhappy criminal. In this abuse he is followed by others; and thus another new law becomes requisite to put a stop to this ingenious mode of oppression. Now we only accelerate the succession of such base artifices, when we anticipate chicaneries that are not yet invented.

Forms of judicial procedure, therefore, cannot be framed, until a nation has arrived at a state of maturity, and when its vices and devices have grown to maturity along with it; and even then, only after many unsuccessful attempts, from which experience has been acquired. They will by this means be calculated to maintain their ground for a long period; but still they will not answer for ever, because the

chicanery of delinquents, on the one hand, and that of judges who want to condemn the innocent, on the other, will never cease. But at no time, certainly, is it more improper to set about any such measure, than while a people are yet honest, virtuous, and conscientious. At this period, they hold oaths very sacred, and are so much afraid of the vengeance of heaven, that even a vicious man will hardly be guilty of perjury. Much of this national virtue will, no doubt, gradually vanish; but still the greater part of the people will shudder at the thoughts of a false oath, and none but the few who are thoroughly corrupted, will have fortitude enough to resolve upon taking it. Should it, however, ever prove otherwise; and here in Germany, for instance, should those doctrines, which, notwithstanding their swearing to the *Symbolical Books*, we sometimes find spiritual persons not only practising, but even publicly owning and defending, once become the universal sense of the nation, and should laymen, judges, accusers, accused, and witnesses, follow such teachers, we should then, no doubt, require a form of judicial procedure very different indeed from the present. But any such form, framed upon the ancient principle of German honesty, and that maxim of our forefathers, which called *a word a word*, and *a man a man*, would, under such a state of morals, be quite ridiculous and useless.

ART. CCXCVII.

Warnings against Partiality and Bribery.

§ 2. WHAT little I have to say on these subjects, may be comprehended under the following particulars.

1. Gifts from a party to a judge are absolutely prohibited, even though not given on condition of his pronouncing a favourable decision; for, as Moses says, *they blind even the wise, and render a just cause uncertain*; Exod. xxiii. 8. Among those secret sins on which the Israelites were to pronounce curses, in making their covenant with God, and invoking his vengeance on transgressors, we find, in Deut. xxvii. 25., *the taking of gifts*; but that passage seems to refer to the case of murdering the innocent: for it is to this effect, *Cursed be he that accepteth a gift to shed innocent blood*. For bribes given to a judge, the Hebrew law has a particular term, שֹׁחָד, *Schochad*, which is not usually applied to denote other kinds of gifts, and so seems to involve the idea of something reprehensible; but its etymology, as is also the case with many other legal terms, has not been yet satisfactorily pointed out.

2. In many passages, Moses enjoins judges to manifest that impartiality which, without respect of persons, or friendship, or passion, follows the law alone; reminding them, at the same time, that a judge sits in the seat of God, and that therefore, no man should have any pre-eminence in his sight, neither ought he to be afraid of any man, in declaring the law *. He,

* Exod. xxiii. 6, 7. Lev. xix. 15. Deut. i. 17. xxi. 18,—20.

moreover, expressly specifies, as partiality, not only all respect to the persons of the rich and great, but also that mistaken sympathy, which is sometimes, unjustly, favourable to the poor. This *last-mentioned* perversion of justice, into which, as it has something of a pious appearance, the man of benevolence would be apt to be hurried, especially where a fine, as in the case of certain restitutions, might ruin a poor man altogether, is prohibited in Exod. xxiii. 3. and Lev. xix. 15. In fact, it is just as unfair, and indeed, in some respects, more mischievous than the *first*; for a rich man certainly does not become a member of civil society, with any view of being in a worse situation than the poor: he only requires, and he has a right to be put on a footing of perfect equality with them; and where he does not find that equality, he will naturally abandon such society. Now, for the poorer part of the community, that must always be a great misfortune, because it is by the employment given them by men of opulence, that the poor live; and the more the former extend their concerns, so much the better for the latter. Both, indeed, ought ever to have equal rights; but if the poor man knew his own interest, he might, of the two evils, rather wish, that partiality should sometimes cause injustice to the poor, than to the rich. For in England, for instance, were but one opulent and extensive manufacturer to meet with such injustice in any cause, as to induce him to migrate into another country, this, to a multitude of poor journeymen-weavers, who would thus be without employment, would prove a much greater misfortune, than if several of themselves had been wronged in any

matter of property.—I may add, that the warnings given by Moses on the subject of partiality in favour of the poor, were more necessary among a people whose government had so much of a democratical cast, than they would be in ours; because this is a fault to which a democracy has an inherent tendency. Among 60,355 judges over tens, and 6035 over hundreds, (Art. L.) there could not but be many poor men, who were much more likely to sympathise with their equals than with the rich.

What punishment was inflicted on a judge, when he was convicted of having accepted a bribe, or manifesting partiality, I cannot tell; for Moses nowhere specifies it. Nor yet does he say, whether a judge durst, by way of perquisite, and remuneration for his trouble, accept of that sort of present, which is in the East always offered to a person of distinction, when any one waits upon him. But it is most probable that he durst not, and that justice was administered gratuitously.

ART. CCXCVIII.

The Seat of Public Justice was at the City-gate.—Whether Advocates were employed?

§ 3. THAT both before and after the time of Moses, the place where justice was administered, used to be the gate of the city, and that he, of course, presupposed that the Israelites, when they came to live in cities, would hold their courts at the gates, is a circumstance too well known, to make it necessary for me to trouble the reader with a collection of passages

in proof of it. It appears, therefore, that their courts were public, and so constituted, as that every one might hear what was going on. This is an ancient usage, which, no doubt, is attended with its inconveniences ; but then it is attended with this advantage, that it compels the judge, from a dread of public displeasure, to impartiality, and a more careful inquiry into the merits of causes. It was no contrivance, or institution of Moses, who, indeed, gave his laws to a people, that then dwelt not in cities ; but an ancient consuetudinary practice, which he left as he found it.

Of advocates, such as ours, there is no appearance, either in the writings of Moses, or in any of the other books of the Old Testament. Every man managed his own cause : and we even see, in 1 Kings iii. 15—28., an instance of an altercation between two whores, before the king, sitting as judge. In the ancient Hebrew there is not so much as a word equivalent to *advocate*, nor does the term *παρακλητος*, occur any where in the Septuagint. The Jews of later times, indeed, have, in the Chaldaic and Talmudical dialects, some words, which they use to denote a person of this profession ; but they are all of Greek origin, as *Dicologos*, *Nicologos*, *Sanigur*, (*συνήγορος*) *Paracelit** ; because they became first acquainted with it from the Greeks, and found no name for it, either in their mother tongue, or its kindred Chaldee.

The circumstance, nevertheless, of the courts being

* See *Buxtorf's Chaldaico-Talmudical Lexicon*, p. 532. 1338. 1509. 1843.

held in the gate, gave room, as we must conclude from Job xxix. 15,—17. (and I beg the reader to peruse the whole passage, from ver. 7. in my German version) for the interference of another sort of pleaders, who were something like the ancient Roman *Patroni*, and still more closely resembled a modern personage, who is seldom quoted in illustration of the book of Job; I mean *Voltaire*, when he stood forth the intercessor of the *Calas* family, and saved the reputation of the unjustly condemned father. The city gate was not only the place of justice, but also of public concourse, where the people assembled to hear the news, and to pass away the time. Thither the man of fortune went for his amusement; and, if he happened to be a man of understanding, and distinguished for his love of justice, he would, though not properly a member of the college of justice, sometimes, no doubt, be asked for his opinion in difficult cases; to which practice, indeed, the above passage, from ver. 7. to 14., seems pointedly to refer. If, then, there came any very intricate cause before this public court, and he thought, that a malicious accuser was doing injustice to a poor man, or to a person who could not help himself, he might naturally be inclined to take his part; and having made himself, perhaps with no small trouble, acquainted with the circumstances of the cause, might plead (as was allowed) in behalf of the accused; thus becoming, merely from noble-mindedness, and a regard to justice, the advocate of the unknown. If the book of Job was, as I believe, written by Moses, the passage now under consideration, is to be considered as so much the more closely

connected with the Mosaic jurisprudence : if it was *not* written by him, it is, at any rate, more ancient than the departure of the Israelites from Egypt, and, therefore, shews us, what was the practice of the neighbouring and kindred nations of Arabia before this law was given, and which we nowhere find abolished by him. It would appear, that it *had* afterwards subsisted also among the Israelites : for the exhortation, in Isa. i. 17. *Plead the cause of the widow*, can scarcely be understood otherwise than in reference to it ; because the judge could not himself be the widow's advocate, or, in other words, a judge and a party at the same time. Nor can we look upon such actions, in men of wealth, which require much more trouble and resolution than almsgiving, and are of much more moment than any sum so bestowed, in any other light than as by far the noblest kind of charity ; more especially considering, that if common, they must have a powerful effect in the prevention of injustice. What a beneficial influence on the administration of justice in France, has not *Voltaire's* pleading the cause of *Calas* had ? There is no Christian who will not, on that account alone, wish him (what, perhaps, he does not wish himself) a firm conviction of the truth of the Christian religion.

ART. CCXCIX.

Of Witnesses.

§ 4. THAT witnesses, before they gave their evidence, were obliged to take an oath, or, more properly speaking, to hear an oath read over, which was precisely tantamount to swearing themselves, we see from Lev. v. 1. ; and the reader may peruse both what we have already stated concerning it, in Arts. CCXLIV. No. 3. CCLVI. No. 1. and CCXCI. ; and what will appear in the Article immediately following the present one.

In the Mosaic law, therefore, none other than *sworn* witnesses were known : what they spoke, was declared upon oath ; and if they concealed what they knew, they were guilty of perjury. Now this plan must have had a powerful effect in making truth come out ; for every one will readily conceive, that if he had to give his evidence in the presence of a delinquent of rank, or with whom he stood in terms of friendship, he might, if not on oath, feel himself strongly tempted not to speak the truth ; and in reality, our courts would discover very little indeed, were they to proceed on such a plan ; whereas, when a witness has sworn, the accused cannot take it amiss, that he should declare the truth, and he has more courage to do so.—Even by the custom of our universities, where there is more lying, perhaps, than is to be found any where else, no man is offended at another for speaking truths that

serve to fix guilt upon him, when once a cause comes to an oath.

In matters where life was concerned, (the crime of idolatry, against which Moses is, in other respects, so very rigorous, not excepted,) *one* witness was not sufficient. More were requisite, or, as he usually expresses it, *two or three*; and if these were not to be found, it was thought better that a guilty person, who would not spontaneously confess, should remain unpunished, than the risk be run, of punishing one who was innocent. In Numb. xxxv. 30. Deut. xvii. 6, 7. and xix. 15. the phrase, *two or three witnesses*, is probably to be understood on this footing, that if the witness, who had seen the fact, was at the same time accuser, or even informer, other *two* witnesses were requisite besides him; that is, *three*, including him. For if we were not to admit this explanation, but to leave the phrase as indefinite and arbitrary, as the expression *six or seven*, which the English commonly make use of, when they do not wish to state a number accurately; it would, in a law relating to life and death, be a very unsuitable term, which even a mere human legislator, of but middling capacity, would not, if he had dropt it even once, be likely to employ a second time; except, indeed, in the case of his copying a foreign law, in which case, we often see imprudent things very inconsiderately adopted.

It would appear, from Moses only requiring *two or three witnesses* in capital cases, that, in matters of less moment, particularly those merely relating to money and value, he had considered a single witness, if unexceptionable, and upon oath, as capable of deciding be-

tween the plaintiff and defendant. Were we to take the word Υ , *Ed*, (witness) in Exod. xxii. 12. and which I have there rendered *Beweis*, (a proof,) in the strict sense, we should have express authority for this opinion; for it is in the singular number; and the clause might be rendered, *He shall bring a witness thereof*. But even if it be translated, as I certainly think it ought, *Beweis*, (proof,) still it would appear, that the owner could not have required more than one witness. (Art. CLXII.)

From the account of Christ's trial before the supreme council, we see that witnesses were examined separately, and without hearing each other's declaration, and that it was necessarily in presence of the accused: for with all the trouble that court took to procure false witnesses, they could find none sufficient to bring guilt home to Jesus, because their testimony did not accord*; and even when at last two came forward, whose declaration was really founded on a fact, which they only varied a little, in order to make it amount to a crime†; still their evidences did not coincide; (Mark xiv. 59.) for the *one* pretended to have heard Jesus say, *I can demolish the temple of God, and build it again in three days*, (Matth. xxvi. 61.)—a speech altogether unworthy to be laid hold of—for if it was but a piece of impudent gasconading, we must remember that people are not usually put to death for such bravadoes; and the *other*, (Mark xiv. 58.) *I will*

* See Matth. xxvi. 59. Mark xiv. 56.

† Jesus had said, (speaking in the imperative mood,) *Destroy this temple, and in three days will I raise it again.*

destroy the temple of God, which is built with hands, (words which Jesus never spoke, but on which alone the charge against him could be said to be founded, on the footing of his meaning the *real* temple of Jerusalem, and threatening to destroy it,) *and in three days, raise one not made with hands.* Had both these witnesses been admitted into court together, this contradiction might easily have been avoided. We see that Jesus was present when they gave their evidence; for the high-priest asked him, saying, *Answerest thou nothing to what these witnesses testify against thee?* (Matt. xxvi. 62.); but he held his peace, because he knew that their evidence could not criminate him, and that they had, besides, contradicted each other.

No one will deny that this procedure is, in many respects, extremely fair and rational; although, for other reasons, and particularly, from the dread which witnesses often have of the accused, and from the circumstance of a person on his trial having it more in his power to contrive lies, if he knows all that has or has not been declared against him, it cannot always be introduced into our courts; which, in their merciful spirit of deliberate investigation, have generally adopted a more private procedure. I am inclined to believe, that it may have existed even in the time of Moses, from its being so accordant to the nature of his public judicial proceedings, although we find no written mandate on the subject; the whole process of the examination of witnesses being presupposed sufficiently understood, either from established usage, or the suggestions of sound reason.

That witnesses were obliged to lend a hand in the

execution of capital punishments, and for what reasons, we have already noticed under Art. CCXXXIII.

ART. CCC.

*The Story of Susanna and Daniel.**

§ 5. WHETHER the story of Susanna and Daniel, which we find among the apocryphal books, be true, or fabulous, it is at any rate much too recent to be considered as an authority, in regard to any point of the Mosaic jurisprudence; for it is placed during the time of the Babylonish captivity, and, of course, eight centuries and a half after the days of Moses; and at a period when the state founded by him was already destroyed, and the people living in Babylon under a foreign yoke. I should not, therefore, have taken the least notice of it, had it not been, that it contains so many strange particulars respecting witnesses, and that many people, even of the Lutheran persuasion, and who acknowledge the book itself to be apocryphal, have quoted it, as exhibiting a pattern of the Mosaic judicial procedure; and, from ignorance of every principle of jurisprudence, admired the plan of examining witnesses, which it details, as something superlatively excellent.

* If this work should happen to find readers of the Roman Catholic religion, I must beg them to remember, that, in regard to what I advance in this Article, I am to be considered as a *Lutheran*, and as such, do not look upon the story of Susanna as canonical Scripture; or if they are likely to take offence at this, they had perhaps better pass by the Article altogether.

In my opinion, the story is a mere fiction, and a very modern one too, belonging entirely to the period when the Greeks were masters of Asia, and when its author, of course, could not be acquainted with the state of the Jews during their captivity in Babylon. I think I have discovered very distinct traces of its having been originally written in Greek * ; but to the Jews, at the time of the Babylonish captivity, that language was altogether unknown ; and did not, until some centuries afterwards, become familiar in Syria and Egypt, where many Jews dwelt, under the dominion of Alexander's successors.

The beginning of the story is pretty good, bating the improbability, that the Jews should, in the city of Babylon, have had their own courts, and that their supreme judge, Joiakim, the husband of Susanna, should there have had such a magnificent residence. This does not look like what was naturally to be supposed, in the case of a people that had been lately carried away as captives from their native land ; but rather like what we should have expected to find many hundred years afterwards, when the Jews had become almost masters of the country. With this, however, I am not here concerned, as the whole story is a mere fiction ; but I must now remark, that whenever it begins to speak of judicial matters, it becomes extremely awkward, and betrays an incredible ignorance of those maxims of law, which must be established in every

* Some of these the reader, if conversant in the Greek language, will find noticed in p 25,—26. of Part IV. of my *Oriental Bibliothek*, although I have there touched upon them but slightly ; intending to treat the subject at greater length afterwards.

nation, unless the life and death of every citizen are to depend on the mere caprice of a judge, and even of a youth who constitutes himself a judge, and has once gained the ears of the populace. Of the story itself, however, we have two different editions; the one, which may be the original, and is not very well dressed up or complete, in the Septuagint version *; and the other, which is both more elegant and perfect, in *Theodotion's* version † of what appears to have been a Hebrew translation from a Greek original. And that I may not do any injustice to the story, I will found my observations on the latter of these; which the reader, if he does not understand Greek, or has not a Greek Bible, may peruse in *Luther's* translation.

Till we arrive, then, at verse 27th, if we can only forget that, at this period, the Jews in Babylon were not people of opulence, and possessed of magnificent establishments, every part of the detail has a tolerable

* The story of Susanna, as given by the LXX., we must not expect to find in any of the editions of the Greek Bible hitherto published from that version; I mean, neither in *Bos's*, nor *Breitinger's*, nor any other edition previous to the year 1772. It is well known, that these have the book of Daniel and its appendages, only according to *Theodotion's* translation; and that the Septuagint version of Daniel was lost, or rather lay hid in one of the libraries at Rome, until that year when it was first published. In 1773, it was reprinted at Gottingen, by *Vandenhoeck*, the text of it at least; and, in 1774, accompanied with the Roman prefaces, commentaries, &c.—See *Orient Bibliothek*, No. 50. Part IV.

† This is that which we find in all the editions of the Greek Bible prior to the year 1772; and which the Vulgate and Luther chiefly follow, although in some readings they depart from it.

shew of probability; and thus far we meet with nothing relative to law, or judicial procedure. But in the very next verse we find, that the two elders, who are at once judges, accusers, and witnesses, though, indeed, they lay aside their judicial functions, while acting in the other two capacities, demanding that Susanna should be summoned before a court of justice; and, strange to tell, the very court wherein her own husband sat as president. Thus the husband, who is the only injured party, is not her accuser; but two other persons appear in that character; and *this*, notwithstanding that it was on the *preceding* day that his wife had been so very publicly proclaimed before all his servants, as a person caught in adultery, and the whole family called out on the occasion. The husband does nothing in the business, and it would seem, as if he had been the only member of the family who had heard nothing of it, or that he had given himself so very little trouble about it, as that we might really entertain various suspicions of his motives; for what wife is there, in such circumstances as Susanna is said to have been in, who would not have given her husband an account of what had befallen her, the moment she came into the house? And this same husband is, moreover, the judge! certainly a very inactive magistrate indeed, and such a drowsy fellow, that one would almost be tempted to think he really deserved to have suffered, what these witnesses asserted to be true.

Susanna now makes her appearance, accompanied by her whole family, who, of course, were acquainted with the whole affair, though it seems her husband

knew nothing about it. On the entrance of the beautiful culprit, the two accusers again resume their judicial functions, in so far at least, as to command her to unveil her face; and having now given their evidence, Susannah is condemned to die. Now, it is quite *unmosaic*, and also quite irrational, that the testimony of these *two* accusers should have been accounted sufficient to condemn her; considering, that besides the accuser, two more witnesses were requisite according to Moses; for it was the *evidence*, which decided where the truth lay, between the affirming accuser, and the denying accused. It is also improbable, that either the Jewish court, or the surrounding multitude (for the term *η συνάγωγη* in ver. 41. is ambiguous) should have pronounced a sentence, which was to be immediately put in execution, without being confirmed by a Babylonian magistrate. This is a right, which is seldom conceded to a people, when they are carried into exile as a punishment. The husband, during the whole procedure, remains the same mute man of straw as before, nor does the wife once address herself to him, though the Præses of the court, but only calls upon God to vindicate her innocence. It is very strange too, that no inquiry whatever is made concerning the youth, who was said to have had to do with her, and to have made his escape; not to mention, that the discovery of him afterwards is, by the hasty execution of the sentence, rendered impossible. In short, the trial hitherto is conducted in such a style, that a stranger procedure can hardly be conceived; and yet the absurdest part of it yet remains to be detailed.

For we are next informed, that when they were conducting Susanna to the place of execution, a very young boy (*παιδαριον νεωτερον*) cried out with a loud voice, *I am guiltless of this blood.* In answer to such speech, we should have said, *Nobody doubts that*; and have given ourselves no farther trouble about *his* declaring, that he neither had, nor wished to have, any share in the woman's condemnation; but here we find the people turning to him with attention, and listening to what was rather an impertinent lecture, and the conclusion of which was, *These men have given a false testimony.* Now, such a declaration forms no particular recommendation of a man for the office of a judge. An accuser he may be, if he is not a mere boy, or, at any rate, if he is a youth: but we must deprecate the idea of making that man a judge, who forms and declares his decision, before he sits down upon the bench and begins to hear evidence. According to Theodotion, however, (for here the Septuagint omits some particulars) the boy is appointed judge by the people; but whoever it was that called him to the chair, we see this wise young gentleman immediately acting as judge. If any such thing took place among us, it might, for a person conducting to the gallows, be an easy and convenient device for obtaining, at any rate, a short respite, provided he happened to have but a few friends among the people; for there would be little difficulty of finding some compassionate youth, who, for money, or fair words, would enact a Daniel. Accordingly he begins by ordering the two witnesses to be separated; whence we must conclude, that the court had not before had

common sense enough to examine each of them separately and circumstantially, nor had it occurred to those persons of distinction related to the accused, and who had accompanied her to her trial, to insist on that being done. And yet to what purpose had they gone along with her, if they were not inclined to do her that service?

To impartiality our little impassioned judge appears to make no great pretensions. He has his sentence already prepared, and he begins the examination of the first witness in these words; *Thou aged villain, thy past sins shall now come upon thy head. Thou hast condemned the innocent, and acquitted the guilty, &c. &c.* A mode of address, which could hardly fail to unhinge any witness to such a degree, as almost to render him incapable of giving a distinct answer. We have reason to be thankful that, in Germany, no judge would be permitted to address an accused person in such terms: or if he did, the person would only need to have the words recorded, and then to add, that he had no occasion to answer such a judge. But, indeed, the judge who says to a witness, *Thou old villain, how many lies hast thou told? They shall now come upon thine own head;* can only appear as desirous to bring off the culprit, and to frighten the witnesses with that view.

As to the question itself, which Daniel is said to have now put to the two elders, and upon which the whole issue of the business is made to hinge, *Under what sort of a tree didst thou catch them together?* none could be more preposterous. It was nothing at all to the purpose, and could only serve to confuse

the witnesses. If the judge, instead of being this young boy, had been the very youth who made his escape, he could not have put a more impudent question. The person who had caught two people in such a situation, would naturally look at *them*, and not at the tree; and, indeed, would be as little likely to notice what sort of a tree it was, as would a witness of adultery in any common case, to mark what sort of wood the bed were made of. It would have been much more pertinent to have asked, “What appearance had the youth who escaped? Was he big or little? What was the colour of his clothes? Shew us the part of the garden, in which you could conceal yourself, so as to observe them?”

Unfortunately for the credit of the story, the answer given by each witness being so contrived, as to give the judge an opportunity of introducing a pun, thus acquires a still higher degree of improbability. For this pun is, in the first case, merely a Greek *paronomasia*, between $\sigma\chi\iota\upsilon\sigma\varsigma$, and $\sigma\chi\iota\zeta\omega$; according to Porphyry’s shrewd remark, which we know from Jerom’s preface to his exposition of Daniel, and to which, as an objection, Jerom very properly replied, that it did not at all affect the book of Daniel, because the story of Susanna and Daniel was not found in the Hebrew; nor did it, even in the Greek, belong to that prophet; being only part of a book ascribed to *Habakkuk, the son of Jesus, of the tribe of Levi*. We find, moreover, Jerom himself adducing these Greek puns, as a proof that this book was not genuine, but a fiction of a later period.

The word $\sigma\chi\iota\upsilon\sigma\varsigma$ does not mean, as Luther has ren-

dered it, a *lime* tree, but a *mastich* tree. The island of Chio is the native country of mastich, which was anciently so entirely unknown* in Asia, that it has not so much as a name in Hebrew, Arabic, Syriac, or Chaldee. For the Arabs and Chaldeans borrow it from the Greek, and in this very passage, the Oriental translators, not understanding what *σχινος* meant, name any tree that occurs to them: and one Arabic version absolutely retains the Greek word, expressing it very awkwardly in Arabic letters, *Al-Schakin*. The reader will find more information on this point, and concerning the *σχιμος* in general, in my intended edition of the *Hierobotanicon* of *Celsius*: for this is not the place to expatiate on philological subjects, or questions belonging to natural history.

A tree, therefore, is specified, in the first man's answer, which, in all probability, was not then known at Babylon; or, at least, one so rare, that a witness was more likely to have excused himself from giving it a name at all, on the footing of ignorance, or of his not being conversant in the history of exotic vegetables, than to have ventured on the dangerous ground of positively calling it by a particular name, and saying, *υπο σχιμων*. To which answer, the reply from the judge, whom we still find taking a side, was, *Good! thou hast lied against thine own head. The angel of the Lord (σχισει σε μεσον) shall cleave thee in twain.*

* It is to be hoped, that nobody will maintain that the *σχιμος*, according to Diodorus Siculus (ii. 49.) grew in Arabia. Those who make this objection, have only to consult *Wesseling's* edition of that author for its refutation.

The second witness being now, in like manner, summoned to appear, is, with the very same disregard to impartiality, addressed in the rudest manner, as a liar, and a felon; *Thou, who art a Canaanite, and not a Jew, beauty hath enticed, and wicked lust corrupted thee.*—(This smart youth, then, can already talk knowingly of wicked lust. Indeed, according to the LXX., he seems to know that it is not a pleasure of long duration; for he there calls it *a little*, or *a brief* lust; and the story would insinuate, as if he had been hard by himself. Indeed, were it not that he is a little boy, we might almost suppose, that he were himself the youth who had escaped; but *he* could not so instantaneously have reduced his stature. It is true, I have no such suspicion; but still I cannot but wonder at the clumsiness of the fiction.)—*Thus have ye dealt with the daughters of Israel* (of the ten tribes) *and they through fear, yielded to your wishes; but this daughter of Judah* (out of compliment to that tribe, she is made more sinless and chaste;) *hath not endured your wickedness.*—And now again comes the ensnaring question, which, after such a preamble, might confound the very best witness, *Under what sort of a tree didst thou surprise them together?* We might suppose, however, that of two witnesses, one, at any rate, would be prudent enough to answer, *This is a circumstance which I cannot recollect: for I saw so much besides, that I could not take any notice of the tree.* But no such thing. This witness falls into the same snare as the other, and says, *Under an Ilex*, ὑπο πρινον; thus happily helping the young judge to a fine Greek pun as before; who accordingly replies, *Good! thou*

hast lied against thine own head. The angel of the Lord shall with the sword cut thee in two ; *πρὸς αὐτὸν μεσον,* or as the LXX. has it, *ὡς κατὰ πρῶτον σε.*

The two judges being now convicted of false witness, are, without having any opportunity of making a defence, condemned to die by the universal voice of the people, and the sentence immediately executed. According to the LXX., the angel of the Lord himself lends a hand in their execution. The people first throw them down a precipice ; (which, by the way, is much in the style of the Jewish fiction, relative to stoning ;) and then the angel of the Lord utterly consumes them with fire ; which may be founded on another Greek *paronomasia*, that occurs in *Aristophanes* ; *πρὸς ἀμπεροσφῆτις.*

I shall only add, that from a country, wherein any such judicial procedure were established, every man who had any regard to his life, would certainly flee ; and that those who think fit to deduce it from the Mosaic law, traduce that law in the grossest manner.

ART. CCCI.

Of Oaths.

§ 6. *An Oath*, as is remarked in the epistle to the Hebrews, (vi. 16.) *is an end of all dispute*, that is, the final test of the truth ; wherewith men must be satisfied, when they come before a court. It would appear, that it been more easy and common to tender oaths among the Israelites, than it is with us. In the cases

mentioned by Moses in Exod. xxii. 9, 10. Lev. vi. 2, 3., respecting theft, the denial of things taken in charge or found, claims of debt, and violations of promise, an oath might, indeed, be urged and imposed, even in our courts, where the action were only civil, and not criminal; still, however, it would require the intervention of certain circumstances, concerning which we find nothing in the Mosaic law. But to the oath of purgation, which the husband had it in his power to impose upon his wife, we have, in our laws, nothing that bears any resemblance; and this awakens the conjecture, that, in other criminal cases likewise, a similar oath might be more easily demanded, than with us.

How a person, who had accounted oaths unlawful, could have kept his ground under such a law, it is not easy to perceive. Among *us* he may, no doubt, sometimes lose a suit, where he has right on his side; but *there* not only would his property, but even his life, have been very frequently in danger. It was not optional to the wife, on whose nuptial fidelity a husband had cast any suspicion, how groundless soever, whether she would, or would not, take the oath of purgation. Moses, therefore, presupposes, the legality of an oath as indisputable; nor does he conceive, that any citizen of Israel would ever be weak enough, to look upon oaths in general, as sinful; of which *we* find frequent instances, from scruples of conscience, in consequence of the misconception of a passage in the Sermon on the Mount. In fact, among a people, to whom God himself had given civil laws, and had prescribed oaths, any such erring conscience was impossible; and, indeed, with

us it commonly proceeds from the ignorance of religious teachers ; at least, from their being too little conversant with the original language of scripture, to be able to strike at the root of such mistakes in conscientious people. Some points of morality are treated of more fully and explicitly in the *Old Testament*, and others again in the *New*. To the former class belongs the doctrine of oaths ; but there are many religious teachers, who of the *Old Testament* understand almost nothing. The scruple in the present case arises from the Sermon on the Mount, the explanation of which actually requires a much more extensive acquaintance with Rabbinical learning, than any other passage of either Testament whatever ; because it is occupied in combating certain Pharisaical errors prevalent in those days, and, of course, cannot be understood, unless we know the nature of those errors. But if a person of no learning looks upon it as the clearest fountain of morality, and as quite intelligible, without the help of any learned expositor, and, of course, understands it, without any commentary, precisely in the light in which it appears to him ; or, if he consults a teacher about it, who, though he may have learned to preach, has no philological knowledge of the original text of the Bible, the consequence must be, what, indeed, we often find it, that the want of that sort of learning, which is indispensably necessary, in order to understand the *principium cognoscendi* of the Christian religion, will give birth to a variety of errors, which become, at last, material to the interests of the community.

If Moses gave his laws by divine authority, it is

impossible that oaths can, in themselves, be sinful; more especially considering that, both by him and the other prophets, an oath is, on some occasions, regarded as a part of religion; being an appeal to God, or a prayer offered to him, accompanied with an acknowledgement of his omniscience, omnipotence, truth, and justice. A knowledge of the Mosaic law were of no trivial importance, did it only serve to tranquilize the consciences of those, who entertain improper notions on this subject; and such people will, in the sequel, obtain farther satisfaction respecting it.

Those to whom the Mosaic jurisprudence appears too profuse in its oaths, and not sufficiently careful to prevent perjuries, will perhaps find, in Art. CCLVI., some remarks, that may serve to answer this objection. Among a people, still honest and religious, impressed with a belief of the vindictive providence of God, and yet strangers to many evasions invented in after times, the legislator had but little occasion to take many precautions for the prevention of perjury; particularly, if God, according to his promise, really exercised his theocracy, and became by his providence the avenger of false oaths. The possibility, likewise, of retracting an oath without incurring any civil infamy, was an admirable contrivance of legislative policy, for preventing perjuries; which could never be attended with much satisfaction, because conscience would never be at rest, until they were retracted. At any rate, we have no right to reproach the Mosaic jurisprudence with a profusion of oaths; for our own law is, at least, as profuse; only that our kinds of them are different. To be sure, we interfere but sparingly,

with oaths of testimony and purgation, and, in general, with those that relate to facts; in consequence of the prevalence of *Augustine's* doctrine of soul-murder; but of oaths of promise and assurance, we have a great many more than are necessary or useful; such as, (1.) *Official* oaths, which are too comprehensive, and thus only habituate us to forget all oaths;—(2.) Oaths merely *ceremonial*, which include many things, that nobody ever thinks of minding; such as oaths of promotion at our universities;—(3.) Oaths of *religion*, which are exacted even from those that are not to teach religion; sometimes from the very lowest officers of government, and taken, perhaps, upon books, of which the swearer does not so much as know the very title. Oaths of these descriptions contribute much more to the corruption of morals, than judicial oaths relative to matters of fact.

ART. CCCII.

Ceremonies accompanying the Administration of Oaths.

§ 7. I HAVE yet the following particulars to notice, relative to the manner in which oaths were to be taken.

In general, the person to be sworn did not pronounce the *formula* of the oath, either when it was a judicial one, or taken on any other solemn occasion. He only heard it pronounced; but, as, when it was finished, he, in all cases, ratified it, by uttering the words *Amen, Amen*, thus subjecting himself to the curse it contained; so what he then answered was on

oath; and his silence with regard to any thing that he knew, or was questioned about, was deemed perjury. This we plainly see from the two passages, Lev. v. 2. and Prov. xxix. 24. illustrated under Arts. CCLVI., CCLVII.; and, in like manner, from the circumstantial description of the oath of purgation, to be taken by a wife in case of a charge of adultery; Numb. v. 16,—25; (illustrated under Art. CCLXIII;) where we find the priest ordered to pronounce the oath and the curse, and the woman, when he had done, only to answer, *Amen, Amen*. In 1 Kings also, chap. viii. 31., the person imposing the oath, pronounces the curse of its violation against his adversary; for the words of this passage literally mean, *If any man hath wronged his neighbour, and his neighbour pronounce the curse against him to adjure him; and the oath come before thine altar in this house; then, &c. &c.*—Nay, the very verb נשבע, (*Nischba*) used to express *swearing*, is in the passive voice, and properly signifies *to be sworn, or adjured*, from השביע (*Hischbia*) *adjuravit*. And hence we see, that Christ himself, at his trial, took an oath in the strictest sense, when, in answer to the question of the high-priest, (Matth. xxvi. 63.) *I adjure thee by the living God, say whether thou art the Christ*, he replied, that he was so: and, therefore, we can hardly suppose, that in the sermon on the mount, he meant to prohibit all manner of oaths whatever.

The *Amen* above mentioned, and which we might render in Latin by the words, *firmiter, ratum*, is not, in itself, an oath, as many expositors of the New Testament ridiculously imagine; thus making Christ him-

self scarcely ever open his mouth without swearing, even where no oath is required of him* ; it is only an oath, when it is uttered, after an adjuration, that is, the curse of an oath, has been pronounced ; as in Numb. v. 22. or Deut. xxvii. 15,—26. We cannot but smile at the two opposite mistakes into which expositors have been betrayed ; by fancying, on the one hand, that Christ prohibited all oaths ; and making him, on the other, scarcely utter a word without an oath.

The most solemn oaths were taken amidst sacrifices ; the person who imposed the oath, dividing the victims in pieces, and the person who took it, passing between the parts, with an imprecation either expressed or understood, to the following purport ; *May God do to me, if I am perjured, what has been done to these victims ; or punish me still more, in proportion to his greater power.* On this point I do not here expatiate, but merely refer the reader to the 109th note of my *Explanation of the Epistle to the Hebrews*.—The oath of purgation, in case of adultery, was likewise administered, during a curse-offering.

Hence, too, has an oath a name in Hebrew, of which we can trace the etymology ; a circumstance that seldom happens in the case of legal terms. As, in ancient times, it was customary, when oaths were administered, to sacrifice *seven* beasts †, either oxen or sheep, and *Schiba* (שביע) meant *seven* ; so *Schebua*, (שביעה) q. d. *Septimatio*, came to signify, *swearing an*

* That is, where in the Greek the word *αμην* occurs, and is rendered, *Verily I say unto you.*

† Gen. xxi. 28,—31.

oath ; *Hischbia* (השביע), q. d. *Septimavit*, to signify, *he has adjured*, or *taken an oath from any one* ; and *Nischba* (נישבע), q. d. *Septimatus est*, to signify, *he has sworn*.

The consequence of this was, that an oath had a certain special relation to the temple ; and hence Solomon, in his prayer at the dedication of the temple, (1 Kings viii. 31, 32.) says, *If any man hath wronged his neighbour, and his neighbour tender an oath to him on that account, and that oath come before thine altar in this temple, (that is, shall be taken at thine altar,) hear thou effectually in heaven, and so judge thy subjects, as to condemn the guilty, and bring his deed on his own head, but to acquit the innocent, and make it happen to him, according to the justice of his cause.* In like manner, David describing, in the xvth. Psalm, what ought to be the qualifications of the citizens of Jerusalem, who live so near the sanctuary, specifies, in ver. 4. *a regard to their oaths in all cases, as one of them ; Who keepeth his oath, even though it be to his loss.*

The reader will now understand, what Christ, when, in Matth. xxiii. 18,—20., he wishes to represent the oath of a person who swears by the altar as binding, means by saying, that he swears not, perhaps as might be expected, by God, whose altar it is, but *by the altar, and all that is upon it.* An explanation, more grammatically correct, of an oath by the altar, could not, according to Hebrew manners, be given than this.

ART. CCCIII.

The Chicaneury of the later Jews, with respect to certain Oaths, combated by Christ in his Sermon on the Mount.

§ 8. THERE was in the time of Christ, a sort of chicanery relative to oaths, very common among the Jews, and the source of many reproachful epithets applied to them as oath-breakers, by the Romans; concerning which, though the consideration of it properly belongs, not to the subject of the Mosaic law, but to that of its perversions and abuses in later times, I wish here to take notice of the principal particulars; because it actually rests on a misinterpretation of a passage in Exodus (chap. xx. 7.), and because those who happen to be interested in the subject, may be likely to look for some account of it in this work.

The reader will recollect, from what was stated under Art. CCLVI. that the Israelites swore not only by the name of *God*, but also by the *king*, (that is, when they had one,) by the *temple*, the *altar*, and the *holy city*. This, if Moses did not command, neither did he, on the other hand, forbid; and it might be quite an innocent practice, and be even attended with a pious effect, which will be noticed immediately. If a man swore by the king, it might either be a mere civil protestation, equivalent to saying, *As I value the king, I avouch this to be true*; or it might be an oath, properly so called, and to this effect; *If I now swear falsely, may God's vengeance light on the king*. In neither view was there much reason to apprehend,

that such a practice, whether as a protestation, or an oath, would be used to sanction untruths, because, in the East, that would have been regarded as a species of the crime of treason. This case, strictly speaking, does not belong to the Mosaic law, because Moses did not appoint a king; but among the Israelites, in the days of David, the practice appears to have been viewed not merely in the light of a protestation, but of a real oath; in taking which, it was presupposed, that nothing could be so dear to them as the welfare of the king; that God could never punish them more severely, than by bringing misfortunes upon him; and, of course, that it was an oath much of the same nature, as when a person, in swearing, imprecates evil not only on himself, but on all his posterity.—The expression in Psal. lxxiii. 12. *He who hath sworn by the king, shall exult*, (viz. because the king prospers, and God thereby appears to legalize his oath as true;) *but the mouth of liars shall be stopt*, leads to this explanation; and thus it was, in the end, an oath by God himself, who was to punish the king, in the event of the swearer's being guilty of perjury.

Swearing by the *altar*, I have already explained to be equivalent to swearing by God. Oaths by *heaven*, the *temple*, or the *holy city**, were likewise oaths by God; only that, instead of his name, some place was

* Besides the passage in Psal. cxxix. 20. *who swear perjuries by thy cities*, we find an example of a similar oath, in Amos viii. 14.; only that it is sworn by cities which God did not acknowledge, but which only superstition, or rather idolatry, had dedicated to him: *They who swear by the guilt of Samaria, and say, "As true as thy God liveth, O Dan;"* or *by the pilgrimage to Beersheba*.

mentioned, wherein he dwelt ; and that might be done with a pious design, and from reverential awe, because they dreaded to utter the name of God. Concerning this point, we find a remarkable passage in *Philo*, which, at any rate, expresses the sentiments common among the Egyptian Jews of his day. It occurs at the very beginning of his book, *De specialibus Legibus*, and is founded on an improper explanation of the third commandment ; which Philo, who was not particularly conversant in Hebrew, conceived, from the Greek version, $\epsilon \lambda \eta \psi \eta \tau \omicron \nu \omicron \mu \alpha \text{ Κυριε } \tau \epsilon \Theta \epsilon \omicron \varsigma \sigma \epsilon \epsilon \pi \iota \mu \alpha \tau \alpha \iota \omega$, to imply the prohibition of a needless and vain utterance of the name of God. “The bare word,” says he, “of a virtuous man, should be an oath, and “equally stedfast, inviolable, and true. Should, how- “ever, necessity absolutely require an oath, let a man “swear by his father and mother, if they be alive, or “by their health, and old age ; and if they be dead, “by their memory ; for they are the image of the “creative power of the Deity, inasmuch as they have “given being to what existed not before.”—He then proceeds, in corroboration of this advice, to state his opinion, that Jacob, in Gen. xxxi. 53. swore by his father Isaac ; represents this as an example ; and goes on thus : “We cannot but commend those, who, when “constrained to swear, hesitate, delay, stop short, and “thus impress not only the spectators, but the very “persons who compel them to take the oath, with fear ; “as when, for instance, having uttered the word *By*— “they break off without mentioning any name at all ; “but in such a way, that it is manifest enough, by “whose name they swear. At all events, instead of

“ the name of the highest and first Essence, we ought
 “ to use the names of other venerable beings, such
 “ as the earth, the sun, the stars, or the whole
 “ world ; for these are more ancient than human ex-
 “ istence, and will, without growing old, exist, by the
 “ will of their great Architect, throughout eternities.
 “ Instead of thus acting, however, there are some so
 “ inconsiderate, as, passing by all created things, to
 “ name at once the maker and Father of all things,”
 &c. &c. *Philo's* doctrine here is well meant, and
 quite Platonic ; but it would not have been to Moses'
 taste ; for swearing by the sun, moon, and stars, bor-
 ders too closely upon idolatry ; although, indeed, it
 here receives a more favourable explanation. And I
 must add, that as, in the opinion of Moses, swearing
 is an act of religion, and of prayer to God, (Deut. vi.
 13. x. 20.) no good reason can be given, why his
 name should not be named.

Oaths of this description became very numerous
 among the people of the East. The Arabs, even in
 their poetry, have a great many of them, which Ma-
 homet introduces into various chapters of his *Koran*,
 in a most ridiculous manner. Having once persuaded
 himself that he was an inimitable poet, (which the
 Mahometans believe on his word, although we can
 seldom feel it,) he wished to do his best to merit that
 title ; and with this view, he has ornamented some of
 his chapters with words, which were accounted beau-
 tiful in other poets, both singly, and in connection :
 But not having it in his power to introduce them
 otherwise, he was forced to have recourse to oaths for
 the purpose ; and so we find him swearing by the

stone-strewing winds, the mountain-rending winds, the swift-flying steeds, &c. &c.; and sometimes without even mentioning what he meant to adjure. Of these poetical oaths, and even of those that were usual in common life, particularly the oaths of lovers, there may have been many, that were not just oaths by God, but mere imitations of some civil adjuration, such as that whereof we have an example in 1 Sam. xi. 7.— And as in that passage, God is not called upon to take vengeance on the oxen of those who would not join the host, but it is merely threatened that the rest of the people would hew them in pieces; so the words in Canticles ii. 7. *I adjure you, ye daughters of Jerusalem, by the roes and the stags of the field, not to awake my love, may mean nothing more than I will kill your favourite roe wherein ye delight, if ye awake my love.* Such oaths as this, were no doubt often merely jocular, and here merit no further notice; and it is likewise obvious, that even more serious protestations, which gave another a right to punish or to despise me, if I spoke falsely, ought to be distinguished from proper oaths.

The consideration of these we now resume; observing, that they always imply a direct call upon God as their avenger, whether his name be expressly mentioned, or whether it be left out from reverential awe, and something sacred to God mentioned instead of it, which is understood to be a *metonymical* expression for God; some sanction being always specified, which not the other party before whom I swear, but God alone, has a right to enforce.

Now with respect to such oaths, there came a doc-

trine into vogue among the Jews, in the time of Christ, which made such a nice distinction between what *was*, and what *was not*, an oath, that illiterate people were really incapable of comprehending it, or indeed, forming any idea of it: and thus a Jew had it in his power to be guilty of the grossest treachery to his neighbour, even when the latter thought he had heard him swear *by all that was sacred*. Who could suppose, for instance, that a Jew did not speak seriously, when he swore *by the temple*. Yet, by this doctrine, such an oath was a mere nothing, *because the stones of the temple were not consecrated*. This base morality had tainted the whole blood of the nation to such a degree, that we find even strangers upbraiding them with it. —*Martial*, in one of his Epigrams, lib. xi. No. 95. says,

*Ecce negas, jurasque mihi per tecta Tonantis;
Non credo! Jura, Verpe, per Anchialum.*

I do not mean to describe this morality by passages from the writings of the Rabbins, both because sufficient collections of these have already been made by others, and because they are not only too extensive, but also too modern for my purpose, as I have principally to do with it, as it stood in the time of Christ. I rather chuse to take what the Jewish moralists of his day taught, from his own mouth, and to accompany their doctrine with his refutation. The reader who wishes to see passages from the Rabbins, may either consult learned commentators on Matth. v. 33, —37. xxiii. 16,—22. or peruse what *Wetstein* has collected from them, in whose New Testament he will find a pretty copious collection of such passages.

Christ himself, then, in Matth. xxiii. 16,—22. mentions some specimens of their doctrine, which he finds it necessary to controvert. The Pharisees, whom he censured, were in the way of saying, *If a man swear by the temple, he is not bound by that oath ; but if he swear by the gold of the temple, he is bound.* This was a very paradoxical distinction ; and no one who heard their oaths, could possibly divine it, unless he happened to be initiated into the whole villainy of the business. One would naturally entertain the very same idea concerning it, which Christ expresses in his refutation of it, viz. that *the temple which consecrates the gold, is of greater account, and belongs more immediately to God than the gold.* But the foundation of the refined distinction made by the Pharisees was, that the gold was sanctified, but not the materials of the edifice.—Again, the Pharisees said, *If a man swear by the altar, it is no oath ; but if he swear by the offering, he is bound ;* because, forsooth, the offering was consecrated, but the stones of the altar, nothing more than common stones. But to this doctrine, Jesus, with equal reason, makes the following objection ; that *the altar which sanctifies the offering, is greater than the offering ;* and he founds it on this unanswerable argument ; “ If
 “ I appear to swear, and use the language of an oath,
 “ my words, though perhaps otherwise equivocal, must
 “ be understood in the sense which they generally
 “ have in oaths. Thus, if I merely mention *heaven,*
 “ that word may have various meanings ; it may mean
 “ *heaven,* in the *physical* sense of the term, that is, either
 “ the *blue atmosphere,* which we behold, or that *unknown*
 “ *matter* which fills the remote regions of space above

“ us, and which the ancients called *æther* ; but nei-
 “ ther of these is God. When, however, I swear *by*
 “ *heaven*, every one understands me as regarding hea-
 “ ven, in its relation towards God, as his dwelling-
 “ place, or as his throne ; and thinks I forbear pro-
 “ nouncing the name of God, merely from reverential
 “ awe, and that, in naming the throne of God, I in-
 “ clude the idea of him who sitteth upon it ; so that,
 “ if my words are to be explained honestly and gram-
 “ matically, I have really sworn *by God*. In like man-
 “ ner, if a man swear *by the temple*, that is not swear-
 “ ing by the stones or other materials of which the
 “ temple is composed, but *by the God* who dwelleth *in*
 “ the temple : And thus also, he who swears *by the*
 “ *altar*, is *not* to understand the bare stones, *as such*,
 “ but as they form an altar, and have offerings made
 “ upon them ; so that he swears *by the altar*, and *what*
 “ *is upon it* ; an oath no less solemn and binding, than
 “ that most awful oath which is taken amidst a sacri-
 “ fice, by passing between the dismembered pieces of
 “ the victim.” (Art. CCC.) A most rational expo-
 sition ; without which we can never, in any compact,
 be sure of understanding our neighbour’s words ; not
 even though he name the name of God in his oath,
 and swear without any mental reservation whatever ;
 for the *syllables*, perhaps, might still be susceptible of
 another signification !

The Pharisees, on the other hand, founded their
 subtle doctrine on the words of the third command-
 ment ; *Thou shalt not pronounce the name of Jehovah*
thy God in confirmation of a falsehood ; for Jehovah
will not let the man go unpunished, who utters his name

to untruths ; Exod. xx. 7. “ Therefore,” argued they, “ it is no oath, nor will God punish the falsehood, if “ only I do not name the name of God ; or” (as they arbitrarily enough added) “ that of any thing sacred to him.” But they might, with more reason, have concluded, either (1.) that there was no oath, when the name of Jehovah was not uttered, and then they would scarcely have had any oaths at all, because they made conscience of uttering it but on the most solemn occasions ; or (2.) that *all* oaths were prohibited, and accounted as idolatry, in which the name of the true God was not expressly mentioned ; in confirmation of which, they might have quoted Deut. vi. 13. x. 20. I do not, it is true, believe that this is Moses’ meaning ; because he nowhere gives any express prohibition to this effect ; and because, in Hebrew, the word *name* is taken in a more extensive sense than with us ; but thus much is certain, and has indeed been already mentioned, that oaths by the *earth, sun, moon, or stars*, would, in the eyes of Moses, have appeared suspicious, either as direct idolatry, or as gradually leading to it ; of course, that he would have highly disapproved of them, as contrary to the spirit of his laws. And if any man had sworn any such oath, he would either have incurred the punishment of death, as guilty of idolatry, or have been obliged so to understand and explain it, as if he regarded the earth, sun, moon, or stars, merely in their relation to the true God, and had, of course, really sworn a true oath.

And very much to the same purpose, do we find Jesus speaking against the doctrine of the Pharisees,

in a passage of his sermon on the mount, Matth. v. 33,—37.; of which the meaning has been so often misapprehended. He does not say, *Swear not at all*, as if the sense *then* were perfect without any farther addition, and he thus meant to prohibit even oaths by God, which Moses had authorised as acts of religion; but, *Swear not at all by heaven, earth, Jerusalem, or your head*; so that, to the doctrine of the Pharisees, which permitted such oaths, but, in contradiction to every principle of grammar, truth, and honesty, declared them not binding, he only opposes this counter-doctrine, that “men should altogether abstain from such oaths, “ which were used only for the purposes of chicanery; “ and, if they had occasion to swear, should swear by “ naming the name of God, as enjoined by Moses; or “ if they had any hesitation in naming the name of “ God, because, perhaps, the matter in question had “ not a reference to him, or was not of much import- “ ance, and there was no need for any protestation; “ neither should they, in such cases, employ those “ words *as* protestations, which were, in fact, oaths “ by God; but on all occasions adhere steadily to “ the truth; so that their *yea* and *nay* might be as “ sure and sacred as any oath; and then they would “ have no necessity for such ceaseless protestations.” —To each example of these deceitful oaths, he then annexes the reason for which it is to be regarded as a real oath; for instance, to that by *Jerusalem*; *because it is the city of the great King*; (for at this time it had no other king, Herod having been twenty-eight years dead, and Archelaus twenty-one years banished,) and nobody who heard a person swear by *Jerusalem*,

could think any thing else than that he regarded it as the holy city, and swore by the true God who dwelt in it. In like manner, that *by my head*, (we would say, *by my soul*,) could only be understood as implying an invocation of God, on whom all our concerns depend, to hurl his vengeance against our heads and lives, if we were perjured. And, in fact, to say nothing of the explanation given by Jesus, we *must* thus understand it; for it is not probable that its meaning should be, that any other person should have a right to kill us, if we were not speaking the truth; because *that* the magistrate could not suffer, even if we had given him such a right a hundred times over; but, indeed, any one might safely swear by a more sacred oath, that we had no such intention.

Christ, therefore, does *not* prohibit oaths in general; neither oaths by God, for he nowhere says a word of any such thing, and he himself even swore in court at his trial; nor yet all extrajudicial oaths, as some, in order to tranquillize anxious consciences, have pretended, and have thereby only disquieted them the more; for every one, who has eyes, may see, that nothing to this effect occurs in the text; and we besides observe, that even the apostles, more than once, make use of such oaths, in the most solemn manner, in their epistles, as in Rom. ix. 1,—5. 2 Cor. i. 23.; and indeed, sound reason teaches us, that, in some cases, an oath *out of court* may be as necessary and important, as any oath whatever *in court*. He only forbids those oaths, in taking which, a man may hesitate at naming the name of God, because, conscious that he meditates some piece of chicanery, or something disrespect-

ful to the divine omniscience ; and those by heaven or earth, the temple, or the altar, the soul, or the head, because at that time so common, and so frequently and basely abused, as to have become perfectly disgraceful to the Jews, even in the eyes of the less treacherous heathens around them, and justly distinguished by the name of *Jewish oaths*.

The man, therefore, who *now* wishes to observe the precept of Christ with literal strictness, should abstain from all oaths, in which the name of God is not expressly mentioned ; such, for instance, as *by my soul, or the Devil take me* ; which, by the way, as he cannot do without God's leave, this is still an oath by God. At the same time, now that Jewish chicanery has ceased, I do not think that the prohibition would affect the man, who, with all due deliberation and reverence, should take an oath by his *soul's salvation*. — More I cannot here add ; the rest belongs to morals, or the exposition of the sermon on the mount ; and, indeed, the little I have said, is rather an excursion into those fields ; though probably such a one, as, on a point so important, and so closely connected with the Mosaic law, most readers would naturally have looked for.

ART. CCCIV.

Of the Sacred Lot.

§ 9. THAT in making distributions of property, and in cases of disputes relative to *meum* and *tuum*, recourse was had to the lot, in default of any other

means of decision, will naturally be supposed. The whole land was partitioned by lot; and that, in after-times, the lot continued to be used, even in courts of justice, we see from Prov. xvi. 33. xviii. 18.; where we are expressly taught to remember, that *it is Providence which maketh the choice*, and that therefore we ought to be satisfied with the decision of the lot, as the will of God. It was for judicial purposes, in a particular manner, that the sacred lot, called *Urim and Thummim* was employed; and on this account, the costly embroidered pouch, in which the priest carried this sacred lot on his breast, was called the *judicial ornament*.

I cannot here enter into a philological and antiquarian enquiry concerning *Urim and Thummim*, because it would be too extensive, particularly considering how much it has already been the subject of controversy. Those who wish to know my sentiments upon it, in a few words, will find them in my Note upon Exod. xxviii. 30.; and the passage whence I have principally deduced the explanation there given, in 1 Sam. xiv. 41. of the Hebrew original.

But was this sacred lot used likewise in criminal trials? Yes; but only to discover the guilty, not to *convict* them: for in the only two instances of its use in such cases, which occur in the whole Bible, viz. in Josh. vii. 14,—18. and 1 Sam. xiv. 37,—45. we find the confessions of the two delinquents, Achan and Jonathan, annexed. It appears also, to have been used only in the case of an oath being transgressed, which the whole people had taken, or the leader of the host in their name; but not in the case of other

crimes; for an unknown murder, for example, was not to be discovered by recourse to the sacred lot.— See Art. CCLXXVIII.

ART. CCCV.

Of Confession of Crimes.

§ 10. FROM the examples of Achan and Jonathan, adverted to in the preceding Article, we in some measure see, that a delinquent's confession might criminate him capitally; although, in these instances, there was proof independent of confession; because, in Achan's case, the *corpus delicti* was actually found buried under his tent, the very place which he himself specified; and as to Jonathan's case, several people had been witnesses to his violation of his father's oath. We find, however, *one* example, where a man was condemned to die on his own confession alone, and for a crime too which perhaps he had not actually perpetrated, but only boasted of, in expectation of a reward. This is the case of the Amalekite, who declared he had killed Saul; 2 Sam. i. 13,—16. But whether this man suffered, in terms of the Mosaic law, or by a military law made on the spur of the occasion, and according to David's idea of justice, I cannot say. No doubt, David was under the necessity of doing what he did, unless he chose to be considered as the man who sent out the assassin, and meant to render the lives of all future kings insecure. But the case was altogether an extraordinary one.

If the delinquent was fully convicted by the eyi-

dence of witnesses, the sentence of death might be pronounced against him, even without his own confession. We see this, partly from the perfect silence of Moses with respect to the necessity of making a confession, and partly from considering the subject of the following Article; for where no man can be capitally punished, who has not confessed his crime, torture is indispensable; because, without it, every culprit has in his own power the means of escaping the punishment he deserves. This is always the trying dilemma, in which legislative policy is placed, between two cruelties; either there must be torture, or else a right to punish a man even with death, though he will not own his guilt. Of the two, however, I should certainly always prefer the latter; especially where trials are conducted as in Germany, where it is scarcely possible that an innocent person should suffer.

ART. CCCVI.

Torture unknown.

§ 11. THE Mosaic law knows of no such expedient as torture, for the purpose of extorting either a confession of guilt, or a discovery of accomplices; nor do we find any account of it in the history of the people of Israel, down to the time of the Babylonish captivity; although, in the course of that period, there were introduced many other cruel things unknown to Moses, or which he even expressly prohibited. It is true, that, in Art. CCXXXVIII., some mention was made of a sort of torture-prisons, which were used towards

the end of the kingdom of Judah ; and it is possible, that they may have begun to employ them, as means of torture, for extorting the truth : but of this, we have, at any rate, no positive knowledge ; for in the instances recorded, they are merely places of punishment.

But how did they manage to bring delinquents to the discovery of their accomplices ?—Just, I imagine, as other nations do, who have no torture, by gentle admonitions, and, perhaps, too, by artifice ; and where these would not avail, they, no doubt, thought it better, that a thousand accomplices should remain undiscovered, than that an individual, who, perhaps, was innocent, or, at any rate, might have no accomplices to criminate, should suffer torture in addition to the punishment of death.

ART. CCCVII.

Speedy Infliction of Punishment.

§ 12. NOTHING could be more expeditious than the execution of punishments, even capital ones, among the Israelites. It took place immediately after sentence was pronounced ; nor have we any mention of preparations for death. See Josh. vii. 16,—26. 1 Sam. xvii. 11,—19. 2 Sam. i. 13,—16. iv. 9,—12. 1 Kings ii. 23,—25. 28,—35. 41,—46.

This is quite in the Oriental style ; but then is it not cruel ? and is it not unsuitable to the character of a civil law given by God himself ?—I grant, for my own part, that I much approve of the tenderness of our

laws with respect to the welfare of criminals in a future world ; particularly when I read of its producing such happy effects, as in the case of *Count Struensee's* repentance ; and yet I must observe, that this anxious concern for the souls of malefactors, is sometimes productive also of bad effects, when it is carried too far. But still, the rapidity wherewith punishments are executed in the East, is not too cruel, either in God or man : not in God ; for we see his providence acting in the same manner every day, and hurrying away sinners in the midst of their crimes ; so that the Mosaic punishments are thus quite analogous to those inflicted by God in the kingdom of nature : not in man ; for in war, we really act precisely in the same manner, and when we fight or pursue our enemies, we do not first prepare them for death, by the aid of clergymen.

Hence it follows, as one consequence ; that should the legislative authority, even in our times, think fit to make any change, with respect to the punishment of certain crimes, to which our clemency in the preparation of malefactors, gives encouragement, such, for instance, as that of murder, committed by a man, that, after previous repentance, he may get quit of a life of which he is tired, by the hand of the magistrate ; or such as that of perjury in the case of deserters ; our theologians would have no business to rise up in arms against the judges on that account : because their censures would strike still more severely against the Mosaic jurisprudence ; so that they ought to leave the matter entirely to legislative policy, as not at all belonging to their province.

AN
ESSAY
ON
THE NATURE AND END
OF
Punishments;

INTENDED AS AN
APPENDIX TO BOOK V.

ADVERTISEMENT,

RESPECTING THE DESIGN OF THIS ESSAY.

I now proceed to offer those reflections on the Nature and Design of Punishments, which I promised to put together, in vindication of certain doctrines which I advanced when treating of criminal law; and because I was *then* under the necessity of taking many things for granted, with respect to which, I could not hope that every reader would coincide with me in opinion. It is by no means my intention to give a systematic theory of the doctrine of punishments, nor yet to combat, in the polemic style, those theories which appear to me to be false; but merely to discuss some particular points, taking those for granted that are generally understood and admitted. The reader, therefore, need not here look for any developement of the ideas attached to the words, *law, crime, punishment*; nor yet for any thing like a philosophical investigation of the lawfulness of laws and punishments; and more especially, as I have already treated on these subjects in another work; of which, as it has now been long out of print, I mean very soon to publish a second edition, augmented and entirely new-modelled, namely, my *Reflections on the Doctrine of Scripture concerning Sin, as a Doctrine consonant to Reason*. Nor do I now, as some readers seem to have expected, from too partial a perusal of the Fifth Part of the present work, intend to treat of *divine punishments in a future world*, but only of those which are inflicted by civil laws in the present.

AN
E S S A Y
ON THE
NATURE AND END OF PUNISHMENTS.

PART I.

OF THE PRIMARY END OF PUNISHMENT.

§ 1. *The General Principles of Punishment.*

THE greatness of punishments should always be determined by the effect they are intended to produce. They should be sufficiently great to attain their proper end; but at the same time, as small as that end will possibly permit. If we could ascertain this *quantum* with unerring mathematical accuracy, we certainly ought never to go one hair-breadth beyond the requisite degree of severity; for punishments are an evil, and where, for the attainment of a certain purpose, such as the prevention of a greater evil, we must necessarily have recourse to any thing of that nature, we ought to make choice of the least possible evil, and not needlessly increase the evil that is in the world. But as this point cannot be accurately deter-

mined, and still less so, determined *a priore*, from mere theoretical speculation, there remains, between the two extremes, of punishments that are *demonstrably of unnecessary severity*, and those that are *inadequate to the proper end*, a middle path, of pretty considerable breadth, upon which legislative policy has always proceeded. We see her, it is true, verging sometimes to the one side, sometimes to the other; and making experiments, whereof some succeed, while others fail; but that she may not make too many experiments in a matter so delicate, and only acquire knowledge in the midst of racks and bloodshed and unbridled licentiousness, she studies to avail herself of the aid of history and philosophy, and of laws both ancient and modern, together with the experience which mankind have had of their effects.

The end of punishment can hardly be, to inflict on a delinquent a *quantum* of misery or evil, exactly proportioned to his depravity, and the wickedness of his actions. This, no doubt, *may* take place, nor shall I say a single word against the principle being adopted, as a definition of punishments; but, at any rate, it is not their end. For what purpose could any such evil serve, without some farther object to justify it? The delinquent is a wicked man; this is *one* evil; he does many bad things, and injures others; this is still *another* evil. Wherefore, then, should I, without any farther reason, add to these a *third* evil, by inflicting pain and punishment upon him, if it be to serve no other purpose, than to bring into the world, instead of two evils, which I shall reckon *one* and *one*, a third, which being supposed equal in magnitude to them

both, only makes *four* evils, in place of *two*. Many people suppose that God acts on this principle, and punishes solely out of hatred to sin, from an essential attribute of his nature, which they think fit to denominate *holiness*, and which impells him to manifest an irresistible antipathy against moral evil. But of this, sound reason (I had first written *philosophy*, but have altered it; because it was from scholastic philosophy, that this conceit had its origin,) teaches us nothing, nor yet does the Bible. Nor can I allow myself to think otherwise on this point, than that God, in punishing, has the very same end in view, which I shall mention by and by, as the end of human punishments; but on this theologico-philosophical topic, I cannot here expatiate, having done so in the treatise above quoted. Allowing, however, that out of reverential awe of the incomprehensible perfections of the Deity, we were to ascribe to him quite a different law from what is called law among men, and quite different motives for punishment, still it is, at any rate, manifest, that human laws do not generally recognize any such end of punishment as this; and, if any theorist, just escaped from his study, were to propose such an abominable innovation, he would be told, that punishments inflicted with such a view, could only serve unnecessarily to multiply the evils that exist in the world.

The error, which I have now described, is not one into which a lawyer will be so likely to be betrayed, because every thing, both in law and practice, counteracts it, as a closet-philosopher or theologian, who has never had any thing to do with punishments, if he has

not sufficient penetration to find out the true end of inflicting them. Many people, however, allow themselves to entertain a doctrine respecting the greatness of punishments, which is nothing more than a consequence of the preceding false doctrine concerning their end, and which obtains so much the more attention, from our feeling, with regard to the villainy wherewith a crime is committed, a degree of indignation bordering on revenge. Many at least suppose, and are thus tempted to suppose, that the greatness of the wickedness should be the measure of the greatness of the punishment.

Nor do I, indeed, deny, that, in some cases, the punishment of the same crime may, where the guilt is greater, be augmented, and where less, diminished* ; but the blackness or whiteness of a crime, which, by a human judge, at any rate, who cannot see into the heart of man, can scarcely ever be indubitably ascertained, should not be made the general rule of procedure here, nor indeed is it so. To illustrate this by an example. Two people are guilty of blaspheming Christ, that is, speaking reproachfully and contemptuously concerning him ; the one a Christian, the other a Jew. In a moral point of view, this, when done by a Christian, particularly one who, in his heart, believes the truth of Christianity, and only means, in a company, perhaps, to shew himself an *esprit fort* ; or who is outrageously discontented with his fate, seems a

* More properly speaking, however, it is pity, that, in the latter case, interferes, and brings about pardons : for *beyond* the letter of the law, punishments ought never, in any case, to be increased.

crime of the deepest dye; and yet, in Protestant countries at least, we seldom punish it, because it would only excite outcries and pity for the sufferer, and make him of too much consequence. Nor do I think that here we act improperly. Let him be left to the contempt he deserves; and he will unquestionably be expelled from all well-bred society, not, perhaps, as guilty of a crime against religion, but against decency; and should any good stout Christian happen to mistake his motive, and give him a good sound beating, it is no more than he deserves, and let him take it. It is only when he complains on that score, and seeks to be avenged, that the cause of the beating which his impertinence gained him, merits to be made the subject of a criminal enquiry.—When the Jew, on the other hand, is guilty of blaspheming Christ, whom he deems an impostor, his crime, in a moral view, is far less black. He is only in an error,—an error too in which he has been educated; and he does nothing more than what we ourselves do, when we call *Mahomet* an impostor. Yet, in his case, the crime of blasphemy, if brought before a court, would hardly pass unpunished. Perhaps the regular punishment, as fixed by the laws, would be inflicted upon him; at least I would not insure his tongue, unless he happened to have plenty of money; and had he gold by tons, he would, in a country in which an Imperial Debt-Commission were expected, or had already arrived, be a most desirable object of plunder to the sovereign, and might, in a good measure, help him out of his difficulties.—It will here be said, “This inequality, no doubt, does take place; but

it is not reasonable." I beg leave, however, to be of a different opinion. Why the Christian is not punished, I have already mentioned ; but to let the Jew remain unpunished, were—I know not what. For to allow ourselves to be grossly insulted by an individual belonging to a people whom we merely tolerate ; who all have an aversion at us ; who cannot with arms defend the state in which they live, and yet wish to be defended and protected by it ; is what the ruling power, and the people who vouchsafe them protection, can not be expected to do.—To give another example : That a religious people may subsist, without inflicting any civil punishment on perjury, has been already asserted in Art. CCLVI. If, however, the same people become, in process of time, less religious, yet still retain the appeal to an oath, such punishments must necessarily be introduced, and must always have their severity and rigour increased, in proportion to the spread of infidelity among them. For if this were not to take place, the state could not subsist, nor could any thing like justice be administered. And yet it is evident, that perjury, on the part of a man who believes religion, is a much blacker, and a more horrible crime, than in one who does not believe in a God, or at least in a God who takes any concern with, or is to judge the world ; for the latter, when he swears falsely, in confirmation of an untruth, only makes use of words to which he can attach no meaning, and so, in his conscience, swears by a nonentity. His saying, *So may God help me, and his holy word*, is nothing more than if I were to say, *So help me the Great Mogul* ; nor indeed quite so much ; for it is just as

possible that I might one day have occasion for the help of the Great Mogul, who is at any rate my neighbour, as the Jew, who fell among the thieves, had of the Samaritan's. I shall hereafter have to speak on this point again, and make an application to a question, for which we are not yet sufficiently prepared.

§ 2. *Determent from Crimes, the Design of Punishments.*

THE essential purpose of punishments is no other than what is usually expressed in indictments and sentences, viz. *to serve as an example to others*. And though those who have nothing to do with punishments, and who philosophize in corners without any experience, have, out of those treasures of thoughts, which they denominate philosophy, and in their zeal for the improvement of theology and criminal jurisprudence, brought forward this proposition, that *all punishments should have amendment for their object*; still the proposition above mentioned, that *punishments are meant for an example to others*, is so evident, that no man, who has to administer justice, can mistake it; and every one who has any experimental knowledge of the subject, admits it as an established point, though, perhaps, without knowing how he has come to do so.

Were I to translate this proposition into language of my own, I would say, *Punishment is an evil; but it is necessary in order to avoid a greater evil: it is a single evil, employed for the prevention of a thousand,*

or rather of numberless evils ; and its end is, determent from crimes*.

If we think of deterring a man from a crime, in the commission of which he sees, or thinks he sees, his advantage, we must menace him with more evil than the supposed advantage amounts to, according even to his own calculation ; that is, with such an evil, as he, taking every thing into account, both the certainty of the advantage, and the uncertainty of the evil, shall estimate to be greater than the advantage. But as a threatening will not have much effect, if any reason be given to hope, that it may remain unfulfilled, it must be put in execution on every one who is convicted of the crime. The more uniformly and inexorably this takes place, the more effectual will the punishment prove ; and, on the other hand, the great-

* For a great part of what I advance on this subject, I am indebted to an oration of Mr. *Von Segner*, member of the privy council, delivered, as Protector of our University, in the year 1749 ; the very same one which I have quoted in my treatise on the *Scripture Doctrine of Sin*, and promised to reprint as an Appendix thereto ; which, however, remained undone, because the book was printed out of Gottingen, and ready before I knew of it. This oration gave me so very great satisfaction, that I could not omit testifying my approbation of it, to its Author ; which occasioned his presenting the MS. to me, with permission to have it printed. This, as I have said, I intended to have got done in 1752, but was disappointed ; and therefore I annex it to the present Essay, not doubting that it will prove a gratification to my readers. I omit the *exordium*, and the conclusion, and only quote from the place where it treats of the proportion of punishments. He there begins with observing, that the science of mathematics is useful in many more points than were then supposed, and that it might be of importance even to the lawyer. *Ne enim putetis, &c.*

er the probability is of ever escaping with impunity, so much the more severe must the punishment be; and after all, where many instances of remission occur, it will be of no effect; that is, it will, in any case where the cruel despot (for such, in fact, is the title suitable to the sovereign who pardons crimes frequently, and without extreme necessity,) orders it to be inflicted, be nothing better than an useless profusion of evil; and, at the same time, a piece of peculiar cruelty to the poor unfortunate culprit who suffers, and who perhaps ventured on the commission of the crime, just from the influence of example, which would have deterred him from it, having been withdrawn; and from his thus being led to hope, that he would be no more rigorously dealt with than others. And does not that man deserve the name of a tyrant, who grants pardons in such a manner? I shall be told, he has not a *bad* heart, (though, very possibly, it is a selfish and dastardly one;) but it is not so often a bad heart that makes a prince a tyrant, as a weak one; or at least, a nation is more apt to suffer tyranny under weak princes, than under severe ones.

The relation of punishments to their end, and the consequences thence resulting, will be best shewn, by representing them as a weight placed in a scale, which another weight, in the opposite scale, has to hold *in equilibrio*. The transgressor of the laws is hurried into crimes, at one time, by the advantage which he himself actually reaps from them; and at another, by that which he conceives them likely to yield him, though it be not immediate, and may indeed be connected with a much greater loss, which

he does not attend to ; but still oftener is he impelled by the violence of his passions ; by his rage, revenge, fear, or lust. Now all this is the weight to be put into the one scale, which I shall take the liberty of denominating *the bad scale*. In the opposite scale, which may be termed the *good* one, there is a counterpoise to be laid ; and, in fact, it is seldom, in any case, altogether empty ; for in it lie (1.) *Religion*, which alone, in most of those who not only theoretically believe, but feel it, proves more than sufficient to counterbalance criminal propensities. (2.) *Natural honesty*, which, in some people, is almost invincible, and always more than a counterbalance ; though in others, indeed, only a drachm against a hundred-weight. (3.) *Sympathy, goodness of heart, natural good disposition, and education* ; which, in some cases, are of most powerful influence ; as we see in that almost insuperable aversion to theft, which is displayed by people of good education, and, strictly speaking, flows solely from the *point d' honneur* ; and, (4.) *Cool and deliberate reason*, which, in regard to many crimes, perceives how detrimental any present advantage may in future prove. In a great many persons, however, one or other of the weights now mentioned, is deficient in the *good* scale, and what we find there, is far from being a counterpoise to the selfishness and passion of the *bad* one. It is, besides, an unfortunate characteristic of the human heart, that trifles, in the *bad* scale, often weigh more than all the weight of reason and religion that lie in the *good* one. We may call this what we will ;—the fantasticalness of the human heart, natural corruption, hereditary sin. preponder-

ance of sensuality over reason ; (they are terms purely synonymous, against *one* of which, while we sometimes manifest much zeal, we nevertheless know and acknowledge the *thing* under *another* ;) still we see it, after all, like a balance which is not as it should be, but has one of its scales, (the *bad* one, unfortunately,) somewhat heavier in itself than the other ; and yet we give it the additional advantage of a longer arm ; so that the pound put into it, becomes, by reason of its greater distance from the centre of suspension, *more* than a pound ; and perhaps, indeed, if we are in a passion, a grain becomes a quintal.

Hence it is, then, that the greatness of punishments is to be determined ; they should just be of sufficient magnitude to answer their end, that is, to deter from crimes. This does not, however, mean, that they are to be sufficient *so* to deter from crimes, as that not one shall on any account be committed ; (that were, indeed, to require an impossibility ; for though we make punishments ever so severe and irremissible, still our passions, which are apt to exaggerate a trifling, and merely apparent good, in an infinite degree, will sometimes have a preponderance ;) but only to make crimes as rare, and to deter from them as far, as, considering the depraved state of the human heart, it is possible for a legislator to do, without thereby occasioning a greater evil.

§ 3. *Of Slight Punishments.*

WERE it possible to put a stop to the most formidable of all crimes by a slight punishment, we ought,

in justice, to chuse the very least one that will be sufficient for that purpose. To smoke tobacco on the ramparts of a fortified town, where there is a powder magazine, is prohibited; and it is indeed a crime, that may be attended with much more terrible consequences than murder or robbery. Even setting fire to any other town, can be but a mere trifle compared to it, if we look only to the probable damage. And yet it is not usually punished with death: much slighter punishments being found sufficient; for however much a person may have, by habit, become a slave to tobacco, he will not, at the very moment he is walking on the ramparts, look upon it as a pleasure so perfectly indispensable, as that he will chuse to suffer a pair of firm thrusts in the ribs from the guard, (with whom he certainly will not venture to contend, at the risk of his life, and of a capital punishment,) together with imprisonment, or some other corporal infliction after them. This were like contending with the gallows or the wheel; and no man will allow himself to be thus hurried away by any passion. In the case, however, of the man, of whom the habit of smoking tobacco has got such a powerful hold, that he does it, without knowing it, even where it is certainly much more dangerous to the public safety, than the commission of robbery; or in the case of the stranger who knows nothing of the prohibition, neither the gallows nor the wheel would operate effectually *in terrorem*, because he either is unacquainted with the law, or, from habit, does not think of it; and therefore any such punishment would only be a foolish and cruel waste of evil; whereas a good thrust in the ribs, from the

centinel, together with a hearty doze of the cudgel, will so thoroughly strengthen his memory, that every time he approaches the ramparts with a tobacco-pipe in his mouth, the *expectatio casuum similium*, which is so famous among logicians, will make a forcible impression upon him, and remind him to put an end to his smoking.

§ 4. *Of Imaginary Punishments.*

WERE it possible to employ mere imaginary evils as punishments, it would be still better. Parents, who know the hearts of their children, and whose will is their law, may do this in the course of their education; but even in that case, they are not so properly punishments, as chastisements; and parents must here take care not to make their children averse from any thing useful, such as their learning, by habituating them to look upon it as a punishment and an evil.—Magistrates have not that unlimited power which parents have over their children; nor ought they to have it, because they cannot be so safely entrusted with it; and hence it is but very rarely that they can have recourse to this artifice, in the use of which, our procedure must always be regulated by the *phantasia* of the culprit, and the punishment changed, whenever he has the sagacity to discern that it is but a bugbear. Sometimes, however, legislative policy will for a while successfully avail itself of the notions and errors of the people for this purpose. A punishment, which has in some places been inflicted on Gypsies, (I mean, taking their children from them, and giving them education,)

proved so powerfully terrific to them, that, though the gallows and the wheel had never been able to scare them away, they immediately disappeared from the country; and yet, in doing this, the police only did what many parents would account a very great favour, even were it to be done in an orphan-house, and what perhaps parents, even in good circumstances, sometimes petition for, in vain.—In like manner, to many, who cannot earn a livelihood, a place in the house of correction, is really an important favour. It secures them from the numerous evils and vices of a vagabond life, and yet affords them sufficient variety of companions, and these too, moralized by labour and superintendence, who talk away the time of their work, particularly the female part of them; and were it not, that the name of a house of correction has something terrific in it, poor people would be as anxious for admission into it as into an hospital; more especially if it were as clean as that at *Zelle* is, where the prisoners, who sit together, maintain such a strict police, that no vermin, which are the usual pest of poor people, are ever seen; and most of them have much more the appearance of happiness than they had before. Any such imaginary evil as this, however, must, *ab extra*, and in name, have a very dismal aspect: for whenever it loses its terrors, and is unmasked, it from that moment ceases to be useful; and we shall then, probably, find crimes committed for the express purpose of getting lodging and maintenance in our houses of correction; with the confinement of which, though no doubt a real evil, the man who has strongly felt the cravings of hunger will, to be sure

of food, be glad to put up with for life. Only the worst of it is, that these seeming punishments commonly require more expense than the state can afford; together with a deep acquaintance with the human heart, and a despotic power, to vary the punishments at pleasure, by abolishing the old, whenever culprits discover the benevolence of the artifice that has been practised upon them, and substituting new ones in their room. This is, therefore, a device of penal policy, which the Deity might reserve for himself, and which might, with becoming propriety, be used by him; but which it is only in a small degree, at most, that we can adopt and imitate: and states and magistrates have this still less in their power than parents.

So much with regard to very slight punishments.

§ 5. *Of Severe Punishments.*

ON other occasions, we must have recourse to punishments which form a much greater physical evil, than the individual injury, wherein the crime consists. What thief, or (with all reverence, be it spoken, for those persons of distinction, who are guilty of the crime I am about to mention, for they cannot justly blame me for naming them with such company,) what smuggler, or defrauder of the revenue, whether of excise, customs, or by whatever other name it be known, would allow himself to be deterred from fraudulent practices, by the punishment of being, without the least loss of reputation, merely subjected to make restitution to *twice* the amount of his fraud? “Ten times, or perhaps a hundred times,” thinks he with

himself, “ shall I secure my profit, ere I be once detected.” So that he has a strong temptation to embark in a lottery, in which, making every unfavourable exception, he may be sure of this—that, on an average, he shall not have a blank but once, perhaps, in a hundred risks, and then only lose, at most, but twice the price of his ticket. Should any person be inclined to project a lottery on this principle, I would ensure him of patrons; and promise, that no other attempt of the same kind would ever succeed, as long as his lasted. It is manifest, therefore, that if the punishment of theft be a pecuniary one, it must, where the crime has been fully committed, be not a *two-fold*, but a *manifold*, restitution; and always, in exact proportion to the number of times, and to the same amount which the thief might hope to steal, undiscovered and unpunished; and, of course, where *thieves have*, as the common proverb says, such *great rights*, as with us, because people dare not venture to impeach them, it should be, not *four* or *five* fold, as under the Mosaic law, nor yet *seven* fold, as in Solomon’s time, (Art. CCLXXXIV. CCLXXXV.) but, at least, *ten* fold, and even more, if it is meant to be of any avail. It must, in short, deprive the thief of more property, than the amount, with interest included, of all that he could probably gain by all his thefts that remained undetected.

§ 6. *Of Capital Punishments.*

If, however, moderately-severe punishments prove insufficient, and we are not disposed tamely to submit

to the injuries that may be offered us; that is, to lay our account with either a box on the ear, or a bloody nose, as to any rascal may seem good; to lose all security both at home and abroad; and to leave our property, our wives and daughters, a prey to every one that chuses to attack them; we must have immediate recourse to severer checks; in other words, we must, even to crimes that do not endanger life, annex a capital punishment; just as is so often done in the case of theft, and particularly where it is committed by servants; only that the legislative power ought always to consider, whether this increase of severity may not degenerate into an impunity; as may perhaps be said to be the case, in regard to the very crime now mentioned.

Now this is the very point, in relation to which, I expect most objection to be made to my doctrine.—“Is there,” I shall be asked, “the smallest proportion betwixt a few dollars or ducats, and a man’s life? Do we ourselves value our lives so cheap? Is it not barbarous to hang a person for stealing from a rich man, what he hardly perceives—a mere nothing compared to the rest of his property, and by the loss of which he will be no poorer than you are made, by the pen, wherewith you write, becoming bad or useless, and your being obliged to mend it, or even to take another? Is it not, generally speaking, preposterous to make use of a very great evil, in preventing a very small one?” My readers already know, from the tenor of Art. CCLXXXII., that, for reasons very different from these, I am quite against punishing theft capitally, and would be glad, if it were possible,

that a punishment more proportioned to the motive of the crime, could be adopted. At present, however, I speak of the question in general ; and, in the character of an objector, resuming the interrogatory style, I ask, “ Should we, to prevent a very trifling crime, “ have recourse to a very great punishment ; one, perhaps, a hundred times greater ? Should we employ “ the punishment of death to deter from crimes that “ do not affect life ? Is not this a foolish multiplication of evil.” The capital punishment of theft, I have selected by way of example, for this reason, that it is looked upon by so many people as the weak side of this argument, and that on which it ought to be attacked ; and impartiality requires, that we do not mask this vulnerable point, but present it fairly to every one’s observation.—Now, my opinion is, that we *may*, and, in many cases, we *must*, do what is here objected to ; that capital punishments may and should be annexed to many crimes that do not endanger life, and that the evils of punishment should, in general, exceed the injuries for which they are inflicted.

This cannot possibly be called unjust by the man who will but reflect on the situation of the human race, in the state of nature. If I be in that state, I am not obliged to let myself be injured. I may not only defend myself when assaulted ; but, to *deter* others (or whatever else you chuse to call it, for the name makes no difference), I may avenge myself, or punish the person who injures me. And should the mildest avengement not prove sufficient for this end ; should a man have given me a malicious blow, and it availed me nought to have repaid it with the like, but he pro-

ceeded immediately to give me another ; no one, I should think, could blame me, if I now (but here I must be the stronger of the two, and, for that reason, I mentioned a *malicious* blow,) repaid him with a hundred for one, that I might be safe in future. And were even that insufficient for my security, I do not know who could find fault with me, though I said, *Whoever gives me the first stroke, I will beat him dead ;* and though I was as good as my word. This, however, would be a very cold-blooded procedure ; nor are we so calculating in a state of nature ; for the desire of revenge implanted in us by nature, (that right which nature has taught all animals, and which even the best-trained dog cannot help feeling, when any man beats him but his master, or suspiciously approaches his plate ;) this passion, I say, generally requires, and indeed glories in retaliating any injury, to a much greater extent than we have suffered.

But to give another example from the state of nature.—Were a person attempting to lay hold of any part of my property,—a man, perhaps, who had nothing that I could take from him in my turn ; would I do wrong to say to him, *I am determined to keep my own ; and if you attempt to take it, I will give you a beating that you shall feel for a week ;* or, if this did not avail me, and he replied, *I must, then, doubtless, put up with that, if you catch me ; but a back-full of blows will not taste half so sour to me, as your property will taste sweet ;* were I to tell him in plain terms, *If you do take it, I shall certainly put you to death ?* In the state of nature, however, people are really not so ceremonious, but proceed to act without any such

preambles ; nor is there any injustice in doing so ; for every man may, from what he is conscious would be his own conduct, very readily infer what he has to expect from his neighbours.

In like manner, where we happen to be in circumstances approximating to the state of nature, on the highway, for instance ; or when our houses are broken into by night, without our having it in our power to call a magistrate to our aid ; we do not deem ourselves bound to abandon our property to robbers, because we cannot preserve it without the loss of *their* lives, in shooting the first of them who approaches, dead ; but we expose it and even our own lives to danger, and we must do so ; for were it the fashion to act otherwise, and were it accounted morally wrong to shoot the first of a band of robbers who came up to us, through the head, and thus to *deter* the rest from attacking us, no part of our property would be secure against those who should think fit to take it by force, either in the highway or in our houses.

Again ; nations live in a state of nature with respect to each other, and for any wrongs they may receive, exact manifold restitution. If their ambassadors are insulted, as were those of Rome, for example, by the Tarentines, they do not wait for an opportunity of repaying the insult in kind ; but they retaliate by declaring war, and perhaps, if they happen to be successful, by destroying the state that has offended them. As the Roman ambassador said at *Tarentum*, they wash out, with blood, the spot from the garment which decency forbids to name ; nor are they censured for so doing ; for the nation who should act otherwise,

would soon sink into contempt, would be always receiving grosser and grosser affronts, and if it continued to bear them with patience, would, at last, be deemed a fair prey, and forced to submit to a foreign yoke. A nation, therefore, cannot be secure, unless it avenge insults in such an exemplary manner, as that its neighbours shall not retain any inclination to repeat them. Nor is it merely in the case of an insult offered to an ambassador, that a powerful nation deems itself justified in a war of vengeance, but even where any act of barbarity happens to be perpetrated against any of its citizens, and satisfaction is refused. The Romans have hitherto never been condemned for doing what *Cicero* mentions in his oration, *pro Lege Manilia*, c. 4. ; *Majores vestri sæpe, mercatoribus ac navicularibus injuriosius tractatis, bella gesserunt.*—Even in our own times, we have the celebrated example of *Jenkins's* ears ; only that here there may be some ground for doubting, whether *he* had really been so innocent as the merchants, who clamoured for a war, and who probably had been smuggling on the coasts of Spanish America, thought fit to maintain.

If, then, we may, in a state of nature, act thus towards the man who is not under subjection to, but entirely on a footing of equality with us, and who is, moreover, a stranger, and has come under no compact to submit to any punishment from us ; wherefore should a state have less right of inflicting punishment on individual transgressors ? As we unite together in civil society, in order to obtain more security and protection, than we could give ourselves as individuals ; it is not conceivable, that, in order to deter the wicked

from outrages, that is, in other words, to maintain the public security and protection, society should not have it in its power to do, what was previously the right of every individual. At our very entrance into the social state, in the view of more perfect security, we renounce, as individuals, all right of self-avengement, or, to use a milder expression, and more suited to that state, all right to punish those who injure us; and consequently, society concentrates in itself, all the rights of those individuals who compose it, and who have united, in order to deter from outrages, by the infliction of judicial punishments. Add to this, that the state makes those punishments previously known by its laws; which, in a state of nature, is seldom done with any such solemnity: for in that state, men think it honourable to threaten little, and perform much; so that here every man may chuse which alternative he pleases; and either abstain from injuries, which no one, and least of all, one enjoying the protection of a state, is obliged to submit to; or else lay his account with being punished for them.—Besides, those laws have the essence and the efficacy of a compact, among all who accept the protection of the state; and every one knows that the government, whether monarchical or democratical; or, in other words, the power which promises protection, has established them, together with the punishments annexed to them, and will insist on their being obeyed. Hence every person who lives under any government, not as its enemy, but desirous of its protection;—who would wish to complain to the magistrate, when any one purloins his property, injures his person without cause, or lays snares for

his life ;—who would think it wrong, were he, under these circumstances, to have justice and security refused him ;—in a word, who does not chuse to be regarded as an outlaw, and has explicitly and publicly declared his wishes to that effect ;—every such person has, without a formal oath of allegiance, merely by his claim of justice and protection, virtually accepted the terms of the compact ; and whether he be a native and a citizen, or only a traveller desiring the protection of the laws, a Turk, for instance, in Hanover, or a Hanoverian in Turkey, makes no difference. And has he then any just reason to complain that, after such a compact, the state should do, what, without any such thing, every individual had it in his power to have done of himself?

Let us now only consider, if there were no right of inflicting severe punishments, what would be the consequence, and whether we should chuse to put up with it. If punishments, which, in point of physical evil, inflict like for like, do not deter delinquents, and if yet they cannot be augmented, we must, of necessity, submit to all manner of injuries. Now, let every one ask himself, whether he has any inclination to be in such a predicament? If the endurance of such misery be all that he has got by living in civil society, will he not have reason, under these circumstances of oppression, to wish himself once more in a state of nature? If on the man, who has given *him*, or *his*, a box on the ear, no other punishment can be inflicted, than that of receiving another in return, on a hide, perhaps, so callous, as not to let him feel it ; will he—let us put ourselves in his place, and say—will he be satisfied

with being obliged to submit to unceasing repetitions of the same treatment, though they were to be all judicially retaliated? If so, I heartily congratulate him; but such would be the case with very few; for most men, if the state did not protect them, would resume their natural rights, and meditate vengeance by bloodshed and murder. It is precisely the same with respect to other injuries, that do not immediately affect life, such, for instance, as theft, or the wanton outrage of window-breaking, to which some people have such an insuperable propensity. Were it evident, that the usual moderate punishments did not suffice to check these offences, and did the people, who were in the habit of committing them, plainly give us to understand, that they would *not* leave them off, but rather bear their punishments; and durst these punishments not be augmented, so as to prove a counterpoise to the crimes, we should be subjected to the hardship of having our windows broken, as often as any rascal chose to risk the consequence, or of having our property stolen, whenever the hope of escaping detection, ninety-nine times out of a hundred, prompted him to make the attempt: in other words, we should be tributary to every man who chose to steal, and we would have nothing that we could call our own property.—Great nations have been averse from giving their kings a right to impose taxes at their pleasure; and in the preceding century, the people of England defended their ancient constitutional right in this respect, first with their swords, for which they could not be blamed; and then with the axe, by taking off their king's head; which was not quite so

becoming, considering that both parties were on a footing. But should we, then, concede to a thief a right, which many nations have refused to the sovereign, though he employs the money taken from the subjects for the public defence? If so, then must we all become the wretched slaves of the most worthless and contemptible part of mankind.

Perhaps the doctrine which I am now defending, would never have been at all called in question, if people had not secretly, and without adverting to the consequences, presupposed, that *the end of punishment should be, to make the delinquent suffer evil in exact proportion to his crime.* This, however, we ought not to admit; for its true end is, *Determent from crimes.* The very *least* evil, that serves to answer this purpose, ought always to be chosen; but unless we are disposed to become slaves, and, as such, patiently to submit to all manner of injuries, we ought not to think even the *greatest* punishment immoderate, in cases where inferior ones prove of no avail.—“The *Greatest!* Is not that saying too much?” Whoever thinks so, I submit the following case to his serious consideration. I ask him, Is he bound, when travelling on the highway, where he cannot have the protection of the magistrate, to let himself be plundered of his property, when he cannot frighten away the robbers who attack him, with his horse-whip, or defend himself otherwise than by shooting one of them dead with his pistol? To this question, if it be answered, “Yes, he *is* bound to do so, and he ought not to shoot him;” then need no man think of travelling with property about him; for whatever we

take with us on a journey belongs to the first robber we meet; and if we are prudent enough to carry nothing with us, then he may come perhaps to reward us for our prudence, as the English footpads are sometimes said to do, with a hearty beating.—If, on the other hand, I can use a pistol in defence of my property, it is quite evident, if we believe our religion, that, on the robber, who plunders me of a little money, I can inflict an infinite and eternal punishment: for in the state wherein he is, he certainly dies miserable, if my pistol-bullet hits him; and that, not only according to the doctrine of Christianity, but probably to that of natural religion also.

§ 7. *Of the Expediency of Impunity in certain cases.*

WHERE moderate punishments prove ineffectual to deter from any particular crime, or, in other words, from violation of the law, and we are doubtful of the propriety of inflicting severer ones, it were better to repeal the law altogether, and not to punish the action hitherto prohibited any more; for if we do, and with little or no good effect, the punishment is only a useless waste of evil. It is but making two evils of one, and not one whit more rational, than if we were to impose a fine, or a corporal punishment, on the man, who could not get rid of a quartan ague. In fact, we generally proceed on this principle, in not annexing punishments to certain sorts of vices, detrimental though they may be to the public, when we see that they would have too little effect. Thus, on idleness, which is highly prejudicial to the community,

we do not find punishments inflicted by any legislators, but those barbarous novices in legislation, who made laws for petty states, in the very earliest times. Were any one to make any such attempt now, he would be looked upon as a blockhead, or a tyrant; for without infringement on liberty, and a system of perpetual information, the punishment could be so seldom executed, that it would be of no avail. In like manner, although self-pollution be a vice extremely detrimental to individuals, and to the public likewise, if thousands, by the practice of it, become enervated, impotent, and miserable; and although, therefore, its extirpation, if it were possible, would be highly desirable; yet the infliction of any judicial punishment upon it, would, for the same reason, be a vain attempt, because it could be too seldom enforced, and of course would prove no deterrent; while, at the same time, it would give a dangerous publicity to an infamous habit; so that we must regard it as equally beyond the reach of a civil punishment with idleness, although it may be made the object of paternal discipline at home, and of chastisement during the period of education. So, likewise, where there is any thing like legislative policy, and a gracious sovereign can forego a little revenue, it has become usual not to inflict punishment on female unchastity, but to abrogate the yet-remaining usages of ancient times, with respect to ecclesiastical penance; because punishment here is quite useless, there being really no greater evil that can happen to a young woman, than what she must reflect on, as the natural consequence of her fault—I mean, the disgrace of having a child, and losing all

hope of a respectable marriage, perhaps of any marriage at all; in other words, having, for our transitory sensual gratification, forgone all the pleasure and comfort of her future life; not to mention, that the fear of punishment here has often the dreadful effect of occasioning the still greater crime of child-murder. —The useless punishment of suicide, and the fruitless prohibitions of duelling, concerning which I have spoken in Art. CXXXV. and CCLXXII., furnish other examples to the same purpose. If the crime hurts only the individual who commits it, and affects the public only in so far as the harm of many individuals constitutes a public calamity, we may abolish its punishment when it becomes useless; and that is eventually the same as abrogating the law, or, if it remain, for honour's sake, on the statute-book, leaving it a mere empty sound; for that law, whose punishment cannot be executed, is as good as no law. But where offences committed against others are in question, this will not answer, because they would thus become slaves, and, as we may say, at the mercy of every one who might chuse to molest them; and as it is by no means with any such views, that a man becomes a member of civil society, he will, unless formed by nature for a slave, and worthy of being distinguished by the vulgar German epithet applied to such people, but which I do not chuse here to transcribe, in all probability contrive at last to do himself justice, if the state afford him no protection by its laws.

§ 8. *Estimation of the Effects of Punishments.*

“ BUT do not your principles (§ 6.) imply the employment of a greater evil for the prevention of a lesser ?” —I should not think so ; or, to speak more properly, they certainly do not ; for punishment ought not only to deter from the individual crime already committed, and which has not been prevented, but also from numberless more crimes, which would certainly be committed, if there were no punishment. The hanging of one thief ought to prevent, I know not how many thefts, and it actually does so. To abide by this very example, which appears to many people a piece of great cruelty, let us only consider, were theft permitted, or had no adequate punishment affixed to it, what a misfortune it would prove to mankind. It would, in the *first* place, occasion perpetual instances of self-avengement, under the name of self-defence ; and what is an evil inseparable from that practice, as it institutes no inquiry, the innocent would often be its victims ; not to mention, that the property of another would suffer, by its owner being supposed a thief ; and that theft would be retaliated upon theft, till robbery and murder were perpetrated in the most public manner.—In the *second* place, it would produce a disgust at the labours of agriculture, as there could be no hope of reaping the fruits of them ; at the acquirement of property, which cannot be always in our view by day, and under our pillow by night ; and at making any store of provision for future exigencies, because it might be only working for a thief : and the conse-

quence of this, on the first failure of a crop, would be not merely scarcity, but famine, as in ancient times, and the absolute starvation of whole nations, with all those infectious disorders that famine brings in its train. Now this is a much greater amount of evil, than if we were to hang thieves by hundreds; which, however, is at least ten times beyond the usual proportion; and the thief, who knows that the sentence of hanging will be pronounced against him, though he have ever so much property within his reach, will be deterred from the commission of a great many thefts. If we are fairly to compare the greatness of the punishment with the evil of the crime, we must take into account, on the one hand, the sum of all the crimes that would be committed, if there were no such punishment, together with all their consequences; and, on the other, the amount of evil included in all the punishments that are actually inflicted. If the latter sum be the greater, then, no doubt, a lesser amount of evil *has* been unœconomically purchased, at the expense of a greater; but this is not a case that will ever be likely to occur.

§ 9. *Punishments should be proportionable to the Temptations of committing Crimes.*

If the punishment ought to be a counterpoise to the temptation to the crime, it must always be the more severe, the stronger the motives are found to be, that impel to the commission of the crime. This is as clear, as that, where, in *one* scale of a balance, a hundred-weight of any article is laid, I must, to raise

it, put more weight into the opposite scale, than if there were only an ounce. The legislator, or rather the law-projector, (and a most eloquent fraternity law-projectors are,) who should act on a different principle, and suppose, for example, that because the enticements to adultery are so strong, its punishment ought to be very slight, would be acting much about as wisely as the man who, in the scale of a small gold balance, should put a hundred-weight, and in that of the huge beam, placed in the *Hotel de Ville* of a commercial town, for weighing tons and cargoes, a few drams; in order to weigh ducats on the former, and ship-loads on the latter. If this be not true, then, no doubt, where we had to give laws to a cold-blooded people, among whom the males are, in youth, what, with us, they are only in extreme old age, the punishment of adultery *might* be very trifling; no more, perhaps, than a slight fine, and yet be sufficiently effectual; but if, on the contrary, we actually find the propensity to this crime far more violent and ungovernable, it must either be counteracted by something more terrific, or else it must be quite overlooked. Only the latter alternative, not to speak of its moral effects, would, among a people whose passions were at all keen, be dangerous, from the jealousy of husbands; and we might come to witness scenes such as *Virgil* describes, in the third book of the *Georgics*, at ver. 220; and as we usually see in April and May, on the first driving out of the cattle. The man who rides through a field of corn, incurs a penalty, if the owner catch him in the fact, (for the latter's right ceases, if the man has once got out,) and must deliver up his hat

by way of pledge that he will make good the damage ; and this is a punishment that keeps the fields pretty safe, because there can seldom be any great temptation to ride through the corn. But were I, in the case of catching a man in bed with my wife, to seize his hat, or any other part of his dress, and keep it until he redeemed it by paying a couple of *guldens* ; such a punishment would be the most ridiculous one that could be devised. If we wish to secure nuptial fidelity, adultery must be punished, not indeed with death, for the reasons I have assigned in Art. CCXL. ; but with very severe penalties. A legislator among the North American Indians, might, however, safely relax a little in the rigour of his punishments, because the concupiscible passions of these people are by no means so violent as ours are. This I know, not merely from books of travels, but from the information of Mr. *Franklin*, a man whose testimony may be fully relied on.

The gradation of punishments, according to the scale of temptation, may go on, until at length the impulse to the crime becomes so strong, that, instead of punishing it, we must let the temptation be yielded to, because we cannot but account any farther increase of punishment too cruel. An example illustrative of this case, we have in the criminal code of Charles V. which inflicts no punishment on the thief who has stolen from absolute hunger. Nothing can be more rational than this clemency. No doubt, a hungry man has *no* right to take away my property ; and I *have* a right to defend it against him, because I may be hungry myself, or too many hungry people may make

demands upon me. This, however, is not a common case. It is but very rarely that a man *must* steal from absolute hunger, and which he had it not in his power to appease, even if he had chosen to work; and therefore, if there is to be any punishment at all, in order to restrain the cravings of extreme hunger, it must be a terrible one, certainly nothing less than a capital one; and even that will hardly be sufficient; for who would not rather be hanged, than die of hunger, if it must be death at last. Here then, it is better to put up with the very rare wrong of having our property purloined by a man oppressed with hunger, than to resort to the gallows and the wheel, in order to prevent such a trifling evil. And yet if, during an extreme famine, after a continued failure of crops, or in a besieged city, no individual has so much provision remaining, as that he can let it be stolen, without being himself in danger of starving; in other words, if the evil be no longer trifling, but intolerable; or if, again, in order that the lives of all may be preserved, the bread must be dealt out sparingly, and by weight, the clemency of Charles V. can no longer have place; but a more rigorous law will be requisite for the occasion, and it must certainly denounce punishments of extreme severity against theft, because gentle ones would be of no avail against hunger.

The stronger the motives of abstaining from any crime are, which the man to whom we give laws, may previously have had, and really felt, so much the less may be its punishment; and the less, I do not say, he individually, but the people to which he belongs, feel these motives, so much the severer must it be

made. This, again, is just as evident as that, when I mean to weigh a hundred-weight of goods, and there are already eighty pounds weight in the opposite scale, I have not to add so much more, as if there were no weight in it at all. If, then, we propose to restrain a people, among whom religion, honour, or education, have considerable influence, from certain crimes, moderate punishments will be sufficient to counteract any trifling preponderance of temptation, that may exist among them. Among a people, on the other hand, who have neither education, honour, nor religion, punishments, to produce any effect, must of necessity be more severe; and whenever I figure to myself a period, when religion shall decline among us, I reflect, at the same time, with horror, on the severe punishments which it will then be necessary to devise, and which, after all, will very often prove more ineffectual than the moderate ones of the present day. For, in place of the weight that religion then no longer lays in the good scale, must be substituted the constant employment of rackers and executioners.—But may God avert the approach of such unhappy times, which too many among us are now labouring to hasten!—In like manner, when certain vices, such, for instance, as sodomy, are abhorred, and regarded with contempt, slight punishments may scare them from approaching our land; but severer ones become necessary in order to expel them, if they have once got a footing, and are become fashionable. (Art. CCLVIII.) No doubt, in the eyes of morality, that man is by much the more guilty and abominable, who sins, while he feels so many motives that should re-

strain him *from* sin ; and God, the searcher of hearts, may on that account punish him with the greater severity ; but of this I do not now speak, nor yet, indeed, of individuals at all ; but of nations, that have the advantages of religion, a sense of honour, and good education, and all these still operating effectually on the majority ; and here, I say, that moderate punishments may be sufficient to lessen the number of crimes. Nor do I enquire, whether, in the case of the particular offender whom we have at present in our view, a bad education, or ignorance of religion, may not be a reason for the mitigation of his punishment. He, at all events, deserves compassion : but I am now speaking of the character of whole nations.

§ 10. *Effects of the Certainty of Punishment—The Right of Pardon.*

I HAVE already observed, that the more *certain* a punishment is, so much the more will it operate *in terrorem* ; and the more uncertain, the less. If a man may hope to steal or to defraud a hundred times, before he be *once* punished, although his punishment were *ten-fold* restitution, he could still entertain the prospect of gaining ten times that amount, in the course of a hundred thefts or frauds. Now, a punishment becomes more uncertain, in other words, less effectual for determent, either by the hope that may be indulged of a pardon, or by the greater difficulty there is in the discovery of the crime, or again, by the facility wherewith the delinquent may escape by flight, or otherwise ; and according to the degree in which

these circumstances hold, its severity must be augmented ; while the certainty of its infliction will, on the other hand, effectually compensate for its greater lenity.—Concerning the bad effects of too frequent and easy pardons, and that they are really acts of cruelty, I have already stated my opinion. A right of pardon should exist somewhere, and it *may* be exercised for weighty reasons ; but still this should be done with very great prudence, and exactly as a physician does, when, in extraordinary cases, he prescribes a strong poison as a medicine. If pardons are frequent, punishments must be augmented, in the same proportion in which they lose their influence, by the probability of their remission ; and certainly there can be no real clemency, where, in order to pardon some delinquents, others must be punished with additional severity. Pardons likewise occasion a very great inequality in the law, which borders on despotism ; and, on the unhappy culprit, whose lot it proves to be a victim to the law, this inequality is the more cruel on this account, that the pardons already granted, were the very means of weakening in him the influence of the motives, which served to restrain him from the crime. The prince, therefore, who would be as wise as he wishes to be gracious, must exercise the greatest possible discretion in the granting of pardons, and make them so rare, that no man, and least of all the man of rank, or the favourite, who has injured his inferior, shall, with any confidence, expect them. A punishment inflicted on a person of distinction and respectability, makes an infinitely greater impression, than on one of the common people, or

whom nobody knows. The sovereign, therefore, who would not merit the character of a *reprieving despot*, but would wish to manage punishments prudently and economically, ought not to be very ready to extend his mercy to a delinquent of rank, unless most peculiar circumstances imperiously require him to do so. To one of the common people, he might, with much more propriety, grant a reprieve occasionally, *out of mere compassion*; because it would do no harm.—Upon the whole, a country looks more like a land of despotism than of freedom, where criminals of distinction are often pardoned, and all others so much the more frequently punished; and this it is which gives birth to those wanton outrages and oppressions, which the great so shamefully practise upon their inferiors, and which lead, in the end, to the downfall of states.

§ 11. *Punishments should be proportioned to the facility of the Discovery of Crimes, and the Danger of Escape.*

THAT milder punishments are sufficient, where crimes are easily discovered, and can hardly be at all concealed, has already been remarked, under Arts. CCLXXXII. and CCLXXXV., in reference to the Mosaic jurisprudence; and I shall now make some applications of the remark to our own laws. The common proverb, *Thieves have great rights*, expresses the state of the case with us most accurately. There must be very strong proofs exhibited, before we can make a man a thief; and the very charge, if we are not able to substantiate it, may be followed by a serious action for defamation; to stop which, we may be

very glad to pay to a real, though unconvicted, thief, a considerable sum of money, by way of damages; and even if we should, in terms of our law, get free of this by an oath, still we may incur more expense and vexation, than the article stolen was worth. Now, according to our national character, (which, by the way, I should not wish ever to be different from what it really is,) the law, in this point, cannot be altered: for theft is too great a reproach, and the mere accusation of it leaves too great a stain behind it, (such, indeed, as tons of gold cannot compensate to a man who values his character,) unless the accuser can be severely disgraced in his turn. As long, however, as our thieves retain those great rights, which proceed from the noble spirit of our laws, their punishment, when convicted, must be the more severe. On the other hand, the man who legislates for a people, who have less sense of honour, or among whom theft is not regarded as so disgraceful, but, as among certain predatory tribes, rather as creditable; and where, of course, if I, *bona fide*, believed a man to be a thief, I could accuse him of theft, without fear of a process of defamation—may satisfy himself with punishments of less severity. Let us, in illustration of this point, take the following example: The practice of defrauding the revenue, in matters of excise or customs, is, in a moral view, a theft committed on the public at large, and, in a political view, a very formidable evil, because the sum necessary to meet the public expenditure must be raised; and, of course, if smuggling prevail extensively, the taxes may require to be so much augmented, as that manufactures, agriculture, and at

last the country itself, may sink under their weight. Unfortunately, however, these fraudulent practices, according to our national ideas, are not disgraceful: so far from it, indeed, that even people of rank are not ashamed of them. The smuggler, therefore, has not such great rights as his brother, the thief; and the consequence is, that smuggling is not, like theft, punished by the delinquent being adjudged to work on the fortifications, to be beheaded, or to be hanged, but by the payment of a fine, forfeiture of the goods, &c. &c.; and were these penalties only rigidly and inexorably exacted, particularly from the servants of the sovereign, without respect of persons, they would still be capable of producing some good effect.—The coining of bad money, without a right of coinage, and the debasement of the coin (I say not, by a sovereign state, for then a different law operates *, but) by

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* A sovereign state coins money, strictly speaking, for itself, and therefore makes a *pactum* with itself, to give and take a certain value of metal at a higher rate than its intrinsic worth; and this practice is as ancient as the second Punic war. If it does this under similar circumstances to those in which the Romans *then* were, and where the community seems threatened with immediate destruction, the procedure does not merit censure, unless we, at the same time, condemn (and this has not hitherto been usual) the conduct of the Romans, which our teachers of jurisprudence commonly approve. Whether foreigners may think fit to take its money at the full value, rests with themselves; but it is under just as little obligation to abide, for *their* sakes, by the ancient standard, as the English are, for *ours*, to make their gold and silver coins, according to the proportion which is settled by the laws of the empire, or the price which bullion bears among goldsmiths, smelters, and merchants. If it circulates its de-

any subject of a great state, who enjoys the privilege of coinage; are two crimes pretty much on a *par*, in point of the loss they occasion to the public; and the motive of both is the same, viz. a desire of gain. But the former is difficult to detect, and on that account, the severest capital punishments should be denounced against it, in order to deter from all such attempts. The detection, on the other hand, of debasement in the money issued by individuals, enjoying the privilege of coinage, is very easy, and will always be very speedy, were it only by the operations of smelters and Jews. Here, therefore, the punishment may be very slight, or rather, there need be almost no punishment at all; but only reparation of the loss occasioned to the people by the fraud; and hence, by our law, the coiner is obliged to take back all his base money, and to give them, instead of it, the legal value, which they ought to have received. This *should* prove a sufficient deterrent from this offence, not to mention the demolition of his mint, and the forfeiture of his privilege. And if this punishment did not stand in our law-books only; were it actually and rigidly executed, no privileged coiner in Germany would ever think of such a thing as issuing base money under his stamp, because the loss would far exceed the profit. For he would lose all the expense of minting, and the re-

based money in an enemy's country at the full value, this is, in fact, imposing a tribute on the vanquished. On the other hand, if in any other circumstances than those of the second Panic war, a state coins alloyed money, it is not a Roman procedure; but still, with respect to foreigners, it is not culpable; for they may refuse to take it, and indeed they generally do so.

melting of the base money, in order to extract the pure silver, would also occasion him a considerable expense, and the more artful the mixture were, so much the greater. He would, moreover, run the risk of having his coin imitated by the makers of bad money, in order to share his profits, and thus of being obliged also to exchange *their* pieces, which were not distinguishable from his own.

Where criminals can easily make their escape, either because the frontiers are hard by, and the neighbours do not deliver them up, or because the whole body of them consists of vagabonds, or because they have nothing to lose, it becomes necessary to make punishments more severe, than where, being possessed of riches and property, they are not so likely to withdraw themselves by flight from the reach of the law; and hence it is, that, among a poor people, most of whom can with truth say, in the language of the philosopher, *Omnia mea mecum porto*, we find punishments generally severe. Most of my readers have no doubt studied at universities; and, if they have been attentive observers, they must have remarked, that at those universities where the majority of the students consists of young men of fortune, very slight punishments, such even as appear ridiculous when coolly considered, have a great effect, when inflicted impartially; and, on the other hand, that at those to which a great number of poor students resort, who have nothing to lose, and laugh at *relegation*, and who, even though they had money to pay its penalty, would rather prefer keeping it to supply their expenses in other places; there, even the severest punishments are insufficient,

to prevent the enormous follies and excesses of the students; in which their poorer comrades, being perhaps bribed to engage, often find their account, or to which they are impelled by their own passion or Quixotism.

§ 12. *Of the Expediency of Torturous Punishments.*

THAT we should always chuse the least possible punishments that will suffice for the prevention of crimes, has been already remarked, and indeed follows as a corollary from this great proposition, that we ought not to increase the evil that is in the world, but let it remain as little as we possibly can. But then, the question comes to be, “If even capital punishments, and these too, painful ones, should prove insufficient to deter certain descriptions of people from crimes, ought we not to resort to others still more painful, and even torturous?” This is not advisable, because experience shews, that too cruel punishments are by no means more terrific than certain more moderate ones, and have, besides, this bad effect, that they render a people hardened and unfeeling. That, in capital punishments, there should be a gradation from the easier to the more painful, I do not account improper, but rather hold it to be necessary, because there can be no other means devised, of restraining murderers and robbers from needlessly torturing those whom they intend to murder. Nothing will more effectually check the barbarities of such miscreants, or move them to dispatch their victims with as little pain as possible, than the certainty of having the law of

retaliation enforced upon themselves with the utmost rigour, or, at any rate, suffering a capital punishment of increased severity. But to re-introduce the horrible punishments of some foreign nations, or those that were used by the barbarians of ancient times, such as the Roman punishment of *empaling*, or the still more dreadful one of *crucifixion*, under which a criminal might be dying by inches for several days, amidst the agonies of intolerable thirst and pain, would not serve to lessen crimes, and but only to harden the feelings of the people. My opinion is just the same, with respect to tortures, where they are only used as an additional punishment to the person who *has* confessed his guilt. They are indeed sufficiently objectionable, when only employed as an expedient for extorting confession; but where they are used as a means to no end, and are only a form of process, and an addition to the main punishment, (God be thanked this is not the case in Germany) they are but let any nation that thus employs them, fill up this blank, and say what they are; indeed *one* nation is now saying so plainly enough. The man who murders *a king*, is no doubt guilty of a more heinous crime than any other murderer. The very attempt to do so is a more formidable evil to the public, than many an actual murder would be, because it so naturally converts a king into a tyrant, who entertains suspicions of all around him, and, of course, may, to secure his own life, deprive even innocent people of theirs. To this crime too, where the people are, whether justly, or unjustly, discontented, or where mistaken ideas of religion come into play, there is sometimes a combi-

nation of motives, which sets many hands, daggers, and poisoned cups in motion. I am, therefore, far from denying, that here a great counterpoise of suffering may be requisite, or that the mere attempting of this crime should be punished with a more painful death, than any other actual murder. At the same time, the word *regicide* sounds somewhat strangely in my ears, while the king yet lives; and, to secure the lives of kings, I could wish, that the man who has meant not just to kill a king, but only to wound him with a view to his amendment, should, if it is not thought proper to grant him the well merited *beneficium* of a person wrong in the head, be punished, at any rate, not as an actual regicide, but with somewhat less severity. If, however, in the case even of actual regicide, and still more, of what is but figuratively so called, the the punishment shall, as by the French law, extend to the most artificial and exquisite tortures, it will only be a waste of evil, without the least use. If the man who murders, or means to murder, the king, be deranged, all the tortures endured by *Ravaillac* and *Damiens* will not deter other madmen from the same crime, one whit more than a milder capital punishment. No doubt, we have a right to put madmen out of the way, if they become dangerous, but not to punish them. They are like the mad dog who should bite a king. He would be shot to prevent him from biting other people, but not put to the torture as a punishment.—But again, should mistaken ideas of religion, or abominable superstition, be the motive that prompts to regicide, and so strongly, that the usual capital punishment, or even breaking on the wheel, proves

insufficient to deter from it; of what avail, in that case, can punishments still more cruel be? We may, if we please, superfluously resort to the rack, to extort the confession of the crime, which has been already confessed, and at the place of execution, we may make a display of the most ingenious tortures, that were ever contrived: but they will, at best, be but trifles, compared either to that eternal damnation, which such an enthusiast dreads will be his portion, if he neglects to perpetrate that regicide which he deems to be his sacred duty; or to that everlasting and unspeakable bliss, always augmented in a geometrical proportion to the increase of his tortures, which he anticipates as his reward, and which his enthusiasm makes him even already feel. Where tortures, therefore, are applied to enthusiasts, they form no counterpoise to this crime; and serve no other end, than to make them appear both to themselves and others, in the light of martyrs; from whose blood new martyrs usually spring. Indeed, the very exhibition of exquisite tortures in the view of the public, directly tends to excite an enthusiasm in their minds, which mildness and mercy in the infliction of punishment would never inflame in the smallest degree. At least, notwithstanding the extreme severity of the French punishments, the kings of France, devoted to them as their people are, are in somewhat greater danger of *Ravallacs* and *Damienses*, than the kings of Britain, in which torture is unknown; and where, though the people speak with great freedom against kings, and have in reality strong and resolute arms, yet we never find

them using them in this manner against the sovereign; neither zealous Protestants, against *James the Second*; nor yet zealous Catholics, against his Protestant successors. Nay, even when *Charles the First* was, after a mock trial, condemned to the block; notwithstanding the hatred entertained against him, and the frantic enthusiasm of the nation at the time, there could no one be found, who, amidst all the security with which the deed might have been done, would venture to strike off his head without a mask. The contrast here is singularly striking, and shews the uselessness of extreme severity in punishments. In Germany, where the punishments of *Ravaillac* and *Damiens* appear to us in the light of foreign rarities, we have, it is true, heard of attempts against the life of sovereigns, but they were not successful.—Besides, what sympathy with the sufferer do not such punishments excite? How much do they lessen the hatred, which is entertained against a regicide? How much secret indifference may they not leave behind them, which but few express? And how highly would not that monarch be esteemed, not merely for his clemency, but also for his fortitude, and becoming unconcern for his life, who should exert the whole force of his authority, were it even in opposition to the laws, to mitigate the punishment of an unsuccessful attempt of this nature?—Once more, What a cure would it be for enthusiasm, if an enthusiast, in consequence of being pardoned, gradually came to himself, learnt to feel, became wise, and manifested unextorted remorse. In the case of common crimes, which do not proceed from enthra-

siasm, the remorse of one delinquent is of no avail to the determent of another ; but every disease requires, and can only be cured by, its own peculiar specifics.

§ 13. *Punishments should be levelled at the Prompting Passion of Delinquents.*

It would be one of the greatest achievements of legislative policy, to hit upon that very punishment, which, according to the passion that prompted him to the crime, should be most sensibly felt by the delinquent ; for could we but light on the place where his feelings are most acute, we should, with far less expence of evil, do far more good, than we can do by resorting to much severer punishments of a different kind. The man who should devise a plan for punishing the duellist, who is prompted to murder merely by a mistaken point of honour, in such a way as to make him infamous in the eyes of the world, would resolve a problem of legislative policy, for which prize questions have been proposed in vain, and in regard to which the well meant severity of *Louis the Fourteenth* had, from a mere mistake in the choice of punishments, almost no other effect, than to shew the world the great weakness of a law that opposes a point of honour. I have already spoken on this subject in Art. CXXXV., and I do not here, in this *Essay*, wish needlessly to copy myself, but only sometimes to make, as it were, little drawers, into which my scattered remarks may be collected. And to this same drawer, which I am now filling, belongs also what has been said in Art. CCLXXXII., on punishing thefts

differently, according to their motives; and another still stronger example is furnished for it by Art. CCLXXII., in the case of the murderer, who has it in view to get rid of a weary life, by the hand of the magistrate, after time has been allowed him to repent. For the rich voluptuary, who has become bankrupt from his own extravagance, imprisonment with slender fare, would be a very sensible, and quite a suitable infliction; particularly if his former friends, who had assisted him in devouring the property of others, were not permitted to send him any better meat or drink, to mitigate his punishment; but how obvious is it, that, if this same punishment were, during a famine or a siege, denounced against theft, it would only entice us to it. We should then be very apt to reason with ourselves, as is related of a meritorious, but neglected French officer. He came to the minister, and thus addressed him, “ My Lord! What would you do to the man, who should call you a scoundrel to your face?” “ What would I do?” replied the minister, “ I would send him to the Bastile, to live on bread and water.”—“ Very well,” replied the officer, “ I say so to your face; keep your word, for I have no bread.”—It is said, he received a pension for his freedom. The story may be true or fictitious, but it serves strikingly to illustrate how unsuitably a punishment may be applied.

To discover and avoid the *grosser* errors which are committed against this rule, will, to a prudent legislator, be no very difficult matter; but to pass that point, and to apply the plan systematically, and in perfection, would seem to be beyond the ken of a human legisla-

tor, and to belong to that omniscient God alone, who knows the secret springs of human actions. The very same crime may have very different sources. Suppose then, that a philosopher discovered them all theoretically, and, according to its several springs, fixed its several punishments, in the most perfect and suitable manner; and that he likewise surmounted a difficulty, which we have been accustomed to regard as insuperable; I mean, that of reducing evils of different kinds, such as bodily pain, disgrace, and the langour of imprisonment, to one scale, and comparing them in such a manner, as that they could be equalized in quantity, and so that we should never do a criminal any injustice, in substituting one of these punishments for another; (—two very great demands, by the bye, which no true philosopher will ever undertake to satisfy;—) still a judge would not be able to apply the law to particular cases; because the true motive of the crime is often so deeply hid, in the most secret recesses of the heart, that man cannot search it out. No doubt, a judge might not unfrequently guess and conjecture it; (and perhaps too, guess wrong;) but we would not just approve of altering a punishment, on the conjectures or opinion of a judge, or by what his penetration might discern by looking the culprit in the face; for then the judge would be a despot, and have it in his power, according as he wished well or ill to him, to chuse the punishment that might least or most annoy him. So far are we from approving of a judge framing his decision by the aspect of the culprit, that we paint justice with her eyes tied up; and we affix no good meaning to

respect of persons, because we are apt to fear, that if a judge's glance were under no controul, he might see with the eye of passion; and, therefore, in cases of great crimes, the accused usually has the privilege of appeal, by sending the minutes of his trial to judges, who do not so much as know him. In very small states, such as we find in the infancy of nations, which rather resemble one large family, and where the judge chosen from his well-known integrity, is invested with a sort of paternal despotism, it might, no doubt, be possible to punish many crimes, according to the passion that led to them; just as parents employ this expedient to excellent purpose in the education of their children, and so are often able, with the aid of one little ludicrous piece of discipline, to produce the happiest effects: but whenever the nation becomes great, and the people lose their primitive simplicity and honesty, the application of the expedient proves more and more difficult, and the power, which must be left to judges, too dangerous.

§ 14. *Legislators should attend to the Motives, from which Crimes are most commonly committed.*

ALL that legislative policy can then do, is to observe, from what motive crimes are most commonly committed by the people in general, and then to counteract them by the most suitable punishment that can be devised, without any regard to the cases of particular criminals, who may have been actuated by other motives. In this way, it will sometimes have the luck to devise a punishment, most happily adapted to a par-

ticular crime: only such discoveries will always be special and insulated, and incapable of being combined into a system of punishments of equal efficacy. An example of a punishment of this kind, we have in the English law, which deprives any chairman, hackney coachman, or waterman, at London, who takes more than the regulated fare, of the use of his chair, coach, or boat, for a year. As these vehicles are all numbered, any such imposition is certain to be discovered; and as nothing but avarice can be its motive, the punishment in question is its strongest possible check, infinitely stronger than *any* forfeiture, though it extended to a hundred or a thousand times the amount overcharged. The consequence is, that, rough as these chairmen, coachmen, and watermen are, and though their numbers amount to many thousands, we very seldom hear of any one of them attempting to impose on his employers; and the person who does not know how much any fare should be, may very safely hold out a handful of money, and desire them to take what is their due. Were the gallows the punishment of imposition here, it would be far less effectual; for with that punishment an Englishman does not associate the idea of such disgrace, as we Germans do; on the contrary, many would seem to look upon the gallows, as a very genteel sort of a machine; as the *ladder* described in Swift's *Tale of a Tub*, on which one may make a harangue, and give the people an opportunity of admiring his courage. Besides, those gentry would pay a better compliment to the good hearts of their countrymen, than to suppose, that any one could be capable of swearing them to the gallows for

a sixpence; and whoever did so, would not, either in the streets or the river, be very secure from their revenge.—Still more powerful has the measure proved, which was devised by the English legislature, to counteract judicial lies, when the resolution to dispense with Quakers taking oaths, as a matter with them contrary to conscience, was passed with this express *proviso*, that, on the very first instance of a Quaker being convicted of *affirming* a falsehood before a court, the privilege should cease for ever; and Quakers be obliged to swear like other Englishmen. During the whole period that has elapsed since, no Quaker has been found guilty of giving a false testimony; and to account for this, we need not resort to the operation of the Spirit; it is quite a natural event; for, as the Quakers are very much beholden to this indulgence, and, indeed, without it, could not subsist in England, or, at any rate, have their property secured, so they take care, in educating their youth, to impress them with such a horror of judicial lies, that a man of this persuasion will tremble at the idea of perjury, a hundred times more than any other person; and, besides, every Quaker is here the watchman of his neighbour, and will naturally take every possible method, if he has the least suspicion of his veracity, to hinder him from uttering a falsehood, which would so deeply affect the interests of the whole body, and yet would most justly deserve to be punished. Add to this, that the man who should occasion them such a misfortune, (or, as *they* would term it, such a *suffering*;) would have reason to apprehend such a direful vengeance, and such an *awakening of the old*

man within them, from the numerous and powerful society of Friends, that it would be more advisable for him, if he meant to *lie* judicially, rather to renounce Quakerism, and commit a perjury, and subject himself, in the event of detection, to the far less formidable punishment of that crime; which, in England, is only transportation to America.

§ 15. *Expediency of regulating Punishments by the Rank and Station of Delinquents.*

FARTHER, it may be expedient to establish a diversity of punishments, in reference to rank and station, and to the influence of its example, if we wish them to attain their end, and to put any crime out of fashion. In illustration of this point, I can give no stronger example than that, already mentioned more than once, of practising frauds with regard to the taxes which are *legally* * imposed, in order to meet the necessary expenses of the state, by whatever name they be called, (and the names of none of them sound very sweetly,) whether customs, excise, *fixum*, &c.; and to which there must always be additions, or new ones made, the more those already established are evaded. The burden of such frauds lies heavy on many a country; partly, because, in order to prevent them, it must em-

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* I must request that this word be not considered as superfluous. If a prince has no right to impose taxes, without the concurrence of his states, and yet does impose them, his subjects are guilty of no fraud in not paying such illicit exactions, nor do they merit any punishment.

ploy so many officers, that their salaries, including perquisites, are often almost equal to the amount of the taxes; and partly, because these taxes, in order to produce the requisite sums, must continually be increased and multiplied, until the honest tradesman, and the possessor of landed property, (*L'homme à quarante Ecus,*) who can never evade them, sink under their weight; and with them, the manufactures, industry, and agriculture of the country; particularly, when in place of the milder sort of imposts, such as excise duties, which are paid imperceptibly, and but occasionally, it becomes necessary, from the facility and extent of frauds, to have recourse to more oppressive exactions, such as a yearly or monthly poll-tax; or again, when, to prevent smuggling, severe and odious regulations are adopted, which lead the people to be less partial to their native land, and make foreign traders, and even travellers, shun a country where they would, without any fault of their own, be exposed to such vexatious proceedings. I have already observed, that the punishments of confiscation, or manifold restitution, would not here be altogether without effect: they would be of more use, at any rate, than similar punishments, affecting only property, are, in preventing theft; but from the great secrecy with which the crime can be carried on, they are not sufficiently efficacious, to prevent the public at large from severely feeling the terrible consequences of frauds, unless the two strong principles of *honour* and *conscience* interfere to support the law and its punishments, and at the same time have an influence on early education. I have once already remarked,

that where honour, education, and religion, come to their aid, slight punishments, by adding but a little weight to the *good* scale, produce great effects. In the present case, however, the misfortune is, that in Germany, and perhaps in other countries also, these principles are not very powerful; and therefore, though punishments may have *some* effect, it is not sufficient to support the sinking interests of the public and the labouring classes, amidst the daily increase of fraudulent practices; more especially when this awkward circumstance is taken into account, that the public, from not perceiving that fraud is here real theft, and repugnant both to honour and religion, have too much sympathy with those who are punished, and lament the fate of the merchant, who is reduced to beggary by the confiscation of contraband goods, though they do not at all pity the thief who is condemned to be hanged for a single theft, incomparably less detrimental to their interests.

§ 16. *Of the Influence of Religion in checking Frauds.*

BUT how then are honour, education, and conscience, to be here brought to the support of sinking laws, and an oppressed people, that punishments, along with them, may only have to put a moderate weight into the good scale, which, however, will be sufficient, if they have laid in their full *quantum* before? Unquestionably this would be a very easy matter, if the doctrine of Matth. xxii. 21. Rom. xiii. 1,—7. 1 Pet. ii. 13,—17. and many other passages of the Bible, were intelligibly and distinctly explained from

the pulpit, and in the instructions given to children; and if it were expressly declared, (what is indeed the real truth,) that such frauds are thefts in the eyes of God and morality, and that the man who wittingly and deliberately commits them, can neither repent, nor die happy, but must be eternally damned, if he still retain what he has withheld or purloined; that is, if he do not make restitution for it, and that not to the poor, but to the person to whom it belongs. This was the doctrine which I myself believed from my youth; although I never heard it preached, but, on the contrary, when I happened myself to broach it, controverted, very gravely controverted, not only by pious laymen, but even by clergymen themselves; until the year 1767, when Dr. Less, in a sermon, *On the invariable duty of Christians not to possess what is not justly their own*, which was afterwards printed, maintained it, to the great offence and scandal of the hearers. Almost all thought it quite a new doctrine. Many were astonished at the impertinence of such a sermon; and that very afternoon, on some people expressing their astonishment to me, that he should have gone such lengths as he did, I was obliged to tell them, that it was the very same doctrine which I myself usually delivered in my lectures on morals; and we soon learnt from the Excise-Office, that many anonymous acts of restitution had taken place, in consequence of this sermon. This doctrine, therefore, ought, both in catechising and preaching, to be handled in such a manner, that the merchant, the citizen, the peasant, and even the child, may learn to understand it; and who that understands it, will ever cease

to believe it? But is this done? I have just said, that I never heard but a single sermon on the subject, in this style; and therefore, to think the best of it, it must be but rare. Our sermons on the 23d Sunday after Trinity, and on the afternoon of the Sunday *Jubilate*, if they touch at all on the duties that we owe to the state and the magistrate, have commonly something of an obscure aspect; or rather, passing entirely by this subject, though it be only once a year pressed upon their notice, our preachers prefer, on these occasions, to treat of the rectitude of God's ways, or of the duty of giving to God what is God's, or of hypocrisis, or of the grand question of self-examination, viz. *Whose is the image and superscription? God's, or the Devil's?* exactly as an Anabaptist, in Charles the Fifth's time, must have done, when he had to preach upon an awkward gospel and epistle. For this, no doubt, the ignorance and incapacity of the teachers of religion is *partly* to blame; as some of them really do not so much as know for what expenses the revenues of the state are needed, and fancy princes to be immensely rich; while others again, who have some feeling, are perhaps not very fond of preaching against themselves; because thus to deliver one's self, while yet in the body, to Satan, from the very pulpit, is rather hard. But what is a still worse circumstance, the citizen and the peasant often both know, that the clergyman himself defrauds the revenue; nay, they are perhaps in this matter, confidants and accomplices of their father confessor, who is so scrupulously conscientious on other points. They thus believe that it is allowable; and so, as far as either they themselves, or the

children whom they bring up, and whom they initiate in this matter, are concerned, religion throws no weight whatever into the good scale : for they entertain, not perhaps on other points, but certainly here, the very doctrine of the Anabaptists, which the Protestants, in 1530, disavowed in the confession of Augsburg, in order to obtain toleration in the Roman empire.—So much for the influence of religion.

§ 17. *Of the influence of Honour in repressing Frauds.*

Now for that of the principle of honour.—Certainly frauds ought, by their nature, to be disgraceful, as well as thefts. Even the man who but cheats at play, is an object of contempt. The defrauder of the revenue is a thief upon the public, and indeed on every part of the public,—*on us all* ; because, in proportion to the amount of his defraudations we must all pay the more ; and therefore, we have a right to say to him, *You have defrauded me* ; and the honest peasant, to his smuggling neighbour, *I would not drink out of the same mug with you*. Were this but the case, how fortunate should we be ? For the few, who might still not be sufficiently alive to the feelings of shame and conscience, the laws would no doubt require to put a little weight of punishment into the scale, but it would be only a little ; for the ideas of honour and shame would augment it. We should then see the states of the country, instead of imposing new taxes, abolishing old ones, because the revenue would be greater than were needed for the expenditure ; or the old war-debts would be paid, and thus industry and trade flourish.

But this is *not* the case. For people, in general, are so far from looking upon such fraudulent practices as shameful, that they actually (which is a horrible piece of education) avow them to their children, avail themselves of their assistance, and employ them as their accomplices. They speak of them in company with the utmost freedom, and never once think, that in the estimation of all good society, it must lower their characters. The reason of their boldness is, that they know, that persons of the highest rank are as guilty as themselves; even the very officers of government, more, perhaps, than any other set of people, except the merchants; and *that*, because the Comptroller dare not venture to be severe upon them, and would be badly received, if he entertained any old-fashioned notions concerning his oath of office.

If we wish to make frauds rare, by the help of punishments, the object and aim of these punishments should be, to deter clergymen, and the servants of government, from countenancing them, by their example, or, what it rather is, by stripping fraud of its turpitude and its criminal appearance, and clothing it in the garb of a matter of perfect indifference, and quite allowable. Were *they* therefore, with this view, more severely punished than others, they could the less justly complain, because their criminality is so much blacker, and at the same time more mischievous; but it would be expedient to have recourse, in every case, to a punishment of such a nature, as that it should be considered as only a reasonable consequence of the crime, and therefore could not be looked upon as severe by any body. What, for instance, if the

clerical defrauder were summoned before the Consistory, and asked, how he had come to engage in such fraudulent practices ; whether he had sinned, contrary to his conscience, or whether only erroneously, and as deeming them lawful in the sight of God? If the *former* were the case, he should be obliged to beg pardon publicly of his congregation for the gross scandal he had given them, and to testify his remorse for having committed so great a sin, contrary to his better knowledge, and the conviction of his conscience.—This would be quite just ; for the scandal is really greater, than if he had debauched his maid, who, in some places, would have to do penance publicly in church ; for no peasant would thence infer, that such a thing was lawful.—Were his excuse, again, to be, that he did not believe there was any injustice in defrauding the revenue, the humiliation just mentioned, ought by all means to be spared him ; but then, as he could not reasonably expect to be any longer allowed to be a clergyman, in a church whose doctrine, in so essential a point, he did not hold, he ought therefore to be deprived of his office ; without, however, suffering any farther disgrace. This, no one can think severe, who admits, that a church ought to have any degree of religious liberty, and who does not make it the mere estate of its clergy. The man who wishes to be a clergyman, must hold the doctrine of the church into which he enters ; or if he does not, he should go into some other church, whose creed coincides with his own ; for it would be a horrible constraint upon religion, were a church obliged to retain and support, and let the children of its members be taught by, a

clergyman who did not receive its religious system, whether true or false; and, indeed, the person who should desire any such thing, or let himself be paid as a teacher by a church, whose doctrines he did not acknowledge, would be a traitor and a scoundrel of the first magnitude. Now, of *our* Protestant religion, at any rate, the Scripture doctrine of the duties owing to the magistrate, forms a very essential part; and it is under the assurance thereof, that it is received in Germany; and, in general, this is, in point of importance to the state that affords protection to a church, a far more essential part of its creed, than many of the great articles of faith; for to a sect, that entertained erroneous notions respecting the Trinity, the state *might* grant protection, nay, what is more, might grant its members equal rights with other citizens, without going to destruction; but not so to a sect, of whose tenets it were one, that no obligation lay upon the citizens to pay legal imposts honestly. The dismissal, therefore, of a clergyman, in the circumstances now under consideration, would not be a punishment, but only the natural consequence of his maintaining opinions, different from those of our symbolical books. And if we suppose, that two such examples were made, and made sufficiently known, there would be no more instances of clergymen defrauding the revenue; many, no longer reproached by their consciences on that score, would then boldly preach and teach the duties owing to the magistrate; and from that moment, religion would become a support to the state, and to its laws.

Nor could the servants of government, who are

still more directly and closely bound and sworn to uphold the interests of the state, and who are commonly paid from the produce of the taxes, consider it as at all unreasonable, that the sovereign should once for all address them, in such terms as these ; “ I
“ retain you in my service, on this condition, that
“ you be faithful, and not concerned in any fraudulent
“ transactions. If you act unfaithfully in the manage-
“ ment of my demesnes, or my treasury, I reserve to
“ myself a right to dispense with your services, but I
“ have, at the same time, a right to forgive you ; only
“ beware of committing any fraud in the payment of
“ those taxes, which are imposed on my subjects : for
“ on this point, I denude myself of all right of par-
“ don, and will, on no account, retain in my service,
“ any person, how useful soever, concerning whom I
“ hear, that he has cheated the country and my sub-
“ jects, by a fraud on the revenue, of which they must
“ make up the deficiency ; and has, by so doing,
“ set a pernicious example to his fellow citizens.”

Were a declaration to this effect to be made, and acted upon in two or three instances, I suppose a fourth instance would not occur in many years. The higher the rank of the person were, to whom the sovereign here kept his word, and more especially, if he happened to be a peculiarly useful and able servant, so much the more efficacious would his punishment be ; and every friend of the country might wish, that two grandees might be detected in revenue frauds, rather than one petty officer. No doubt, it is obvious, that this measure would not answer universally. It would not answer, where the sovereign himself were depen-

dent on his servants, or where there were a want of able men to fill public situations. But then its application would be just so much the easier, where greater numbers were pressing for employments than were wanted ; there it could not fail to be highly efficacious, unless morals were in a state of the grossest corruption. Whenever the people of rank ceased to defraud the revenue, the practice would become disgraceful ; and thus, not, properly speaking, by punishment, but by the very reasonable measure of dismissing from their employments, both in church and state, those servants who behaved unsuitably to their offices, the influence of the two powerful principles of religion and honour, and of a third that depends upon both, I mean that of education, would be re-established among the people : and here we should really have an instance of a punishment, which, at the same time, effected amendment.



PART II.

OF SECONDARY ENDS OF PUNISHMENT.

So much for the essential and primary end of punishments. I now proceed to the consideration of certain collateral objects, which are sometimes aimed at in inflicting them, and have thus an influence on their magnitude and nature, or their quantity and quality. These objects are *three* ; (1.) the extirpation or removal of dangerous delinquents ; (2.) the avengement of

the injured ; and, (3.) the moral amendment of the punished. The last of these is, doubtless, the most desirable of the three, and its very name sounds softer and better than the others : but I postpone its consideration to the last place ; partly, because others, who have chosen to write on this subject, have said so much in its favour, that little is left for me to add ; and partly, because we must previously know something of the nature of extirpation, as an end of punishment, unless we wish to run the risk of introducing amendment, as an end of it, in a wrong place.

I. *Of the Extirpation or Removal of Delinquents—
and the Means thereof.*

I. *First*, then, concerning the extirpation, or removal of dangerous delinquents.—The latter of these is only a milder, and more artificial substitute for the former. In a state of nature, if we cannot be secure, we only think of killing our disturber ; but, in process of time, we devise means of removing him to such a distance, that he can never annoy us any more ; and of this plan civil society usually avails itself, as a milder measure, in cases where the individual could only have resorted to the harsher expedient just mentioned, and in so doing would not have acted unjustly. Should I make use of the term *extirpation*, in a more general sense, to denote *both*, the reader will, perhaps, be the more inclined to excuse me, because I have been accustomed to do so in the course of the preceding work.

The person, then, against whom I cannot be secure,

I should, in a state of nature, have it in my power to put to death. I am not bound to submit to injuries, nor yet to live continually in a state of well-founded alarm; but have a right to procure security to myself; and, the person, in whose neighbourhood I cannot obtain it, I may lawfully drive away or destroy. He has himself only to blame, for imposing upon me the necessity of thus using my right; and I act in a manner morally good, if I chuse the mildest measure that renders my object attainable. Now, this right, which every *individual* thus enjoyed, *millions* certainly do not lose, merely by uniting for their common security in civil society; they rather bring all their individual rights along with them, and resign them, united, unto the state. And *by* the state, they are commonly exercised with a much greater degree of lenity, than they could be in a state of nature, or than they can yet be, when we have occasion to travel through a dangerous forest, and when suspicious persons, notwithstanding all our warnings, approach us so closely, that we are not secure from their attempts. This lenity proceeds from the power of the state being far superior to that of delinquents, and from its having more means of security against their outrages: but it does not, by this lenient exercise of it, at all forfeit the right, which so many thousand individuals brought into it, and resigned into its hands.

It is chiefly with respect to incendiaries, and bands of thieves, that this object of punishment is attended to among us. If people of these descriptions remain in the country, we cannot be in security; they con-

tinue their trade, even though they *be* punished ; and what is still worse, they train up their children to the very same profession ; and thus, and by recruiting their forces from the worthless and unfortunate part of the community, they will always continue to subsist. Punishments, how exemplary soever, unless they at the same time clear the country of such dangerous people, will never be sufficient for its security. But it is not to them alone, but to many other descriptions of malefactors, such as the instigators of rebellions, and to the incorrigible propagators of unnatural vices, (Art. CCLIX.) that the punishment of extirpation may become necessary.

Hence arises the disagreeable necessity of inflicting capital punishments upon many crimes, which we would, if possible, gladly repress by gentler means, in order to save lives. I am firmly convinced, and I have already observed in Art. CCLXXXII., that death is not the most suitable punishment for theft, and that to many thieves a milder punishment would be far more terrific ; nay, that capital punishment may often serve to make murderers of thieves, who would otherwise spare the lives of those whom they rob. To this part of our criminal law, therefore, I am not partial, but esteem the Mosaic jurisprudence here far preferable ; only I do not see how we could here, in Germany, dispense with capital punishments, and I consider some complaints that are made concerning them as unjust.

Society, however, ought to be secured against the attempts of those malefactors, to whom we may

justly give credit for the inclination of continuing their outrages; and the means for this purpose are the following :

1. The punishment of death.
2. Transportation to desert islands.—(This, however, would, in many cases, be a harder punishment than even death; and, therefore, its use, as a species of clemency, does not properly fall under our consideration.)
3. Transportation to a distant colony, which is to be cultivated and improved.
4. Banishment from the country,
5. Perpetual imprisonment.
6. Selling delinquents into slavery, where they will be sufficiently confined, and prevented from doing mischief; or, in lieu of this,
7. Condemning them to labour at the fortifications, and other public works.

All these we may, if we chuse, comprehend under the term *extirpation*. It is evident that, where the other expedients are impracticable, we must, where public security requires it, have recourse to death: and this is frequently the case in Germany, but in some parts of it more so than others. There are states, which have it in their power to employ the milder punishments, and thus to be mercifully and economically sparing of human life: but what is possible with them, will not answer with others; and this, again, is agreeable to the principle, which I laid down in the beginning of the preceding work; that all countries cannot have the same laws, either civil or criminal; but that these must differ according to the local or

accidental circumstances there specified ; those which, are in one place good, being, in another, improper, and perhaps ruinous. Let us now, therefore, make the different means of extirpation here pass muster, with the exception of the second, which has already been disposed of ; and, in so doing, sometimes apply them to Germany, and sometimes to other countries.

1. *Slavery.*

It may be hoped, then, that we shall not wish for the re-introduction of *slavery* here in Germany, considering the great pains that have been taken, in those countries on the north east, which were gained from the Vandals, to effect its abolition ; which, if I mistake not, *has* taken place throughout all Prussia. For as to the slavery which still subsists in some parts of Germany, as Bohemia and Mecklenburgh, it is not of such a rigorous sort, as to permit the sale of a malefactor into a foreign land, in order to get rid of his future outrages. The nobleman (for, in those countries, the nobles still have slaves) would really no more bid for a thief, that should be exposed to sale, than the vintner would engage a drunkard, who was in his debt, for a wine-cooper, in order to pay himself by his work. But were this not the case, and were any benevolent opposer of capital punishments to imagine, that it were far better for Germany, that the ancient Roman slavery, or the still more cruel slavery of the Negroes in the American colonies, should prevail in all its horrors, he would soon find, that a very awkward circumstance would render his plan quite

fruitless : for Germany is divided into such a number of states, many of them quite impotent, that there could, in many places, be no security whatever to property, by punishing delinquents with slavery. In the smaller principalities, counties, and imperial cities, bands of robbers would liberate them *per force*, in order to strengthen their numbers, and we should have a revival of those scenes, which have not been witnessed now for many centuries. In our land, therefore, slavery will not answer as a punishment. Nor will any man, out of clemency, be likely to propose the sale of criminals into Turkey or Barbary, for slaves ; for this would not only be to drive them into a renunciation of their religion, and perhaps too, into unnatural vices ; but it would, besides, in a political point of view, be any thing but expedient, to add to the strength of the Turks, or of the piratical states, which are already much more troublesome to *our* commerce, than to that of England and Holland, by sending them such good hands, as German robbers would prove ; more especially, as they might, if deserters or disbanded soldiers, understand something of the operations of war. With this plan, therefore, I need, methinks, give myself no farther trouble.

2. *Banishment.*

Banishment from the country is a common enough punishment ; but so much has been long ago said against it, and its mischievous consequences are so well known from experience, that we ought rather to think of its total abolition. Not merely the specula-

tive theorists, but even the practical lawyers, who sat as judges in our high courts, during the preceding century, expressed their disapprobation of this punishment, and considered it as the worst part of our criminal jurisprudence. It is in fact nothing more than an exchange of pestilential commodities, between contiguous nations. We give our neighbour *our* robbers, thieves, gypsies, and vagabonds; and he gives us *his* in return: and what better is either for this? Besides, are our neighbours obliged to receive our exiles? Certainly not. This punishment has likewise, in most instances, the bad effect of deteriorating, to the utmost, the moral character of the sufferer, that was previously, perhaps, but a little corrupted; for the exiled thief, in a country where there is a well-regulated police, will neither get lodging nor employment; nor will he indeed be suffered to be at large, if it is once known what he is; so that he will be under the necessity of lurking in the forests, and seeking society there; and thus, from having been guilty of a single theft, he will first *live* by stealing, and then commence robber. In a word, frequent banishments look just like recruiting the forces of *banditti*; or, if there are none such, a nursery for rearing them.—*Richard the First* of England, made a strange law during his crusade. If a person was convicted of theft, he had his head first cropt bare, and then besmeared with melted pitch, and bestuck with feathers; (just such a punishment as what the Americans call *feathering*, and have inflicted, or threatened to inflict, on the custom-house officers;) and in this plight he was set on shore at the first land they touched at. Now this punishment,

which we may denominate *fleet-banishment*, was not one hair-breadth less severe than death; because a thief, thus *marked*, could not but naturally expect, that the people on whose coast he was landed, would deprive him of life; and where it happened not to be an enemy's country, it was an act of gross injustice. Nay, to make even an enemy a present of the thieves which the crusaders did not chuse to keep themselves, was much the same as if the plague had broke out in their fleet, and they had, in order to purify it, put all the infected on shore on his coast.

2. *Imprisonment, and Private Labour.*

Perpetual Imprisonment, in which the prisoner is locked up, and without work, also appears to me to be worse than death; and had I forfeited my life, I certainly should not thank my sovereign for his mercy, in commuting my punishment into perpetual confinement. Here, however, others may think differently, and look upon death as the greatest of all evils; and they are welcome to keep their opinion. But, in my mind, this expedient is, besides, too expensive, when thieves are numerous, and there are, as at present in Germany, bands of them, containing some hundred individuals; partly, the relics of the late war, and disbanded light troops. For, whence is a state to draw the sums necessary for securing and maintaining them? I do not here so much as *think* of the small principalities, which are often deeply in debt, and in which, the impracticability of the measure is obvious to every one; but I shall instance a considerable ter-

ritory, in which too there is plenty of money, viz. Hanover. Whence could the king of Britain, as elector of Hanover, without heavily burdening his subjects, raise money sufficient to keep some hundreds of such *banditti* in secure confinement and maintenance for life ; most of them too, foreigners, to whom we are certainly under no obligation to give bread as long as they live, just because they steal from us ? The very securing them would require the building of larger, stronger, and healthier prisons, because we have none of sufficient extent ; not to mention a couple of regiments, to prevent the bands of robbers from setting their companions at liberty, to strengthen their own force. So far are we from having money for such purposes, that, although our military establishment has been reduced, new taxes must be granted by the states, in order to extinguish the debts contracted in the preceding war.

“ Well ; but work should be given to the prisoners :
 “ work-houses, and houses of correction, should be
 “ established, in which, they may not only earn their
 “ maintenance, but perhaps even yield a profit to the
 “ country.” Certainly this were highly desirable ;
 and in many places it *is* practised with advantage on
 a small scale ; but there is one unlucky circumstance,
 that in most countries the secret has not yet been discovered,
 of establishing work-houses, not for the poor,
 (for there the difficulty is less,) but for large bodies of
 thieves and malefactors, on such a plan as to make
 them support themselves. They generally require a
 considerable supply either from the founder, or from
 the court that sends prisoners to fill them. Here, it

is true, I am of opinion, that errors in œconomy, and ignorance of the business, are often the causes of this defect; particularly where the annual grants are so large as we find them for some of these institutions; but until we have more knowledge on the subject, it must be impossible to establish a sufficient number of workhouses for all the thieves and blackguards that come from other countries upon us; and particularly at the end of a war, which has caused a great corruption of morals, and when those troops, for whose services the belligerent state has no longer occasion, are disbanded, and must seek another trade. The smaller the state is, (and we have, in Germany, a considerable number of petty principalities, counties, and free lordships, not much larger than the ancient kingdoms of Greece) the greater is the difficulty here; for the very expense of one single well-kept workhouse often exceeds the means of the sovereign, even though he be not in debt. There is this farther circumstance to be considered; that if I establish a workhouse, I must have a vent for the work, and know where I am to find purchasers. This vent may perhaps be found to a *certain* extent; but if the number of prisoners happen to increase, there is a want of purchasers, and a loss on the articles manufactured: for it is here exactly, as with the manufactures of free people, which become ruinous, when carried on to too great an extent. Now we commonly observe, that the offenders of a less criminal class, who are adjudged to suffer this punishment, are sufficiently numerous to fill the workhouses to the point which œconomy limits; nay, that they cannot all find accommodation in them. In this case,

there remains no room for banditti of a worse description. The consideration of the most suspicious circumstance of all, I mean, the keeping of hundreds of criminals of certain kinds all together, I reserve, till I have finished my observations relative to the punishment of labouring on fortifications and other public works, to which I now proceed.

4. *Operæ Publicæ.*

With regard then to employment in such *operæ publicæ*; undoubtedly it is a means of punishing many delinquents; and while it secures the public against their outrages, it at the same time spares their lives. In a country in which there are a great number of fortresses, such, for instance, as France, many wicked hands may be thus usefully employed. But what if the prince has no fortresses, or so few, that, in order to keep them up, he has not occasion for so many hands, as there are dangerous offenders to find employment for? In the reparation of the roads, which, in Germany, is certainly very necessary, and would be of great consequence to the improvement and prosperity of the country, thieves and robbers could not well be employed; for we have not just prisons at every way-side, wherein to confine them, to prevent their escape by night; and were we, for want of these, and from philanthropy, to quarter them upon the peasantry, it would be necessary, even by day, to have a body both of infantry and light cavalry, to overawe a few hundreds of such road-makers, lest they should set one another at liberty, or be so, by other *banditti* belonging to the fraternity.

But we have yet, as hinted a little ago, to notice that most serious objection, affecting imprisonment, workhouses, and public works ; which is, that when, besides a moderate number of those less criminal delinquents, who are usually adjudged to these punishments, a greater number of robbers, incendiaries, and other hardened miscreants, are, as is generally the case, kept and worked along with them, they soon make their fellow prisoners as bad as themselves. This contagious corruption of morals is a very lamentable consideration, and I have reserved it to the last, as a perfect answer to the benevolent system of *amending* punishments ; for its effects are scarcely to be prevented, if such profligate wretches are brought into the houses of industry. But besides this, what if they were to set themselves, together with their corrupted companions, at liberty, and to break into other prisons, in order to strengthen their forces ? Or what if even the yet wandering bands of robbers, having re-united their forces, were to make an unlooked-for attempt to liberate their captive brethren, and to succeed in it ? We should then see very unhappy times indeed, for the banditti being more powerful than many of the *weaker* princes, would command forage, and a sure maintenance, and levy contributions within their dominions, and thence, in parties, carry their outrages into the adjoining territories of the *stronger* ; robbing, burning, house-breaking, &c. In the *North* of Germany, indeed, where more troops are kept, the fear of such an outbreaking would not be so great ; yet I know not what might have been the consequence, even in Hanover, if all the thieves and robbers that have

been punished or expelled since the year 1762, had been locked up in work-houses, or employed on the fortifications ; whether banditti from the neighbouring countries might not have unexpectedly liberated them, and, thus strengthened, have, besides lessening our own security, become a nuisance to the smaller states. We should, at any rate, have been under the necessity of sending forth troops against them, and that not merely to scour the forests, or seize them in taverns, but actually to carry on a sort of petty warfare with them.—But then, in the numerous little states of *Southern Germany*, where there are but few troops, what might not have been the consequence, if capital punishments had not rid the empire of such miscreants, and they had been confined in prisons, from which their brother-banditti could have so easily set them at liberty ? The case is very different in the two powerful states of *Eastern Germany*, each of which, even in time of peace, has an army on foot, of more than 200,000 men. There it is possible to spare many lives ; to employ delinquents with safety on the fortifications ; or to confine them in houses of industry : for no bands of robbers, from the empire, would go to Berlin or Magdeburg, in order to liberate them. The smaller states might likewise secure their safety, and certainly would not purchase it too dear, by throwing themselves at once into the protection of these greater powers, as they would at last be obliged to do, were these banditti to get the upper hand of them.

5. *Transportation.*

I have still to take notice of *transportation* to distant countries, which it is intended to colonise or cultivate. Any state, possessed of such territories, may employ them to excellent purpose, as a means of lessening the number of capital punishments; and it *will* do so, if its government is wise. Thus England has long been in the way of transporting, to America, ship-loads of delinquents, even such as had forfeited their lives to the common laws of the land, but whose punishments were mitigated by the king. Only the American colonists have now, for some time past, strongly deprecated the continuance of this practice; and, with some degree of reason, compared it to the tyrannical assumption of a right of making a necessary of a neighbour's court-yard. Russia, in like manner, employs for this purpose the country of *Siberia*, which is extremely fruitful, and rich in all the bounties of nature, and whose only want is inhabitants. This country is a prison of infinite extent, but so perfectly secure for those whom the government wishes to send to a distance, that Peter the Great, in 1709, transported thither the prisoners taken from the Swedish army, which had been the terror of Russia, and of other countries besides. It has likewise been found eminently useful, as a place of punishment for state-criminals, and whom it would otherwise have been necessary to put to death, for the security of the state. Since the reign of the empress Elizabeth, there is no country in which capital punishments have been so

rare as in Russia; and, in fact, there is no country, in which, for political reasons, it is so necessary to be sparing of men's lives with the strictest possible œconomy; as *Süssmilch* has demonstrated in part ii. p. 201, 202. of his *Göttliche Ordnung*.

Here, therefore, Russia may, and must have other laws than are possible in Germany, and can, with more safety than any other state, spare the lives of criminals even by thousands, in order to employ them advantageously. On this point, I would have expressed myself still more strongly, if it had not been stated in the newspapers, that Siberian prisoners had joined in the late rebellion of *Pugatscheff*, and thus strengthened his forces. Whether this be true or not, cannot, at this distance, yet be ascertained; but if it be, it would form a suspicious phenomenon, and have the effect of making the court of Petersburg resort to this expedient in a more limited way in future, and under new legislative provisions. It would even have an influence on the code of laws which the Empress is engaged in framing, and for which she has herself thrown out some excellent ideas.—But then, *wæ* Germans have not a *Siberia*, for which, however, we may be very thankful; nor need we regret, perhaps, the want of an *America*; (although, indeed, if we had had one, we certainly should not have transported our thieves and banditti to it since 1762;) for if the colonies had at present among them so many people who had been soldiers, subalterns, and officers of light troops, their opposition to the mother country, which they have already loaded with a debt of 70 millions, would be very formidable.—Where a state, then, can-

not have recourse to life-sparing punishments, for the security of the people, it has just as good a right to resort to capital ones, as the inhabitants of a maritime town have, to fire at, and to sink a ship, and especially a strange ship, infected with the plague, that attempts to approach their shore, and will not sheer off; particularly if they have no quarantine-institution. In this case, it is true, the law of self-defence, severe though it be, does not operate against malefactors, and therefore there is the more reason to regret the necessity of having recourse to it; but then, our own lives are dearer to us than other people's.

II. *Avengement of the Injured.*

II. *The avengement of the injured* is the second collateral object which sometimes influences the determination of punishments, and of which I have spoken in different parts of the preceding work; as, for instance, in Art. CCXCII. My opinions on this point are perhaps different from those of many readers, and even lawyers, who maintain, that the object of a *pœna publica* is not by any means to give a satisfaction to the injured party; but they will have the goodness to consider what I now offer in defence of them.

The universal experience of mankind in all nations, and at every period of life, from earliest infancy, to extreme old age, demonstrates, that nature has implanted within us a pretty strong propensity to revenge, when we find ourselves designedly injured, and particularly if the injury be an insult. This propensity is so lively, that we are apt to feel a great degree

of dissatisfaction if we cannot gratify it, and *that*, even in spite of an education which habituates us, from our childhood, to bear wrongs without avenging them. Nay, its non-gratification, if prevented, will sometimes induce such a state of disquietude, as to have a manifest influence on our bodily frame, and to break our sleep; and, in many instances, all the arguments of philosophy and religion are only able to *subdue* this passion, but not to *extirpate* it. Indeed its impulse is almost irresistible. Yet there are, at the same time, some other natural propensities, which serve so to moderate its effects, as that all the mischief *does* not proceed from it, which might at first be apprehended; and where these interpose their influence, the *violence* of revenge, in general, completely disappears. Among these may be enumerated pride, contempt of an enemy, magnanimity, generosity, good-heartedness, the pleasure we feel in our intercourse with the injurious party, and compassion; but the operations of these gentle affections, which are very important in the eyes of the moralist, it does not fall within my present plan to illustrate.

Dangerous, however, as the passion of revenge is, when not under the controul of reason, it seems nevertheless to be a wise and necessary gift of nature to man; for we should, without it, be continually exposed to injuries from wanton malice, or from selfishness. Reason, to be sure, would still prescribe it as a rule, *Avenge yourself, in order to deter others from insulting you*; but then her decision is too slow: for the injurious person has perhaps already made his escape, or otherwise secured himself from our revenge; and

besides, this cold-blooded faculty would be too considerate, to have to combat timidity, and it would find the hands too often slack and reluctant. The natural impulse, however, compensates for all these defects; and reason has no need to exhort us to revenge, but only to regulate that passion, and keep it within the bounds of moderation. The rapidity also with which revenge goes to work, has the advantage of being a much more powerful deterrent to the attempts of the injurious, than the tedious procedure which would result from the mere cool and rational consideration of the propriety or impropriety of digesting a slap in the face, or any such insult; for the more quickly that the punishment follows the crime, the stronger is the impression which it makes; and by the laws of association, if the offerer of any such insult conceives an inclination to repeat it, a repetition of the chastisement which he has already received, will occur to him in the very act, as its sure and immediate consequence. Every man who has a mind to injure his neighbour, reads even in his own heart, that man is vindictive; and this lessens his desire of inflicting injuries, because he must at any rate be afraid lest his neighbour, though ever so good a Christian, might, in this particular instance, be hurried away to obey the dictates of his natural passion.

By the *jus naturæ*, properly so called, and in so far as it is to be discriminated from the law of morality, we have all, while in the state of nature, a perfect right to follow the impulse of revenge; only its limits are doubtful, as is the extent to which we ought to carry it. To the question, *How far may the revenge,*

ment exceed the offence, and in what multiply ratio may it be repaid? some indeed will answer, *In infinitum*. But that morality, of which it is a principle to endeavour to promote happiness to the utmost possible extent, certainly limits its operation very materially, and says in effect, *Choose the very least retaliation that will suffice to answer the end, for which nature has implanted the desire of revenge within you, viz. to secure you against future injuries. Carry your revenge against your neighbour no farther than you would think it just, that your neighbour should carry his against you.* On these rules, it will not be expected that I should here expatiate farther than to remark, that the exercise of revenge, as limited by them, is actually permitted by the laws of morality; the province of which, is not to extirpate, but to regulate, our passions. And even the Christian religion, where it dissuades us from self-avengement, tells us, that we ought not to interfere with God, in his judicial office; that vengeance is his; and that, if the person who has injured us, does not repent and amend, *he* will exercise his vengeance upon him, either in this world, or in that which is to come.

Now this passion, and this nature, we all, whether savage, or civilized, or refined, or believers, or profligates, or virtuous, or regenerated, or saints, bring along with us into civil society; only we must, on our very entrance into that state, totally divest ourselves of our natural right of self-avengement. But what then is more reasonable, than that society should, at least in cases of serious and intolerable injuries, give us an equivalent for what we thus renounce; in

other words, take upon itself the duty of avenging our wrongs? Is it indeed probable that any man would ever enter into civil society, without making this stipulation, or at any rate expecting to find it settled as a *pactum tacitum*? Supposing, however, that the state did not act thus, but held this language, *You ought not to be avenged, or to have any desire of revenge: your whole nature should be regenerated;—* still we would feel that we are *not* yet regenerated, and then avenge ourselves. Whether we should thus be good Christians, is a different question, with which I have here nothing to do. I am taking the world as it is, and as it has never yet seen any state composed of none but downright good Christians, or rigid observers of the purest morality. Should any such state hereafter appear, this Essay of mine would be totally inapplicable to it; for it would have no occasion at all for any punishments, but only for mere precepts.—Nor do I wish, from one single passage of the Sermon on the Mount, which is balanced by so many others in the Bible, and even by Christ's own example, and of which I really believe we ought not to understand it literally,—to make it part of a good Christian's duty, if he receives a stroke on the right cheek, to hold up the left for a second, and not to have any desire of revenge, even that which may be judicially exercised; because it appears to me very strange, that we should from *one* obscure passage, explain a *hundred* clear ones, otherwise than according to their grammatical import. But even allowing that this *were* the duty of Christians, and that there were a state, of which all the members were true Chris-

tians; still the reply here occurs to me, which General Field-Marshal *Von Natzmer*, a very brave man, and a very strict Christian, gave to the late king of Prussia, when he asked him, in a company, how he would act, if any one should call him out.—“ I cannot,” said he, “ say for certain beforehand. Were *the Christian* at home, he certainly would not go; but if the challenger only found *Natzmer* at home, he might then.....but I shall not say what would be the consequence.”—This man was really so well known, from the battles he had fought, and for his personal valour, that no one ever had the boldness to put him to the proof, because it was looked upon as very possible that *Natzmer* might be at home. Many others, however, not quite so good Christians, would do, and in a far more reprehensible way, what he insinuated, if the state did not think of procuring them satisfaction?—But why am I here wasting so many words about a Platonic republic, such as never yet existed, and never will? If the members of the state be not slaves, but free people, and the state finds them no satisfaction for their wrongs, (by which I mean, not merely apologies and pardons, but positive avengements,) the infallible consequence will be, that self-avengement will again begin to operate anew—that formidable evil, which so often lights upon the innocent; which is always the just object of suspicion; and which aggravates an evil a thousand-fold: first, by the injured party seeking ten-fold vengeance, and then by the first aggressor seeking ten-fold vengeance again; and thus causing a perpetual succession of alternate injuries for a long series of years. If, there-

fore, the legislator wishes to prevent such a dreadful *crisis*, he must remember, that it is not to patient sheep, or to worms made to be trod upon, that he is giving laws, but to men.

We do not feel the emotions of revenge in the case of all sorts of injuries alike. When any thing has been stolen from us, we scarcely feel any desire of revenge ; all we look for is restitution and future security ; unless, indeed, the article purloined was very necessary, or we had put a *pretium affectionis* upon it, or the thief had abused our confidence. In these cases we are more ill-natured. But where our desire of revenge is not, in general, very keen, the legislator has no occasion to regulate his procedure by it ; for he is not to be the executioner of every sentence which the injured party may wish to inflict ; and the man who is so extremely vindictive, as to refuse, in such a case as this, to sacrifice the privilege of the state of nature, to those great advantages of protection and security which he enjoys in civil society, may even leave it ;—it will lose nothing by his departure. In every case, however, where the emotions of revenge are, not merely in particular individuals, but in the bulk of mankind, so strong, that self-avengement would become a common evil, unless the law afforded satisfaction for wrongs, they must be made the objects of legislative provisions. Thus, by the murder of our nearest and dearest relations, our revenge is roused in all its extent ; which is really a most wise provision of nature, for the security of human life : and hence arises the practice of blood-avengement, together with those ideas of honour and shame, which we find connected with it in the very

earliest ages, in so many different climates, and among so many nations not at all related to each other, and who could not possibly have borrowed their manners from each other ; for it subsists among the Caribs and North American Indians, as well as among the Arabs and Hebrews.

Even among civilized nations, who have long renounced the right of self-avengement, and look upon it as disgraceful to put a malefactor to death, the brother, or father, or son, of a murdered person, feels, in the first ebullitions of grief, a desire to avenge his blood with his own hand ; and that hand proves, in such a case, a very fit instrument of vengeance. I had once an opportunity of attentively observing the conduct of a brother in such a situation as this. One of our citizens here at Gottingen had been shot by an arch-villain, previously well known as a country thief. On hearing this, curiosity carried me into the house where the murdered person lay ; and I found his brother, a strong, resolute-looking man, sitting by his corpse, and only expressing his regret, that he had not been at hand, and that the perpetrator was already in prison ; for if he had not, he would not have let him live, had he but got hold of him. I observed to him, that the murderer was not worthy to die by *his* hand, but by the hand of a very different person : and this observation he understood and felt ; but I saw in his behaviour at the time,—what I had before only formed an idea of in my own mind,—an instance of the vindictive emotions which we feel on beholding the blood of our relations : and which are, no doubt, still stronger and more irresistible, where the murdered

person, instead of a brother, is a father or a son. Now, if we figure to ourselves a nation of free and brave men, whose laws do not punish murder in such a way, as to give satisfaction to injured relations, but too slightly, as in Poland, where a nobleman can, by the mere fine of, if I mistake not, a hundred *guldens*, expiate the murder of any of his subjects, what will be the consequence? In process of time it will, in all probability, either be the complete re-establishment of the ancient *Goël*, described in Art. CXXXI,—CXXXIV., with all his rights; or else an exchange of blood-avengement for duels, in which one of the parties *must* fall, and which will never cease, till a kinsman of the murdered has killed the murderer; but first of all, it will be this; that the injured father, son, or brother, as they can obtain no *legal* avengement, will take the first opportunity of killing the murderer; for which they will, of course, get off with the same easy punishment which he did: for it would be absurd to punish the persons, who only continue and repeat the aggression, more severely than him who first began it. Were, however, a barbarous legislator to act thus, and to inflict a capital punishment on the retaliation of a murder, while on the murder itself he inflicted but the punishment of a fine, every person thus aggrieved, who had any spirit, and had not too deep a stake in the country, would, rather than stay in a country, where only the first aggressor had such an absurd privilege, resolve to embrace the first opportunity of taking effectual revenge at his own hand, and then to make his escape. In Poland, it is true, these effects are not observed to take place; but the

reason is, that the subjects of the noblesse there are slaves, and obliged, from their earliest youth, to submit to sufferings with patience.

It appears, therefore, that death should be the regular punishment of murder ; not so much, however, on account of the law in Gen. ix. 6. (which does not concern *us*, and which only allowed, or rather enjoined, the first race of men, while yet in a state of nature, and without any common weal, to avenge blood, for the security of their lives,) as, in order to prevent greater misery, and blood-avengement by relations, from which the most mischievous consequences may ensue. (Art. CXXXIII.) The propriety, likewise, of ever granting a pardon to a real murderer seems to be very doubtful ; or, at any rate, it ought not to be done, without the most urgent reason. A right of pardon, no doubt, there must be somewhere in every state ; and it is always better in the hands of one person, than of the people at large ; (Art. CCLXXV.): but the sovereign who imprudently exercises it in the case of murder, from mere clemency or personal favour, acts with great cruelty towards the relations of the murdered, who have a right to look for *legal* avengement, and have, in that view, renounced their natural right of taking revenge at their own hands. For it has somewhat of a despotic appearance, that, merely because a murderer happens to be a favourite with his prince, or a person of high rank, the son of the murdered should see the murderer of his father escaping with impunity, or but slightly punished at best ; nor can he, in such a case, but look upon himself, in a very humiliating light, and almost as if he were a

Polish peasant. But what then, if he should venture to avenge himself? Ought the prince to grant him a pardon in his turn? If he does not, what becomes of that equality of rights, which free people, even those of the lower classes, down to the peasants, whose arms defend their country, are entitled to claim? In the case of any popular ferment, one single injudicious instance of a reprieve given to a murderer, may endanger the safety of the state, and prove the signal for a general rebellion.

That this doctrine does not at all apply to cases, where no one is aggrieved by a murder, or where the surviving relations do themselves intercede for the murderer, is obvious: in these cases, avengement is not the end of punishment, but only the deterrent of others. The case is the very same when a man falls in a duel, even in a duel where it was previously agreed, that one of the parties *should* fall: for as the deceased gave his own consent to the duel, no wrong has been done him, and the survivors will not think of revenging his death. Sovereigns, who exercise the right of pardon with discretion, actually attend to this distinction. *George II.*, in whose history it appears such a fine trait, that he would not pardon Lord *Ferrers*, still granted pardons to those who committed murder in duels; and with the more justice, because, from the impotence of laws, it is scarcely possible for people of a certain class to avoid duels altogether; and we have not wounds in our own power. The nobleman who murders another in a duel, may always be pardoned, as long as we have no effectual punish-

ment for duelling, but not so, the nobleman who murders a peasant.

From the object of punishment now under consideration, flows the maxim expressed in Art. CCLX. of the preceding work ; that the law should view those injuries, which strongly prompt to revenge, particularly if they be of the nature of insults, in the same light, in which they appear to the people. If it does not ; and among us, for instance, were it to estimate blows and lashes, merely by their physical pain, and to inflict a punishment accordingly ; (which in many other countries, where no idea of disgrace is attached to such things, would be quite sufficient ;) no reasonable man would ever think of applying to a court for redress, but would always take revenge at his own hand. Most of my readers have, no doubt, been at universities, and are acquainted with them. Let them only, then, go back to the days of their youth, and consider what the consequences would have been, if a box on the ear had only been punished by a small fine ; and what actually followed when the *Pro-rector* did not enforce the established severe punishment.—What but endless duels ; for which the laws, or the judges were alone to blame.—In order to avoid such evils, it may be necessary, by reason of our law respecting duels, to expel the authors of such outrages from a university ; but where the point of honour is not insisted on so strictly in the spirit of chivalry, sharp punishments will prove sufficient to prevent their dangerous consequences.

Among us, and in England, the punishment of rape

is death. Indeed, by the ancient German law, this crime was so heinous, that the cognizance of it was reserved for the king. In a physical point of view, however, it was not, in the times when that law was made, by any means so great an injury, as it may now be: for the *Lues venerea*, which we owe to America, could not then have been given to the woman ravished, but at most, a child. But by a people, among whom female virtue is valued, and where a woman's comfort and happiness through life depends entirely on her virginal chastity, because no man has any desire to take another's leavings, this injury must, from the shame which is attached to it, be deemed so enormous, as almost to exceed death itself: and in this view, therefore, ought a legislator to regard it, and to act accordingly; at least, until the other sex alter their notions of honour, and men become more condescending;—a period, which I hope my native country may never see.—Yet geography has made us acquainted with nations, whose manners are totally different; for, in some countries in the interior parts of Asia, the people are so courteous, as to let travellers sleep with their daughters, and look upon this as but a piece of becoming hospitality. Something of the same kind takes place among the Indians of North America: and the celebrated *William Penn*, at the time that he was treating with them for the purchase of Pennsylvania, had the daughter of a chief hospitably given him as a bed-fellow; whom, however, it is said, he left as pure as he found her. The legislator, then, of a people in such circumstances, might, or rather must, impose but a slight punishment on the

crime of rape : for a severe one would not only be unnecessary, as a satisfaction to the aggrieved damsel herself ; but it would be unsuitable to the great end of punishment. It would not operate at all *in terrorem* ; for among such a people, no young woman would ever complain, if such a trifling matter were to cost the accused his life.

This brings me again to the maxim stated in Art. CCLX., when treating of the punishment of adultery ; namely, that if we, in the mere view of deterring from any crime, impose a punishment too far exceeding the utmost desire of avengement, which is usually entertained by the injured party, it sometimes comes to be almost equivalent to an absolute impunity ; because nobody will complain. Of this we have a striking proof in the case of the capital punishment, which, in some countries, is annexed to thefts committed by servants, and which is often rigorously inflicted. I confess, I do not know what other punishment could be substituted in its room ; for houses of discipline are too expensive, and banishment has commonly no other effect, than the total corruption of the morals of those who suffer it ; but still it is evident, that the punishment of death almost gives an impunity to such thefts ; and, therefore, has a very opposite effect to what is intended ; just because this crime does not excite our revenge, and we have sympathy with one whom we know so well, as a domestic. I knew a case, which happened at *Zell*, where a servant, having stolen a sum greater than would have hanged him, and the loss of which extremely incommoded his master, confessed his guilt, on being privately convicted. His

master, who dismissed him, asked no farther satisfaction, than an acknowledgement, under his hand, that he owed him such a sum ; in order that he might at a future period get back his own ; and he gave him his promise, that he would not prosecute him. The thief, who had money in expectancy, refused to give such an acknowledgement ; being convinced his master would not prosecute him at any rate, because, if he did so, he could not possibly save him from the hand of justice and the gallows ; and thus the gentleman not only did not get any restitution, but not so much as even the promise of it.—This evil consequence, however, of too hard a punishment proving nothing else than an incitement to a crime, only takes place where there must be a complainer ; and not in regard to such crimes, as are inquired into for the sake of justice, and without any complaint on the part of the aggrieved.

As to what I have said with respect to the necessity of the law viewing those injuries that provoke revenge, in the same light wherein they appear to the people ; I think it must be evident, from the language I have used, that I do not mean, that it should be regulated by the immoderately-vindictive spirit of any individual. It ought to *follow* the sense of the nation ; at any rate, till it be able to effect a change therein for the better ; and if any individual should happen to be more revengeful than others, he must be told, that the laws are universal, and that punishments cannot be altered according to the caprice of individuals. As he enjoys public protection, he must, for that good, forego a little of his own will, and be satisfied to put

up with that revenge, which the general sense of the nation pronounces to be sufficient. For his name cannot stand in the laws in this manner; *The man who injures Titius shall be punished thus; but the man who injures Caius shall be punished with greater severity.*

III. *The Moral Amendment of Delinquents.*

The moral amendment of delinquents is the noblest, most benevolent, and at the same time, in a political view, the most desirable secondary object of punishments; but still it is nothing more *than* a secondary object. It is only in a political view that I here mean to consider it; for as to the other views of this subject, which has been such a favourite theme for the last ten years, they have been so fully expatiated upon by many writers, some of them very excellent ones, that nothing has been left for me to add. The fate, however, which generally attends favourite doctrines, has attended this doctrine also: it has been carried too far. It is certainly desirable, highly desirable, and, in the strictest sense of the term, a fatherly wish, that a punishment should always amend the moral character of the sufferer; but instead of speaking in this style, some have made the amendment of delinquents the end of all punishments. In Germany, this doctrine, which runs counter to the principles of every system of human jurisprudence hitherto framed, has not found so much patronage among lawyers, (because they have so many different punishments before their eyes, which have *no such object* in view, and yet are necessary,) as among a certain set of theologians, of a new way of thinking, because they have

found it useful in combating the doctrine of the eternity of hell-torments. With these theologians, however, I have here nothing to do. They are, indeed, rather too irritable, and too much of a persecuting spirit for me; much more so, at any rate, than the most strictly orthodox divines of the preceding age; of whose persecuting spirit, however, they loudly complain; just like the fat Englishman, who, in a crowd, within a small apartment, took up four times as much room as any other person, and yet growled horribly on account of the people squeezing *him* so closely, while yet every one of them required such a wide space for himself. With them, therefore, I am happily not here concerned, nor yet with their opinions concerning hell-torments. But in confutation of their doctrine respecting amendment, as the end of every punishment, I have some remarks to offer, as follows:

In the *first* place, then, I look upon it as false.—If we distinguish between chastisements and punishments, the difference, in my opinion, and according to the common usage of the terms, consists in this; that, in chastisements, the amendment of the sufferer is the essential aim; whereas, in punishments, it is example, and the determent of others; and hence these operate, even though the person punished should not be made better. It is at any rate evident, that *capital* punishments are not a means of amending delinquents, (unless we think fit to reckon a little upon their previous conversion, and their subsequent amendment in another world! But what if they will not be converted?) and yet we know no people among whom they are not used. By the term *punishment*, there-

fore, all mankind understand something which has for its object, not properly the amendment of the culprit himself, but the determent of others from the imitation of his example. No doubt, some people deduce from this very definition, an objection against all capital punishments; but I should be glad to see how a company of these merciful gentlemen would behave, if they were riding, well armed with pistols, through a forest, and a band of robbers approached them;—whether they would not cry out, *Keep off; we will shoot the first man dead, who comes near us*; and if, notwithstanding, any of the band had the courage to lay hold of a bridle, whether they would not, from the impulse of self-preservation, and to frighten the rest, (in other words, *in terrorem*, and by way of example,) shoot him dead upon the spot? Yet he is not thereby amended in his morals! Why then do they not rather seize, bind, and carry him home behind them on horseback; and there, in order to his amendment, consign him to the care of a Christian clergyman to instruct him in his catechism? I think they will know the reason themselves; and I need not give it. What, then, is right for *them* to do, cannot be wrong for human society at large; I mean, to inflict what *are* punishments, in the proper sense of the word, without any view to the amendment of the sufferer.

Let the reader now suppose himself carried back to an absolute state of nature, and, like another *Robinson Crusoe*, placed in a desert island, only that he has with him a wife and family, among whom are two full-grown sons; and that some cattle have been saved from the wreck of the ship, and got on shore. Let him sup-

pose farther, that, after some years, when they have brought a little land into cultivation, a set of cannibals, accidentally passing along, should burn their corn-fields, carry off some of their cattle, and seize even one of the children, and roast it; but that the little family, by the advantage of fire-arms, proved at last the stronger party;—would there be any injustice, after previously warning the savages by signs, in their shooting the first of them dead, who again attempted to set fire to the corn, and signifying to the rest, that they might all expect the same fate, if they made the like attempt; and, if this did not avail, shooting the rest of them successively, as they set foot on shore; and finally, that the family might not have their security interrupted any more, sinking their canoes, with all their crews, by cannon-shot fired from a gun that had been saved from the wreck? Our *Robinson Crusoe* wishes to be secure, and has a right to be so; and for that purpose, he may certainly employ all these means of determent and destruction, although the cannibals are not one whit bettered by them. And how, then, comes it to pass, that the millions who live in civil society, have lost that right which *Robinson Crusoe* enjoyed in his desert island?—Every state exercises such a right, even in war, and must do so, else it will become the prey of the first enemy that attacks it. To unjust conquerors, or even to an *Attila*, it does not send out a body of military chaplains to preach up amendment; but it has recourse to arms, covers the field of battle with thousands of slain, and thus *deters* its enemies from future attempts; that is, they are disheartened, and flee.

The state, or, in other words, that greater society into which we enter for mutual security, has also the very same right with respect to individual disturbers of that security; and if it only attended to the *main* design for which this union is established, it would, in punishing, never take the trouble to think of the moral amendment of the punished. But it exercises this right with great, yea, with paternal lenity, and studies to amend delinquents wherever it is possible; at least every government that is mild, and wisely regulated, does so. The reasons of this lenity are,

1. That it has more power, and can thus always maintain its security against the attempts of those individuals, whose amendment it is endeavouring to promote. Now this we certainly have not in our power in a state of nature.

2. That it regards every citizen as what we call (*ein Landeskind*) a child of the land, and, as such, treats him with paternal regard, as long as it answers any good purpose.

3. That the transgressor of the laws, may, if he become amended, yet prove a very useful citizen, and every good citizen is valuable to the state.—It is obvious, that the two latter reasons only apply to citizens, and not to foreign robbers or vagabonds, who commit crimes.

Now where the state acts in this manner, it may be said, in the stricter sense of the words, that it does not properly *punish*, but only *chastise*, and take upon itself the paternal duty of education. And happy is the state, and praiseworthy the merciful and wise legislator, who often does so; but then we cannot re-

quire it of a state, that it shall *uniformly* make use of chastisement, and *never* of punishment. For how many delinquents are there, whom it is not possible to amend; or at least, to amend whom, we do not know any means whatever? To think of amending a hardened band of robbers, who were at the same time incendiaries, would in all probability be a vain attempt; and so would it also be, to reform the wretch who has become hacknied in the practice of unnatural vices. We might, to be sure, shut him up in a solitary and dismal prison, where he could have no farther opportunity for continuing them; but then this would not be an amending punishment. Add to this, the risk, with which a multitude of villains, whom we wish to amend, are kept; and the awkward consideration, that the system of amending chastisements requires great expense. Now the state has a vast variety of expenditure otherwise, in paying judges, supporting fortresses, and maintaining armies, &c. &c.; nor has it a single penny, besides what the citizens give it, and they are often sufficiently burdened by other imposts. Is it then under any obligation to load them with fresh taxes, in order that villains may be amended; that murderers, highwaymen, and incendiaries, may (I leave an empty space here, which every one may fill up with his own project for their amendment; because I really do not know any means of amending the more profligate among them.) —In general, however, it is not easy to conceive, wherefore I, merely because another injures me, attacking me, for instance, on the highway, or burning my house about my ears, come under any obligation

to reform his morals, particularly where great expense is requisite for the purpose. What we can, after paying the public burdens, contribute to the purposes of beneficence, belongs in justice, first of all, to the poor who stand in need of our aid; and it is only with the *overplus*, for which we find no occasion in administering to their necessities, that we should attempt the reformation and conversion of such miscreants.

But I have not yet noticed that circumstance, which proves the greatest obstacle to the *amending* system, and must always very much limit its operation. Many reforming punishments, indeed some of the most efficacious of them, are of such a nature, that though a father *may* employ them on a small scale, a sovereign *never can*, on a great. Thus, the former may place an undutiful son among soldiers, where a severe officer shall have the charge of him; or, what is still better, he may, for punishment, leave the son who has enlisted in spite of him, among them, and let him live on his bare pay, without any farther support; only making a private bargain with an officer, who, for a gratuity, becomes his guardian. The exact regularity, and strict obedience maintained in a regiment; the honour of the military profession; the constant occupations given to the soldier, were they at certain times only to consist in mounting guard, scouring his arms, and keeping clean his regimentals; and the circumstance of the acute punishment of whipping, (which is now almost entirely proscribed in civil life,) being yet inflictible on a soldier, without affecting his honour;—all conspire to give hope of that youth being made better as a soldier, who might otherwise be

given up for lost. Were, however, the sovereign, or the legislator, to *enjoin* this means of reformation, as a punishment *, he would thereby deprive the military profession of that principle of honour, which alone gives it its efficacy. In this way, he would also make military service odious and contemptible in the eyes of his subjects ; and, in short, be guilty of the very same error which those parents commit, who make learning a punishment, instead of teaching their children to consider the want of lessons, and exclusion from school in that light. Besides, were he to think of applying this reforming punishment to thieves, and other *banditti*, how would his subjects fare, who should be obliged to quarter soldiers of such descriptions ? and if they were very numerous, what would become of the public security, or of military discipline ? In fact, the gangs of *banditti* chiefly consist of disbanded light troops, which, when a war is ended, it is not judged expedient to retain in service, or to draft into other regiments ; because their characters are exceptionable. Every government which is duly conver-

* If, during an unsuccessful war, those sentenced to imprisonment, are liberated, on condition of serving as soldiers, this is not to be considered as a punishment, but as an act of clemency ; and its design is, to clear the country of them. Something of this kind was done, during the war with the Turks, in 1739, in many parts of Germany, where the people were so civil to the Imperial recruiting officers, as to turn their prisoners over to them ; not sorry to be freed from the expense of their maintenance. Such recruits, however, are very troublesome, and, if numerous, may do much mischief ; nor indeed had the Emperor much profit by them on that occasion.

sant in military affairs, will endeavour to get rid of such people, as soon as peace takes place, and will be glad to let them go into other countries; which is the very reverse of what it would do, if, after having been among *banditti*, and had access to their instructions, it were advisable to incorporate such people with the permanent troops. But, in fact, instead of becoming reformed themselves, they would only serve to ruin the character of the whole army.

Thus far, I think, all my readers will coincide with me in opinion. I have, however, as yet only adverted to the least part of the evil. Are we then anxious that the sovereign should adopt the use of military service, as a part of the reforming system of punishments? Let us consider what the consequence will be, to those who commit offences that merit punishment, and yet have neither inclination nor ability *for* military service. Shall the sovereign, or, to speak more properly, as *he* cannot be supposed to concern himself about this particular case, shall the judge, who may possibly be disposed, on some occasions, to gratify a recruiting officer, have a right to commute our legal punishments into military service, under the pretext of reforming such offenders? When a *father* takes this method, nobody can object to it. But shall a judge or a prince adopt it? They cannot know any thing of the health and constitution of the man whom they adjudge to such a punishment, or whether he be even capable of bearing the fatigues of the first march.—The very same objection applies to many more of the amending punishments; and besides, the most efficacious are always the most dangerous. They imply

and require the exercise of a despotic power, which a father *may* exercise over his child, without being apt to abuse it, but which no one would approve of giving to sovereigns, and still less to judges, or to an aristocratic senate of nobles, and least of all to the inconsiderate and passion-swayed populace under a democracy. Nor can they be defined and fixed by any general laws: for what may, or may not, produce reformation, must be regulated by the personal circumstances of the delinquent, in various respects; in so much, that many amending punishments would cease to be such, if they were once determined by express laws, and their object known. For the person who means to punish upon this plan, must often take the culprit by surprize; and not allow him to observe what his drift is; precisely as in conducting the discipline of children.

The high-flying preachers of reforming punishments, therefore, are, in fact, preachers of despotism; without which their scheme is impracticable. They are so, I believe, without knowing it: but we can now easily account for the strange phenomenon, that the most zealous advocates of this doctrine belong to countries, whose constitution has a tendency to despotism; and that we hear but very little of it in England. It would seem, as if they founded it, in some degree, on those despotic principles, which have been current among them from their youth; and left a discretionary right *somewhere*, of altering punishments in such a manner, as to make them best answer their benevolent end;—a right, however, which a person unaccustomed to despotism, would not wish to

see in the hands of a sovereign, and still less in those of inferior judges.

In a word, so many difficulties interfere, to prevent punishments from effecting reformation, except in a very few cases, that we must be satisfied, if we can only make them attain their great end of deterring others from crimes.

PART III.

MISCELLANEOUS OBSERVATIONS.

I. *On the Distinctions to be made between Citizens and Strangers, in relation to Punishments.*

IN applying what has been said concerning the ends of punishments, and the consequent determination of their kinds and magnitude, we must make more than one distinction between *subjects* and *strangers*. By the latter, I here understand, not those foreigners, who have settled among us, and committed themselves to our protection; not that description of persons called *strangers* in the Mosaic law; but those who are altogether strange to us; such, for instance, as foreign vagabonds, thieves, incendiaries, pirates, and other miscreants, who have either voluntarily, or in consequence of banishment from home, come into our country. I must also observe, as a further limitation, that in Germany that person cannot be regarded as a perfect stranger, who, though he comes from the dominions of a different prince, is still a German; because all Germany is connected together as one large state, comprehending numerous smaller ones; all consisting of one and the same people. Of the

following remarks, some, but not all, are applicable to persons of this description.

In the *first* place, then, the plan of moral amendment, as an end of punishment, when it requires expence, or is attended with danger, does not extend to strangers; at least no farther, than as we wish well to every man, with whom we have in other respects no concern: for what we do to our fellow subjects, who have hitherto contributed to the revenues of the state, we are under no obligation of doing to other people. Suppose, that we bordered on a country, where theft and robbing were in vogue; on a certain part of Germany, for instance, in which, owing to the fault of their bad education, most of the people are accustomed to stealing; it certainly would not be incumbent on us to establish houses of discipline, for the ill-educated subjects of another country, which contributes nothing to our public expences; we would have a right to recur to a punishment of a different kind: and still more so, in the case of our coasts being infested by foreign pirates. The reformation of mankind at large, we cannot undertake; we shall find enough to do in that way with those of our own countrymen, to whose crimes amending punishments are applicable.

On the contrary, we are more frequently actuated by the desire of extirpating foreign delinquents, and so delivering the country from a very grievous evil. And much as there is to be said against banishment in *other* cases, no one would censure us for expelling strangers, who have not committed capital crimes, if only we did not send them in upon our innocent

neighbours, who live in terms of amity with us, and who certainly are under no obligation whatever to receive them. It would be best, if we could always send them back to their native countries; but were we even to transport them by ship-loads to a strange and hostile coast, this would not be what *Richard the First* did; for the thieves whom he thus treated were his subjects, and he landed them not merely on hostile shores, but on every coast indiscriminately. This principle goes so far, that we prohibit all such strangers, (among whom many are suspicious people and blackguards, such, for instance, as gipsies,) whether innocent or guilty, from coming into our country, under severe penalties; because *they* have no right to be there, and *we* have a right to place ourselves in a state of safety. What I now state, is nothing more than the law that is actually in use. We may, however, go still farther, and recur to that more severe sort of extirpation, *death*; only not a painful or ignominious death, unless when the nature and enormity of the crime authorise it.

This will be best illustrated by supposing the case of a ship cruising about at sea, on board of which the plague has broken out. If the crew wish to land on their own shore, it were certainly very cruel, absolutely to deny them access to it, and leave them to despair, in which they will attempt any thing. Nothing could excuse such cruelty, except the total want of the means of keeping them under such restraints, as that they might not spread the disorder through the country; but indeed, a state which carries on maritime commerce, ought always to have lazarettos,

and places for performing quarantine, established somewhere on its shores. Thus driven from their native coast, were the crew to attempt landing on any other shore, where would be the obligation upon the inhabitants, to permit them to do so? or if, in spite of all warning, they persisted in the attempt, and some actually came on shore, would not the law of self-defence justify the people in shooting them dead, and even in sinking the ship, if they had a battery, and she would not withdraw. In such a case, the crew are not to blame; they are only unfortunate, and much to be pitied; but then we are not bound to cure strangers of the plague, and thus to expose ourselves to the danger of infection. Now, the distinction, in such a case, in regard to *medical* amendment, between citizens and strangers, holds also with respect to *moral* reformation; at least, I should be glad to know, wherefore, and by what law of the spiritual priesthood, that should be a duty in the one case, which is not so in the other.

There is yet *another* theoretical and real distinction, between strangers and citizens, with which, although in the present refined state of manners, it seldom has an actual influence on the punishments of individuals, we must nevertheless be acquainted, if we wish to philosophise upon them. It is this; that we are apt to carry our revenge farther, and with greater violence, against strangers, than against citizens and subjects. Had the Portuguese, or the French, or the Spaniards, done such things as are at present going on in the American colonies; had they boarded English ships, and thrown their cargoes into

the sea, and compelled their owners to set them on fire, if they wished to escape being put to death ; and, after wantonly dipping some Englishmen in tar, and then rolling them among feathers, sent them in that plight home to England, and threatened to do the same to more ; all England would have been transported with the desire of revenge, and so furious to rush into a war of vengeance, that the king, however reluctant to unsheath the sword, would have been compelled to yield to the wish of the nation, in order to prevent internal commotions ; and I should be glad to see the minister, who, in such a case, would have had the courage to declare himself hostile to a war. Whether by such a war, the innocent would not be punished with the guilty ; whether the English themselves had not, in this instance, been somewhat to blame, or might not, at least have arrogated questionable rights, would, by no means, be the question. *George the Second* had always his doubts with regard to *Jenkins'* celebrated ears, and thought it very likely, that the English might not, on that occasion, have had clean hands with respect to the Spaniards ; and yet he was then, much against his will, compelled to declare war against Spain ; as he was in 1756, in like manner, against France. In the present case, however, the English think differently, because the authors of the above outrages are their fellow subjects ; for such certainly we may term those, who demand protection from England as her duty, and for whose sake alone she carried on the late war, and was obliged to load herself with seventy millions of debt. That the majority of the people in London, together with the opposition,

are in favour of the Americans, I do not here take into account, because the reasons of this are well known ; but the bulk of the people, who are against them, and insist on satisfaction for their outrages, together with their recognizance of the rights of Britain, still manifest great moderation and coolness. And why ? Just because they are their fellow subjects !

Farther ; in the state of nature, much severer punishments are resorted to, *in terrorem*, than those ordained by express laws usually are. In the case of a citizen, we have no right to go beyond the punishment prescribed by law ; for the law is here the compact entered into betwixt him and society, as to the *quantum* of punishment which the latter shall be entitled to inflict, and the former bound to suffer. But to entire strangers, who are not under our laws, we have a right to act, as enemies, and to subject them, with a view to the determent of others, to all that severity of punishment, which is authorised by the rigour of the law of nature. This extreme severity, however, we do not *now* exercise towards strangers, but really consider them as living under our own laws, and as not punishable beyond the extent therein prescribed, when they happen to commit crimes within our land. This is merciful and noble ; nor would we ourselves wish, that other nations should proceed against *us*, or our countrymen, with all the severity which the law of nature permits. Such, indeed, were not the sentiments and conduct of ancient nations ; but the extension of commerce, together with much intercourse by travelling, and the decreased violence of patriotism, have added much to the mildness of men's man-

ners, and made the whole human race much more like one people in this respect, than they were in ancient times.

II. *On the Comparative Expediency of Summary and Deliberate Infliction of Punishment.*

I MUST now take notice of the following conflict that takes place between wisdom and clemency on the one hand, and prudent caution, with respect to the danger of punishing the innocent, on the other.—Speedy punishments are the most efficacious, both for the determent of others from the like crimes, and for the moral amendment of delinquents. They involve, at the same time, a less degree of evil; because the man who long waits for his punishment, feels it previously, in imagination, a hundred times repeated; and if it be a painful one, when the time of suffering it at length comes, his whole frame, racked by its long anticipation, is prepared to feel in it all the intensity of torture.—“Why not then,” it will be said, “let punishment, in all cases, follow condemnation as quickly as possible.”—Very proper, no doubt; but then may not the innocent suffer on this plan; and particularly where a judge happens to be deficient in the requisite penetration, or to decide by the influence of passion? And if, in consequence of apparent guilt, a man has had his *natural* head taken off, what will it avail him, if it be afterwards found that he was innocent, to have a head *in effigie* clapt upon his shoulders? Now, by slow and deliberate procedure, both in the administration of justice, and in the execution

of punishments, this great evil is powerfully guarded against; nor can even the most maliciously-inclined judge be likely, by our form of process, to punish an innocent man, at least without the greatest risk to himself; and, indeed, that any innocent man should, in Germany, lose his life, is next to impossible. In respect to the point in question, the modern world is thus situated. In the East, speedy punishment still prevails: in Europe, it is the reverse. The ancient infancy of nations was more partial to summary justice; modern times, and, as it were, the mature age of nations, to deliberate procedure: and thus much may be said in general, that the more *patriarchal* the government is, and the more the state resembles one great family, and such as one honest man can superintend, as a father, unlikely to do injustice to any of his children; the more suitable are speedy punishments to it: whereas, when it increases to an extent, wherein such a style of superintendence is impracticable, the more dangerous do they become to innocence. And here, likewise, there is a distinction between capital punishments and others. In the case of the latter, *some* satisfaction may be made to a person who has been found to have suffered unjustly; nay, the harm done him may be *fully* repaired; but in the case of capital punishment, this is impossible. *Calas* himself still remains dead; and it is only to his family that any atonement can be made for his murdered innocence.

III. *On the Abolition of Capital Punishments.*

IN these later times, numerous objections have been made against capital punishments in general; and

sovereigns have sometimes hesitated to subscribe warrants for execution. And thus far, at any rate, these objections and doubts are just ; that we ought never to be profuse of such punishments, but rather to use them, exactly as physicians do strong poisons, with the greatest possible caution and reserve. This I need not repeat ; for enough has been said about it by others. But, after all, capital punishments can never be entirely proscribed. If the security of *Russia* is to be maintained in future, *Pugatscheff* must not be suffered to live.—I have already made various observations to this effect ; but the following remarks yet remain to be offered.

A great deal has been said about the *clemency* of abrogating capital punishments, and substituting others in their room. The sovereign who has abolished them, is represented as truly humane and gracious ; and a sovereign, possessed of unlimited power, might thereby be impelled entirely to prohibit the use of them. But would this, after all, be, in every case, real clemency ? Might not the change of capital punishments into others, sometimes prove cruelty,—the very extreme of cruelty ? Is that death, which we have all one day to expect, and which, in many diseases, and to the soldier in the field of battle, approaches so nearly, an object so very terrific ? Are not perpetual imprisonment, (which, by being commonly in an unwholesome place, becomes a sort of torture,) and condemnation to unwholesome labours, with which, besides, infamy is connected, really worse evils than death ? Who, that is of any rank, or has any sense of honour, will not rather chuse to lose his head at once,

than go about every day chained to a wheel-barrow, in that very city, where the eyes of thousands, to whom he is known, are upon him? As to those unwholesome kinds of labour, to which criminals are subjected, and which occasion tedious and torturous diseases; I do not merely allude to working in unwholesome mines, but what, to people otherwise brought up, and perhaps of delicate constitutions, is equally irksome, working in the wet, and with cold feet; the certain effect of which is, the total ruin of health, together with gout, and other painful diseases. And must not condemnation to the galleys be worse than death? Or suppose, that a man had his choice of death, on the one hand, and, on the other, of the Russian punishment of the *knout*, together with excision of his tongue, and the slitting of his nose, whereby he would, during his whole life, be rendered miserable, as an object of hideous disgust to himself, and, at the same time, branded as infamous in the sight of others; which of the two would he be likely to prefer? No doubt, men will feel and appreciate such evils very differently. The poltroon and the slave will regard them in a very different light from the man who is free, who can look death in the face, and could not bear the thought of living without honour. But thus much, at any rate, is certain, that, to some people, death will appear a much less formidable object than such punishments.

Hitherto I have mentioned only common punishments: but there are also others more ingenious, which, without the infliction of any pain, may become much more severe than death; and the vindictive despot, who

has a right knowledge of the human heart, with all its feelings, and all the nerves, as it were, of the human soul, will not punish capitally, but, by prolonging the agonies of his victims, make them feel his vengeance in the most acute and sensible manner. In such cases, therefore, I would not be disposed to use the term *clemency*; because I very much doubt, whether there be any clemency in commuting easy capital punishments, into such corporal ones as are both tedious and ignominious.

It likewise appears to me very strange, that a sovereign should, from a principle of clemency, give up the infliction of capital punishments, and yet carry on, without the least remorse, a war of vengeance, in which men shall lose their lives by thousands, and hundreds of thousands; and yet in such wars he *must* sometimes embark, if he wishes to maintain the security of his subjects. It were, therefore, a very singular contrast, that the very same sovereign should, in the one case, lavish the lives of his best subjects by thousands, and yet think himself bound to be as sparing of the blood of a single villain, who had disturbed the peace of the community, and whose death might be a salutary example to others, as if it were something sacred. Would such a man be the clement and gracious sovereign, whose conduct our reformers propose to regulate by the aid of philosophy?

“But are capital punishments,” I shall perhaps be asked, “allowable by the law of nature?”—Indeed I do not see, why they should not be thought so? For, in that state, who would have the least hesitation about dispatching the person who attacked him, in

order to preserve his own life? In doing so, he would be acting literally in obedience to the ancient definition, which calls self-preservation, *the law which nature hath taught to every creature*; for what animal, furnished with any offensive weapon, has not a natural desire to kill its destroyer, if it cannot otherwise be secure? This very law, likewise, we ourselves exercise in war; nor could we exist, if we did not. Where then can be the wrong in doing to individuals, what, when done to thousands, is held to be right? In fact, the question, “Is it lawful to put malefactors to death?” we should hardly expect to hear from an European philosopher, but only from a Siamese *Talapoin*, who holds the precept, *Thou shalt not kill*, without any limitation*; and yet, by so doing, gives a handle for the infliction of capital punishments of the most extreme cruelty; only that they are pure from bloodshed.

To what I have now said respecting the law of nature, there is this to be added respecting civil society, that every member thereof gives it a right over his life, the exercise of which is defined by the laws.—“But,” say the opponents of capital punishments, “can any man give to others any such right? He did not give himself life. Can he then himself take it away, or voluntarily let others do so? He is not lord of his life.”—I should, however, think, that he really were so, in so far as that he might warrantably expose it at any time to a lesser danger, in order to be

* See the *Universal History*, part xxiv. § 14. These people think it unlawful to kill vermin, or even seeds, to which they ascribe a vital principle.

secure against a greater. We are obliged to do this, in defending ourselves against any enemy; and if we do not, but run away, (were it only from a large dog that has attacked us,) we only lavish away our life, and become suicides from mere cowardice. The case here is this: In order that we may, under the protection of others, be secure of our own life, which would, in a state of nature, be in continual danger, and has no other defence than our own hand, we enter into civil society, and give it, in return, a right to take our life, whenever we commit any offence which the law has made capital; for of such offences it is certainly in our own power to keep clear. I should therefore think, that this were a very advantageous bargain for our life; for it is only subjecting ourselves to *one single* danger, and one too w'ich we may easily avoid, for the advantage of escaping *numerous* dangers, which would daily and hourly beset us. Besides, we here only give to society a right, which it before had; for if we had disturbed its peace, it might, even without our consent, have put us to death as enemies, who did not belong to it. If we had no right over our own lives, and if we could give to others no such right, neither could we defend the state, nor ourselves, in war.—Upon the whole, every man who enters into civil society, gives up many natural rights, which he previously enjoyed; such, for instance, as that liberty and independence in which he is born; in order thereby to gain things of greater value; and, in like manner, he gives up to society, *per pactum*, rights over his life, when he either ventures it in defence of the state, or forfeits it by his crimes. And between

the right of locking a man up for life, or whipping him, or cutting off one of his limbs, and taking his life at once, there is no farther difference, than between a *major* and a *minus* : for if the state has no right to take away life, I cannot see how it should have the other rights now mentioned ; and if so, then there could be no such thing as punishment at all, that is, in other words, there could be no security.

IV. *On Punishments affecting Honour.*

Punishments affecting honour may be united with those that are capital ; that is, criminals may be condemned to deaths, which are accounted ignominious. A certain degree of ignominy should, indeed, be attached to every capital punishment, if it be meant that it should make any impression. The want of sufficient ignominy, or rather, perhaps, an idea of the honour, attending it, is the cause, that in no country does the gallows groan under the weight of so many highwaymen, as in England. There, no doubt, it does all that good stout wood can do ; hanging so many people, that all our German gallowses put together are absolute idlers compared to it ; but still, it has very little effect, because hanging is not so ignominious as with us. On the contrary, the people of England would seem to think it quite an honourable death ; for they crowd to executions, to see if the criminal dies with courage, and if he does so, he dies with more renown than many a hero. Perhaps he makes a speech to the spectators, which is always very acceptable ; and used indeed to be (but, I believe,

this has now ceased to be the case) a favourite theme for school-exercises. It is, besides, always stated in the newspapers, how criminals die; and this is, at any rate, as much praise, as when, in any of our German literary journals, it is said of a candidate for academical honours, that he defended his *thesis* on every occasion, with the greatest readiness, and with universal approbation; because nobody, who knows any thing of our university practices, believes that there is a word of truth in such commendations. The reader of the English newspapers, however, *does* believe such reports from Cambridge or Oxford, because flattering falsehoods with respect to those promoted to degrees, are not there allowed to be printed, for the purpose of either shewing favour to graduates, or alluring others to aspire after similar honours.

How little ignominy attends the gallows in England, is strikingly manifested, by the remarks made on the conduct of a German, named *Stirn*, who was not long ago condemned to be hanged at London. He was the son of respectable parents, his father being what we call a *Metropolitan*, or *Superintendent of Police*; and having, merely from too nice a sense of honour, committed a murder, for which he was sentenced to the gallows, he dispatched himself in prison with poison. In the English papers, there were various observations on this strange suicide; and it was remarked, that he must have suffered much more by the poison, than he could have expected from dying on the gallows. Now, of suicide, in other cases, there are daily examples in England; but the supposed folly of it, in this instance, excited much wonder. They

little thought, that dying on the gallows, which, in Germany is very sparingly used, and almost exclusively, indeed, for the punishment of theft, could appear more disgraceful to a German, than to an Englishman; or that a German, not indeed of high, but of plebeian descent, would account the bringing such a disgrace upon his family a much greater evil than any present torture, however great. Nor, common as suicide in England is, could they comprehend how *Stirn* had been such a fool, as to save the hangman's trouble. They even moralized on the heinous sin he had committed; just as if it were not one and the same thing, whether the man who must die, lets himself be hanged, or, like *Socrates*, drinks a cup of poison.—England, however, will never be secure against highwaymen, until the people are inoculated with *Stirn's* folly; and learn to look upon the gallows as highly disgraceful.

How useful soever punishments affecting honour may be, when annexed to capital punishments, their utility becomes extremely questionable, when the person on whom they are inflicted continues to live; and they ought, therefore, in reason, to be used much more cautiously and sparingly than capital punishments.

They are very severe, and, indeed, to a person who has a regard to his honour, far more so than the loss of life. It is not enough to say of them, that they are only an apparent evil, and absolutely nothing more than the loss of an apparent good. But, allowing that they were, an apparent evil may be a much severer punishment than a real one. To see water

before one, or even a glass of wine, is certainly no evil, unless we imagine it to be so ; but to shew either to a person who has been bit by a mad dog, is the most intolerable torture to him ; and, in like manner, other maniacs may, by the most insignificant trifle, if to them an object of terror, be tortured to such a degree, that death would be mercy in comparison. But the case is also precisely the same with people not at all deranged, if they only happen to be strongly under the influence of error or prejudice. To lock up a person, afraid of ghosts, in a prison, or even in the most genteel, and elegantly furnished apartment, which were said to be haunted with a ghost, would be a piece of horrible cruelty, and might bring on epilepsy upon him, and even make him die in the most dreadful agonies. As long, however, as we are not gods, but so dependent as we are upon our fellow men, and their good opinion, honour is not a mere semblance of good, but a real good ; and, indeed, so great a good, that, by many, the loss of it is deemed a much greater misfortune than the loss of life. A great proportion of mankind really regard it in this light : and to a duellist, the loss, not of *all* honour, but even of that *part* which he might forfeit in a certain circle, is a consideration that far outweighs the loss of life. Those, therefore, who wish to speak the praises of clemency, should exert their energies, still more to decry ignominious punishments than capital ones. Both are on a footing thus far, that by every infliction, a citizen is lost to the state, for the man who is made infamous is made useless ; only there is this difference, that he who is punished capitally, is

no longer a loss; while the other, though lost, must either still be supported, or allowed to put forth his hand, and find support where he best can.

But ignominious punishments have, besides, this farther suspicious effect. If they be frequent, and consist not in the total loss of honour, nor yet in the forfeiture of a certain pre-eminence and rank, but in what is a sort of *medium* between both, in *affronts* or indignities, they render a people abject, and regardless of honour. This has been exemplified in our schools; in which, in the days of our fathers, there were many kinds of disgraceful punishments: for the whole race of the *literati*, and all those who had the misfortune to get a school-education, had *then* very improper ideas respecting honour; and, therefore, great pains having been taken to prohibit these punishments, they are at length utterly banished from our schools, and will continue so, until some reformer, who knows nothing of the nature of the human heart, shall introduce them again. To be subjected to public insults, and obliged to submit patiently to derision to one's face, without being allowed to retaliate with either tongue or hands, is a method of education only calculated to make scoundrels or villains.

A farther effect of such punishments is, that they render the people too cunning; so that they soon learn to laugh at any disgrace which is short of total infamy, and get far above all the shame which a sentence of the law can bring upon them. Honour and disgrace do not depend, properly speaking, on the laws, but on the opinions of mankind. When the laws

meddle with them but sparingly, they may, indeed, have it in their power to regulate the *ton*, and to decide what is honour, and what disgrace; but they must proceed with great caution; for if they come too often in collision with the opinions of mankind, people will be so far from recognizing their decisions, that what is with them a mark of disgrace, will absolutely become an honourable distinction. Were we ever to prohibit duelling, under the penalty of the duellist being obliged, by way of disgrace, to wear a rope about his neck as long as he lived, many would fight duels, merely to gain the *insignia* of the order; or were every unmarried man, who was not a pure bachelor, to be obliged to wear *one* flower in his hat, and the person who had seduced a pretty girl, *two*; there are, perhaps, very few, who would chuse to appear without these ornaments; and their very number would be deemed a recommendation, to every one that wanted a wife. The law, therefore, must not, in fixing the boundaries of honour and disgrace, put the faith of the citizens to such dangerous proofs. I have in my possession a most curious collection of university-relegation-patents, with which I sometimes amuse myself. I believe it will be as agreeable to the university which issued them, that I do not name it. It is, however, in the decisions of our university-courts, that we generally meet with the strangest specimens of legislation, and judicial inflictions; and such as are to be found nowhere else. In one of these patents, the Professor of Eloquence relates the crime which occasioned the expulsion, in the following terms: *Cerevisia madidi per civitatis nostræ plateas*

districtis gladiis obambulantes, virum militarem eximiæ auctoritatis, forte fortuna obvium, nulla data occasione, nulla injuria præcedente, oppugnastis, convicia ac contumelias eructando, et ad armorum certamen insano ausu provocando. Qui si minore prudentia fuisset instructus, nec vestrum furorem sapienter declinasset, facile profecto potuisset contingere, ut illud temporis monumentum, quo maxime cæpistis desipere, et vobis funestum, et nostro Lycaeo evenisset deplorandum. Et is vero ab ulciscendi studio alienus, laudabili ratione querimoniam ad nos detulit, ratus hoc pacto se servaturum dignitatem, vosque subituros dedecus ; and then follows the sentence of expulsion on one of the party, in these words, *Unanimi concilii nostri decreto statutum est, ut tanquam confessus et convictus in perpetuum, infamiæ macula notatus, relegaretur.*—A person, thus treated, might very naturally have taken it into his head, to pin up this deed of relegation *cum infamia*, in his chamber, or to exhibit it *in rei testimonium* ; particularly if the word *cerevisia*, had been altered into *vino*, that nobody might suppose, that he had been of such mean descent, that no officer, who had any regard to his honour, would have engaged with him. Nothing farther was wanting to have rendered the said officer, in other places, an object of greater infamy than the person expelled, than that the *Senatus Academicus*, while they celebrated his prudence so highly, should have mentioned his name. Whether this point was so settled as we find it, by classical erudition, or out of the author's ill-will to the officer, I cannot tell ; but benevolence almost prompts me to believe, that the latter was the case.

But the worst of all the effects of true and complete infamy, and what is so in the eyes of the public, is, that it naturally renders the man who has suffered it, a perfect villain, and always the more perfect, the nobler his rank previously was, and the greater regard he had to his honour; unless he be at the same time confined for life. His bread he cannot earn in an honest manner, because no man who knows him, (and often a *brand* makes him but too well known,) will chuse to have any thing to do with him; he is, therefore, compelled to have recourse to dishonest means to get a livelihood. The great band of honour, which keeps the most wicked men, and such even as have no religion, dependent upon mankind at large, is thus burst for ever; he has nothing more to lose; he troubles himself no longer about the opinion of the world; but is perfectly independent, and does what he pleases, if he can but keep his person secure. And from that universal contempt which he suffers, there must soon arise, in his mind, a cordial contempt and hatred of all mankind; excepting only of those who are in the same situation with himself; with whom he will naturally associate, and join, not only in preying upon the public for daily bread, but in all the cruelties and barbarities, in which they are but too likely to be concerned.

But, least of all, ought punishments affecting honour to be used, where it may be seen beforehand, that they will be quite useless; as, for instance, in the case of those crimes to which the public has already attached ideas of disgrace; for if the public opinion respecting the infamy of any crime, has proved insuf-

ficient to repress it, any shame which the laws can fasten upon it, will be perfectly fruitless; because the person who commits it, has previously laid his account with, and resolved to encounter, the ignominy of it. For the very same reason, the subjecting of a woman, who has been unchaste, to public ecclesiastical penance, or any other such disgrace, is extremely repugnant to legislative policy, and in other respects an abominable practice. The fear of shame is, besides, apt to drive the unhappy wretch either to the perpetration of child-murder, or, in a great city, such as London, into a brothel, where she is soon completely corrupted, and becomes a pest of society. She is, therefore, rather deserving of the sympathy and forgiveness of her friends, nor ought the magistrate to know any thing of her misfortune, excepting, in so far as it may be expedient, that she should be obliged to submit to a private admonition from a prudent clergyman.

Nor will the punishment of infamy be of much effect in repressing theft, excepting perhaps in the case of that species of it which is committed, from a false principle of honour, in order to pay gaming debts. Here it may be expedient, that it should still be resorted to, in order that the public may not learn to regard such thefts as less disgraceful than they now do.

In no cases, on the other hand, do punishments affecting honour appear to be so suitable, as where mistaken ideas of honour are the motives of crimes; as, for instance, in the case of child-murder, and of that species of theft just now alluded to, viz. the laying hold of money intrusted to one's care, in order to pay gaming debts with it, &c. &c. Could any punish

ment be effectual to prevent duelling, it would be the loss of honour ; only it would require to be in such a way, as that it should hold good in the public opinion ; but how that is to be managed, as long as a duel is held to be an affair of honour, and the declining of it a proof of cowardice, is that great problem of legislative policy which is hitherto unresolved ; and as long as that continues to be the case, it will not be so much punishment, that can ever prevent duels, as a certain stratagem, which it is not my province here to detail.

Legislators are therefore, after all, placed in a very awkward *dilemma*, with respect to the use of infamizing punishments ; for, on the one hand, where the public already holds the crime to be infamous, they are unnecessary, because the offender has predetermined to submit to the infamy ; and on the other, where the public holds a crime to be honourable, the contradiction of the laws is of no avail ; for in saying to an offender, *Thou art infamous*, they rather ennoble him. The Bedouin Arab holds nothing in so much respect as his beard ; and to have it cut off, is such an infamy, as, in many cases, to be more insupportable than the punishment of death. At the same time, he looks upon highway robbery as noble and honourable. Were then any conqueror, who had brought these sons of freedom into subjection, to make cutting off the beard the punishment of robbery, it might at first, no doubt, prove very terrific ; but if the punishment were rigorously inflicted, and a couple of thousand gallant fellows went about without beards, it would not only soon cease to be disgraceful, but actually become honourable, not to have a beard ; and the time

would then come, when it would be infamous to have one. The point in question lies somewhere in the middle between the horns of this *dilemma* ; but it has not yet been hit upon.

V. *On the Punishment of Blasphemy.*

I HAD still a great many remarks to make concerning imprisonment ; which ought neither to be unwholesome nor tedious, but, for that reason, while it lasts, the more rigorous and solitary ; 2. Concerning that sort of exile, which renders the sufferer neither infamous nor destitute, but merely rids the country of a dangerous citizen, or, in other words, punishes him, as was done in ancient Rome, by interdicting him from access to his beloved native land, or the place of his enjoyments ; 3. Concerning stripes, which were so commonly used in ancient times, but are now only a military punishment, and not held to affect a soldier's honour at all. But this Essay has already extended to too great a length ; and I have yet to add some remarks in illustration of Art. CCLI. concerning the punishment of blasphemy. That perpetual imprisonment and exile deprive the state of citizens, just as effectually as capital punishments, (though with some rare exceptions,) the reader will remark without my assistance.

With regard then to *blasphemy* ; is it irrational, barbarous, and superstitious, that any punishment should be inflicted on the crimes which are usually comprehended under this name ? Almost all nations have accounted it just ; and some have punished such

crimes with extreme severity. At present, however, the objection, that *blasphemy injures not God, he being infinitely exalted above it*, is trumpeted abroad with loud approbation. It does not, indeed, appear very striking to me; and those who make it, would seem to have conceived, that the intention of punishing blasphemy were to procure safety to God. That, however, could scarcely have been the unanimous idea of so many nations, and these too, differing so widely in civilization, climate, and religion. For most people, in all of them, would probably have conceived, that if God wished to avenge this crime, he could take vengeance at his pleasure, and would not want the aid of human laws for that purpose.

On God's account, then, punishments for blasphemies are certainly *not* necessary; but perhaps they *are* necessary for the sake of our neighbour, who, if he believes in a God, or holds his religion, whether true or false, to be true,—always feels himself extremely scandalized by them. Nor is it only blasphemy against the *true* God that ought to be punished; but even that against false gods, supposed saints, and fictitious religion, whenever they happen to be the gods, saints, and religion of the people.

Putting blasphemy entirely out of the question; Has any man a right to call me, to my face, on account of my opinions, whether true or false, or, which is the same thing, on account of the philosophy which I adopt, a fool, a profligate, a villain? *He* may be of a different opinion, and may, if I chuse to hear him, give his reasons with great animation; in which case, should a harsh word escape him in the keenness of ar-

gument, I am bound to overlook it, because I might myself be guilty of the same fault; but if, without having this apology, he should tell me to my face, *The philosophy which you adopt, is nonsense; it is abominable; it is imposture; and its author is a villain and a rogue;* I certainly should not be censurable for repaying such insolence with manual chastisement, if the magistrate would listen to no complaint on account of it. And if the man had treated me with such gross rudeness, in the presence of others, of my children, perhaps, or my servants, before whom I should thereby have appeared in a contemptible light, his offence would be so much the greater. I ought to have it in my power to complain of it: and though, instead of doing so, I were to give him a drubbing, I certainly should have the excuse of what is called a *justus dolor* to plead.—Again, the offence would be farther aggravated, and my right to avenge it the better, if he had addressed me in such insolent language, in a place where he had no title to be without my permission; for example, in my own house.

Now to the man who, from his heart, believes his religion, and regards it as the way to eternal bliss, and as the comfort both of life and death; and who, of course, wishes to educate his family in the knowledge and belief of it;—nothing can be more offensive than to hear another speaking against it, and employing, not arguments, (although even these he might let alone, because every man has a right even to err, without our forcibly interfering to rid him of his error,) but insolent and contemptuous language, and blaspheming its God, its prophets, saints, and sacred

things. Were the religion in question only *tolerated*, still the state is bound to protect every person who believes it, from such outrages, or it cannot blame him, if he has not the patience to bear them. But if it be the established national religion, and, of course, the person not believing it be only tolerated by the state, and, though he enjoys its protection, just as if he were in a strange house; such an outrage is excessively gross, and unless we conceive the people to be so tame as to put up with *any* affront, and, of course, likely to play but a very despicable part on the stage of the world, the state has only to chuse between the two alternatives, of either punishing the blasphemer himself, or else leaving him to the fury of the people. The former is the milder plan, and therefore to be preferred, because the people are apt to gratify their vengeance, without sufficient enquiry; and of course it may light upon the innocent.

Nor is this by any means a right, which I only claim for the religion which I hold to be the true one; but I am also bound to admit it, when I happen to be among a people from whose religion I dissent. Were I, in a Catholic country, to deride their saints, or insult their religion by my behaviour, were it only by rudely and designedly putting on my hat, where decency would have suggested the taking it off; or were I, in Turkey, to blaspheme Mahomet, or in a heathen city, its gods;—nothing would be more natural than for the people, instead of suffering it, to avenge the insult in their usual way, that is, tumultuously, passionately, and immoderately; or else the state would, in order to secure me from the effects of their fury,

be under the necessity of taking my punishment upon itself; and if it does so, it does a favour both to me and to other dissenters from the established religion, because it secures us from still greater evils.—Of the mischief that the blasphemer, and still more, the scoffer at religion, does in society, if he succeed in making religion really contemptible, I do not think it necessary here to say a word.

To the complete disowner of religion, whether he disbelieve in a God altogether, or but only as concerning himself in human affairs, as punishing sin, and ruling the world; and consequently, to the blasphemer of the only true God; the state, according to the spirit of laws, owes no toleration whatever; because no dependence can be placed on any such person, his oath being a mere nonentity; nor is he to be trusted farther than he is under inspection. Should he be a malicious rascal, punishments would be insufficient to secure us against his attacks, because the man who has no dread of another world, can hope to escape punishment by suicide. He is, therefore, a very dangerous member of society.—If, again, the state does not proceed upon this principle; if it tolerates the atheist and the infidel, nay, and protects him too, although no dependance can be placed on his doing any thing in return for the defence of the country, because he can give himself a dispensation from all oaths, and putting arms into his hands might be hazardous; still such a man must suspect, that he is, as I before expressed it, in a strange house, wherein he cannot possibly claim equal rights with others. His oath cannot so much as be valid for a proof in

any judicial process. He ought, therefore, to behave as a man in a strange house will naturally do; without insulting, by his blasphemies, the people who lodge and protect him, and yet get nothing from him in return; or else he cannot think it unjust that he should be punished, if he does.

In fact, the doctrine, that *blasphemy ought not to be punished*, appears to me to border upon the persecution of religion; for thus the infidel would have a right to blaspheme, and we should be obliged to bear it. Nay, even scoffing and reviling religion is likewise a persecution of it, and one that is felt very sensibly by its friends; for if I am obliged to let another person insult me to my face, I must consider it as inflicting a deep wound upon my honour.

As to the manner in which blasphemy should be punished, I am not concerned with it. Legislative policy will find one punishment more suitable in one place, and another in another. But capital punishments I should not here recommend, because they make the blasphemer of too much consequence, and awaken sympathy for his fate. Blasphemy uttered under the influence of intoxication, it were better to leave unpunished altogether. Perhaps the most suitable and natural punishment that a state could inflict upon the blasphemer,—and in fact it would not be a small one,—would be, to consider him as a man destitute of religion, and whose oath, of course, could not be regarded *as* an oath.

Gettingen, 10th April, 1775.

SEGNERI DE PŒNARUM QUANTITATE ORATIO,

(*Vide page 372*)

Ne enim putetis, numerorum, magnitudinum, atque momentorum scientiam, quam ego imprimis profiteor, extra umbram non prodire; (quamvis id quoque magnum sit, quod mentem philosophiæ præparat, atque artibus aliis; plurimarumque rerum notiones vel sola nobis offert, vel aliunde haustas perficit;) ita mathematica in omnia, quæ cognosci ab homine possunt, influunt, ut eorum perpauca sint, quæ non, si capiantur ab homine mathematicum prorsus experte, a geometra, si animum adverterit, non multo rectius perspiciantur. Patiamini, auditores, ut id loco ex jurisprudentia universali in medium adlato declarare studeam, eo, in quo proportionem adhibendam esse vix quisquam est, qui non videat, etsi, qualis ea sit, forte non omnibus pateat: non quasi magni momenti sint, quæ per transennam fere tantum de ea re cogitanti succurrerunt, sed quia lege jubeor audientiam a Vobis petere. Conabor, ut, si non satis ornata oratione molestum me Vobis esse necesse est, prolixitate tamen molestus non sim, faxoque, ne, cum attentionem mihi benevolam a Vobis exoro, occasionem tædii Vobis exhibendi petiisse videar. De quantitate pœnarum agam, quæ cuilibet delicto in republica constituendæ sint.

Quid pœna quidve præmium sit, interrogati philosophi in diversa fortasse discedent, ii maxime, qui diverso modo de libertate humana, deque principio actionum nostrarum sentiunt. Nos mathematicos in eo quoque imitemur, quo illi pulcherrimos in philosophia

naturali progressus fecerunt, interea, dum philosophi de elementis corporum formisque, et quæ ejus generis sunt alia, bella nunquam finienda gerunt, separemusque a quæstione quidquid abesse potest, neque ad eam solvendam aliquid confert. Nitamur experientia, quæ una, ne nubes et inania in ejusmodi rebus captemus, maxime potest impedire. Ea autem, inter principia actionum humanarum, instinctum nobis primum offert, homini cum brutis communem, quo tum etiam, cum ratione per ætatem uti nondum potest, vel cum ejus usum tantisper seponit, ad ea fertur, sine quibus vita constare, vel universum genus humanum, conservari non potest. Accedit deinde ratio, quæ prout boni malive specie aliquid nobis offert, ut illud natura appetamus, hoc quantum possumus aversemur, efficit. Verum bonum malumve non in se spectamus, si modo in se spectatum aliquid bonum malumve dici potest, verum ad nos referimus, illudque bonum habemus, quod pro eo, in quo quovis tempore constituti sumus statu, nobis jucundum fore judicamus, si potiri liceat, malum, quod triste. Bonumque adeo sæpe dicimus, quod alias inter mala retulimus; malum habemus, *generatim*, quod *nobis* bonum putamus, vel bonum huic illive, quod nobis malum sit, non aliter, quam omnes modo magnam modo parvam rem dicimus, prout eam cum hac et illa re alia conferimus. Est præterea consuetudo, cum instinctu cognata, et si ratione plerumque ad ea agenda permoti fuerimus, quæ repetita consuetudinem fecerunt. Sunt affectus, iique maximam partem imaginibus quibusdam vel excitantur, vel soventur, quæ, quia recurrunt, utcumque ab iis mentem removere tentemus, quia rem non uti est nobis exhibent, sed vel immensum auctam, vel multum imminu-

tam, verbo, aliam, omnino, quam examine solemus deprehendere, phantasia, solent tribui. Cumque circa instinctum, consuetudinem, affectus, rationis aliquod imperium sit, etsi valde restrictum: in morbis et per furorem interdum ea agimus, quæ consilio qui regere conaretur, operam perderet planissime, quia scilicet is, qui ita agit, vix conscius est, certe reliquarum rerum omnium, quæ ad alia eum impellere possent, notiones omnino nullas habere videtur. In tristi ergo hoc statu constitutis cum imperari omnino nihil possit, eos, qui sana mente utuntur, ad ea quæ volumus peragenda movebimus, si effecerimus, uti bona illis videantur, quæ illos agere volumus, certe minus mala illis, quæ volumus vitare, retrahamusque ab his malo aliquo, quod iis inest, quodque cernere ante non valebant, objecto. Id autem cum rationibus, persuadendo, vincendo consuetudinem consuetudine contraria, aut phantasiam alia phantasia turbando, feliciter sæpe fiat; potest ex instituto bonum, natura cum re quam appeti volumus non conjunctum, cum ea conjungi, vel malum addi illi quam vitari volumus. Atque bonum ita cum actione connexum merces est vel præmium, malum autem id, quod omnes pœnam dicimus: in qua recte constituenda, qui leges ferunt, quique eas ad causas præsentis adplicant, quotidie occupantur. Longum enim est, rationibus persuadere, vehementerque impeditum, cum erudire ante hominem debeas, quantum sufficit ad argumentorum vim percipiendam. Consuetudinem vincere, aut naturalem inclinationem, difficile, utpote ad quod quotidiana exercitatione continuatoque labore opus est. Phantasiam autem cum ne illi quidem semper corrigere possint, quibus cupi singulis

res est, populi, qui ad hanc classem referri debent, errores, tanto magis curatu difficiles erunt. Præmia in erectas mentes, et natura vel exercitatione magni, pulchri, honesti adpetentes, fere tantum agunt; solæ pœnæ ad doctos pariter atque indoctos, perspicaces et hebetes, pertinent, nec facile error aliquis tam gravis est, qui earum vim prorsus infringat.

Malum autem, quod pro pœna est, cum aliquando sola hominum opinione malum sit, plerumque vere malum esse convenit, ut illos quoque, qui a communi sententia hac in parte recesserunt, permoveat. Atque id primum est, quod pœnarum magnitudinem aliqua saltem ex parte determinat. Nihil magis conandum est illis, qui rempublicam sive constituunt, sive gubernant, quam ut in ea mali insit quam minimum. Ergo et pœna in universum quam minimum ut sit, conandum erit, eaque puniendi ratio, qua summa pœnarum in tota civitate omnium maxime imminuitur, reliquis præferenda. Neque mala, quæ in sola opinione consistunt, penitus seponenda sunt, quippe quæ, etsi rempublicam per se non lædunt, difficilius tamen sæpe, quam vere quæ mala sunt, a civibus feruntur, neque crudelitatis maculam, qua vix ulla res magistratibus magis vitanda est, illis adspergunt. Contra, non minor pœna cuilibet delicto constitua esse debet, quam quæ momenta, si fieri possit, omnia, quibus ad delictum illud impelli solent, vincat; si non omnia possit, vincat certe quam plurima. Præstat enim paucos parce aliqua in re delinquere, quam in minima delicta, quæ cavere humana natura vix potest, severissime animadverti.

Hæc aliqua ex parte magnitudinem pœnarum definire dixi: sed laxi nimium sunt limites, atque magis constringendi.

Vel consilio peccare homines vidimus, vel impetu. Etsi enim maximam partem utroque ad male faciendum impellantur, licebit tamen hic quoque mente distinguere ea, quæ in ipsa re conjuncta sunt. Solo consilio si hominem peccare intelligas, sitque pœna cum delicto conjuncta ita certa, ut dubitare nemo possit, si peccaverit, et pœnam sequuturam: nihil facilius est, quam hujus magnitudinem eam assignare, quæ ad avertendum a peccando quemlicet sufficit. Solo commodo hoc usu movemur per maleficio quæsito. Cum eo ergo si incommodum jungatur commodo, plane æquale, tolletur commodum illud, planeque evanescet. Quod ergo ad agendum impellit, jam nihil erit, nihilo autem, non magis mens quam libra nullo pondere aut vi movente aliâ, agitur. Et si quantumvis parvo majorem feceris pœnam commodo illo, tanto minus verendum erit, tam amentem fore quemquam, uti rem appetat, quæ jam mala tota est, universo maleficii commodo per pœnam destructo, et hujus aliquo influo superfluo, quod ad destruendum illud commodum impensum non est.

Verum ne hac in re decipiantur homines coercendi, conandum est, ut pœna ea sit, quæ cum commodo per actionem quæsito, quam prohibere velis, facile comparetur, quod erit, si ex eodem quantorum genere desumatur. Id enim nisi fiat, et æqualem fieri pœnam ei, quod ex delicto quæritur, commodo, difficile est; et si omnino æqualis fiat, vel eo paulo major, non omnes tamen rationem inter malum pro pœna expectandum, atque commodum quod delinquentes quærunt, a priore ipso genere diversum, perspiciunt, ob eamque rem verendum est, ne plurimi commodum malo majus

judicent, quorum neminem pœna quantumvis certa a peccando retrahet. Pone, furem certum esse, id quod furto abstulit ex asse fore reddendum; adeone eum amentem potes fingere, ut nihilo minus curam, vigiliis, reliquasque, quæ furi subeundæ sunt, molestias devoraturus sit, etsi nulla præterea furto pœna foret constituta? Verum relinque illi spolia sua, pœnam autem vel carcerem statue, vel verbera, vel exilium, aut aliud, quod facultates non imminuat; plurimos, reperies, qui quæ ita capiunt damna lucro minora putent, ut et multo majora sint, augendoque ita pœnæ magnitudinem minus efficies, quam effecisses pœnis minoribus, sed iis cum commodo ex furto facilius comparandis. Ac nonne quotidie videmus, cum gloriæ opinione, vel metu dedecoris ad flagitia homines impelluntur, exilii, carceris, quin nec mortis metu eos continere posse? Constitutæ hæc pœnæ sunt illis, qui injurias gladiis ulciscuntur, salva existimatione ejus, qui adversus illas leges peccat, manifestoque illius vituperio, qui legibus morem gerit. Tantæ hæc tamque graves pœnæ malo penitus tollendo pares non fuerunt. Verum deme privatis his pugnis honesti opinionem, in eosque, qui in eas descendunt, dedecus confer, quod jam illos manet, qui satis sui compotes sunt, satisque periti rerum æstimatores ut iis sese subducere audeant. Vocabula, quæ probri causa in eas jactantur, qui provocati non comparent, in eos verti finge, qui adeo dementes sunt, ut compareant; una hac pœna, mali vix quidquam habente, quod non soli opinioni sit tribuendum, omnium ejus generis certaminum apud te imaginem evanescere videbis. Et absunt pugnæ istæ, abfueruntque semper ab his gentibus, ad quas parum

certe sana, secundum quæ majores nostri de eo quod in his rebus honestum et turpe est judicarunt, principia non pervenere.

Verum non semper ex eo genere pœnas repetere licet, in quo sunt commoda per maleficia quæsita, sed has sæpe alterius generis esse, res ipsa exigit. Hoc casu cum verendum sit, ne pœna præ commodo illo vilipendatur, augenda pœna est, quo illi quoque, qui minorem quam est judicant, commodo tamen illo minorem existinare non facile possunt. Augendæ quoque erunt, si consuetudine vel adfectu homines agitentur. Nam quamvis, quando ejusdem generis est pœna cum commodo, quod per delicta quæritur, ne consuetudo quidem vel adfectus in multos homines magnopere agant; agunt tamen vehementer, cum incommodi ex pœna expectandi genus a genere commodi quæsiti diversum est, efficiuntque id imprimis, ut incommodum ex pœna multo minus, quam est, videatur.

Sed raro pœnæ adeo certæ sunt, ut eas evitari prorsus non posse extra dubitationem sit. Spes latendi, circumveniendi per astutiam, vel fallendi testimonio judicem, aut ejus misericordiam movendi, non semper falsa, multis ad peccandum auctoramento est, eritque semper iis, qui non casto virtutis studio, sed commodi ratione ducuntur, aut brutorum instar impetui obediunt. Hic cum spes impunitatis ex iis sit, quibus ad peccandum homines alliciuntur, pœna pro eadem spe augenda erit.

Sed spes non vana intelligenda est, cujus nulla esse potest mensura, sed rationalis, quæque probabilitate nititur, atque in eadem cum illa ratione crescit, eademque et ad metum transferenda: ut semper spes alicu-

jus rei consequendæ sit ad metum vel ejus quod illi oppositum est, vel alterius cujusdam rei nobis adversæ, ut probabilitas prioris eventus ad probabilitatem posterioris. Manente ergo commodo, quod per actionem quæritur, atque metu pœnæ; si spes impunitatis duplo major fiat, et a pœna expectandum incommodum in duplum augendum erit: si spes in triplum crescat, et incommodum illud erit triplicandum: sic ut, si apud certitudinem incommodum ex pœna commo huic æquale feceris, sit utique spes impunitatis ad metum pœnæ ut quantitas incommodi ex pœna, ad magnitudinem commodi ex actione, quam vitari velis: sin majorem apud certitudinem pœnam commo feceris, ratio quoque incommodi ex pœna ad commodum ex delicto, ratione spei ad metum, major sit. Est autem posteriori isto potius utendum, ut illi quoque a peccato avertantur, qui majorem, quam pro probabilitate eventus, spem concipiunt. Atque ad hæc respexisse illi legislatores videntur, qui furi pœnam statuerunt restitutionis quadrupli. Cum enim in recte constituta republica vix duplo vel triplo probabilius sit, furtum impune futurum, quam pœnam cum eo a lege statutam, conjunctum iri, dicta pœnæ quantitas abunde videtur sufficere, nisi singulares quædam conditiones aliæ furto jungantur.

Verum incommodum, quod is capit qui pœnam sustinet, cum commo comparandum esse diximus, quod maleficio quærit, non ipsam pœnæ quantitatem. Quod sic intelligimus. Si pœna mulcta sit, duplum ejus summæ, quæ pro mulcta exigitur, pœnæ duplum est, triplum summæ, triplum pœnæ, semperque magnitudo pœnæ absoluta in eadem cum mulcta ratione crescit.

Verum cum incommodo, quod is capit, qui mulctetur, aliter omnino comparatum est. Cum enim in proclivi sit, eandem mulctam diviti minus incommodam esse quam pauperi, si de vero incommodo agatur, non de eo quod sola avaritia sentitur, quæ divites magis plerumque obsidet quam pauperes; facile patet, si duplum mulctæ alicujus ab aliquo capias secundum, utique partem exigi ab eo, qui priori mulctatus jam pauperior est factus; adeoque incommodum, quod et mulcta dupla capit, majus esse duplo incommodi, quod ex simpla ceperat. Sit aliquis centum solidorum dominus, qui in annum ei victum debent sufficere. Si decem solidorum jacturam faciat, aliquid cum sibi subtrahere necesse est, si anno finito rationes constare debeant, sed non id, in quo maxima consistit vitæ commoditas. Si alios decem amittat, eo quoque carebit, quod aliquanto plus ad suaviter vivendum faciat; si decem insuper alios, vix tantum restabit, quo famem, frigus depellat, vel corpus decenter tegat: sicque majus semper ex jactura eadem sentiet incommodum, quo minus habet reliqui. Eodem modo cum carcere comparatum est, si dedecus demas, vix aliquis est nostrum, quin una die vel altera eodem loco se concludi facile patiat, qui sæpe totas hebdomades studiorum gratia voluntario quasi carceri nos mancipamus. Verum plures hebdomades usu aëris liberioris, consuetudine amicorum, pulcherrimo rerum naturalium spectaculo carere debere, negotiorum omnium expertem, id vero homini ad libertatem nato fere intolerabile erit; unde sane patet, incommodum in carcere magis multo quam pro tempore crescere: atque vicissim una tantum hebdomadæ a mense demta, quem lex carceri

præfinit, incommodum sæpe infra dimidiam tertiamve aut quartam adeo partem imminui. Non facile est, hæc ad mensuram revocare, cum a plurimis rebus vix clare simul comprehendendis pendeant. Et quantumvis facile foret, mihi jam ad id, unde digressus sum, est revertendum, ipsius incommodi æstimatione prudenti judici, atque ad conditiones rerum attento, permissa. Ea concessa, magnitudinis ipsius pœnæ determinatio nihil exigit, quam ut ratio metus pœnæ ad spem impunitatis determinetur, quæ probabilitate utriusque eventus ex numero casuum, uti solenne est, elicit, habetur.

Ita agendum, ubi solum consilium est, quod homines ad agendum impellit. Si consuetudo accedit, adfectus, falsaque, quæ tolli subito non potest, persuasio, pro qualibet harum rerum pœnæ augendæ sunt, conandum autem, si fieri potest, ut ita comparatæ sint, ut adfectum quoque vel persuasionem, contrarii persuasionem vel adfectu contrario corrigant. Sed hac quidem de re jam aliqua diximus. Mensuras autem pœnarum pro magnitudine adfectus, aut pro vi consuetudinis, tradere plane exactas, inter impossibilia rependum videtur, exactis proximas dare, admodum difficile est. Relinquendus ergo hic quoque locus prudentiæ ejus est, qui pœnas constituit, qui, si ad genium attenderit seculi sui, atque ad indolem gentis, multorumque annorum experientiam contulerit, utique videbit, quantum priori pœnæ addendum sit, ut consuetudo quoque, adpetitus, vel falsa persuasio eorum, quibus præest, superentur. Quin et cum vehementer interest reipublicæ, actionem aliquam omitti, ex hac quoque causa pœna augenda erit: verum non præcise

in ratione damni, quod respublica capit, si fiat id quod omitti velis, qua magnitudo damni neminem impellit. Sed et hoc augmentum sola prudentia legislatoris determinari fas est.

Atque ex his sequitur, constituta poena nihil magis in potestate judicis esse, quo poenarum numerum in universa civitate minuat, quam uti curet, ut spes impunitatis, apud eos quam maxime minuatur, qui delinquent. Imminuta enim spe ista, manente poena, ratio incommodi ex poena expectandi ad commodum mala actione quaesitum, quae constans est ratione spei impunitatis ad metum poenae, hac spe, ut dixi, imminuta, necessario fiet major, magisque adeo poena ad continendos in officio homines efficax. Imminuitur autem impunitatis spes, si magistratus omni studio omnique diligentia caveat, ne quod delictum latere possit, adhibeatque omnem prudentiam, ne delictum detectum vel per advocatorum cavillationes, vel mendacio rei, vel testium perfidia, negetur, si coerceat artificia fori intra legitimos terminos, testibus, qui non mentiri modo, verum in judicio etiam coram magistratu mentiri audent, id impune esse non sinat, poenas per misericordiam non condonet, vel ultra id quod aequum est minuat, verbo, omni re curet, ut si ad plenam certitudinem poenae eventum reducere non potest, probabilitatem ejus tantum augeat, ut certitudini sit proxima. Hoc magistratus officium est, hoc sese amare civitatem, cui praest, imprimis potest demonstrare. Si indulget criminibus, si benignitatis opinionem apud unum alterumve captat, quod uni remittit malum, id in universam non modo civitatem cumulat, verum etiam indulgentia sua efficit, ut augenda sit poenae

quantitas, siquidem satis in ea esse velimus ad reprimenda peccata efficaciam. An vero is benignus, humanus, indulgens dicendus est, qui unum cum indemnem dimittit, id scilicet efficit, ut gravius deinde mulcandi sint tres vel decem alii; an ille potius, qui unum moderate punit, ne, si fieri potest, quisquam deinde alius, qui puniendus sit, occurrat? Est omnino lenitas hæc prorsus inepta, eoque magis damnanda, si delicta ejus sint generis, ut non solum rei publicæ obsint, verum et illis, qui delinquent, maxime si damnum ex delicto metuendum ingens sit vel prorsus irreparabile, ut cum non de facultatibus, re fluxili, sed de sanitate atque vita civis agitur. Ea in re qui mollis est, is modo non amare se quibus præest ostendit, verum etiam adeo eos contemnere, ut propter levem imperitorum existimationem, aut per amorem otii, quod iis carissimum est casui exponere non dubitet. Ego quidem, generosissima nobilissimaque pectora, ita sentio, nulla me re magis, quanti Vos faciam, quantopere Vos salvos cupiam, cuiquam ostendere posse, quam severa legum academicarum custodia. Quodque ita sentiam, non probabili aliqua ratione inductus sum, verum demonstratione, non quales hodie jactantur, quibus raro illi ipsi adsentiuntur, qui demonstrant, reliquorum omnium nemo, sed quæ adsensum plane extorquent, ullamque prorsus dubitationem relinquunt. &c.

THE END

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